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The American University in Cairo
School of Global Affairs and Public Policy

**MYANMAR IN TRANSITION: RULE OF LAW,
DEMOCRACY, FREE MARKETS
AND FALSE CONTINGENCIES**

A Thesis Submitted to the
Department of Law

In partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law

By

Claiton Fyock

June 2015

The American University in Cairo
School of Global Affairs and Public Policy

THE REGULATION OF INTERFAITH MARRIAGES
IN ISLAMIC LEGAL DISCOURSE

A Thesis Submitted by

Claiton Fyock

to the Department of Law
May 2015

in partial fulfillment of the requirements for the
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MYANMAR IN TRANSITION: RULE OF LAW,
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Claiton Fyock

Supervised by Professor Hani Sayed

ABSTRACT

Myanmar is in the midst of a major political/economic transition. After years of repressive rule under a harsh military regime, the country is moving towards liberalism. At the behest of the domestic and foreign liberal pressure, the foundations of liberalism including the rule of law, democracy, and open markets are taking shape in Myanmar. This paper demonstrates the lack of agency that Myanmar, both as a state and for the citizens within the state, maintains during this transition. This lack of agency is due, in part, to the neoliberal interpretation of liberalism and its founding tenets. Utilizing Roberto Unger and Susan Marks's theories of "False Necessity" and "False Contingency," I will demonstrate how international institutions and ideologies are propagated and forced on Myanmar. The belief in these ideologies and institutions creates pressures and imposes limitations on the systems that they influence in Myanmar. These pressures and limits, in turn, create a lack of true agency in the transition that Myanmar and its people are experiencing. I begin by first exploring the general liberal thought in regards to transition. I then demonstrate the false contingencies that a neoliberal understanding on the liberal tenets reflects. I apply this dynamic to actual circumstances in Myanmar as a case. The thesis concludes with the exploration of the concept of false contingency on Myanmar's transition to democratization, neoliberalizing markets, and its embrace of human rights.

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I. Introduction

By merely glancing at the headlines of any world news section, one can easily recognize the importance of political and economic transitions. Their salience is undeniable when examining the current media attention given to them, whether in the Middle East, North Africa or elsewhere. Transition is a constant and often the focal point of global politics. It is a seemingly irreversible process that can open the door to potentially unlimited contingencies. This project is very much about the process of transition and its contingencies. It is about what a political/economic transition means and looks like today. It is about the freedom and constraints a state that is going through a transition realistically endures. This project is not about what succeeds after a transition has taken place. It offers no critique of what systems are best for a particular state, and it offers no judgment of the outcome of any transition. The focus is singularly on transition itself.

The underlying assumption is that a transition inhabits a time and space in which an entity, in the case of this paper a state, has, or should have, the agency to decide for itself which systems and institutions best suit it. However, this assumption is arguably contradicted by the reality that hegemonic states and organizations posit their political/economic power. History has shown that transition has often been a time when a particular dynamic of power is enacted against the weak transitioning state by more powerful entities.¹ This paper looks at this dynamic in the very contemporary setting of Myanmar and its relationship to the hegemonic institutions such as the UN and World Bank and the states behind these organizations.

I posit that a state, such as Myanmar, has very little realistic agency in the decisions it makes during its current political/economic transition. This is due to a great many factors, but there appears to be a power dynamic at play that does not allow Myanmar, and subsequently its people, to practice their own agency in this

¹ See NAOMI KLEIN, *THE SHOCK DOCTRINE* (Penguin Books) (2007) (tracing the violent political/economic transitions of Latin America, East Europe and Asia under the powerful doctrine of neoliberalism).

time of transition. Myanmar is situated, like most other poor, marginalized states in a developed/undeveloped dynamic in which much of its agency is sapped by its dependency on the systems, such as the legal or economic institutions, of the stronger states. This has not always been the case for Myanmar. Until this current transition, Myanmar was one of the western world's outsider states much like North Korea or Iran. It was not assimilated into the global systems that most states adhered to, and its politics reflected an isolated, non-aligned policy. This is changing for Myanmar now as it opens up to the western hegemony in economics and political ideology.

This project does not mean to gloss over the many horrendous details of Myanmar's recent history. It does not expunge the record of the government's egregious actions against its own people. Nor does this project qualify the systems of governance or institutions Myanmar has chosen in the past, or is choosing now. As stated above, the focus is on the freedoms and constraints of the current transition taking place in Myanmar right now and how they have come to exist. I do not offer any critique of what form of government or economy is best for Myanmar. This is not a project claiming that Myanmar should be allowed to pursue its socialist past, or that a liberalist future will fix all of Myanmar's problems. This project's scope is about the degree of agency a state such as Myanmar has in a political/economic transition.

Myanmar has been chosen for multiple reasons. First, it is currently under a transition that began in 2008 when the government promulgated a new constitution,² and it is still underway. The country will be conducting another round of presidential elections in the latter part of 2015.³ Second, its undeniably unique history that straddles both capitalist and communist leanings gives valuable insight into a transition from one system to another. Third, Myanmar's position in terms of its economy is valuable because it demonstrates the ability an extremely poor

² See Xinhua, *Myanmar formally announces ratification of new constitution draft*, People's Daily Online, (May, 2008) available at <http://en.people.cn/90001/90777/90851/6421254.html>.

³ See, Marie Lall, Nwe Nwe San, Theint Theint Myat and Yin Nyein Aye, *Myanmar's Ethnic Parties and the 2015 Elections*, European Union (2015).

nation has in determining its own destiny in the contemporary global order. Lastly, Myanmar has many groups and advocates promoting change. They are particular adherents to liberal models, which is not a negative in and of itself. However, their devotion to liberalism may in fact be from the very power dynamic this project wishes to demonstrate; they yearn to have the ability to choose for themselves their own models, but the systems around them do, in fact, place constraints and pressure on them, so much so, that there is little choice to be had.

Myanmar lacks agency in its transition due to its position in the power dynamic between a state and the hegemony of global institutions such as the UN or World Bank and their universal approach. These institutions, in turn, are controlled by much more powerful states such as the US or EU. This argument does not necessarily require Myanmar. I have chosen it because the argument could apply to any number of poor, maligned states going through their own transition at the mercy of bigger, more powerful states, and Myanmar has been chosen as this project's case. I will demonstrate this lack of agency using Susan Marks's theory of 'False Contingency,' that there is a system of limits and pressures that constrain Roberto Unger's 'False Necessity,' in which he posits that there are a limitless number of potential systems of governance and economy.⁴

The paper begins with a brief modern history of Myanmar. I will then demonstrate an overarching liberal ideology regarding transition and the contemporary influence liberal ideologies have had and continue to have on Myanmar. In the fourth chapter I explore both Unger's 'False Necessity' and Marks's 'False Contingency' and their relevance to the freedoms and constraints of transition. This will also include an analysis of the potential misgivings of the liberal approach and ideology to transition particularly in regards to the more modern approach to neoliberalism. Finally, in the fifth chapter I will use Myanmar as a case study to demonstrate how liberalism, and particularly neoliberalism, has created the power dynamic that is Marks's 'False Contingency' reflected in Myanmar's political/economic transition.

⁴ See ROBERTO UNGER, *FALSE NECESSITY*, (Verso, 2nd edn. London, 2004) and Susan Marks, *False Contingency*, Susan Marks, (Current L. Prob. 2009).

II. A Brief History of Modern Myanmar

An elementary understanding of Myanmar's modern history is needed to grasp its relevance. There are several themes that are particularly apposite. First, Myanmar is a state that has traversed both economies of capitalism and socialism in the last 60 years. Second, it is a state that deliberately chose nonalignment in a bipolarized world during the communist/capitalist divide. This nonalignment was then transformed into extreme isolation. Finally, the result of this was a military led state with extensive socio-economic woes. This section will give a succinct history of Myanmar since WWII and highlight some of the major events and names of the last 50 years.

Myanmar, formerly known as Burma, was a British colonial invention. The British were present for a relatively brief time, from 1885 to 1937, in comparison to their other endeavors such as in India.⁵ Myanmar's borders were unsurprisingly drawn up by the UK. It was a very successful colony by economic standards and was a major exporter of rice, timber and minerals.⁶ After a traumatic WWII experience in which the colony dealt with both British and Japanese occupation, Myanmar was finally given its own sovereignty in 1948.⁷ Before, during and after the WWII, both communists and liberals were present in Myanmar. Present day Myanmarese heroine Aung San Suu Kyi's father, Aung San, was the central player in gaining independence for the country. He rode the fence between liberalism and communism: whichever best suited his needs in the fight for independence.⁸ Unfortunately, Aung San was assassinated in 1947, and the country, losing its charismatic leader, was left in the hands of Nu, who in its first decade took the state down a liberal path infused with Buddhist nationalist sentiment.⁹

In 1962, under General Ne Win, the country changed course. First, under the banner Revolutionary Council, then the Burma Socialist Program Party, Ne Win and

⁵ PETER JOHN PERRY, MYANMAR (BURMA) SINCE 1962: THE FAILURE OF DEVELOPMENT 21 (Ashgate Publishing Limited 2007).

⁶ *Id.*, at 1.

⁷ MICHAEL W. CHARNEY, A HISTORY OF MODERN BURMA 71 (Cambridge University Press 2009).

⁸ *See Id.*, at 46-72.

⁹ *Id.*, at 72.

his military controlled the state in one form or another until 1988.¹⁰ The Ne Win regime utilized what it called the “The Burmese Way to Socialism.”¹¹ It was in fact not entirely socialist. The peasants continued to be the producers of rice, Myanmar’s main crop, and the state was to oversee the rice trade and practice procurement. It was meant to be based on cooperation between the state and the producers, but it failed miserably due to state incompetence and greed. Perry describes the dynamic as state and elite-rewarding capitalism.¹² Politically, the ideology was meant to be democratic centralism, but instead developed into a, “‘centrally guided’ democracy in which the only way to participate in political activity was to join the army or public service and gain promotion. As was often noted compliance, conformity and corruption served this purpose better than ability or activity.”¹³ Beyond this, the military proved to be terrible administrators and never utilized talent and skill outside of its rank and file.¹⁴ The government reined in dissent through tactics of censorship, curfew, reeducation programs at the university and monastic level, and arrests.¹⁵

An essential element to the regime was its active pursuit of isolationism. Ne Win himself was an ardent believer in it, and the nation developed an ideology of self-help and self-pay.¹⁶ Isolation imbued nearly every aspect of Myanmar society including ideologies, politics and economics. Beyond isolation was the belief in nonalignment that had begun in the 1950s during the Cold War.¹⁷ Myanmar was to focus on development instead of the distraction of the Cold War. In fact, Myanmar remained neutral to even the non-alignment movement itself, preferring isolation over joining any form of political bloc.¹⁸ The status quo of quasi-socialist Myanmar remained with certain adjustments and a very gradual shift towards capitalism until the democratic protests of 1988.

¹⁰ *Id.*, at 107.

¹¹ Perry, *supra* note 5, at 26.

¹² *Id.*, at 27.

¹³ *Id.*, at 29.

¹⁴ *Id.*, at 32.

¹⁵ Charney, *supra* note 7, at 115.

¹⁶ Perry, *supra* note 5, at 37.

¹⁷ Charney, *supra* note 7, at 79.

¹⁸ *Id.*, at 81.

The protests were a major moment in the recent history of Myanmar and ushered in a new, important era. Students largely led the 1988 protests making demands for a better economy, democracy, and the release of unwarranted prisoners. The number of demonstrators escalated rapidly and grew into the thousands. Over the course of a few years the government attempted different ways to pacify their people but were unsuccessful; thousands lost their lives and even more were imprisoned sometimes for decades. Eventually, Ne Win was replaced. More importantly, democratic elections were scheduled that involved the newly developed National League for Democracy (NLD), which is still in operation today and led by Aung San Suu Kyi. In 1990 parliamentary elections were held in which the NLD won 392 out of 447 seats. However, the newly reorganized military regime, under the reinvented title, the State Law and Order Restoration Council (SLORC), hijacked the elections and put the country on a course of indefinite democratic transition that has essentially lasted two decades.¹⁹

The SLORC years have come to be known as arguably Myanmar's most oppressive and unfortunate years to date. Through not recognizing multi-party election results, calling for constitutional reforms that never happened, and repressing any form of public dissent by means of military tribunals capable of sentencing people to death, life imprisonment or three years hard labor,²⁰ The SLORC held onto power at the expense of letting the Myanmar people fall further into extreme poverty.²¹ It is during these years that Myanmar developed a significant reputation for egregious human rights abuses and oppressive state control involving everything from forced labor to indefinite detentions. "The SLORC had a particular view of how the future of the country should be shaped. As events would soon demonstrate, this view was hostile to both foreign interference and democracy, which in the Council's eyes became inextricably linked."²² Due to these actions committed by the government, the international community, namely the US and the EU, responded with economic sanctions. The EU began in 1996 with a visa

¹⁹ *Id.*, at 148-170.

²⁰ *Id.*, at 167.

²¹ *Id.*, at 170-176.

²² *Id.*, at 173.

ban on government families and then in 2007 with an export ban on Myanmar timber and minerals. The US began its sanctions regime in 1997 and was intensified after the Burma Freedom and Democracy Act, which banned all imports from Myanmar to the US.²³ However, since 2008, when a new constitution was ratified, and in 2010, when a new quasi-civilian government was put in place and began the reform process, the West has reengaged with Myanmar. This brings us to the current argument of this project that Myanmar has a lack of agency in its own transition.

²³ Klaus E. Meyer and Htwe Htwe Thein, *Business under adverse home country institutions: The case of international sanctions against Myanmar* (49 J. of WORLD Bus. 156, 160 (2014)).

III: A Liberal Critique of Transition

In the last 30 to 40 years, especially since the fall of the Soviet bloc, the discourse over transition has been steered in a singularly liberal direction. With the failure of the communist systems, has come a sort of vindication of all things liberal with the US and Western Europe leading the charge. Authors such as Francis Fukuyama declared this new world order the “End of History”²⁴ and a ubiquitous political belief in all things democratic, rule of law oriented and capitalist began. There was no longer the need to debate which system was better for a society. The conversations over global order had shifted. All of these failed governments required an overhauling of virtually all their public systems, which made transition the new pressing matter.

