Law and Development

1. Law and Development in the Beginning

'Law and development' is a term usually used to describe legal assistance programs for developing countries and the related academic work. The movement as such, began in the 1960s with overseas projects funded by various foreign foundations and development agencies. Legal scholars at leading American law schools, as well as in some European institutions, soon adopted the topic as an academic field. Following foreign aid patterns of the time, the movement primarily focused on Latin America and Africa. It sought to aid developing countries by promoting changes in laws and legal systems to make them more 'modern.' Paralleling the then popular and now defunct modernization theory, this law and development paradigm presumed that as these countries developed, they would construct legal institutions and cultures similar to those that spurred economic and political development in the West. The law and development movement assumed that convergence on the Westernized notion of the rule of law could be hastened by external assistance.

American scholars sought to develop a theory of the role of law in state and market development that could be integrated into general modernization theory. To that end, they drew on Max Weber's historical explanation of the rise of capitalist societies in Western Europe (Trubek 1972). Weber's theory asserted that in addition to the 'Protestant ethic,' the rational, formal, and logical legal system was necessary to provide the stability and predictability in economic exchange, and the protection of property rights, which facilitated economic innovation. Weber's work suggested that law would best contribute to capitalism if it was based on universal rules uniformly applied, contract law guaranteeing the security of future exchanges, and Property law capable of protecting the fruits of labor.

However, this model of legal development did not fit squarely with the spirit of the 1960s and the needs of the development agencies. In an era in which development policy favored a strong and proactive role for the state, a legal theory was needed that would promote the use of law as an instrument to modernize society. In such a vision, lawyers, and judges were seen as social engineers who would cultivate the legal norms and the changes in the formal system of law needed to promote progressive political and economic development. The emphasis on law as an instrument of a modernizing state and the Weberian idea of a set of formal rules that guaranteed predictability did not sit easily together. To bridge the gap, law and development scholars produced a hybrid theory, dubbed by some 'liberal legalism' that sought to unite faith in the rule of law with a commitment to aggressive social engineering. It was assumed that this hybrid was the prevailing ethos of US legal culture, and if exported to the developing world it would hasten progress towards modernity. As a result, the emphasis of foreign aid was on legal education, and training was done by Western scholars and at universities in the US and other developed 'first world' countries. It was assumed that if the ideas taught in developing country law schools could be changed, then the behavior of lawyers would also change. If the right laws were created, they would be enforced and if the positive benefits of the Westernized 'rule of law' could be demonstrated, then it would be embraced.

In the mid-1970s, however, a series of articles appeared that challenged the original ideas of the law and development movement (e.g., Trubek and Galanter 1974). These articles reflected a growing unease among scholars regarding the assumptions and prescriptions of legal liberalism. A decade of experience with the original approach showed there were serious problems with the strategy of transplanting foreign legal models through an elite-driven approach that did not coincide with the cultural, social, and political contexts of the developing countries (Burg 1977, Merryman 1979). The failure of legal transplants and the stigma of 'legal imperialism' (Gardner 1980) convinced many that the movement had got off on the wrong foot.

As experience accumulated, scholars began to realize that the enterprise had not been guided by a robust theory of the relationship between law, and economic and political development. Critics pointed out that what passed for law and development theory was a somewhat idealized projection of the self-understanding of US and other developed country lawyers, concerning the role of law in their societies. This was combined with a simplistic model of history that presupposed causal and linear relationships between the evolution of a 'modern' legal system and market democracy. Needless to say, no empirical evidence was ever produced to support this theory which was little more than a romantic and ethnocentric projection of a
developed country legal culture’s ideal of itself. It became clear to some that the movement suffered from an entrenched ethnocentrism and naïveté (Trubek and Galanter 1974).

This critique was intended to strengthen law and development scholarship by distancing the academic project from immediate activist policy agendas and encouraging the development of more systematic empirical research and conceptualization. The hope was that in the long run the academy could come up with better and more effective ideas for legal assistance to developing countries. But that was not the result; rather, this critique helped kill the nascent academic project. The critique was taken by many to be a denunciation of the movement. Moreover, it came at a time when the aid agencies were losing interest in law for other reasons, and when US intellectuals had become especially sensitive to charges of meddling in foreign countries as a result of the Vietnam War protests. As a result, the law and development movement lost its momentum. Comparative legal scholars turned their attention to other pursuits, funds for law and development programs dried up, and after a ‘short, happy life’ the movement was presumed dead.

2. Law and Development Reawakened

The 1990s revealed, however, that the law and development movement was not dead, but merely in hibernation (Tamanaha 1995). While some law reform activities continued throughout the 1970s and 1980s (such as USAID judicial assistance programs and foundation support for public interest law in developing countries), it was the end of the Cold War and the collapse of communism in Eastern Europe and the former Soviet Union which incited a ‘rule of law revival’ and gave new life to external assistance in legal and judicial reform (Carothers 1998). At the twentieth century’s end, if all the current ‘rule of law’ portfolios of the World Bank, regional banks, major nongovernmental organizations and foundations, the US Agency for International Development (USAID), and other bilateral aid institutions and local counterparts were added up, it would equal several billion dollars worth of assistance funds being spent on law projects.

