

THE BUSINESS OF TRANSITION

This interdisciplinary volume offers a timely reflection on law, development and economics through empirical and comparative perspectives on contemporary Myanmar. The book explores the business that takes place in times of major political change through law and development initiatives and foreign investment. The expert contributors to this volume identify the ways in which law reform creates new markets and embodies hopes of social transformation, while also being driven by the promise 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. The chapters speak to a range of common issues – land rights, access to finance, economic development, the role of law including its potential and its limits, and the intersection between local actors, globalised ideas and the international community. This interdisciplinary book is for students, scholars and practitioners of law and development, Asian Studies, political science and international relations.

MELISSA CROUCH is Senior Lecturer in the Faculty of Law at the University of New South Wales. She has published extensively on the law and politics of Myanmar and Indonesia.

ADVANCE PRAISE FOR *THE BUSINESS
OF TRANSITION*

‘This is an important book, as the emergence of Myanmar from decades of relative isolation triggers yet another round of debates about the relationship between law and development. The contributors share their wealth of experience with law and business reform projects in the country and enable readers to understand the difficulties and prospects of success.’

– Christoph Antons, Professor, Newcastle University Faculty of Law

‘*The Business of Transition* offers a new and searching critique of the decades-long enterprise of law and development. Myanmar cross-disciplinary specialists in law and markets superbly question glib conventionalities, boldly encounter intricate complexities, and refuse to be locked into formulaic answers. Through intensive case studies the authors skillfully explore the complex, fraught and sometimes paradoxical interplay between international donors and advisors and domestic actors, whether political elites, businesses, non-profits, civil society or local communities. Every specialist in globalization, law and markets will benefit greatly from thoughtful engagement with this excellent volume as it reveals again the intricacy and particularity of every country’s encounter with the transnational and global.’

– Terence Halliday, Professor, Center on Law and Globalization, American Bar Foundation

‘The contributors to this volume, diverse in origin, expertise and experience, blend to give an insightful commentary on and exposition of the present realities and future possibilities of this unique transitional economy. It places contemporary empirical data in a broader context. Its coverage of economic, legal, social, political, moral and humanitarian issues as well as the examination of the interaction between domestic, regional and international regimes make this a book that should be on the shelves of scholarly and business readers alike.’

– Mary E. Hiscock, Emeritus Professor of Law, Bond University, Australia

‘This is compulsory reading for policy analysts and/or academics interested in the process of business and commercial legal reform. Through the prism of Myanmar – a country at the confluence of geoeconomics, political and economic transition – the contributors to this volume bring to bear theoretical sophistication alongside deep empirical knowledge to explore the business of transition. The book eschews technocratic analysis of legal reform, and instead analyses how social forces such as business, labour, the legal profession as well as political elites and multilateral organisations are engaged in contestations that shape the business of transition. It is essential reading material for anyone wishing to understand the complex dynamics of legal change, not just in Myanmar but in an array of transitional economies and polities.’

– Kanishka Jayasuriya, Professor, Murdoch University, Australia

‘Myanmar provides a particularly instructive context for exploring the relationship between law and development as it undergoes two dramatic and simultaneous transitions: from military rule to semi-democracy, and from socialism to a market economy. The essays in this volume make a compelling case that “best practices” transplanted from foreign jurisdictions provide limited purchase on the unique challenges that such transitions entail and imply more modesty than has often been the case on the part of external agencies in promoting their conception of an appropriate law reform agenda.’

– Michael Trebilcock, Professor, University of Toronto

THE BUSINESS OF TRANSITION

Law Reform, Development and
Economics in Myanmar

Edited by
MELISSA CROUCH



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FOREWORD

MARTIN KRYGIER

This book is the third of a trilogy (so far) that Dr Melissa Crouch has recently edited on many of the distinctive characteristics of Myanmar's social and political fabric, and some of the major challenges and opportunities that country faces today and for some considerable time to come. The first was *Law, Society and Transition in Myanmar* (co-edited with Tim Lindsey, 2014); the second *Islam and the State in Myanmar* (2016); and now *The Business of Transition*. So her work has quickly come to be associated with penetrating analyses of the central issues and challenges facing Myanmar – legal, social, religious and now economic. Given the extent to which all these domains are interwoven, it would be best to buy all three books and read them together, with the awareness that their subjects constantly act and interact with each other in many, various and changeable ways. Short of that, any one of them is an edifying treat, and this one particularly so.

For this is the first academic treatment of 'the business of transition' in Myanmar, taken in the round. As such, and given the huge novelty, range, complexity, volatility and unpredictability of developments included in and related to this subject, it is appropriate that rather than a monograph by one person with one point of view, one thesis about one subject, it brings together a selection of diverse, though related, essays by different authors on different elements and aspects of this difficult 'business'. The essays in this book identify a range of major domains and issues of significance, situate them in Myanmar's historical and social context, survey current problems, develop educated conjectures about future developments and introduce a variety of viewpoints – about a range of different elements that make up the hugely complex and layered course of events we try to gesture at with optimistic umbrella words such as 'development' or 'transition'.