In this time of great need, the global institutions of the West seized their opportunity to transplant their systems into these transitioning states in Eastern Europe and Asia. Many of these governments, such as Poland or earlier Chile and Argentina, were hit with what has been termed the “shock treatment,”²⁵ in which hardline governments, such as Pinochet and his supporters, enforced an intensive economic overhaul under the supervision of Milton Friedman and his Chicago Boys.²⁶ This ‘shock treatment’ involved a radical embracing of neoliberal ideologies including extensive free trade, a hands-off state policy, and the massive privatization of enterprises.²⁷ This new form of private/public, political/economic relationship gradually took hold and by the time the communist world was finished, the Western-led financial institutions such as the World Bank and IMF were in full power to command the transitions.

This neoliberal agenda established through hegemony was arranged to guide the transitioning states through their individual processes, but with a universal

²⁴See FRANCIS FUKUYAMA, END OF HISTORY AND THE LAST MAN (Free Press 1992) (referring to the end of communism in the 1990s and the result of which meant liberalism is the endpoint for humanity’s social evolution).

²⁵ Klein, *supra* note 1, at 73-116.

²⁶ *Id.*

²⁷ *Id.*

roadmap.²⁸ This chapter will explore what exactly the neoliberal ideology entails. It focuses on the strict adherence to the rule of law, which is the foundation on which democracy and free market capitalism is built.

A. A Neoliberal Foundation for Transition

Neoliberalism is the all-encompassing term given to the political/economic dynamic that has been in action since the late seventies. The neoliberal experience is built upon the pillars of general liberal thought: democracy, capitalism and rule of law. The fundamental difference from liberalism is that neoliberalism takes a hardline approach that severely limits a state's capacity to engage in the economy. It does this by separating the discourse that goes on between politics and the economy.

Roberto Unger offers this extensive definition of its central values:

Neoliberalism is the program committed to orthodox macroeconomic stabilization, especially through fiscal balance, achieved more by containment of public spending than by increases in the tax take; to liberalization in the form of increasing integration into the world trading system and its established rules; to privatization, understood both more narrowly as the withdrawal of government from production and more generally as the adoption of standard Western private law; and to the deployment of compensatory social policies ("social-safety nets") designed to counteract the unequalizing effects of the other planks in the orthodox platform.²⁹

It is based on the belief that a universalist, globalizing influence in all states' politics, economies and legal structures best serves all economies and inevitably develops the world's states.

Thus, the ideals of liberalism have been greatly propagated by the methods of neoliberalism. There is a sense of vindication surrounding these methods and ideals due to the level of support given them by the major hegemonic states and

²⁸ See SUNDHYA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011), <http://ssrn.com/abstract=1743269>, (arguing that international law is based of a universal prescription for development and economic growth).

²⁹ ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 53 (Verso) (1998).

institutions of the global order. The flagships of (neo)liberalism have been and continue to be the IMF, World Bank, WTO, and the UN, which are all largely led by the powerful states of North America and Western Europe. These hegemonic powers and institutions carry out their global activities under a belief resembling Rawls's 'duty of assistance.'³⁰ For Rawls, there is a, "well-ordered peoples' duty to assist burdened societies in establishing just (or decent) institutions [which] is one part of [the] project of transition, a project which we are bound to engage in by the *natural duty of justice*."³¹ The natural duty of justice demonstrates the underlying belief that it is the duty of this hegemony to assist, as it can, in exporting its just and successful mechanisms of society to less developed and maligned regions of the world. The time and place to accomplish this is within these undeveloped countries' transitions.

The result of these beliefs in neoliberalism and the duty of assistance has come to be known as globalization. Globalization is the neoliberal's term for spreading their system around the world. Its adherents are fervent in their belief in its potential for good. Thomas Friedman, a major proponent of globalization, demonstrates his propensity for it saying, "The spread of free markets and democracy around the world is permitting more people everywhere to turn their aspirations into achievements."³² These aspirations and achievements of globalization are meant to open the doors of these transitioning States to unlimited potential. Scholar Karin van Marle highlights both the broad scope of its embrace and the faith in its ability to open the doors of limitless contingencies:

Transition should encompass not only institutional change (evolution) but also the change of particular individuals within society (transformation). The process of transition should however protect an individual's right to imagine him/herself freely without the limitations or restrictions of strict and fixed concepts of identity [. . .]The contingency and fluidity of individual transition should also influence institutional approaches to transition [. . .] Both the

³⁰ See Caleb Young, *Rawls's Duty of Assistance: Transitional not Humanitarian or Sufficiencyarian* (Nuffield's Working Papers Series in Politics, 2012).

³¹ *Id.*, at 3.

³² AMY CHUA, *WORLD ON FIRE: EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 9 (Doubleday, 2003) quoting THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* ix, svi, 12 (Anchor Books, 2000).

transition of a society on a structural or institutional level and the transition of an individual should be seen as contingent, fluid and open.³³

Globalization is built on a firm belief in the cosmopolitan - the idea that with enough effort, humanity can achieve its most coherent and effective form of governance through universal principles. Marle is writing about transcending into the cosmopolitan. By harnessing Universalist principles, humanity will find its freedom and most effective means of governance.

1. Rule of Law

The backbone of achieving a globalized, cosmopolitan world is an adherence to the rule of law. Once humanity can agree upon a set of universalist principles that all can abide by, the other pillars of liberalism take shape and assist the marginalized states of the world such as Myanmar. It is for this reason that certain scholars promote international legal assistance in the name of cosmopolitanism.³⁴ This legal assistance is meant to open the doors to a myriad of other “beneficial” structures that should ideally transform a country such as Myanmar into a peaceful, productive state. It only requires an initial sacrifice of a portion of each state’s inherent right to sovereignty. For example, when a state signs an international convention, it is obligated to adhere to its decree even if the decree limits the freedom of the state’s actions regarding anything from trade to humanitarian law. Hafner-Burton, Mansfield and Pevhouse demonstrate the incentives democratizing states are offered to surrender a portion of their sovereignty to consolidate their democratization. One is embracing liberal policies, namely human rights. The incentives to do so are to prove their commitment to “lock in liberal policies” and to “respond to inducements from more established democracies.” “Joining a human rights institution that extracts high costs enhances the credibility of the

³³ Karin van Marle, *The multiplicity of transition*, 35 Comp. & Int’l L. J. S. AFRICA. 65, 67 (2002).

³⁴ Andrew Morgan, *A Remarkable Occurrence: Progress for Civil Society in an “Open” Myanmar*, 23 Pac. Rim L. and P. J. 495, 498 (2014).

government's commitment to democratic reform and sends a credible signal to both domestic and foreign audiences that it is serious about such change."³⁵

A major proponent of such transitions under the rule of international law is the World Bank. It has been funding and assisting states to rebuild themselves essentially since its inception. The multinational financial institution is heavily involved in the global discourse over development and regularly weighs in on the discussion through its various publications and reports. The bank strongly advocates for development to take place under the ever-vigilant eye of the rule of law. "The development process must be comprehensive, and [. . .] legal and judicial reforms are critical components of that process. Indeed, legal and judicial reform is one of the main pillars of the Comprehensive Development Framework."³⁶ The World Bank, since the nineties, institutes a series of assessments and diagnostics on the countries with which it is engaged. The assessment examines, "different aspects of the administration of justice, including court and case administration; selection, promotion, and disciplining of judges; training of judges, lawyers and law students; access to justice and its gender dimension; and alternative dispute resolution mechanisms."³⁷ The Bank recognizes the ability of law to influence the distribution and benefits of economic growth. The institution promotes the notion that law must be used to bolster other societal structures such as politics and the economy to protect the vulnerable against starvation, violence, disease, and poverty.³⁸ To do so requires:

Transparency and accountability in government, public participation and legal institutions and processes that are not only effective and efficient but also provide equitable remedies for all in society. A well functioning legal and judicial system is critical both as an end in itself as well as a means to facilitate and leverage the achievement of other development objectives.³⁹

³⁵ Emilie M. Hafner-Burton, Edward D. Mansfield and Jon C.W. Pevehouse, *Human Rights Institutions, Sovereignty Costs and Democratization*, 45 *Brit. J. of Pol. Sci.* 1, 2 (2015) (first published Cambridge Uni. Press 2013).

³⁶ Legal Vice Presidency, *Initiatives in Legal and Judicial Reform*, The World Bank 1 (2004).

³⁷ *Id.*, at 5.

³⁸ *Id.*

³⁹ *Id.*

With a foundation built on the rule of law, the World Bank should be able to carry out its mission to assist the world's transitioning states through their process.

2. Democracy and a Free Market Economy

Legal reform may be the backbone of the liberal transition, but the fundamental impetus behind reform is certainly one of democratization and free market capitalism. There is a wealth of literature regarding democratic transitions especially since the fall of the Berlin wall. The World Bank has weighed in heavily on these transitions on how to make the change from a planned, centralized society to a liberal, market-based, democratic system.⁴⁰ The planned economies had failed, so liberal answers became axiomatic.

The long-held ideology that democracy and free markets go hand-in-hand is still as fundamental a belief today as it was 25 years ago when the planned governments of the Soviet Bloc were transitioning. The international financial institutions, the UN, North American and Western European leaders, and many academics still espouse these ideas and attempt to evince the relationship between the systems quantitatively.⁴¹ Daniel Treisman is a case in point: "Since Lipset (1959), many scholars have held that as countries develop economically they tend to become more democratic [. . .] Moreover, a variety of plausible mechanisms—from the spread of education and mass media to growing tolerance and social differentiation—seemed likely to render citizens of richer societies both more eager to participate and harder to control." Treisman continues with his overview of history of the connection of democracy and income. Recently, he demonstrates, scholars believe that it is maybe not so causal, but instead, democracy and income expand together.⁴²

⁴⁰ See The World Bank, *World Development Report: From Plan to Market*, Ox. Uni. Press (1996).

⁴¹ See Daniel Treisman, *Income, Democracy, and the Cunning Reason*, (2011), Fabrice Murtin and Romain Wacziarg, *The democratic Transition*, (2013), Yi Feng and Paul J. Zak, *The Determinants of Democratic Transitions*, (1999), Siddharth Swaminathan, *Time, Power, and Democratic Transitions*, (1999).

⁴² Daniel Treisman, *Income, Democracy, and the Cunning Reason* 4 (National Bureau of Economic Research Working Paper Series, Paper No. 17132, 2011).

Various aspects of modernization may affect politics with a lag. Rising literacy and the spread of education will create pressure for more accountable government only after newly literate and educated groups become politically aware and develop organizational skills [. . .] The demand for democracy and the readiness of society to sustain it have a greater impact in periods after change occurs in a country's top leadership.⁴³

Treisman demonstrates how the social benefits that arise from a market economy have a positive effect on the democratization of the country. Murtin and Wacziarg come to essentially the same conclusion while looking largely at industrialization and modernization.⁴⁴ They also note, "a strong empirical link from the level of development, particularly as captured by the level of primary schooling, to democracy."⁴⁵ Yi Feng and Paul J. Zak virtually turn liberal economics and democracy's relationship into an axiom with their statement, "With sufficient growth, nondemocratic governments almost always become democracies."⁴⁶ The key to these articles is in their mathematical analyses. These authors have quantitatively proven that democracy and free markets go together, and that is what is important for transitioning governments to understand.

From the early 1990s until today, the debate has not been about what different political and economic structures states can employ to satisfy their citizens' needs. Rather, the discourse has been about how to best liberalize a transitioning state. "Two major ideologies have been pitted against each other: the 'Washington Consensus' and the 'evolutionary-institutionalist perspective.'⁴⁷ The names suggest their relative meanings - the former being a rapid overhauling of multiple governmental structures, whereas the latter is a more gradual process. The Washington Consensus employs the shock treatment by, "Conducting all necessary reforms [which] at once gets the economy along an irreversible path featuring

⁴³ *Id.*, at 9.

⁴⁴ Fabrice Murtin and Romain Wacziarg, *The democratic Transition*, 19 J. Econ. Growth 141, 142, (2013).

⁴⁵ *Id.*, at 178.

⁴⁶ Yi Feng and Paul J. Zak, *The Determinants of Democratic Transitions*, 43 J. of Conf. Res. 162, (1999).

⁴⁷ Peter Koveos, *Economies in Transition: Recent Performance*, 30 Syracuse J. of Intl. L. and Com. 287, 291, (2003).

strong market influence and weak government intervention. Once the old structures disappear, new laws and mass privatization will enable the economy to take full advantage of the new environment.”⁴⁸ The World Bank was in favor of the shock treatment supporting the notion that, “Both extensive liberalization and determined stabilization are needed for improved productivity and growth and that sustaining these policies requires rapid structural changes as well as institutional reform.”⁴⁹ However, not all states have undergone this same treatment. Certain Asian countries, namely China, have undergone a much more incrementalist approach to transition; this includes Myanmar. Regardless of the speed at which a transition undergoes, the objective of the hegemonic-influenced transition is the same: “Countries will have completed their transition only when their problems and further reforms come to resemble those of long-established market economies at similar levels of income.”⁵⁰ The idea is to assimilate the countries in question to the globalized order with its neoliberal ideals of free world markets, privatization and limited government involvement in the economy.

B. The Liberal Critique of Myanmar

Since the 1990s, Myanmar has made steady strides in liberalizing its politics and economy. As previously demonstrated, the debate in Myanmar between liberalism and socialism stretches back to the immediate aftermath of WWII. The country had straddled both sides for many years leaning one way for a period of time and then the other for another period of time. Since the 1988 uprisings however, the National League for Democracy (NLD) has existed as something of a popular underdog, steadily gaining support. Led by Aung San Suu Kyi, the party abstained from the 2010 presidential elections.⁵¹ By 2012 the party came back for the

⁴⁸ *Id.*

⁴⁹ Plan to Market, *supra* note 40, at 5.

⁵⁰ *Id.*, at 4.

⁵¹ *Suu Kyi's NLD democracy party to rejoin Burma politics*, BBC, (Nov 18, 2011) available at <http://www.bbc.com/news/world-asia-15787605> (accessed Apr 25, 2015).

country's by-elections and secured a sweeping victory in the country's parliament.⁵² Clearly, the support is there for a liberal party, which can only make sense after so many years of abuse under a socialist system. As its popularity grows within Myanmar, it is important to analyze what the party's ideologies are and what it strives to accomplish.