The current law and development movement emerged from the confluence of two broad forces that came to prominence in the post-Cold War era. The first of these could be called ‘the project of democracy’ and came out of the human rights movement of the 1970s and 1980s. The international community made great progress in specifying human rights norms, creating machinery for international action to enforce them, and ensuring that internationally recognized human rights became part of the discourse of domestic politics in many countries. Events such as the Helsinki process drew attention to the lack of protection for human rights in domestic institutions. This highlighted the need for legal change at the national level to ensure that human rights would not only be nominally secured in the letter of the law, but would also be protected in practice. These universal human rights, in addition to the ‘Third Wave’ of democratization (Huntington 1991) drew attention to the need for constitutional protections for civil liberties, the independence of the judiciary from potential corrupt and weak states, and the guarantee of equitable access to justice for all of civil society.

The second—and stronger—force propelling the ‘new law and development’ was based on economic reform. While the burgeoning international human rights regime and democracy assistance sustained the notion of foreign legal aid in the name of justice throughout the 1980s, the dramatic revival of the law and development movement in the 1990s took on a decidedly economic character. The catalyst was the collapse of communism in Eastern Europe and the former Soviet Union, and the subsequent failure of shock therapy to produce a successful transition to the market through a tripartite plan of liberalization, stabilization, and privatization. Development specialists began to claim that initial reform strategies had failed due to a lack of attention to the ‘institutional preconditions’ of a capitalist economy. Foremost among these were the appropriate legal institutions.

The empirical lessons of the post-Communist transition coincided with the increasing popularity of new institutional economics, based on the Nobel prize-winning work of Douglass North, among others. In his Institutions, Institutional Change and Economic Performance, North (1990) argues that as economies develop from ‘traditional’ to ‘modern,’ rational economic actors seek to construct institutions that among other things will protect property rights and reduce transaction costs by providing credible and efficient means of contract enforcement. These legal institutions (both formal and informal) create incentives for rational economic actors to engage in increasingly complex modes of exchange conducive to furthering economic growth. In North’s theory, it is the absence of such modern legal institutions that explains the lack of economic development in the Third World (North 1990, pp. 64–5).

Consistent with the ‘Washington Consensus,’ embedded in the development ideology of the Bretton Woods Institutions, this economic theory reaffirmed the role of law in creating and protecting an enabling environment for the development of the market. Unlike the previous law and development movement, when state-led economic development theories were in vogue, in this approach the state plays a largely passive role and the law assumes an autonomous and proactive role in providing the ‘legal foundations of capitalism’ (Commons 1924) while at the same time monitoring and constraining the arbitrary use of power or the excessive use of regulation by the state. In the context of globalization, this role of law and the
formal legal system is deemed critical to establishing the ‘good governance’ necessary for attracting foreign and domestic sources of private investment (Shihata 1997). In this approach, we are back to Weber, shorn of the activist, social engineering gloss of the 1960s ‘liberal legalist’ hybrid.

The strategies of the new law and development movement, aimed at the dual projects of human rights and markets, reflect a widened scope of legal and judicial reform. While much of external assistance continues to target legislative drafting, legal education, training, and the professionalization of the bar (including exchange trips), reform activities place more emphasis on the effective administration of justice. This includes the efficient management of cases, increased access to justice through the construction of alternative dispute resolution mechanisms, enhanced means of enforcing judicial decisions, and the promotion of judicial independence. Moreover, broader legal reform projects seek in certain contexts to create a demand for a rule of law where one is perceived to be absent (as in much of the former Soviet Union) by constructing public awareness campaigns and building domestic consensus and support for reform efforts.

3. Comparing the ‘Old’ and ‘New’ Law and Development: Lessons Learned?

The revived legal reform agendas do not avoid the ethnocentric, ‘imperialistic’ nature of the old law and development movement. There is an over reliance on legal technical assistance, which tends to neglect the deeper political and cultural environments shaping the legal systems. There is still a faith in legal transplants, a belief that Western lawyers can design systems that will work in emerging markets and new democracies, and a stress on education. However, there are also signs of dissent from this orthodoxy. For example, some activists profess to avoid the mistakes of the past by engaging in more participatory work with civil society groups, build upon existing grassroots legal reform efforts, and generally working as much as possible within the existing legal infrastructure. Critics have also rediscovered the old critique of legal transplants. It is increasingly recognized that in the absence of a clear demand from key societal actors and reform strategies that build upon (rather than against) the rooted legal culture of a country, ‘supply-side’ legal reform efforts focused on constructing new laws and institutions, will be insufficient for the task of creating and consolidating a rule of law (Hendley 1996).

