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Understanding the Business of Transition in Myanmar

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A joke was going around about the impact of development in the country since Myanmar began its controlled transition to a quasi-civilian government in 2011. The word for 'to develop', 'to progress' or 'to improve' in Burmese is 'တိုးတက်'. This is made up of two words, which mean, respectively, 'to push, to advance or to go forward' and 'to climb up, to advance or to get on'. The joke would begin with one person commenting, 'The country is really *developing*.' To which another person would reply, 'Yes, now you have to *push* to get on the bus.' The play on the double-meaning of the word 'to develop' and 'to push' here is a telling sign of the illusive promise of development. The joke is a reference to the fact that the only thing that has changed for many people in Yangon is that the public buses are more crowded. This is not to mention that the traffic on the roads is often at a standstill because of the dramatic increase in car imports.

This book is oriented around the theme of the 'business of transition'. It is concerned with how to understand the 'business' that takes place in times of major political change. There has been growing recognition of the commercial stakes and business activities of the rule-of-law industry (Marshall 2014: xiv). This book identifies the way in which law creates new markets, law embodies hopes of social engineering and law reform is motivated by the goal of economic gain. This book is an invitation to think carefully and critically about the intersection between law, development and economics in times of political transition. This theme is one that has caused considerable angst and soul-searching in academia and public policy and amongst legal practitioners. It is hoped that by focusing on one specific context – Myanmar – as the latest site for law and development and rule-of-law reforms fresh insights can be gained. The importance of Myanmar cannot be underestimated, given its strategic location between China and India and the perception that it is the newest

frontier in Southeast Asia for foreign investment and law and governance initiatives. Building on recent work (Crouch and Lindsey 2014), the case of Myanmar can be used as a gauge of the current trends in the law and development movement.

This chapter introduces the Myanmar context by sketching out the contours of the business of transition, with a focus on local engagement and responses to law reform and rule-of-law promotion. Given that Myanmar finds itself as the latest site for law reform, the chapter situates developments in Myanmar within the broader trends in law and development. It argues that we must continue to grapple with the legacy of past law and development efforts, and remind ourselves of lessons learnt from past failures, because many of the concerns around court reform, legal education and model laws remain directly relevant to contexts such as Myanmar today.

The chapter first turns 'Back to Business', which is a reference to the failed attempt in Myanmar to shift from a socialist to market-based economy after 1988. The chapter argues that the past history of law and economic reform is shaping future efforts at reform. Many of the economic and business reforms since 2011 have built on these earlier foundations in some way. I emphasise the importance of understanding current reforms in light of past political, legal and economic practices. In short, law and development initiatives need to take into consideration the path dependency of a country's legal culture to support efforts that can build on or disrupt this trajectory.

The chapter then questions 'Whose Business?' is involved in the post-2011 reform frenzy of new rule-of-law and economic development initiatives. While so often attention is drawn to laws or institutions, it is of course people who are the actors and agents engaged in the business of law reform. This focus on agents is an intentional reminder that despite the persistence of legal technical assistance, these efforts all rely on and are determined by the people who inhabit and animate these institutions.

The chapter concludes with attention to 'Business Matters', that is, distinctive features or characteristics of debates on law reform and economic development as it is playing out in Myanmar. At a time when aid, diplomacy and business interests are closer than ever, there is an emphasis on greater transparency, participation and distribution of resources; the reform of legal texts and institutions; and the awareness of foreign involvement in the process of aid delivery, development assistance and

foreign investment. These concerns are addressed in more detail in other chapters throughout the book.

Myanmar in the History of Law and Development

This chapter repositions Myanmar in light of what is often referred to as the 'law and development' movement, a broad and contested term that is used to describe the use of law reform to pursue goals of political, economic and social development. In more recent decades, the field has been described by the less contested term 'law and governance', or through the prominence of overarching themes such as the globalisation of the rule of law (Morgan 2010). The literature on the history of law and development is largely dominated by a focus on Western actors and institutions, particularly the United States and institutions such as the World Bank and the Ford Foundation (Kleinfeld 2012; Carothers 1999; Carothers and De Gramont 2013). I acknowledge that, with more time and space, a broader perspective could also include law reform under Myanmar's period of British colonial rule (1885–1947). Nevertheless, I begin in the 1960s and seek to demonstrate modern Myanmar's paradoxical position within the law and development movement. I do so to highlight Myanmar's current curious status as the latest site for rule-of-law initiatives and foreign investment.