The NLD supports the general liberal tenets of democracy, free markets, and human rights. It is very understandable that the NLD believes in these institutions to take Myanmar from its current and historical position of one of the world's most impoverished and damaged countries to one of fairness, equity and prosperity. Liberalism makes the promise that citizens will have a say in their government, have the opportunity to climb an economic ladder, and enjoy the rights that are inherent to being a human. These ideals have registered with the Myanmar people as seen in the results of 2012's by-elections in which a semi-civilian government was elected. The hope within the country is that the momentum for change persists. The current transformation and the active pursuit for further change can be viewed in the realms of law and democracy, free markets and human rights.

1. Law and Democracy in Myanmar

Further democratization is of utmost concern. Aung San Suu Kyi could potentially be eligible for the upcoming elections in late 2015.⁵³ Her ineligibility is the reason for the NLD not running in the 2010 elections.⁵⁴ Aung San herself has, "emphasized how critical for Burma's future it is both to change the retrograde document that is the country's current constitution, and to hold serious talks about the transition to democracy."⁵⁵ As Woollacott describes it, the military has put itself in the position

⁵² Kyaw Kyaw, *Analysis of Myanmar's NLD landslide*, New Mandala (May, 2012) available at <http://asiapacific.anu.edu.au/newmandala/2012/05/01/analysis-of-myanmars-nld-landslide/> (Apr 25, 2015).

⁵³ Martin Woollacott, *Why Burma still needs Aung San Suu Kyi*, The Guardian (Apr, 2015) available at <http://www.theguardian.com/commentisfree/2015/apr/06/burma-aung-san-suu-kyi-democracy-election> (Apr 25, 2015).

⁵⁴ BBC, *supra* note 51.

⁵⁵ Woollacott, *supra* note 53.

of a halfway house between military and civilian rule.⁵⁶ What Aung San and the NLD must do is get the constitution repaired so that the military branch of the government is not so strongly positioned.

In order to make these required repairs it is important that there actually be people on the ground advocating for legal reform under the umbrella of liberalism. Cheesman and Min San's piece about cause lawyers in authoritarian regimes supports this view.⁵⁷ In order for there to be cause lawyering there must first be advocacy for law. They discuss three roles that law plays as being: guardianship of justice, concern for professional ethics, and a transformative project for political and economic change. What is important is that lawyers are strict adherents to the justice of law to fight these authoritarian leaders on a political front.⁵⁸ Once these values are embraced, institutions like the World Bank and cause lawyers can transplant liberal laws on a country like Myanmar. Then Myanmar and similar states should be able to start enjoying the other pillars of the cosmopolitan world such as democracy. It is this kind of cause lawyering the NLD benefits from in its endeavors to repair the constitution and potentially instill a purer form of democracy for Myanmar.

2. Free Markets in Myanmar

As observed by the group Network Myanmar, there is a steady relationship building between the Myanmar government, as more and more NLD members become active, and neoliberal institutions such as the World Bank and IMF.⁵⁹ Both financial institutions give regular investment assessments on the steadily liberalizing state. This process actually began back in 1987. Myanmar's governmental body, the SLORC, began a process of liberalizing a handful of its planned sectors. It was in response to the drastic decline of the country's economic performance of the 1980s,

⁵⁶ *Id.*

⁵⁷ Nick Cheesman & Kyaw Min San, *Not just Defending: Advocating for Law in Myanmar*, 31 WISCONSIN INT'L. L. J. 702, 702-733 (2014).

⁵⁸ *Id.*

⁵⁹ See The World Bank, *Investment Climate Assessment in Myanmar*, (Mar, 2015) and IMF Press Release, *Statement at the end of the IMF Staff Visit to Myanmar*, (Feb, 2015) available at <http://www.networkmyanmar.org/index.php/economy> (accessed Apr 25, 2015).

which saw a steadily worsening GDP and budget deficit. With the encouragement of the World Bank it began its slow, steady march towards liberalizing its economy. The government opened both the agricultural and industrial sectors to privatization and liberalization to domestic marketing. “With the enactment of the Foreign Investment Law in late 1988, foreign investors in Myanmar [were] allowed to establish wholly-owned enterprises or enter into joint ventures with Myanmar citizens in almost all subsectors.”⁶⁰ However, it held on to 11% of the total crop and still operates the teak, gem, oil, power and gas industries.⁶¹

This liberal progress was stymied for a period of time during the nineties. Myanmar’s government was the recipient of an extensive sanctions regime imposed largely by the US and EU. In response to this, the regime halted its credit payments to the IDA [International Development Association]. This resulted in the cancellation of approved current and future loans.⁶² It was in response to the horrendous quelling of political demonstrations against the regime. From 1988 to 1990 thousands of protestors were jailed and many killed.⁶³ The West embarked on a major sanctions regime against the Myanmar government.

This relationship between the Myanmar government and Western powers has seen a very significant thawing since 2010, and gains have been made. The World Bank Reengagement and Reform Support Program states that the current Myanmar government is implementing an extensive reform program that includes floating the currency, new fiscal regulations, structural reforms designed to develop the private sector, reviewing the financial sector in hopes of better access, and creating a more conducive job environment.⁶⁴

Many scholars and political talking heads regard this transformation with considerable enthusiasm. There is much optimism for these opening markets due to

⁶⁰ World Bank, *Myanmar: Policies for Sustaining Economic Reform*, World Bank Country Economic Report, 8 (1995).

⁶¹ *Id.*, at 8.

⁶² World Bank, *Implementation Completion and Results Report on a Credit in the Amount of SDR SDR 287.75 Million to the Republic of the Union of Myanmar for a Reengagement and Reform Support Program*, World Bank Document (2014).

⁶³ See Charney, *supra* note 7, 148-169.

⁶⁴ World Bank, *supra* note 62, at 1.

Myanmar's wealth in natural resources.⁶⁵ Organizations such as the OECD go so far as to make recommendations on investment and other economic policies.⁶⁶ Since their initial dealings with Myanmar in the early 90s, the Bank has steadily encouraged these neoliberal reforms. "An important lesson from other reforming economies is that the main goal of privatization efforts should be to maximize economic efficiency [. . .] The main reason to emphasize large-scale privatization is that there is growing evidence from market-oriented and transition economies that ownership matters for productivity."⁶⁷ Until just recently, it had been since 1987 when Myanmar last received any assistance from the IMF or the World Bank even though it is a member of both institutions.⁶⁸ This changed in 2013 when the Asian Development Bank and the World Bank agreed to give Myanmar a \$900 million loan.⁶⁹

3. Human Rights in Myanmar

In recent history, the bulk of the international community's concern towards Myanmar has been in regards to its human rights record. There is no shortage of examples of egregious crimes committed by the military leadership from forced labor to ethnic cleansing.⁷⁰ Many find issue with international corporations doing business in a country with such a record. Not only are these international corporations not trying to alleviate the problems, they may be indirectly exacerbating them. In 2005 the UN appointed a Special Representative of the UN Secretary-General to examine the issue of human rights and transnational corporations and the role of states of regulating the businesses. The findings were as follows, "while business operations can impact on virtually all internationally

⁶⁵ See BALBIR B. BHASIN, *BUSINESS AND INVESTMENT OPPORTUNITIES IN EMERGING MYANMAR*, Bus. Expert Press 1-172 (2014).

⁶⁶ See OECD, *Investment Policy Reviews: Myanmar 2014* (2014).

⁶⁷ World Bank, *supra* note 60, at 19.

⁶⁸ Bhasin, *supra* note 65, at 13.

⁶⁹ *Lending Agencies Restart Burma Loan Programs*, Voice of America (January, 2013) available at <http://www.voanews.com/content/lending-agencies-restart-burma-loan-programs/1592573.html>.

⁷⁰ See UN General Assembly, *Situation of human rights in Myanmar*, (2014), The Asian NGO Network on National Human Rights Institutions (ANNI), *2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, (2014).

recognized human rights across the civil/political-social/economic/cultural divide, states need to mainstream human rights concerns into all business-related legal and policy domains, both internally and externally.”⁷¹ The universal approach to this problem centered on three pillars: states’ duty to protect against human rights abuses through enforcement and regulatory policies, corporations’ responsibility to not infringe on human rights, and more access for the victims of international businesses’ human rights abuses to legal and non-legal entities.⁷²

Human rights has become seen as an integral component of the liberal transformation, and steps have been initiated to instill them as an institution within Myanmar. Human rights is another part of the package of liberalism that works alongside and assists the other tenets. “As a system of governance, however, democracy is not only consistent with respect for human rights, but it also provides opportunities for non-governmental actors to pressure the government.”⁷³ NGOs, international organizations, and local governments are able to communicate together through the language of human rights. Transnational efforts have been made in Myanmar to assist in instilling compliance to international human rights. From 2000 to 2003, Australia initiated a human rights training program for government officials.⁷⁴ Its goal was to assist establishing an “independent Human Rights Commission in accordance with the ‘Paris Principles.’”⁷⁵ The efforts made by the Australian training program paid off, and in September 2011, the “Myanmar National Human Rights Commission (‘Myanmar Commission’) was formally established by Presidential Decree.”⁷⁶ The international community, Myanmarese activists, and the transforming government hope that with a commission such as

⁷¹ Daniel Augenstein, *The Crisis of International Human Rights: Law in the Global Economy*, 44 NETHERLANDS YEARBOOK INT’L L. 41, 42 (2014).

⁷² *Id.*

⁷³ Emilie M. Hafner-Burton and Edward D. Mansfield and Jon C.W. Pevehouse, *Human Rights Institutions, Sovereignty Costs and Democratization*, 45 BRI. J. POL. SCI. 1, 5 (2015).

⁷⁴ David Kinley and Trevor Wilson, *Engaging a Pariah: Human Rights Training in Burma/Myanmar*, 29 HMN. RTS. QUART. 369 (2007).

⁷⁵ *Id.* at 382, (the Paris Principles are a list of responsibilities for national institutions to adhere to for the promotion and protection of human rights *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx>)

⁷⁶ Melissa Crouch, *Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia*, 5 HAGUE J. RULE L. 146-177, 166 (2013).

this in place, the changes that Myanmar so desperately needs will begin to take shape, and Myanmar's transition towards a liberal state will be firmly grounded in international law and human rights.

Myanmar's transformation is a real process. There have been major strides made by the liberal movement both from within and outside the country. There is certainly a large amount of optimism surrounding these changes, with some well-warranted skepticism. But what I wish to ascertain is whether this transition and these changes are really from any true agency of Myanmar and its people at all. Is Myanmar really in control of its transition or is there more at work systemically? How much agency does a State such as Myanmar have in a time of transition? The next chapter offers another perspective on these questions from a group of scholars much less optimistic than their liberal peers, authors of international banking institutions or politicians.

IV. The False Contingency of the Liberal Transition on Poor States

I posit that Myanmar's political/economic transition is not out of its own true agency. The state and its people are positioned in a space whereby the external pressures on them exerted by exterior international institutions strongly limit and influence the actual choices they are able to make. These external forces have influenced the history of Myanmar for a long time and have limited the breadth of options open to them during the process of transition. The liberal movement that has been striving for change since the late 1980s is actually unaware of how much Myanmar's agency has been curtailed by these forces. To understand the limits and pressures I am speaking of, I will employ Susan Marks and Roberto Unger's concepts of 'False Contingency' and 'False Necessity.' I believe these theories permeate Myanmar's 'Narrative of Progress' as articulated by Thomas Skouteris. These theories come together to give a comprehensive picture of the other side of Myanmar's transition, away from naïve optimism in a liberal overhauling. Narratives of progress drive ideologies of false necessity that liberal systems are necessary because they are the best systems available. These two forces demonstrate the current power that neoliberalism has over transition. Liberalism, hijacked by the ideologies of neoliberalism, has created a space in which the contingencies in front of Myanmar are actually false.

This chapter, I will demonstrate the different forces that are in action around the globe that limit and pressure the transition of a state such as Myanmar. I will first explore the theories of false necessity, narratives of progress and false contingency. I will then demonstrate how neoliberalism has taken three major pillars of liberalism: rule of law, democracy, and capitalism, and turned them into false contingencies for transitioning states.

A. False Necessity and False Contingency

False necessity and false contingency are two different sides of the same coin. Unger and Marks are concerned with the beliefs societies have in their ideologies and politics. Unger asserts that the headstrong pursuit towards a universal cosmopolitan creates ideological/political necessities that are false. Marks, on the other hand, argues that this universal pursuit, in turn, results in a narrowing of the scope of the contingencies Unger is arguing are available. Both themes will be explored further below.

1. False Necessity and its Narratives of Progress

A transition's freedoms and constraints are greatly influenced by the degree of freedom of agency in the process of transition. Roberto Unger espouses the idea of freedom of agency in his book *False Necessity*. False necessity is the notion that the current state of things and the context in which we live and make decisions in is how it ought to be. It is the natural and necessary state of being. For Unger, this is false.⁷⁷ Unger means that social aspects such as systems of governance and thought are not fixed but are mutable: "What seems to be given and presupposed is merely what we have temporarily refrained from challenging and remaking."⁷⁸ Like Karin van Marle's ideas of transformation, there should be no limits on an individual or institution's imagination to create what it desires. The idea that there is one natural or correct way to do so is false.

This paper posits that Unger's concept of false necessity has greatly shaped current liberal ideologies. Democracy, capitalism and human rights all bolstered by rule of law have become a false necessity. Thomas Skouteris demonstrates how a grand narrative of progress is used to instill this feeling of necessity and the necessity of liberal institutions such as democracy:

⁷⁷ See ROBERTO UNGER, *FALSE NECESSITY*, (Verso, 2nd edn. London, 2004).

⁷⁸ Susan Marks, *False Contingency*, Susan Marks, CUR. L. PROB. 3 (2009) *quoting id.*

Instead of being described as historically and culturally specific ideological projects, they [the concepts of democracy and absolutism] are dehistoricized and de-politicized: they appear as forces of nature which somehow simply exist, as traits of humanity, like the propensities to drink, to eat, to maximize our individual interest, and so on. Scholars of ideology critique have identified this discursive strategy as 'naturalization', "whereby existing social arrangements come to seem as obvious and self-evident, as if they were natural phenomena belonging to a world 'out there.'"⁷⁹

States and even broader institutions like international organizations embrace this singular view of the road to prosperity because the narrative joining freedom (democracy) with free markets overrides reality and even other narratives. Being part of the larger narrative of progress is the glue that holds the narrative of democracy and free markets together.