While these breaks in the law and development orthodoxy are welcome, they represent a minority voice. The faith in legal change through top-down reforms supported by Western legal expertise remains strong. The idea that there is one best way to build the legal institutions for markets and democracy is still pervasive, as is the faith that this path has already been trod by the rich countries of the West which stand as models and as sources of expertise. People still believe that Western laws can be transplanted out court to countries as diverse as Brazil and Bangladesh.

The continuing faith in law and development orthodoxy comes as no surprise. The leaders of the West have decided that the rule of law is essential for both emerging markets and new democracies. As a result, the international and bilateral development agencies are committed to legal reform on a global scale. To implement these programs in all the countries they deal with, these agencies need relatively simple models that can be easily supported by the traditional tools of foreign assistance. The last thing they want to hear is that each country is unique, that there is no easy answer to what laws and what legal system reforms are needed, or that Western expertise is of dubious value.

Billions of dollars have been spent on reforms that are guided more by intuition and hope than by any systematic knowledge or empirical evidence. Projects still rest on assumptions criticized in the 1970s. Will history repeat itself? Will the cry for a more independent and critical academic examination of ‘law and development’ still go unheard? While the academic side of the ‘new law and development’ remains modest at least in contrast to the scale of the assistance effort, at the beginning of the twenty-first century there are signs that a critical and autonomous endeavor may be taking shape in the academy.

If so, there are several questions that must be dealt with. First, scholars should study the microfoundations of the so-called ‘rule of law.’ The old law and development movement was a very top-down effort. It was assumed that law was a universal boon for all classes. It assumed that if the elite said they favored the rule of law, they meant it. It was assumed that most people would see law in a positive light so that legal reform would enjoy popular support. Needless to say, none of these assumptions were correct in the 1960s, yet they still pervade policy circles at the turn of the century. Scholars should investigate how various social interests benefit from law and legal order, and how interests can be mobilized to build and embed the rule of law while ensuring that legal orders do not just favor the strong and the rich.

Second, scholars must ask to what extent can there be a true trans-national discourse on law and development. Is it possible to create useful and authentic knowledge about law and development that is based on theory and has relevance beyond a single country or even a single field of law in one country? One of the cardinal accusations levied at the old law and development movement was that it tried to impose an ethnocentric bias for Western law in the guise of academic knowledge. As we approach the task of refining the new law and development, we have to be careful to avoid that trap. It is tempting to see the legal institutions of our own society as a model for
emulation by developing nations, albeit with a lag to allow for evolution to do its work. This is even more alluring when to do so happens to foster our national interest in shaping foreign markets in ways that will be congenial to Western capital and our own national firms in particular. To avoid this fallacy, the new law and development should be tentative, situational, and dialogic. We should be careful not to project our own past on others and idealize our own society. We should seek to develop knowledge only in conjunction with those directly affected by our ‘science’ in a truly transnational environment.

Finally, the academy needs to address the normative vision that guides scholars and activists working on law and development. The law and development movement has multiple and potentially conflicting goals. On the one hand, the promotion of democracy and human rights through legal and judicial reform promises greater access to justice and a means of enforcing accountability and transparency. On the other hand, legal reform efforts aimed at creating a market-friendly environment attractive to foreign and domestic investors (such as the growing attention to alternative dispute resolution mechanisms and the funding of economic legislative drafting) can overshadow or crowd out the social and political dimensions of reform. Even more dangerous is the possibility that market-driven legal reform that benefits an economic elite minority may run counter to democracy-oriented reform goals that are geared towards a politically powerful but impoverished majority, with the resulting potential for ethnic tensions or conflict (Chua 1998). The academic community must always be sensitive to potential conflicts, and ensure that the enterprise promotes fairness as well as efficiency, and democracy as well as markets.

See also: Development and the State; Development, Economics of; Development: Social; Development: Social- anthropological Aspects; Human Rights, Anthropology of; Human Rights, History of; Human Rights in Intercultural Discourse: Cultural Concerns; Justice and Law; Law and Democracy

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Law and Economics

Under the economic approach to the analysis of law, two basic questions about legal rules are addressed: descriptive questions, concerning the effects of legal rules on behavior and outcomes; and evaluative questions, concerning the social desirability of the effects of legal rules. In answering these questions, the method employed is that used in economic analysis generally. Namely, individuals and firms are ordinarily presumed to be forward-looking and rational, and the framework of welfare economics is adopted to assess the social desirability of outcomes. The field of economic analysis of law may be traced significantly to Bentham (1789), but lay essentially dormant until the contributions of Coase (1960), Becker (1968), Calabresi (1970), and Posner (1972). The field is now rapidly growing, although it is far from mature (one indication being lack of empirical work). To illustrate the approach, this article first focuses on accident law, briefly considers other areas of law, and concludes with a section on basic foundations and criticisms of the economic approach.

1. Economic Analysis of Law Illustrated: Accident Law

By accident law is meant the law governing liability for accidents, that is, the rules determining when a party who causes an accident must pay for the harm done. Economic analysis of this branch of law centers