In the 1960s, Myanmar was in a paradoxical situation in terms of its connections to the law and development movement. On one hand, Myanmar was thrust onto the world stage of diplomatic peace-building and development in a very unlikely way. The unexpected death of the then–UN Secretary-General Dag Hammarskjöld created an opportunity for U Thant, a Burmese diplomat, to be appointed in his place (U Thant 1978). U Thant's term (1961–1971) was historic for many reasons, not least because this was the first time a non-European was elected to the position, and it was during a period when many former colonies had gained independence and were entering into membership of the UN. In December 1961, under the leadership of U Thant as the new secretary-general, the General Assembly declared the First Decade of Development. While this declaration did not place an emphasis on law, it did pave the way for international technical assistance in a range of areas and became the platform on which subsequent international development efforts were based. Just several months later in 1962, Ne Win executed a coup in Burma. In the ensuing years, General Ne Win shut off the country from

the outside world, driving out most foreign embassies and international organisations.

It was also in the 1960s when the law and development movement took off, driven by US lawyers and professors in Latin America and the United States Agency for International Development (USAID) (Scott 2008). The focus of these modernisation initiatives was on civic education, courts, the legal profession and legal education (Carothers 1999: 20–29). In short, the emphasis was on legal technical assistance (Arndt 1987). This first decade of practice was driven by a small pool of lawyers (Paul 2003). Some academic practitioners amongst these ranks were soon overcome with a sense of crisis and disillusionment due to the paternalistic and top-down approach taken, as articulated in a famous article by Trubek and Galanter (1974).

Trubek and Galanter suggest that legal reform efforts had been based on many wrong assumptions. They identify that many efforts had started from the assumption of an individualised view of society. Reform efforts had presumed that the state has control over individuals, that individuals would conform to legal rules and that the state was central to law reform. Practitioners had acted upon the belief that the design of laws can achieve social goals and that law can be used to justify injustice by the state. Yet of course law reform is not able to change behaviour in predictable ways. Efforts to train and support the legal profession ignored the fact that the growth in the legal profession is not in itself neutral, and may actually increase social inequality because the legal profession does not necessarily uphold the public interest. Further, while many technical assistance programmes focused on the courts as central to the legal order, it was often the case that courts were inaccessible and biased, while informal dispute resolution forums were overlooked. In response to these criticisms, Trubek and Galanter suggested that there was a need to enhance empirical understanding of local cultures and institutions, and the assumption that US law serves as an appropriate model needs to be questioned. Many of the assumptions about the role of the courts, legal education and the legal profession are still evident in contemporary rule-of-law programmes, and so Trubek and Galanter's critique remains an important reminder.

The year of publication of Trubek and Galanter's article, 1974, also marked the death of U Thant, the former Secretary-General of the UN (1961–1971). When his body was returned from New York to Yangon, a stand-off ensued between the military and students over whether he should be given a proper state burial. The conflict resulted in the military blowing up the student union building, causing an untold number of

deaths. Over the coming decades, the memory of U Thant and his service to the global community was suppressed in Myanmar.

The 1980s are often seen as the second moment in the Western liberal narrative of law and development. This time has been depicted as a period of law and the neo-liberal market, in which law took centre-stage in development (Trubek and Santos 2006). Globally, the belief that law enables economic growth comes with a standard set of requirements – protection of property rights, enforcement of contracts, banking regulations and intellectual property regimes, amongst others (see, for example, Ginsburg 2000; Pistor and Wellons 1999; Jayasuriya 1999). This period was also marked by an absence of accountability of donors and providers of law and development initiatives, such as the World Bank. This vacuum of accountability has been labelled the 'lawlessness of development' (Paul 2003: xiii). It was a growing industry, but one that was yet to enter Myanmar. The 1980s in Myanmar were a period of public dissatisfaction with the dysfunctionalities of socialist rule under Ne Win, such as the imposition of harsh demonetisation policies. In 1988, the democratic uprising in Myanmar began, only to be suppressed by another two decades of military rule.