Skouteris writes about the narrative of progress through law that keeps this cycle moving.⁸⁰ He analyses the role of narratives, specifically of progress, in the field of law development. "The basic contention is that although progress may be a convenient label to caption a certain international law event, it is ultimately a notion devoid of meaning unless placed in the context of a narrative – a story about how things were, how things are, and how things need to be."⁸¹ He describes how these narratives cannot "speak for themselves," but they are instead constructed by an author that uses vocabulary and language as his/her tool. The author constructs these narratives through tools such as "assumptions, images, metaphors, and other discursive structures."⁸² It is what these narratives do after their author has constructed them that demonstrates their power. They are able to remove competitive accounts of the reality of a situation and replace them with a simplified version that may or may not be objective. They "exclude alternative accounts of progress."⁸³ Then, these narratives of progress begin to "constitute the basis for

⁷⁹ THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE, Thomas Skouteris Ph.D. Thesis 46 (2008) (quoting Susan Marks, *International Law, Democracy, and the End of History*, 22)

⁸⁰ *Id.*, 1-184.

⁸¹ *Id.*, at 1.

⁸² *Id.*

⁸³ *Id.*

policies and decisions that produce tangible effects on everyday life. In this light, progress narratives are no longer descriptions of an objective reality but powerful rhetorical strategies of (de)legitimation.⁸⁴

Skouteris's narratives of progress are the driving force behind Unger's false necessities. False necessities are based on the idea of what "things were, how things are, and how things need to be."⁸⁵ Narratives of progress create the necessity of believing that democracy, rule of law, and capitalism are how things were, are and need to be. These systems are the most dominant because they are naturally the best. Unger writes, "[their] advocates regularly subscribe to the convergence thesis: the belief that contemporary societies gradually converge on a connected set of the best available practices and institutions worldwide."⁸⁶ Skouteris demonstrates that as these terms such as democracy or rule of law have become normalized, the need to fully grasp their meanings is gone and the discussion jumps forward with the assumptions of their meanings. "If my political agenda is derived from the concept of democracy, and if democracy stands on the side of progress, then my agenda is progressive."⁸⁷ Rittich demonstrates that often it is not even a matter of "best available practices:" "Rather than a product of Darwinian superiority, rules and practices become dominant under a variety of pressures and circumstances. They are often the result of political struggles. Alternatively, dominant institutional forms and practices may be the consequence of various hegemonies, national, professional, ideological and disciplinary."⁸⁸ In both scenarios it is the power dynamic of allowing the winners' story to trump opposing ideologies, narratives, systems, or disciplines that determines the direction history takes. Like Skouteris states, "it would be enough for me to claim or prove that I contribute to democracy in order to gain legitimacy, without really having to enter into investigations of the notion of democracy."⁸⁹ Narratives limit the "available practices and institutions."

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM, 54 (Ox. Uni. Pr., 2005).

⁸⁷ Skouteris, *supra* note 79, at 47.

⁸⁸ KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM, 93 (Kluwer L. Int'l., 2002).

⁸⁹ Skouteris, *supra* note 79, at 47.

They create the false necessities that nation states embrace and then promote. They can be used as a tool for control by one state over another. They can also be used as a tool for control by a state against its own people.

2. False Contingency

The other side of the same coin is a concept whose effects are responsible for the true insidiousness of this narrative of false necessity: *False Contingency* by Susan Marks's. It is her interpretation of the question of agency, and it lends itself to the goal of this particular project. In her article she uses Marx's *The Eighteenth Brumaire of Louis Bonaparte* to question how "[men] make their own history."⁹⁰ She writes, "men make their own history [. . .] but [. . .] they do not make it just as they please in circumstances of their own choosing but rather in circumstances they inherit."⁹¹ It is not determinism; the future is not set in stone. But, it is an acknowledgment that there is more to the decisions people, groups, and governments make than what a notion of free will would have us believe.

There is a constant battle taking place over determinism and free will. Marks engages this debate with Isaiah Berlin and EH Carr. She posits that actions can and do have unintended consequences; this does not mean that they are the outcome of "some all powerful force, but it is to note that social circumstances matter in historical explanation."⁹² Marks compares the forms of the word determinism. Determination – the process – and the verb to determine – the action – makes determinism – the belief.⁹³ She explains that determinism has multiple meanings which include words such as compulsion, cause and effect, and even fated. This idea of strict inevitability cannot be what Marks means because she acknowledges herself that, "history is a social product, not given but made."⁹⁴ But what about the verb 'to determine?' 'To determine' means 'to set bounds.'⁹⁵ If this is the case, then

⁹⁰ Marks, *supra* note 78, at 1.

⁹¹ *Id.*

⁹² *Id.*, at 5.

⁹³ *Id.*, at 7.

⁹⁴ *Id.*, at 2.

⁹⁵ *Id.*, at 7.

determination is the process of setting bounds or conditioning outcomes. Determination sets limits and pressures, which are quite different from determinism's reliance on concepts such as accident and arbitrary factors.⁹⁶

Marks examines how history comes to be made. She embraces neither necessity nor contingency. Events are not inevitable, but they are not accidental either: "Rather, there exist some 'necessary factors', as Williams calls them, in the shape of limits and pressures which orient change without actually predetermining it."⁹⁷ Her point is that we need to be aware of not only the false necessity, that things are not the way they are because they are natural and therefore immutable, but we must also be cognizant of false contingency, that things are the way they are because there are forces at work that set bounds and limit a possible outcome.

False contingency is a rejection of history not being just a "matter of chance and will."⁹⁸ "Insofar as anti-necessitarian critique depends on showing that current arrangements are not simply arbitrary or accidental, but belong with the logics of a system which must also be brought within the analytical frame."⁹⁹ To further grasp what she is arguing she puts forth a few examples, one of which I will attempt to expand. Marks discusses David Kennedy's *The International Human Rights Movement: Part of the Problem?* in which he argues that human rights are a problem when viewed pragmatically. He is fighting against the false necessity that human rights are part of a universal interest. There is not a universal interest because different people will view costs and benefits differently.¹⁰⁰

But the problem with rational choice is not just that it fails to register that costs and benefits will look different and be evaluated differently by different people. It is also that it fails to register that costs and benefits are linked, both to one another and to a larger set of systemic processes, the upshot of which is that some people always enjoy social benefits while bearing very few social costs, and the reverse applies to others.¹⁰¹

⁹⁶ *Id.* at 8.

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 10.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 13.

¹⁰¹ *Id.* at 14.

Marks explains that necessity gets misconstrued as contingency.¹⁰² Ideas and ideologies such as liberalism, democracy, or human rights are creators or enablers of contingency. Unger argues that they are falsely necessary because there are, of course, other options and contingencies that society and humans can follow. Marks argues they are falsely contingent because they do not actually give the contingencies that they are supposed to be offering. False necessity does not account for the pressures and limits that coexist with it at all times. False necessity and false contingency inhabit the same space. Or as Marks explains, “False contingency [. . .] is in the nature of an absent presence.”¹⁰³ It is the other side of the same coin of false necessity.

B. The Rule of Law, Democracy, and Free Markets

This paper makes the argument that Myanmar’s lack of agency in its transition is due to the concepts of false necessity and false contingency. The pillars of liberalism are the false necessities that are imposed upon Myanmar. I posit that the problem is not necessarily the liberal system, but it is the neoliberal hijacking of liberalism that presents false contingencies in Myanmar’s transition. This section will explore neoliberalism and its ideologies.

1. The Neoliberal Package

Neoliberalism and globalization have shown themselves to be major perpetrators of the theme of false necessity and its supporting narratives and false contingency. Unger offers three assumptions that result in necessitarian thinking that apply to Myanmar’s case: the closed list idea, the indivisibility idea, and the determinist idea. The closed list is the idea that there are only certain institutions and systems to choose from such as feudalism, capitalism, or Marxism. The indivisibility idea is that there is no common ground these different systems can share; they are exclusive of each other. And, the determinist idea is that “lawlike forces determine their

¹⁰² *Id.*, at 15.

¹⁰³ *Id.*, at 14.

[system's] evolution."¹⁰⁴ These law-like forces are essentially the same kind of forces that the quantitative analyses discussed in the previous chapter use to demonstrate their point. These forces can also be described as correlations, but by utilizing mathematical formulas these correlations become corollaries, which determine a system's evolution and make it "lawlike."

Neoliberalism utilizes all three of Unger's list of necessitarian thinking. The closed list idea has been narrowed to essentially one option, liberalism, since the end of history. There is the belief that there is a fixed relationship between political and economic systems that is not possible to break. Essentially, only liberal markets are going to be able to provide the freedom necessary for democracy.¹⁰⁵ The thinking is that, "there ought to be a particular division of labor and costs among enterprises, the state, civil society and individuals or households,"¹⁰⁶ has become axiomatic. These ideas are the false necessity. Unger writes, "They teach that the institutional arrangements of contemporary society are the outcomes of many loosely connected sequences of social and ideological conflict rather than of irresistible and determinate functional imperatives, driving forward a succession of indivisible institutional systems."¹⁰⁷

The necessity of a closed list is compounded by the indivisibility neoliberalism enforces through its various methods including, to a great extent, law. Unger continues, "The second tenet of neoliberalism is the renunciation by the state of any affirmative strategy of national development other than the strategy implicit in an unresisting adherence to the world economic order."¹⁰⁸ Law plays a pivotal role in the neoliberal transitions because it provides the structure and boundaries to the reforms by deliberating the boundaries between the market and the state. It also forms the border between politics and economics. This is relevant in a neoliberal transition due to the fact that, "The rule of law and the protection of rights are positioned on the side of economics and efficiency, while many forms of

¹⁰⁴ Unger, *supra* note 29, at 22.

¹⁰⁵ Rittich, *supra* note 88, at 101.

¹⁰⁶ *Id.*, at 55.

¹⁰⁷ Unger, *supra* note 29, at 24.

¹⁰⁸ *Id.*, at 55.

regulation are characterized as political.”¹⁰⁹ Rittich demonstrates how “The state’s role in promoting growth has been conclusively trumped by that of the market.”¹¹⁰

The reason why the state’s role in promoting economic growth has been taken away is because it was determined to be less efficient as other, perhaps more law-like forces bolstered by a narrative of progress. Rittich describes the rhetoric of “best practices” as being what we might consider Unger’s determinist (law-like forces) idea. The meaning of “best practices” being that, the particular policies of deregulation or privatization are in practice because they have proven themselves to be reliable and established. They are better than the other alternatives available and are the “recipe for success.”¹¹¹ The notion that other ideas that still include the state in promoting growth is forgotten. “The genius of best practice arguments is that, through the suppression of alternative practices and amnesia about the history of existing practices, local successes and particular interests are construed as the general interest and the inevitable outcome of the process of market evolution.”¹¹² The belief in science and its overhaul of thought has created a sense of natural law to other contexts and suppressed alternative practices.

Economics is assumed to act according to natural laws. These laws are recognizable and capable of being manipulated. Neoliberalism is the faith that economics work like the natural world and follow a set of natural laws that should not be tampered with. If tampered with, these laws are disrupted and disorder ensues. This is a false equivalency. There is no reason for economics to follow a natural set of rules like chemistry. Economics, after all, is influenced by humans’ irrationality, emotions, and culture, none of which is quantifiable. However, “Best practices both emerge from and serve this functionalist approach to economic development, insofar as such arguments suggest that the optimal institutions can be empirically and scientifically derived through observation and analysis of markets and economic structures on a comparative basis,”¹¹³ just like the quantitative

¹⁰⁹ Rittich, *supra* note 88, at 7.

¹¹⁰ *Id.*, at 5.

¹¹¹ *Id.*, at 85.

¹¹² *Id.*, at 94.

¹¹³ *Id.*, at 88.

studies listed in the previous section regarding democratizing states. These quantitative studies provide shoddy evidence in a field that is unquantifiable. Empirical evidence is being used as a tool for narratives of progress. “Influential doctrines, expounded as scientific insight in the universities of the leading powers, lend them a semblance of naturalness and necessity.”¹¹⁴ The belief in the naturalness of markets and their “optimal form” gives hegemonic states and institutions the ammunition they need to push through policies that are neoliberal in nature. But as Unger states, “Nevertheless, they remain, in the end, neither natural nor necessary.”¹¹⁵

What is of concern is how powerful the proponents of these systems, ideologies and institutions actually are. The hegemony of the West and its international organizations and businesses perpetuate these false necessities through progress narratives. Narratives are powerful tools for deciding public perception:

A major effect of the success of the progress-through-globalization narrative is that those who jump on the bandwagon to facilitate the process of economic integration come to seem reasonable and pragmatic, while those who either resist or pose alternative interpretations of events seem alternatively hopelessly idealistic and old-fashioned or simply wrong.¹¹⁶

Harvey demonstrates how neoliberalism has been used, and serves, in fact, as its own narrative.¹¹⁷ He asserts that the conceptual apparatus that was advanced in order for neoliberalism to be embraced was that it espoused ideals of human dignity and individual freedom.¹¹⁸ It depends on the simple notion that its policies are simply common sense. For example he points out Margaret Thatcher’s “no alternative” rhetoric:¹¹⁹ “Common sense is constructed out of longstanding practices of cultural socialization often rooted deep in regional or national traditions.” He continues, “The word ‘freedom’ resonates so widely within the common-sense

¹¹⁴ Unger, *supra* note 29, at 23.

¹¹⁵ *Id.*

¹¹⁶ Rittich, *supra* note 88, at 63.

¹¹⁷ Harvey, *supra* note 86, at 39-64.

¹¹⁸ *Id.*, at 5.

¹¹⁹ *Id.*, at 40.

understanding of Americans that it becomes ‘a button that elites can press to open the door to the masses’ to justify almost anything.”¹²⁰ By propagating this belief in pragmatism and efficiency while simultaneously abhorring any move towards an alternative, the dynamic resolves into one of false contingency for a state in transition that is attempting to reorder its systems. “Individual states have increasingly limited room to maneuver and to pursue regulatory and policy options that diverge significantly from those adopted by other states, as they are in competition with each other for resources and investment.”¹²¹

C. False Contingencies of the Neoliberal Package

Freedom under the global hegemony comes as a package. Liberalism is assumed to be the cure-all for the world’s problems. Liberals believe that when the rule of law, democracy and capitalism are all working in unison within a state, there is no way that the state cannot be developing. However, Amy Chua points to a tension in this system: “The prevailing view among globalization’s supporters is that markets and democracy are a kind of universal prescription for the multiple ills of underdevelopment.”¹²² She continues, “Working hand in hand, markets and democracy will gradually transform the world into a community of prosperous, war-shunning nations, and individuals into liberal, civic-minded citizens and consumers.”¹²³ But, as will be demonstrated in the upcoming sections, the ardent faith in this package leads to a series of false contingencies that are propagated by the global hegemony through its international organizations and financial institutions.