The challenge for the analyst is to penetrate the crowded realities sheltering under such capacious umbrellas. The challenge for 'change agents' is to recognise the complexity and volatility of 'development' or 'transition'

without succumbing helplessly before them. This work rises to those challenges by presenting characterisations, diagnoses and prognoses from a number of leading specialists on many of the central constituents of these processes. Encouraging its authors to speak in their individual voices and deliver individual assessments of a variety of problems has been the successful strategy of this work.

The title of the work is usefully ambivalent. Taken in a broad sense, ‘the business of transition’ suggests – what is the truth – that ‘transition’ is no foreordained linear passage from a rejected dysfunctional past to a wished-for and promised future, for example, military dictatorship to liberal democracy. Rather, like so many other countries ‘in transition’ (Krygiel and Czarnota 2006), whatever course it takes, Myanmar’s passage will be a difficult, tricky, even perilous business, with surprising trajectories; wins for some and losses for others; wins for some that *depend upon* losses for others; moves forward and back; full – as Tim Frewer’s chapter in this volume emphasises – of unintended consequences, some fortunate, others not. Frequently espoused as a self-evident good for all, transition rarely turns out that way. And however it turns out, there will be surprises en route.

Even a successful transition is rarely a simple ‘break with the past’, for we never ‘break’ with the past, however much things change. That is one thing that all ‘transitional’ orders have in common, and that paradoxically makes them all different: they all have particular histories and traditions which leave lasting particular legacies, with which present and future generations will have to deal, indeed *within which* present and future generations think and act. No slates are clean; all is bricolage, picking from existing shards and fragments, adding to them novel bits and pieces, coming up with something both old and new. If for Tolstoy, ‘happy families are all alike; every unhappy family is unhappy in its own way’, countries in transition are more like unhappy families. For precisely the fact that the presence of particular pasts is a universal phenomenon means that no transition is the same as another.

The presence of the past is exacerbated in Myanmar, since we are not talking merely of relics or legacies. The polity, the economy, indeed the whole society remains in considerable part under the control of the military, which controlled it without competition for more than fifty years, and retains control of central domains today. As Matthew Arnold points out in Chapter 6 of this book,

Full military rule in Myanmar ended in April 2011. However, overcoming the legacies of decades of such authoritarianism will take a long time. This

is primarily because the military penetrate deeply into the bureaucracy starting in the early 1960s ... The influence of military authoritarianism on the bureaucracy had significant effects on economic governance as well. Namely, economic governance was not focused benignly on the full empowerment of the private sector, but rather part of a wider bureaucratic intent of surveillance and control of the population. Current economic realities in Myanmar are also compounded by the socialist tendencies of the junta.

There is thus a real risk, in ‘transitional’ societies in general, and in Myanmar in particular as it moves, in Frewer’s terms, from aid orphan to aid hub, not merely that aid will serve *donor* interests more than is publicly averred, but that it will serve, as he also stresses, overlapping interests of donors and existing elites, rather than and possibly at the expense of those of its ostensible and announced target populations. This is yet another reason, and a theme of many of the chapters of this book, why it is as important as it is rare that people involved in this business know as much about what and where the country which they are keen to transform *is* as they do about where they want it to get to. It is also a reason, as the chapters by Arnold, Nishimura, Renshaw and Frewer stress, why it is misguided to treat development as a purely, or even primarily, technical matter. It has many technical aspects, as Turnell emphasises, which cannot be wished away, but framing the whole process is *politics*, and in Myanmar politics of a distinctly and pervasively militaristic cast.

And so, particularly in the case of Myanmar, where the past and present are so complex, close knowledge of the particular country and domain involved is crucial for anyone involved in this business. On the other hand, insiders – particularly in countries such as Myanmar that have been cut off from much of the rest of the world for several generations – need exposure to experiences beyond their own. It is a key achievement of this work that it brings together general reflections on ‘development’ with particular, nuanced understandings of Myanmar, without subordinating either to the other.