The 1990s were marked by the ascendance of the rule of law as the dominant mantra of law and development. Law became both central to social and economic development and was seen as a remedy for market failures. This era ushered in a renewed emphasis on institutional reform, including courts, due to the impact of new institutionalist economics (North 1990). The number of international agencies that have rule-of-law programmes has grown significantly, and globally there are at least forty UN agencies alone that offer some form of rule-of-law assistance (O'Connor 2015). In Myanmar, the 1990s marked an attempt by the military to shift the economy from a socialist to a market-based system. Various legislative reforms on economic and commercial affairs were passed as the regime made a desperate effort to revamp the economy by attracting significant foreign investment and tourism. This failed, and Western sanctions remained a significant deterrent.

In the 2000s and beyond, at the international level there was a renewed focus on development through the Millennium Development Goals, and, more recently, the Sustainable Development Goals. However, it was only the latter goals that explicitly put law and justice on the global development agenda. These efforts were complemented by the 2005 Paris Declaration on Aid Effectiveness, which affirmed principles of local ownership and the need for greater accountability of the aid industry itself. While legal

technical assistance often remained a core part of rule-of-law programmes, ideas of legal empowerment and access to justice gained traction (Golub 2006). Further, a new industry of measuring the rule of law has emerged, although measuring the impact of rule-of-law programmes remains a complex and fraught endeavour (Engel Merry, Davis and Kingsbury 2015). At present Myanmar remains close to the bottom of most indexes, such as Transparency International's Corruption Perception Index (see Simpson, Chapter 3) or the World Bank's Doing Business report, although of course such rankings have been criticised.

The range of professionals now driving rule-of-law programmes is diverse, and this has drawn attention to the emergence of the global 'rule of law profession' (Simion and Taylor 2015). This profession has had to rethink the assumption that law can and does play a role in social and economic change, an assertion that is far more challenging than we have previously assumed. The results from socio-legal studies on whether law can engender social and behavioural change are mixed at best (Gillespie and Nicholson 2012: 2). In many ways, while the current phase in law and development may bear renewed emphasis on the rule of law as a good in and of itself, it still carries the remnants of old approaches such as the belief in the utility of legal transfers and assumptions about the desirability of recourse to best practice (Tamanaha 1995). There has also been a renewed turn to the political economy of rule-of-law reforms (Carothers and De Gramont 2013), and a re-emphasis of the role of law in development more generally (WDR 2017).

In Asia, much of this Western or internationally driven law reform frenzy primarily took place in the wake of the financial crisis of 1997. At times, loan agreements came with heavy conditionality clauses (Antons 2003; Antons and Gessner 2007). The law and development industry continued to pursue a standard core of activities – judicial reform, police and security sector reform, legal education, professional regulation, corporate and trade law reforms (Trebilcock and Daniels 2008) – although often infused with a new emphasis on access to justice, gender sensitivity and legal empowerment (Golub 2006).

Throughout the 1990s and 2000s, Myanmar remained under tight military control. The points of interaction on law and development with the outside world were minimal, such as the in-country work of the UN Office of Drugs and Crime to address the opium trade and the International Labour Organisation's work on the cronic problem of child labour. By the late 2000s, the British Council's Pyoe Pin programme was one of few to explicitly include a rule-of-law component. In 2012 the grandson of U

Thant (former Secretary General of the UN) gained permission from the government, and financial backing from donors, to renovate U Thant's former house as a museum in honour of his service to the global community through the United Nations. In the same year, many international organisations, businesses and foreign embassies once again began to set up shop in Myanmar.