1. False Contingencies of the Rule of Law

¹²⁰ *Id.*, at 39.

¹²¹ Rittich, *supra* note 88, at 63.

¹²² AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY*, 8 (Doubleday, 2003).

¹²³ *Id.*, at 9.

Assuming a neoliberal transition, the rule of law, economics, and politics are meant to be a coordinated effort in integrating a state into the global economic order of a free market democracy under the control of law. Law is essential in solidifying and supporting the pillars of democracy and open markets. Rittich highlights, “The successful pursuit of economic development is now explicitly conceived as a matter of law, institutions and ‘good governance’.”¹²⁴ Many scholars agree with Rittich in her assertion that development and law come in tandem. John Ohnesorge stresses that law and development place legal functions at the center of the development agenda.¹²⁵

Law development is at the foundation of any kind of liberal development. Rittich examines the role of market-centered orthodoxy in the transitioning of undeveloped states. She displays the relationship between the ideology of restructuring and the legal instruments used to fulfill the transition. She writes, “Rather, transition itself proved to be a crucial moment in the consolidation of a consensus around the demands of markets-centered growth and the site of a particularly intense effort to establish its institutional form.”¹²⁶

Law is essentially the connecting thread used in establishing a liberal institutional form. These moments have occurred in the past as seen in Tamanah’s *The Primacy of Society and the Failures of Law and Development*.¹²⁷ One can see from the period of decolonization that Parsons distinguishes also as the time of “modernization.”¹²⁸ During this time, the belief was to modernize a state, four societal institutions need to be developed including: the bureaucratic governmental apparatus, capitalist market systems, “generalized universalistic legal systems,” and democratic political systems.¹²⁹ “Legal development was seen as a concomitant

¹²⁴ Rittich, *supra* note 88, at 3.

¹²⁵ John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. Pa. J. Intl Econ. L. 220, 226 (2007).

¹²⁶ Rittich, *supra* note 88, at 2.

¹²⁷ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44, Cor. Intl. L. J. 209, 209-247 (2011).

¹²⁸ *Id.*, at 209 (quoting Talcott Parsons, *Evolutionary Universals in Society*, 29, Am. Soc. Rev. 339, 356 (1964)).

¹²⁹ *Id.*, at 211.

aspect of economic and political development on the assumption that market regimes and government require legal backbones.”¹³⁰

These beliefs persisted through time even if they no longer fell under the moniker of “modernization.” In the 1990s, the belief that legal infrastructure was seminal to economic development in times of transition continued. Rittich outlines this ideology, “Growth can only be expected in law-based societies that protect private rights, resist special interests, and prevent the arbitrary interference of the state in the economy.”¹³¹ Even today, after the many changes ushered in after the fall of the communist bloc and the rise of the war on terror, development ideologies still regard law reform in the realm of politico-economics as a major crux of development. As Tamanaha posits, law is fundamental in economic development because it has the capacity through its infrastructure to influence social, economic and political elements.¹³² The main purpose behind the central position of law has to do with its role in private property and markets, “The main thrust of today’s rule-of-law projects in the developing world is to facilitate market activity (by strengthening legislative and judicial protections of property and contract).” However, Chua sees a flaw in the system: “To the extent that such initiatives succeed, they will accomplish very significant achievements, but in the process they may intensify the contest between unequal wealth and majoritarian politics.”¹³³

There is discord in the law and development world because as time has moved forward, there is puzzlement as to why these ‘underdeveloped’ regions are not keeping up. Much of the problem seems to arise from the tension between universal ideologies coming from the West and the realities of the legal-politico-economic features of a state such as Myanmar. It is the tension between the universalist approach and the realities in certain states that the approach is not compatible with. As Rittich suggests, “There is now what approaches a universal template for market reform and development. Rather than a series of discrete

¹³⁰ *Id.*, at 210.

¹³¹ Rittich, *supra* note 88, at 4.

¹³² Tamanaha, *supra* note 127, at 211.

¹³³ Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41, HARV. INT’L L. J. 287, 293 (2000).

initiatives and projects tailored to the needs of particular states in specific contexts, market reform projects have increasingly taken the form of common or general prescriptions.”¹³⁴ Rittich then goes on to describe the crucial role international institutions play in the prominence of legal structure in economic development. “Market reform has given these institutions new visibility and heightened importance in the international order.”¹³⁵

It is this belief in the universality of the rule of law that creates the discord that disallows the flexibility and differences needed in a social context. Chua argues that particular characteristics of developing countries make the conflict between democracy and capitalism particularly difficult to overcome.¹³⁶ Law must have the respect of the populace, but it must also serve the needs of the populace. One does not come before the other; they must develop at the same time.¹³⁷ Tamanaha points to the complexities of the realities that conflict with this universalist approach, “The fundamental problem is that factors that influence law extend far beyond law itself.”¹³⁸ Factors such as history, tradition, culture of a society, political and economic systems and the distribution of wealth and power, plus a myriad of other factors, all play roles. He argues that development efforts break apart because the societies they are imposed upon do not share the same economic, political and judicial underpinnings that the original states had.¹³⁹ Tamanaha, Rittich and Chua suggest that there is not a universal template for development, and perhaps it is some of these Western institutions and ideologies that are, not only making development difficult for marginalized states to develop, but are actually to blame for perpetuating the marginalization. The law does not end up working for the developing state. Instead, it acts as a false contingency that the state believes it will benefit from, when in actuality, law development is benefiting only the systems it originated from, i.e., the hegemonic states and institutions.

¹³⁴ Rittich, *supra* note 88, at 5.

¹³⁵ *Id.*

¹³⁶ Chua, *supra* note 133, at 293.

¹³⁷ Tamanaha, *supra* note 127, at 214.

¹³⁸ *Id.*, at 214

¹³⁹ *Id.*, at 215.

2. False Contingencies of Democratization

A similar dynamic is at work in the liberal tenet of democratization. The overwhelming faith in such a benign concept of democratic rule leaves out much of the complexities that come along with democracy. However, democracy is firmly encapsulated in the package of Rittich's best practices and is universally held as the most aspired form of governance. But, this unflinching adherence to democracy gives rise to its own problems when unprepared and uninitiated countries embrace democracy at the behest of the global hegemony.

There is the argument that perhaps the pillars of liberalism, property and democracy, may actually be incompatible. This is because as long as there is a gap in wealth between some with wealth and many without, the many will want to use suffrage to get what the some have.¹⁴⁰ Chua proposes the, "Inherent *instability* in free market democracy."¹⁴¹ By using the ideas of some of history's most prominent thinkers, such as Adam Smith, she examines free market democracy from its outset. She questions whether certain Western countries surpassed this paradox in the last 200 years, and whether the currently developing countries will be able to do the same and if so by using what means.¹⁴² Using Thomas Babinton Macaulay's work as evidence, she demonstrates how universal suffrage is incompatible with property. Chua bases her overall argument on four points. The first is that the West has been able to mediate the paradox via material, political and ideological means. "Second, these developed-world mediating devices are largely absent from the developing world, and there is no reason to assume that they will be spontaneously generated by market and democratic reforms."¹⁴³ Third, the paradox is far more potentially dangerous in the developing world. "Universal suffrage is generally being implemented in the developing world on a rapid, large-scale basis that contrasts sharply with the very gradual and incremental enfranchisement characteristic of the

¹⁴⁰ Chua, *supra* note 133, at 288 (quoting Thomas Babington Macaulay, *17 Complete Writings*, 263-76 (Houghton, Mifflin and Co. 1900).

¹⁴¹ *Id.*, at 287.

¹⁴² *Id.*, at 289.

¹⁴³ *Id.*, at 290.

history of Western democratization.”¹⁴⁴ Fourth, it is unwise to promote these two pillars of development to the developing world because they do not have the institutions that are able to attenuate the tension between the free markets and democracy.¹⁴⁵ She contends that we need to think long and hard about how it is that the West was able to somehow marry two disparate entities, democracy and capitalism, and whether the rest of the world could or should be obliged to follow.¹⁴⁶

Chua posits that group and ethnic violence are the result of this aggressive spread of markets and democracy. The market minorities are the center of this hegemony that imposes these institutions. She posits that, “Markets concentrate enormous wealth in the hands of an “outsider” minority, fomenting ethnic envy and hatred among often chronically poor majorities.”¹⁴⁷ She continues,

Introducing democracy in these circumstances does not transform voters into open-minded cocitizens in a national community. Rather, the competition for votes fosters the emergence of demagogues who scapegoat the resented minority and foment active ethnonationalist movements demanding that the country’s wealth and identity be reclaimed by the ‘true owners of the nation.’¹⁴⁸

This same dynamic can also be transplanted on a state that may have numerous smaller minorities that add up to being a substantial portion of the population that is marginalized by a single, central ethnicity.

The issue with democratizing these kinds of states is similar to the simplified universal approach discussed in the previous section with law. Each state has its own various difficulties that present obstacles to democratization. What works in Western Europe or North America does not necessarily transplant to other regions of the world. The different histories, cultures, ethnicities and economies all play a central role in how a state defines democracy and how it implements it. In certain states, simply holding fair elections that will be embraced by the population without tension is a difficult task. To assume an easy process of democratization does not

¹⁴⁴ *Id.*, at 291.

¹⁴⁵ *Id.*, at 292.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Chua, *supra* note 122, at 10.

account for the considerable limits and pressures that each individual state may be subject to and results in promoting false contingencies for a state such as Myanmar.

3. False Contingencies of Free Markets

Finally, the liberal tenet of free markets and capitalism represents another false contingency propagated by neoliberalism. It is based off of Unger's indivisibility idea that a system such as democracy cannot operate without the coordination of a capitalist economy. Free market capitalism has been seen as ubiquitous with economic success. The international financial institutions encourage transitioning economies to view the supposedly unlimited potential of their economic policies. In actuality, their influence is a pressure that leaves transitioning economies with few genuine contingencies.

Currently, the non-maneuverability of a state to pursue its own policies is manifested in the ability of these least developed states to use their resources on their poorest communities. Rittich posits that economic growth does not coincide with welfare. "Attempts to induce greater economic growth through restructuring, even if they produce material progress for society in the aggregate, are not experienced as a single, homogeneous event nor do their benefits accrue evenly to different sectors of the population." For example, Tamanaha points out that democracy has made massive gains throughout the world since the 1970s. But, he argues that one billion people still experience extreme poverty with another billion fairing barely much better.¹⁴⁹

According to neoliberal theory, concerns such as alleviating poverty or inequality are to be dealt with not by altering these preferred market structures, as such efforts have proven both ineffective and inefficient where they have not lead to complete economic disaster. Instead, the proper solution is to provide limited form of redistribution by the state that are targeted and carefully confined to the most needy.¹⁵⁰

¹⁴⁹ Tamanaha, *supra* note 127, at 212.

¹⁵⁰ Rittich, *supra* note 88, at 32.

Rittich argues that this uneven disbursement of wealth appears to be structural within the transformation.¹⁵¹ “In the neoliberal vision, the state is positioned largely as the handmaid or servant of the market; the activities of the state must be subordinated to the demands of economic growth.”¹⁵² But, when a state’s role becomes seriously limited through practices such as privatization and deregulation, being the servant of the market and influencing wealth disbursement is increasingly difficult.

The normalization of neoliberal ideals oversimplifies the roles of both the market and the state. This over simplification creates a situation whereby any kind of state involvement within the economy is seen as threatening. The corollary of this is the ability of a state to influence distributional forces within a society is suppressed, inevitably creating inequalities.¹⁵³ Free market policies inevitably divert the capital away from the host state and the host state is unable to retaliate through law. Daniel Augenstein demonstrates this dynamic: “‘Multi-national’ corporations remain subject to the domestic laws of the states in which they reside, and often rely on these laws for the regulation and enforcement of their business transactions.”¹⁵⁴ Unger asserts that developing countries that are transitioning to neoliberal policies discover too late that foreign capital is more useful the less it is depended on because capital inflows are not sustained enough in countries that are investing and consuming beyond their means. While on the developing state’s side, the inflows restart high inflation and decrease the government’s effective rule over the economy.¹⁵⁵ But, the argument is that this is all just a part of some natural process.

A common narrative of development in the West is that there is a hierarchical distribution of production. This hierarchy is dependent on the level of development in each state, but each state is constantly evolving with the lesser-developed states eventually meeting up with their more developed peers.

¹⁵¹ *Id.*, at 9.

¹⁵² *Id.*, at 50.

¹⁵³ *Id.*, at 61.

¹⁵⁴ Augenstein, *supra* note 71, at 46.

¹⁵⁵ Unger, *supra* note 29, at 55.

“Developing economies must pass, for example, through a protracted phase of low-wage, export-oriented production.”¹⁵⁶

A dominant neoliberal technique for traversing this phase of production and separating state involvement from the economy is privatization. It often accompanies the neoliberalizing of an economy as can be seen by practice throughout Latin America and Eastern Europe.¹⁵⁷ However, as Beatrice Hibou demonstrates, this is not a simple, natural process like the hegemonic rhetoric would have states and their citizens believe. Hibou argues that privatization is more of a transition in the modes of governing. It transcends the economy. It is a transformation from direct management of enterprises to the management of society’s modernization policies and its foreign economic relations.¹⁵⁸ The power differential only plays into the hands of the corporation’s business and governmental elites. As Unger writes, “The perversion of economic growth and its fruits begins when we attempt to make up for the scarcity of public goods by producing more private ones, and to find in private consumption a barren solace for social frustration.”¹⁵⁹

¹⁵⁶ *Id.*, at 31.

¹⁵⁷ Klein, *supra* note 1.

¹⁵⁸ BEATRICE HIBOU, *PRIVATIZING THE STATE*, 47 (Col. Uni. Press, 2004).

¹⁵⁹ Unger, *supra* note 29, at 7.