While in the broad sense, the business of transition encompasses all the domains of life with which Dr Crouch’s three collections have been concerned, there is of course a narrower sense at the forefront of many people’s minds when they think of transition and development, and when they hear the phrase ‘*economic* development’. That is the focus of this work, and it is crucial in a country such as Myanmar, which has managed to combine rich natural resources with dramatic poverty. Like every other domain of development, it has multiple elements and impacts, many of

which are illuminated by the various essays in this collection. As for elements, one soon learns at least two, apparently but not really contradictory, lessons. One is that economic development has its own imperatives and constraints. Ignoring them can be costly, even in pursuit of virtuous ends, and not merely in economic terms. Thus, Sean Turnell stresses in relation to microfinance, ‘The lesson for microfinance in Myanmar from the long and sorry history (and recent past) of its financial cooperatives is a simple one. The provision of financial services, even in their micro form, are best left unburdened by aims and objectives that have little to do with such services, but much more to do with utopian visions of societal transformation.’ This is not a caution that should stop with financial services.

On the other hand, to adapt Kipling on English parochialism, ‘what do they know of economics who only economics know?’ To understand, still more effectively to promote economic development, one needs to think about law, administration, political structures and incentives, in Myanmar’s case especially *military* structures and incentives, social organisation, culture, religion and many other things. One is put in mind of Amartya Sen’s mordant observation, in his influential speech to the World Bank,

Even when we consider development in a particular sphere, such as economic development or legal development, the instruments that are needed to enhance development in that circumscribed sphere may not be confined only to institutions and policies in that sphere ... If this sounds a little complex, I must point out that the complication relates, ultimately, to the interdependences of the world in which we live. I did not create that world, and any blame for it has to be addressed elsewhere. (Sen 2000, and see Tamanaha 2011)

Not only will the *instruments* of development overlap any particular designated sphere, so too will their effects. For example, even were special economic zones to be economically warranted (which, in the case of two of the three in Myanmar, Wood questions), there remain the issues that Nishimura raises about the effects on local communities. More generally, economic development can encourage both social inclusion and exclusion, and it matters a great deal which, as Chapter 2 on labour standards, Chapter 4 on social enterprise, Chapter 8 on local effects of special economic zones and Chapter 10 on the differential effects of international aid illustrate. Even where such effects are unintended, they are not all unpredictable, and those interested in development that is at once effective *and* equitable need to take them into account. The essays in this volume are useful guides to several.

This book is a rich resource in all these ways and more. It is not the task of a book's foreword, however, to anticipate all the riches to come. So, aside from recommending this work with enthusiasm, I will stop here.

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ACRONYMS

AGRAM	Action Group for Resource Accountability in Myanmar
ASEAN	Association of Southeast Asian Nations
CSOs	civil society organisations
DAO	Development Affairs Organisations; municipal offices
DDA	Dawei Development Association
DfID	UK Department for International Development
DICA	Directorate of Investment and Company Administration
ECL	Environmental Conservation Law
EIA	environmental impact assessment
EITI	Extractive Industries Transparency Initiative
FDI	foreign direct investment
FER	Foundation for Ecological Recovery
FESR	Framework for Economic and Social Reforms
FLA	Fair Labor Association
FLEGT	Forest Law Enforcement, Governance and Trade
GAD	General Administration Department
GSP	Generalised System of Preferences
IATI	International Aid Transparency Initiative
ILO	International Labour Organisation
ITD	Italian-Thai Development PLC
JICA	Japan International Cooperation Agency
KNU	Karen National Union
MaBaTha	Committee for the Protection of Nationality and Religion
MATA	Myanmar Alliance for Transparency and Accountability
MCDC	Mandalay City Development Committee
MDRI	Myanmar Development Resource Institute
MEITI	Myanmar Extractive Industries Transparency Initiative
MGMA	Myanmar Garment Manufacturing Association
MIC	Myanmar Investment Commission
MJTD	Myanmar Japan Thilawa Development

MoC	memorandum of cooperation
MOGE	Myanmar Oil and Gas Enterprise
MoHA	Ministry of Home Affairs
MOLES	Ministry of Labour Employment and Social Security
MSG	multi-stakeholder group
MSMEs	micro- and small- and medium-sized enterprises
MTUG	Myanmar Trade Union Federation
NCA	National Ceasefire Agreement
NHRCT	National Human Rights Commission of Thailand
NLD	National League for Democracy
NRGI	Natural Resources Governance Institute
OECD	Organisation for Economic Co-Operation and Development
OFAC	Office of Foreign Assets Control
OGM	Operational Grievance Mechanism
PDCs	peace and development committees
PHR	Physicians for Human Rights
SDN	Special Designated Nationals
SEA	strategic environmental assessment
SEZs	special economic zones
SGM	Shwe Gas Movement
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
SPV	special purpose vehicle
SSN	Southern Society Development Network
TDAC	Township Development Affairs Committee
TERRA	Towards Ecological Recovery and Regional Alliance
TNI	Transnational Institute
TSDG	Thilawa Social Development Group
UMEHL	Union of Myanmar Economic Holdings Ltd
UMFCCI	Union of Myanmar Federation of Chambers of Commerce and Industry
YCDC	Yangon City Development Committee