By 2013–2014 Myanmar was the highest recipient of development assistance from the Organisation for Economic Co-Operation and Development (OECD). One does not need to go far on the OECD website to see the connection that is increasingly being drawn between aid and foreign investment, referenced in slogans such as 'aid for trade' or 'financing for sustainable development'. The largest donor by far to Myanmar is Japan, yet the efforts of Japan or other countries such as China in terms of their development impact in the region and around the globe are often overlooked. The role of law reform and economic development in times of political transition therefore requires particular attention.

In some respects, a conventional history of law and development would position Myanmar as largely absent from the picture. However, I have tried to demonstrate that in fact the legacy of U Thant as former secretary-general of the UN at a time when the First Decade of Development was launched is in fact a significant event in itself. Although the socialist regime of Burma ultimately denied his global contribution by refusing an official state burial, fast-forward to 2012 shows U Thant's legacy slowly coming to light. Further, it is essential to bear in mind the turbulent history of the law and development movement itself, as well as the recent avalanche since 2012 in Myanmar in order to understand the trends in law reform today.

I turn now to consider the two decades prior to Myanmar's official semi-democratic turn, to examine the local context and legal culture in which the contemporary business of transition is taking place.

Back to Business

All efforts at law reform take place against the backdrop of a particular historical trajectory. In Myanmar, efforts to kick-start a market economy and undertake law reform are not new. After the fall of the socialist regime in 1988, measures were taken to reorient away from a socialist economy towards a market-based economy. The abrupt change from socialism to a market economy was accompanied by a push to open up opportunities for foreign investment in Myanmar, as well as to establish

private banks (Turnell 2009: 256–260). In the 1990s, the abolition of the socialist economic system and the introduction of new laws on foreign investment followed. Yet the business sector remained under the control and surveillance of the regime, and there was little emphasis on innovation (Tin Maung Maung Than 2007). The post-1988 efforts to shift to a market economy were largely stillborn. This was made more difficult by heavy Western sanctions in the 1990s–2000s. As Renshaw points out (Chapter 9 in this volume), the example of US sanctions under military rule is one demonstration that targeted sanctions may simply exacerbate the situation due to a lack of legitimacy.

Many of the reforms introduced since 2011 – from the Central Bank Law to the Foreign Investment Law – began with the legal framework from the 1990s as a background template. These laws have created new tensions and new forms of conflict (Crouch 2016b). In this sense, 'Back to Business' in Myanmar is more about returning to the legislative foundations and regulatory practice laid in the 1990s on business and economic reforms, and expanding on and liberalising these measures. In many ways this is not surprising. While there are many international experts offering advice, the reality is that local legal drafters often stick with familiar strategies and procedures rather than introduce the radically unknown.

While the business of transition may involve an intensive effort at law reform, efforts at law reform are not new in Myanmar. In fact, every regime has placed some emphasis on the idea of law reform. For example, in the 1880s as Burma was being annexed to British India in several stages, authorities in the British Indian empire were appointed to various law commissions to draft the Penal Code, the Code of Civil Procedure and Criminal Procedure Code, and a range of staple laws that remain in existence today, including the Contract Act, Specific Relief Act, Evidence Act, Transfer of Property Act, Succession Act and Negotiable Instruments Act. After independence in 1947, the parliamentary government established a Laws Revision Committee in 1954 to compile and publish the thirteen-volume Burma Code. Many of the laws from the Burma Code still remain in force with few amendments today. After the coup of 1962 and the takeover by General Ne Win, a Laws Revision Committee chaired by the attorney general was established in October 1963 with the task of reviewing legislation. A similar pattern was established by the State Law and Order Restoration Council (1988–2010), which set up a committee in 1995 to review all laws and consider amending or repealing existing laws. The post-2011 governments have followed this pattern by establishing law reform committees with the task of considering laws that require amendment,

replacement or cancellation. This obsession with reform of legal texts shows no sign of abating, with the creation of Thura Shwe Mann's Commission for the Assessment of Legal Affairs and Special Issues and its primary mandate of legislative review.