V. Myanmar and its False Contingencies: Freedom and Constraint

Anywhere one finds something to read about Myanmar, one of the first things they will encounter is a discussion about its transition.¹⁶⁰ Though the transition began economically in the late 1980s and early 1990s, it has picked up momentum since the ruling party announced the ratification of a new constitution in 2008.¹⁶¹ Ideally, Myanmar is a sovereign state that is capable of its own agency and decision-making. Its transition should not fall prey to Unger's false necessities of the globalized world's single-track policies of governance and economy. Its systems of governance should not be determined by any outside influence, and it should have access to a myriad of combinations out of which it can form its own politics and economy. Myanmar has been one of the last bastions against the assimilating order we have discussed as globalization. Today, the international community is trying to bring Myanmar into the fold. The forces discussed in the previous chapter are weighing down on Myanmar in many ways. I will demonstrate how Myanmar is one example of the lack of agency discussed in the previous chapter. The country is not so much transitioning by its own accord as it is assimilating out of necessity at the hands of much more powerful institutions.

This chapter will present three arguments displaying false contingencies at work within and outside of the nation-state. First, it will analyze Myanmar's post-colonial history and the tension caused by the different ethnicities vying for recognition and power. This dynamic has been long at work in Myanmar, and it is still a major obstacle in the way of any kind of genuine democratization. Myanmar's history of ethnic tensions coupled with the unwillingness of the military regime to

¹⁶⁰ See Daniel Rothenberg, *Burma's Democratic Transition: The Internationalization of Justice, the Challenge of Legitimacy, and the Necessity of Facing Past Political Violence*, HUM. RTS. BRIEF (2002), Baladas Ghoshal, *Democratic Transition in Myanmar: Challenges Ahead*, IND. Q. (2013), BALBIR B. BHASIN, BUSINESS AND INVESTMENT OPPORTUNITIES IN EMERGING MYANMAR, Bus. Expert Press 1-172 (2014), Moe Thuzar, *Myanmar: No Turning Back*, S.E. ASIAN AFF. (2012).

¹⁶¹ See Xinhua, *Myanmar formally announces ratification of new constitution draft*, People's Daily Online (May, 2008) (accessed at <http://en.people.cn/90001/90777/90851/6421254.html> May, 2015).

make actual concessions makes the contingencies offered by democratization false. Secondly, this chapter analyzes the current liberalizing of the Myanmar macroeconomics to display that the very same rhetoric that institutions such as the World Bank and other neoliberal entities have been espousing for over 20 years are still at work and still putting a stranglehold on countries such as Myanmar. The neoliberalising of Myanmar's economy is not for the benefit of the citizens of Myanmar but for the distribution of their resources and capital elsewhere. Finally, this chapter will demonstrate how a new human rights commission is being initiated at the request of the international community. It is meant to placate international institutions and human rights groups, but in actually does not fulfill the effects wanted by the liberal activists in Myanmar. None of these reforms taking place are likely to give the citizens of Myanmar any power to make the transition they would like to see their country traverse. This chapter's purpose is to demonstrate that the power dynamics of neoliberalism and globalization are at work making the false contingencies of Myanmar's transition.

A. False Contingencies of Democratization in Myanmar

The NLD and liberal activists of Myanmar have a very daunting task in front of them. The next round of presidential elections is later in this year, 2015.¹⁶² If democracy is what the people of Myanmar strive for, it is certainly the system that they should receive. However, this system is being handed over to them from a military junta that has controlled Myanmar since the 1960s. This section does not argue that democracy is a poor choice of governance. But, it does demonstrate the problems democracy represents in the context of Myanmar's history and politics. Myanmar has a very long and intricate history of ethnic conflict due to the organization of the state both before and after colonization. There are also elements in Myanmar's current political structure, such as its constitution, that further complicate the process. I will demonstrate that democracy in Myanmar, in its current form, creates

¹⁶² Tin Aung Khine, *Myanmar Election Body Says No Change in 2015 Vote Campaign Format*, RADIO FREE ASIA (Sep, 2014), <http://www.rfa.org/english/news/myanmar/election-05092014204140.html>.

the belief that there are contingencies for the liberal supporters of Myanmar. However, many of these contingencies are unavailable due to the political history, ethnic conflicts, and current political structure of Myanmar.

To begin, it is integral to view Myanmar as it was during its colonial period. What is seen on the map today of contemporary Myanmar is not quite the same as it would have looked before WWII. Before the British came, the region of Myanmar was an incredibly ethnically diverse region that included, and still includes, the tribes of the Shan, Burman, Kachin, Mon, Karen, and more.¹⁶³ Furthermore, there was an influx of South Asian immigrants who moved in with the British from mainly India and what is now Bangladesh.¹⁶⁴ There are to this day remnants of these immigrant communities, most notably the Rohingyas.¹⁶⁵ The efforts to create the nation of Burma was a difficult task for the British colonizers due to their trying to transplant Western organizational and political structures on an unfamiliar people and the limited amount of time the British occupied Myanmar.¹⁶⁶ Their solution in colonial Myanmar has had tremendous consequences.

The majority of Myanmar citizens are ethnically Bamar.¹⁶⁷ However, there are seven other major ethnicities recognized by the state.¹⁶⁸ The Bamar have traditionally lived in what geographically would be the center/central plain of Myanmar. Many of the minorities are located at the exterior and surrounding mountains of the state. Not only were they ethnically and geographically isolated, but many of the political and religious ideologies were diverse as well.¹⁶⁹ The minorities traditionally enjoyed substantial autonomy. When the British tried to govern the region, they devised a strategy called the Burma Frontier Service in

¹⁶³ Charney, *supra* note 7, at 5.

¹⁶⁴ *Id.*, at 23.

¹⁶⁵ See Ivan Watson and Tim Schwarz, *Myanmar: Rohingya not welcome*, CNN (Nov, 2014), <http://edition.cnn.com/2014/11/11/world/asia/myanmar-rohingya-minority/>.

¹⁶⁶ Charney, *supra* note 7, 32.

¹⁶⁷ See GUIDE FOR MYANMAR, <http://www.guideformyanmar.com/people.html>. (last visited May 17, 2015) (The census numbers are almost completely unreliable, but it is generally accepted that the Bamar are a majority with potentially about two thirds of the population),

¹⁶⁸ MARTIN SMITH, *ETHNIC GROUPS IN BURMA: DEVELOPMENT, DEMOCRACY, AND HUMAN RIGHTS* 17 (Anti-Slavery Int'l 1994).

¹⁶⁹ The tribes Kachin and Karen both have Christian communities, and there has been a communist faction present in Myanmar since pre-independence.

1922. This was an administrative step that divided Burma into two ministerial regions subject to separate constitutional reforms.¹⁷⁰ As Myanmar was gaining independence the Frontier areas remained,

According to the British White Paper of May 1945, the Scheduled Area [. . .] [remained] outside of “ministerial ‘ Burma and thus outside the authority of the Executive Council and directly under that of the governor [. . .] The second Frontier Areas’ Conference [. . .] mentioned in the London Agreement...determined (sic) Frontier Area representation in the Executive Council and the forthcoming Constituent Assembly [. . .] the Frontier Areas would be brought within the authority of the Executive Council on matters of ‘common interest,’ in such cases as defence (sic) and external affairs, ‘but without prejudice to full internal autonomy.’¹⁷¹

The Frontier areas also kept their internal administrative autonomy. However, once full independence was gained from England, these areas immediately pushed for their own independence. There were tremendous amounts of weapons left over from the war, which contributed to the immediate tension that resulted from independence and ethnic tensions.¹⁷² It was a situation that alluded a solution as, “Post-independence Myanmar’s inability to attain the elusive goal of national unity is exemplified by the incessant armed conflict between the central government and a variety of insurgent groups that were either fighting for separation or autonomy, or to establish a communist state.”¹⁷³

Since 1948, ethnic insurgencies have been a mainstay of Myanmar’s internal politics.¹⁷⁴ The history is inextricably violent and riddled with human rights abuses: “Researchers have documented the military’s practice of systematically entering villages, raping and/or killing villagers they find, burning the village, and then setting landmines for those who may return to recover any belongings or loved ones.”¹⁷⁵ The inexcusable tactics of the military have not resulted in fully suppressing these rebels. Particularly

¹⁷⁰ Charney, *supra* note 7, at 37.

¹⁷¹ *Id.*, at 65.

¹⁷² *Id.*, at 73.

¹⁷³ Thin Maung Maung Than, *The essential tension: Democratization and the unitary state in Myanmar (Burma)*, 12 S.E. ASIA RES. 187, 192 (2004).

¹⁷⁴ Charney, *supra* note 7, at 73.

¹⁷⁵ Rachel E. Ryon, *Foreigners in Burma: A Framework for Responsible Investment*, 23 PAC. RIM L. & POL’Y J. 831, 835 (2014).

the Northern Hill Tribes, the Karen and the Kachin, maintain these insurgencies to this very day. A statement from Minority Rights Group International in July, 2014 detailing some of the more recent conflicts highlights this: “Armed ethnic groups continued to clash with government forces throughout the year, despite making some progress on ceasefire negotiations. Fighting in Burma's northern Kachin state reached its peak in January 2013, when the military launched a full-scale land and aerial assault on the ethnic rebel stronghold in Laiza, killing civilians and forcing thousands from their homes.”¹⁷⁶ The constant fighting has had a tremendous impact on the state’s policies, but it is not the only factor contributing to the complexity of Myanmar’s post-independence history.

This is where a narrative of progress would allow the false contingencies of Myanmar’s democratization to assist in the double bind that the marginalized, informal community encounters with globalization. There has been scholarship regarding what happens when democracy is transplanted in states with situations such as Myanmar. Whether it is in the Middle East or South East Asia, a transitioning state is expected to hold elections as soon as any initial step towards democratization has occurred. Elections are meant to weed out the corrupt and self-serving leaders and replace them with an authority capable of steering the government and economy to oversee the best interests of the community. Unfortunately, democracy involves far more than just elections, and it is this oversimplifying that creates,

Today’s universal policy prescription for ‘underdevelopment,’ shaped and promulgated to a large extent by the United States, essentially amounts to this. Take the rawest form of capitalism, slap it together with the rawest form of democracy, and export the two as a package deal to the poorest, most frustrated, most unstable, and most desperate countries of the world. Add market-dominant minorities to the picture, and the instability inherent in this bareknuckle version of free market democracy is compounded a thousand fold by the manipulatable forces of ethnic hatred.¹⁷⁷

¹⁷⁶ Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2014 - Burma*, (July 2014), <http://www.refworld.org/docid/53ba8dfe5.html> (accessed December, 2014)

¹⁷⁷ Chua, *supra* note 122, at 195.

Chua gives perspective to an element of neoliberalism that she believes is causing damage within developing states, “The relationship between free market democracy and ethnic violence around the world is inextricably bound up with globalization.”¹⁷⁸ The majority of globalization’s critics criticize it for the disparity it foments between classes. She argues that another crucial factor in the critique of globalization is that it also instigates ethnic hatred.¹⁷⁹

Ethnic hatred is particularly relevant in Myanmar. Thin Maung Maung Than writes, “The non-Bamar groups’ perceptions of the majority Bamar dominance in ethnic relations have been a contentious political issue in independent Myanmar, with far-reaching implications for building a democratic state premised upon national unity.”¹⁸⁰ In her book *World on Fire*, Chua explores the dynamic in countries that have a politically/economically powerful minority and a marginalized ethnic majority. Chua writes that in, “countries with a market-dominant minority and a poor ‘indigenous’ majority, the forces of democratization and marketization directly collide. As markets enrich the market-dominant minority, democratization increases the political voice and power of the frustrated majority.”¹⁸¹ In the case of Myanmar, the military-elite, largely encompassed by the Burmese majority, are largely the ones reaping the benefits from the current liberalizing of the markets. The current president has even admitted to the vast corruption within the civil services.¹⁸²

There are fundamental tensions within the current democratic structure in the unitary state.¹⁸³ Myanmar’s current house structure consists of essentially three houses (hluttaws in Burmese): one of equal regional representation, one based on population, and the third group of representatives nominated by the commander-and-chief (who is not the president). Each group then nominates a vice president

¹⁷⁸ Chua, *supra* note 122, at 7.

¹⁷⁹ *Id.* at 12.

¹⁸⁰ Than, *supra* note 173, at 188.

¹⁸¹ Chua, *supra* note 122, at 123.

¹⁸² See Kya Kha, *Thein Sein Admits Corruption, Bribery Are ‘Chronic’ in Burma*, The Irrawaddy (Aug, 2014), <http://www.irrawaddy.org/burma/thein-sein-admits-corruption-bribery-chronic-burma.html> (visited Apr 29, 2015).

¹⁸³ See Than, *supra* note 173.

who is then chosen by the entire Electoral College to be the president.¹⁸⁴ The president and commander-in-chief wield tremendous power in their ability to hand-pick the members they want serving in the top executive decisions:

Even when elected representatives are chosen to serve in the government, they must forego their party affiliations. In this way, the elected representatives' role in the *hluttaws* would generally be confined to legislative and deliberative functions, and the *raison d'être* of competitive politics, that is, to form a government, would be obviated. It effectively separates state power from political competition and representation of voting constituencies. Consequently it creates a corporatist, bureaucratic, unitary state with centralized powers, in which the ruling elite are insulated from the rough and tumble of electoral politics. The result should be a strong regime in a centralized unitary state.¹⁸⁵

Myanmarese citizens' votes are essentially invalid in this structure. It is incredibly easy for the previous military regime to remain in power because the positions that the president and chief choose do not even have to be within the body politic.¹⁸⁶

While Myanmar makes more and more progress by holding elections and allowing citizens the opportunity to vote, there is the ability of the military ruling class to keep hold of their positions and not actually allow for a transition towards fair representation. But, as the newly represented peoples, especially the minority regions, get a taste of representation, they will only have it stopped short of true representation. Thus, potential for further ethnic violence is incredibly high. These issues create very real problems for the institutionalizing of democracy within Myanmar. With the tendency of non-democratic states to rush the processes of democratization, the ethnic variable, and the junta's political stranglehold, the prospects of genuine democratization are not promising. The democratic process presents contingencies in Myanmar that are false until the state and its people are able to work through the process themselves without the interference of the international community's universal approach.

¹⁸⁴ Than, *supra* note 173, at 201.

¹⁸⁵ *Id.*, at 202.

¹⁸⁶ *Id.*

B. The False Contingencies of Myanmar's Neoliberalizing Markets

A very similar dynamic to what I demonstrated with Myanmar's democratization is at work in the neoliberalizing of its economy. The indivisibility of democracy and free markets is still very much alive and at work in Myanmar. This section displays the steady road the state has taken towards opening up its markets to the international community's globalized economy. I will show that at no point in time has receiving assistance from the international financial institutions ever actually improved Myanmar's dire economic circumstances. In spite of this failure, Myanmar continues to make concessions. The success that is promised with the opening up of Myanmar's economy to globalized markets is another false contingency. This section will demonstrate that Myanmar's neoliberalizing has not only not been of its own choosing, but it also does not bring with it the supposed promises of success to Myanmar's many economically maligned citizens.

To understand Myanmar's politico-economics one must be cognizant of the context of where the country sits in time and space. Achieving independence from a colonial power after WWII, communism was a very strong political discourse in Myanmar.¹⁸⁷ The appeal to a working class, planned economy with equal distribution is understandable when considering a country's experience as an indigenous producing/labor class serving colonial benefactors. "For the average Burmese, at the root of colonial exploitation was the ruthlessness of foreign capital, the cruelties of the world capitalist order, and the greedy intentions of agents of foreign companies."¹⁸⁸ These factors took a heavy toll on Myanmar and gave rise to its first socialist-leaning regime. The first regime led under Nu devised a system whereby the government was in control of its minerals, transportation and communications while private property remained a fixture. With these moves, however, came a massive capital flight as mainly British investment withdrew.¹⁸⁹ Nu's regime was never able to fully get a grasp of the economy and was replaced by Ne Win in 1962.

¹⁸⁷ Perry, *supra* note 5, at 25.

¹⁸⁸ Charney, *supra* note 7, at 81.

¹⁸⁹ *Id.*, at 82.

The new government steered Myanmar in a very different direction that involved massive state control. Ne Win's military regime began with his ideological "Burmese way to Socialism" in which, "Every sector of the economy was to come under state control."¹⁹⁰ However, the military turned out to be horrendous economic caretakers, and as is common with totalitarian military regimes, they were always more concerned with holding on to power rather than keeping their state in order. The regime created, "a *milieu* of fear (which) so pervades the polity that problems, some obvious to outside observers, cannot surface to the top of the intensely hierarchical and command-driven military structure from the bottom of the social, economic and political ladder."¹⁹¹ As the years passed different measures became necessary to keep Myanmar's desperate economy afloat. The first forms of capitalism began to appear in 1972 with the threat of a rice shortage and skyrocketing price. After arresting 530 "rice hoarders" and profiteers, the government "both partially decontrolled the rice trade and suspended the export of rice."¹⁹² Anything grown beyond the government collection quota was made available to the free market. But, only a few years later in 1976 the country's economy was in such dire straits that it took loans from the World Bank for the first time.¹⁹³ "The Burmese economy began to crack again by the mid-1980s. Between 1981 and 1986, the national debt doubled to US \$ 2.8 billion."¹⁹⁴ It was only two short years between these conditions and the protests that stood up against the military government. With the wave of unrest that occurred in 1988 coupled with the intensity of Myanmar's economic woes, the ruling military was forced to adapt.

The road to globalization had already begun even if the regime could not see it. The SLORC allowed the neoliberal reforms of structural adjustment to take place,

¹⁹⁰ Perry, *supra* note 5, at 27.

¹⁹¹ Perry, *supra* note 5, at 29 (quoting R.I. Rotberg, *Burma: prospects for a democratic future*, Brook. Inst. Pr. 272 (1998)).

¹⁹² Charney, *supra* note 7, at 136.

¹⁹³ *Id.*, at 144.

¹⁹⁴ *Id.*, at 145.

similar to the many other transitioning regions of the world.¹⁹⁵ The reforms involved liberalizing regulations and foreign investment, licensing private banks and the trading of foreign exchange by private investors.¹⁹⁶ Rittich's list of 'best practices,' privatization and deregulation, was set in action, and Myanmar was set on the road towards assimilating into the global economic order. However, the Bank's 1995 assessment of the lack of positive economic improvement is telling of the policies enacted 7 to 8 years prior. The World Bank admitted that, "macroeconomic stability remains elusive, as indicated by continued internal and external imbalances. Inflation remains high and variable." It is important to note the means by which the Bank attempted to achieve balancing Myanmar's macroeconomics. The Bank's 1995 policy report explained that, "The reduction in the fiscal deficit has been achieved entirely by cutting expenditures (current and capital) rather than by broadening the revenue base or improving the performance of SEs[state enterprises]."¹⁹⁷ By cutting expenditures, the government enacted austerity measures that could and would never benefit the population. This is in spite of the IMF and the State's assuring rhetoric that, "In the process of normalization and naturalization, restructuring is figured as a large scale project which is of benefit and necessity to all."¹⁹⁸ But, this has proven false. "One consequence of the priority given to efficiency enhancement and wealth maximization is a demotion of the distributive dimension of reforms."¹⁹⁹ In a totalitarian regime, the elites are not the ones who feel the austerity measures. Those who were already impoverished in Myanmar suffered under the weight of the economic reforms, which were only to get worse.

The international community intensified Myanmar's economic problems. During the 1990s, Myanmar's government was the object of an extensive sanctions regime imposed largely by the US and EU. In response to this, the regime halted its

¹⁹⁵ World Bank, *Myanmar: Policies for Sustaining Economic Reform*, Report No. 14062-BA ii (Oct, 1995).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*, at v.

¹⁹⁸ Rittich, *supra* note 88, at 57.

¹⁹⁹ *Id.*

credit payments to the International Development Association (IDA). This resulted in the cancellation of approved current and future loans at that time.²⁰⁰ Myanmar was once again away from the influence of the global order. But, it was absolutely floundering economically, and to hold onto power during the next two decades, the regime resorted to horrendous abuse of its people.²⁰¹ It is generally regarded that the sanctions had minimal impact on Myanmar, both with its economy (which may have been affected slightly worse) and the impetus to make the desired changes.²⁰² In any case, the status quo was maintained while China and other regional neighbors supplied the military regime with arms and provided a small economic lifeline to the Myanmar people.²⁰³ It may not have been the sanctions that were hurting the economy, Myanmar had other states to do business with,²⁰⁴ but the massive debt the country had accumulated coupled with their inability to take any more loans, created a situation in which there was simply not enough money to go around.

Today, reengagement with the West has been reinitiated and Myanmar is opening up even further after nearly two decades of distrust. Before it could fully reengage, there was first the issue of the tremendous amount of accumulated debt that the regime never really intended paying off.

The presence of arrears presented a major obstacle to reengagement with the international community. Of Myanmar's total debt stock of US \$15 billion (estimated as of end December 2012) some US \$11 billion was in the form of arrears that had accumulated during the period of sanctions and isolation. The bulk of these arrears

²⁰⁰ World Bank, *Implementation Completion and Results Report (IDA-51970) on a Credit in the Amount of SDR 287.75 Million (US\$ 440 Million Equivalent) to the Republic of the Union of Myanmar for a Reengagement and Reform Support Program*, Report No. ICR3099 1 (Apr, 2014).

²⁰¹ See Amnesty International, *Myanmar (Burma) Human Rights*, visited at <http://www.amnestyusa.org/our-work/countries/asia-and-the-pacific/myanmar> (Mar 29, 2015), (referencing Myanmar's history of arrests, detentions, torture, forced labor, and the killing of protesters),).

²⁰² See Klaus E. Meyer and Htwe Htwe Thein, *Business under adverse home country institutions: The case of international sanctions against Myanmar*, J. of W. BUS. (2014), Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, Wash. U. GLOB. STU. L. R. (2008), Roman David and Ian Holliday, *International sanctions or international justice? Shaping political development in Myanmar*, Aus. J. INT'L. AFF. (2012).

²⁰³ Ian Holliday, *Rethinking the United State's Myanmar Policy*, 45 ASIAN SURV. 603, 609 (2005).

²⁰⁴ *Id.*

(approximately 92 percent) were owed to Paris Club debtors, and arrears to Japan alone were 65 percent of the total. Arrears to multilateral institutions were around 9 percent of the total, with 5 percent due to the ADB and 4 percent to IDA.²⁰⁵

In 2012, the Bank approved a pre-arrears clearance grant that supports a Community Driven Development project. A Development Policy Operation was prepared “With the Bank’s Interim Strategy Note for Myanmar and with institutional guidelines on the clearance of arrears.”²⁰⁶ Furthermore, other international lending agencies such as the Asian Development Bank began canceling unpaid debt and allowing for restructured loans to be initiated.²⁰⁷ In spite of this, a debt percentage of 24.8 from 27.3 still remained in 2012. This means that debt accounts for a quarter of Myanmar’s entire economy.²⁰⁸

Debt, however, is not something the Bank is concerned with when attempting to integrate a country such as Myanmar into its influence, as can be seen by its willingness to give more loans. In 2013, Myanmar signed a \$140 million deal with the Bank in order to pay for a new power plant in the Mon State.²⁰⁹ Along with signing this deal Myanmar’s government gained full access to MIGA, the World Bank’s Multilateral Investment Guarantee Agency. This agency ensures that “foreign direct investment into Myanmar will be eligible for the Agency’s political risk insurance.”²¹⁰ The foreign investors are able to make their transactions in Myanmar without worrying about transfer restriction, expropriation, breach of contract, and non-honoring of financial obligations. But, the Myanmar government must first make a required capital contribution to MIGA.²¹¹ Myanmar essentially must pay for

²⁰⁵ World Bank, *supra* note 200, at 2.

²⁰⁶ *Id.*

²⁰⁷ Voice of America, *Lending Agencies Restart Burma Loan Programs*, (Jan, 2013) available at <http://www.voanews.com/content/lending-agencies-restart-burma-loan-programs/1592573.html>.

²⁰⁸ The World Bank Group, *Myanmar Economic Monitor*, 8 (Oct 2013) available at http://www.worldbank.org/content/dam/Worldbank/document/EAP/Myanmar/Myanmar_Economic_Monitor_October_2013.pdf.

²⁰⁹ World Bank, *Myanmar and WBG sign electricity and investment agreements at Annual Meetings*, (Oct, 2013), available at <http://www.worldbank.org/en/news/press-release/2013/10/12/myanmar-wbg-sign-electricity-investment-guarantee-agreements-at-annual-meetings>.

²¹⁰ *Id.*

²¹¹ *Id.*

membership in order to supply opportunities to foreign entities to invest in its domestic operations with no risk to these foreign entities. This example is one of many “reforms” taking place within Myanmar’s economy and legislation.

In parallel with the reengagement comes an overhauling of the State’s economic sector. Under the recommendation of international financial institutions including the World Bank and the Asian Development Bank, Myanmar reordered their Foreign Investment laws in 2012.²¹² Under the current laws, levels of foreign investment are demarcated in which foreign investors can own up to 100% of the capital, or the ventures can be a joint effort with domestic partnerships.²¹³ The laws have been formulated to offer as much incentive to investors as the government can extend without losing its position of control. Further incentives for foreign investment include private insurance companies for foreign investing, tax exemptions of up to 5 years, and the ability to use only foreign currency if the investor so chooses.²¹⁴ Myanmar’s economic reforms are being done under the watch of the World Trade Organization. The WTO’s Trade Policy Review claims, “The authorities state that trade-related domestic legislation must be formulated in line with the WTO Agreements.”²¹⁵ The WTO has overseen the law reforms previously mentioned as well as other new laws such as a new Telecommunications law enabling the liberalization of the sector, a consumer protection law, and a SMEs law.²¹⁶ Furthermore, the government has opened up international banking services that allow for private banks that to wire transfers and approve credit for trade. The government has also removed its “export-first policy” which stipulated that imports be paid with the profits made from exports.²¹⁷ The report quotes, “The economic reform process continues and is focused on removing further regulatory restrictions

²¹² IM, *Myanmar Investment Laws*, Invest in Myanmar: Intelligent Commentary and Analysis on Myanmar Business, accessed Mar, (2015) available at <http://www.investinmyanmar.com/myanmar-investment-laws/>.

²¹³ Ryon, *supra* note 175, at 838.

²¹⁴ *Id.*, at 839.

²¹⁵ World Trade Organization, *Trade Policy Review Report by the Secretariat: Myanmar*, Trade Policy Review Body (January, 2014) at 18.

²¹⁶ *Id.*

²¹⁷ Jared Bissinger, *Myanmar’s Economic Institutions in Transition*, 31 J. S.E. ASIAN ECON. 241, 246 (2014).

to trade and investment, improving the provision of essential backbone services, and reducing corruption in order to improve Myanmar's business environment."²¹⁸

It is very important to the neoliberal agenda to keep the two spheres - economy and politics - separate.²¹⁹ It is how the progress narratives are able to exist and drive the momentum of change. However, the reality is that it is a state's government and legislature that ultimately enact the legislation. But, other, stronger institutions such as the World Bank, Asian Development Bank and WTO can heavily influence these state institutions. As the Initiatives in Legal and Judicial Reform report by the Bank makes clear, certain laws are initiated by the Bank as a conditionality for the loans that it is willing to give a state. The Bank does not finance the actual legal work that takes place, but rather the country's balance of payments. It is meant to happen in a short period of time, but they can come in a series of adjustment loans that are meant to last a period of years.²²⁰ This means that not only is the experience a one time shock between the state and global institutions, but it is an ongoing process where the international financial institutions are able to extend their influence for years to come.

Though the narrative that the Bank gives may give the impression that there is a separation between politics and the economy, politics and the economy are inextricably linked.²²¹ Perhaps the reason for this is that other liberal pillars such as democracy and human rights do not actually go hand in hand with capitalism and vice versa. Even mainstream political researchers have posited their quantitative arguments demonstrating that investment is influenced by politics.²²² In a study conducted by Resnick regarding these matters, he tests whether investors are optimistic about transition, indifferent towards it, or pessimistic about it.²²³ Interestingly, what Resnick's analysis determined was that transition to democracy

²¹⁸ The World Bank Group, *supra* note 208, at 10.

²¹⁹ Rittich, *supra* note 88, at 13.

²²⁰ World Bank, *Initiatives in Legal and Judicial Reform*, 2004 ED. 6 (2004).

²²¹ Rittich, *supra* note 88, at 13.