The key distinction since 1988 is that the economic and legal system has been oriented away from socialism and towards a market economy. The current basis for economic reform is the 2008 Constitution. The emphasis on the market economy is in fact embedded in the Constitution. The Constitution specifies that Myanmar is based on a 'market economy', and this is explicitly attributed to the former State Peace and Development Council in the Preamble to the Constitution. While it may seem unusual to recognise the market economy in the Constitution, Myanmar in fact joins a growing number of countries that explicitly enshrine the market economy in the constitution. This list includes the Constitution of Afghanistan (2004), Albania (1998), Andora (1993), Angola, Bosnia and Herzegovnia (1995), Cambodia (1993), Guatemala (1985), Kosovo (2008), Laos (1991), Malawi (1994), Moldova (1994), Romania (1991), Serbia (2006), Slovakia (1992) and Spain (1978).[1] This long list of constitutions from Asia to Eastern and Central Europe to the Middle East is just one indication of the way in which the idea of the 'market economy' has embedded itself in constitutional law. This is particularly the case in countries that have made a shift from a socialist economy to a market economy. The inclusion of a 'market economy' provision in a constitution is an overt effort to distinguish economic reforms from the past and to enshrine the concept of the market economy in the Constitution, as a form of 'higher' law. Perhaps more distinctive to Myanmar is the constitutional promise not to nationalise or demonetise the currency, as the previous military regime had done with devastating consequences.

In terms of the intersection between the legal system and the economy in Myanmar, many new laws address economic reforms geared towards greater foreign investment and the market economy, including in the banking sector, establishment of special economic zones and potential reform of the Company Law. This churn in legal policies and regulations has created significant challenges for commercial lawyers, where responding to a client's request often requires investigative journalism as much as

[1] See the Comparative Constitution-Making Project: http://comparativeconstitutionsproject.org/. This is not including constitutions that recognise a qualified market economy, such as the 'socialist market economy' of the China Constitution 1982 and the 'socialist-oriented market economy' of the Vietnam Constitution 1992 (art 51).

it does legal research, given the challenges of finding and matching legal text with administrative practice.

In sum, law reform in Myanmar, as in any other developing context, is not new. The genesis of the market economy can be traced to post-1988 trends, and yet the post-2011 period with its relative freedoms is clearly marked by a greater effort to enshrine a market-based system, or to get 'Back to Business'. At the heart of this controlled reform process are local actors. I turn now to consider whose business is at the heart of the law and development agenda.

Whose Business?

Times of political change involve intensive efforts at economic and legal reform, and often raise concerns about who should be able to participate in and benefit from the business of transition. The chapters in this book pay particular attention to local actors in contemporary Myanmar. Amongst the most prominent are civil society organisations (CSOs) working in a range of sectors that advocate for and with local communities and interest groups. This includes advocacy on matters as important and diverse as land rights for farmers, labour rights for factory workers, protection from domestic violence for women and the right to education for children. There has certainly been an increase in scope and influence of CSOs in Myanmar in recent years, and many have traced this to the post–Cyclone Nargis recovery activities in 2008.

The renewed agency of CSOs in Myanmar is evident throughout this book, from Simpson's concern with the CSOs that form part of the Multi-Stakeholder Group for the Extractive Industries Transparency Initiative (Chapter 3), to Dale and Kyle's concern with social enterprise (Chapter 4), to Turnell's focus on microfinance initiatives (Chapter 5) and Nishimura's attention to CSOs that advocate for the rights of communities affected by special economic zones such as Dawei Watch (Chapter 8). CSOs face ongoing challenges in their efforts to participate in the law reform process, and some have had more meaningful opportunities than others in being able to engage in consultation with government agencies. While these chapters recognise the new space that has opened up for CSOs since 2011, they are also alert to the ongoing challenges and struggles that remain in the quest for genuine consultation, transparency and advocacy for social justice and equality.

A shift from authoritarian rule inevitably leads to renewed focus on the state as a key actor in law reform. In Myanmar, state actors include