²²² Adam L. Resnick, *Investors, turbulence and transition: Democratic transition and foreign direct investment in nineteen developing countries*, 27 INT'L. INTER. EMP. THEO. RESO. INT'L. REL. 381,381-398 (2001).

²²³ *Id.*, at 386.

is seen to have a negative effect on its share of foreign direct investment.²²⁴ Resnick makes three different interpretations of the data. He suggests that democracy may lead to factors such as higher labor costs and lower stability. Secondly, he argues that foreign direct investors avoid uncertainty at almost any cost. And lastly, he combines the two to make the point that autocracies provide more long-term stability with more certainty than a transitioning democracy can.²²⁵ This implies that the impetus behind the engagement from the global financial institutions is not to support the transition for the common good of another state and its people. The impetus behind engagement is to redistribute resources towards more powerful, hegemonic states through privatization and assisting international corporations. It is the financial institutions and the foreign direct investors that reap the rewards from such engagement. The experience of Myanmarese private entrepreneurs has been the opposite. The returns have proven to be very difficult to acquire due to a lack of initial capital and the unwillingness of state ministries to privatize their enterprises.²²⁶

Privatization has had further harmful effects on much of Myanmar's massive informal economy. Rittich argues that any kind of reforms for efficiency that are made will also impact the distribution of wealth.²²⁷ "Attempts to induce greater economic growth through restructuring, even if they produce material progress for society in the aggregate, are not experienced as a single, homogeneous event nor do their benefits accrue evenly to different sectors of the population."²²⁸ This problem of unequal distribution seems to be an even larger issue in states such as Myanmar with such an enormous informal sector. Even the World Development Report from 2014 recognizes the paradox:

Benefits from globalization accrue more to the formal economy because informal enterprises often do not have the appropriate standards and qualifications from the suppliers' standpoint to

²²⁴ *Id.*, at 393.

²²⁵ *Id.*, at 394.

²²⁶ U Thein Tun, *Experiences of Myanmar Privatization Programme*, Project Appraisal and Progress Reporting Department, Ministry of National Planning and Economic Development (this article has since been made unavailable online, last accessed Apr, 2015).

²²⁷ Rittich, *supra* note 88, at 13.

²²⁸ *Id.*, at 8.

compete. Economies with high rates of informality are thus often positioned at the lower end of the global value chain, and their workers are more vulnerable to global shocks and less likely to benefit from opportunities. Recent research suggests that globalization has contributed to the prosperity of many countries, although sometimes at the cost of rising inequality.²²⁹

Unfortunately, these informal sections of society that thrive off of economic sectors such as agriculture, retail and transport suffer something of a double bind: they do not receive the benefits of globalization while they are often the ones bearing the brunt of the economic risk. “Overall, globalization exposes enterprises to competition in the world market, providing incentives for productive enterprises to expand and pressures for unproductive ones to exit.”²³⁰ It is the informal market typically residing in poorer countries such as Myanmar that the Bank assumes are the unproductive ones. The Bank itself acknowledges that trends in globalization have been harmful towards countries with highly informal economies. Yet, its response to this is to devise policies and techniques in which the unproductive informal sectors can be alleviated in favor of the efficiency of formal markets, which then compliment the globalized economy.

The neoliberalizing of Myanmar’s economy has not brought the results that the liberals in Myanmar have been hoping for. The neoliberal economic system is one of universal practices that involve development through the global financial institutions, privatization and limited state involvement. This section demonstrated that the slow history of Myanmar’s liberalization has not produced its desired results. The involvement with international financial institutions has resulted in tremendous debt, and privatization has benefited the external world while further disadvantaging Myanmar’s vast informal sector. The neoliberalizing of Myanmar’s economy has resulted in optimism for the contingencies that a liberal economy can

²²⁹ World Bank Group, *Risk and Opportunity: Managing Risk for Development*, W. DEV. R. 178 (2014) available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/EXTNWDR2013/0,,contentMDK:23459971~pagePK:8261309~piPK:8258028~theSitePK:8258025,00.html>.

²³⁰ *Id.*

offer. But, the optimism these contingencies engender will not benefit Myanmar as a state or people.

C. The False Contingencies of Human Rights in Myanmar

Much of the media attention Myanmar has received over the last two decades has been in regards to its many grave human rights abuses perpetrated largely by the government. The military regime has a miserable history of committing horrendous acts against its people.²³¹ For example, in 2015, there are around 900,000 internally displaced people,²³² which is largely due to the ethnic conflicts going on in various locations of the state.²³³ Within the camps of the displaced peoples, conditions are terrible. Restrictions on movement exacerbate the problems these displaced people have in acquiring necessities such as food, water, education and medicine.²³⁴ Land rights issues abound with land-grabbing and eviction taking place in areas such as the Rhakine state.²³⁵ Because of circumstances like these, the liberal activist in Myanmar champion human rights in the hopes for change.

This section will demonstrate that there is yet again a similar dynamic to both Myanmar's democratization and economic neoliberalization with its rule of human rights law and how an international, universal approach creates false contingencies that are unable to be realized. The limited human rights of a state like Myanmar has become unacceptable in the age of international rights agencies and international organizations. Many liberals would argue that giant strides have been made given the gains made in the civil rights arena with the elections of 2010, which give hope towards a further developing democratic apparatus. They also draw

²³¹ See UN General Assembly, *Situation of human rights in Myanmar*, (2014), The Asian NGO Network on National Human Rights Institutions (ANNI), *2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, (2014), International Federation for Human Rights, *Burma: Sustained EU engagement at UN critical to support human rights reforms*, 1 September (2014), Freedom House, *Freedom of the Press 2014 - Burma*, 12 September (2014), Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2014 - Burma*, (Jul, 2014).

²³² Internal Displacement Monitoring Center, *Myanmar*, available at <http://www.internal-displacement.org/south-and-south-east-asia/myanmar/> (visited May 18, 2015).

²³³ UN General Assembly, *Situation of human rights in Myanmar*, A/68/397 10 (2013).

²³⁴ *Id.*, at 13.

²³⁵ *Id.*, at 16.

attention to the fact that free speech has been made more possible.²³⁶ Furthermore, there is also the recently enacted Myanmar National Human Rights Commission in 2014.²³⁷ But, these gains have actually only brought about changes exceedingly limited in scope. The promise of human rights in Myanmar is a false contingency for its liberal activists because human rights limit the view of what Myanmarese citizens are actually capable of receiving from their ruling body.

Before discussing Myanmar's Human Rights Commission, there first needs to be a discussion about what rights are universally subscribed to and forced on Myanmar and which are ignored. Lisa Brooten focuses on the dialogue shared by the human rights indices, the public and the government regarding the move towards stronger human rights in Myanmar.²³⁸ One of her arguments is that the indices give a skewed picture of the rights discourse within a given case. She argues that these indices are used to promote a narrow version of universal human rights that focuses on the individual and civil rights. What they do not reveal is the social and economic rights. This can give a false image of what the politics in a state is actually impacting. She posits that this is due to the global North's control over what, exactly, universal human rights should encompass. Instead of demonstrating the importance of socio-economic freedoms and rights, the discourse is based primarily on civil rights, which gives a false impression that civil liberties are the only ones that matter. This in turn gives a false impression of the rights and liberties actually taking place in states such as Myanmar.²³⁹ What can be seen from Brooten's work is the incoherence in a state between the gains made from civil or political reforms and the lack thereof in the socio-economic betterment of actual Myanmarese. Socio-economic rights, which include many of the life requirements

²³⁶ BBC News, *Myanmar riot police beat student protesters with batons*, (Mar, 2015) available at <http://www.bbc.com/news/world-asia-31812028>. (the ability for Myanmarese to truly enjoy freedom of speech and association is contestable as can be seen by the arrest of 100 student protesters in March, 2015).

²³⁷ See Burma Partnership and Equality Myanmar, *Burma: All the President's Men*, Burma Partnership and Equality Myanmar (2014).

²³⁸ Lisa Brooten, *The Problem with Human Rights Discourse and Freedom Indices: The Case of Burma/Myanmar Media*, 7 INT'L. J. COM. 681, 681-700 (2013).

²³⁹ *Id.*

Myanmarese desperately need, are not a priority in these indices because they do not fit into the universal subscription of human rights priority.

In March, 2014, Myanmar passed the law enabling the Myanmar National Human Rights Commission.²⁴⁰ Its purpose is to protect the rights enshrined in Myanmar's new constitution, protect the rights of the UNHCR, protect the rights of other international conventions, and to engage with NGOs and regional organizations that deal with human rights.²⁴¹ However, it is clear that this Commission is a red herring that distracts attention away from the very real issues the state has with inflicting violence on its people. For instance, the funding and appointments, like Than demonstrates, are coordinated by the executive branch.²⁴² This is a very unfortunate aspect to the Commission because, as John Southalan demonstrates, "The first requirement for independence is legal and operational autonomy. The NHRI must have the power to operate on its own and to be able to force others to cooperate if they will not freely do so."²⁴³ If the Commission is in the hands of the executive branch, and the executive branch is in the hands of the military, then there can be no transformation of human rights in Myanmar.

The fact that the human rights commission is mere window dressing should not actually be of utmost concern to the liberal movement of Myanmar. What should be of concern is how a human rights commission such as this one can take the focus off of the very real political/economic issues already discussed in this paper. Human rights are a portion of law that fits entirely within the package of neoliberalism that has been discussed. It is necessitarian thinking that the only way to protect human rights, private property and democracy is through legislation of commissions that the regime barely acknowledges.²⁴⁴ It at once suggests Unger's list of three forms of necessitarian thinking: the closed list, indivisibility and determinist idea. It is a closed list because the Commission allows the government

²⁴⁰ Burma Partnership and Equality Myanmar, *Burma: All the President's Men*, Burma Partnership and Equality Myanmar 12 (2014).

²⁴¹ *Id.*, at 14.

²⁴² *Id.*, at 16.

²⁴³ John Southalan, *Military Regime to Establish Base on Mars...Or a Human Rights Commission*, 5 LEGAL IS. BURMA J. (2000).

²⁴⁴ Burma Partnership and Equality Myanmar, *supra* note 240.

to be the definers in what is and isn't a "right" in Myanmar. I argue that it is an indivisible idea because it has only become relevant with this most recent transition in which it is merely another factor in the overall neoliberalizing of Myanmar. Finally, it is determinist because it is of the general faith that human rights are "natural" and therefore universal. What the people of Myanmar do not need is a piece of legislation telling them what they should be entitled to. What the people of Myanmar need are things like a more stable economy, housing, water and electricity. The Myanmarese need a government that does not treat them like subjects to do what it wants with, but a government that is there to support the will and needs of its people in a fashion that the people deem appropriate and necessary. In order for this to be more possible, the global community needs to stop forcing systems that give false securities and hope for changes that do not manifest.

VI. Conclusion

A look at Myanmar's transition is very useful in today's context. In many ways, the transitions of today occur for very similar reasons as the transitions of the past. They often result from a refusal of the people to accept the space the government has made for itself politically or economically and they revolt. However, transition has seemingly changed in that it no longer results in immediate, radical reversals of systems, in fact:

The idea of revolution has become a pretext for its opposite. Because real change would be revolutionary change, and revolutionary change is unavailable, and would be too dangerous if it were feasible, we are left to humanize the inevitable. Such is the project of a pessimistic reformism resigned to soften, especially through compensatory redistribution by tax-and-transfer, what it despairs of challenging and changing. Such is the program of gradual adjustment instead of 'shock therapy,' of a modicum of social protection rescued from the inevitable weakening of workers' rights, of a softer version of the other side's political point.²⁴⁵

Neoliberalism and its narratives of progress have taken transition and bent it to its own liking. Neoliberalism has created a dynamic of false necessities and false contingencies that manipulate transition to the international community's universal, neoliberal will. This results in countries like Myanmar going through an insubstantial transition.

This paper has traced this dynamic of power by utilizing Unger's and Marks's false necessities and false contingencies. I first displayed the general liberal thought regarding transition and the global North's faith in the liberal project. I demonstrated that, in recent history, the tenets of liberalism, rule of law, democracy, and capitalism, have been neoliberalized. With the next chapter, I demonstrated how neoliberalism and narratives of progress have created the dynamic of power that is the result of false necessities and contingencies. This dynamic has had a tremendous influence on all three tenets of liberalism. Finally, I demonstrated this dynamic using the currently transitioning state of Myanmar. By analyzing

²⁴⁵ Unger, *supra* note 29, at 20.

Myanmar's transition, it can be seen how neoliberalist, universal policies have created false contingencies in Myanmar's project of democratization, liberalizing of markets, and writing of a human rights commission.

The human rights commission can be seen as a culmination of the entire dynamic this paper has strived to explore. It represents how the universal approach of law can actually be used to limit the contingencies of a transitioning state such as Myanmar. Myanmar is not part of Western Europe or North America; it has not had the same history, same culture, same religion, or governing systems. Their ideas of what rights are inherent to their being are very likely different from those in the West. Much like their ideas of what kind of economy or governing system is most appropriate for Myanmar are likely very different from the international community's ideas for Myanmar. Unfortunately, Myanmar is a state with very little international sway or power. They are not a part of the hegemony. They have resisted the hegemony for half a century. But in this transition, Myanmar is reconciling with the international community and its hegemonic institutions. These institutions follow a universalist ideology founded on a narrative of grand progress inspired by the ideals of liberalism. These institutions have further embraced a much more hardline approach to these ideologies, what we call neoliberalism. Neoliberalism has thrust the economy into the front of all priorities for global order. It utilizes its falsely necessary narratives and ideologies to create a dynamic of false contingency such as how a human rights commission can prevent more contingencies for what people deserve by limiting the conversation about what rights they deserve.

False contingency, is at its heart, a power dynamic. By affording a state and its people the belief in contingencies that are not actually available, the hegemony effectively places blinders over the eyes of the less powerful. The scope is limited from the outset. It is the international community that shapes many of Myanmar's ideas of what humans should inherently be entitled to. It is an insidious process, however, because it's done through systems like democracy, free markets, and human rights that appear to be inherently open to contingencies. But, as this paper has demonstrated, neoliberal practices such as the separation of the state and

economy, privatization and deregulation, are actually limiting forces on the contingencies that Myanmar should actually have. This effectively leaves power in the hands of the international organizations such as the UN or World Bank over a state such as Myanmar. This entire dynamic, in turn, makes the contingencies of Myanmar's transition false.