

## **Law and Development in the Twenty-first Century<sup>1</sup>**

**David M. Trubek**

*University of Wisconsin-Madison*

The idea that a nation's legal system affects its economic and social prospects can be traced back as far as the 18<sup>th</sup> century. And as early as the 19<sup>th</sup> century the discourse about law reform often took account of the economic impact of specific measures. But it was only in the 20<sup>th</sup> century that an effort was made to create an academic discipline to study the relationship between law and development and governments and international institutions concerned with development began to organize systematic legal reform projects.

### 1) Law and Development in the 20<sup>th</sup> Century

The 1960s marked the beginning of support for systematic reform efforts by international development agencies and the first effort to create an academic "field" for the study of law and development. The pace of support for systemic reform picked up in the 1980s and academic study increased. In the second half of the 20<sup>th</sup> century, we saw the emergence of several theories, each of which spawned reform efforts. Three major themes can be identified:

**Law can be an instrument to be used by developmental states to foster change:** The first law and development movement stressed the need for change in economic and social relations and expressed hope that new laws could induce such change. This body of thought drew on modernization theory and the view -- widely held by economists around mid-century -- that a strong state was needed to manage the economy and transform society. Law, in this view, could serve as a positive instrument of change, offering incentives for people and institutions that are "modern" and promote growth, and disincentives for those who resist change and cling to traditional values.

**Law may be a barrier to economic development:** From the beginning, even those who had a positive view of law understood that the wrong kind of legal rules and practices could reduce incentives for investment and increase the cost of innovation. Concern about the negative impact of law grew in importance towards the end of the century as development agencies lost faith in state intervention and began to put more stress on the role of markets and on the need for deregulation.

**Law should be a framework to facilitate private decision-making:** As development economics turned away from a belief in state-led initiatives, more and more emphasis was placed on the role of law as a framework within which private actors would make economic decisions. Scholars stressed that to function properly, markets require a

---

<sup>1</sup> Originally delivered at the Conference on Law and Development, Brasilia 2009

complex infrastructure of institutions and rules, including legal rules such as the law of contract and property. They also depend on the ability of legal professionals and judges to ensure that the laws are effective. Markets may also require regulations, like anti-trust and securities law.. Much of the interest in legal transplants and in judicial reform for development, which made up the bulk of international support for law reform in the late 20<sup>th</sup> century, was based on the importance of creating such a neutral framework.

The legacy of the 20<sup>th</sup> century is a complex one. First, the hoped-for academic field of law and development never materialized. Academic interest has increased and several disciplines besides law have taken up the topic, but nothing like a “field” exists. Second, the experience of reform was mixed as best: some projects failed and some transplanted laws did not “take”. Third, there are conflicts among the several ideas that dominated the period. There are tensions between the idea of the use of law by a strong developmental state on the one hand and a deregulatory push on the other; between law as an instrument to change behavior and law as a neutral framework; between deregulation and the need to create new institutions. All these issues continue to be debated in the academy and in practice and no consensus has emerged.

## 2) Law and Development Today

Thus, as we enter the 21<sup>st</sup> century, we are faced with unresolved issues and unfinished tasks. We have yet to reconcile tensions among the ideas of the 20<sup>th</sup> Century and create a systematic body of knowledge that can serve as a reliable guide to reform efforts. And we can begin to glimpse new ideas and new phenomena that need to be studied and absorbed. They include:

**Law should facilitate experimentation and innovation:** Twentieth Century law and development experts assumed that the path to development was known and the challenge was to create instruments and institutions that would help move nations down that path. For those who saw law as an instrument of state control, knowledge about the path forward would be provided by state planners and the law would implement the plan. Those who rejected planning thought that unrestricted markets would make the optimal economic choices so that right way to foster development was to create markets and let them alone. However, in the 21<sup>st</sup> century many are coming to believe that neither planners nor markets working alone can find the optimal path. Rather, strategies must evolve and investment choices must be made through public-private partnerships and processes of iterative experimentation. These processes require new forms of governance and law. In such an “experimentalist” developmental states, law can neither be a simple tool for direct state invention, nor merely a neutral framework for private decisions. Rather, the law should seek to establish partnerships between public and private sectors and institutionalize a process of mutual search for innovative solutions and optimal developmental paths.

**Law is increasingly affected by global forces:** Twenty-first century law and development must deal with the growing impact of global forces on the law. There are

three major forces at work. The first is the availability of global models such as the formulae for law and development promoted by the World Bank. Whether or not a country receives funding from the Bank, the models it promotes have an influence on national thinking. Second, national lawmakers must take account of the role law plays in determining national competitiveness. The more a country's development strategy depends on foreign investment, the more its laws will be subject to scrutiny by foreign investors who will compare the legal environment for development in various nations before deciding where to invest. Today, investors have many options and law becomes an important factor in the effort to attract capital. The third global force is the growth of transnational law. Increasingly, a nation's legal order is affected by norms originating outside of its borders. Whether they are norms of regional bodies like NAFTA or Mercosur or global institutions like the WTO, national legal orders are subject to constraints from other levels of governance.

**Law itself is part of development:** All the major ideas about law and development in the 20<sup>th</sup> century saw law as a *means* to some other goal, whether it is economic growth or social protection. But recently scholars have argued that the existence of "the Rule of Law" is a goal in itself, a necessary part of the process of empowerment and capability-enhancement that constitutes "development". This means that legal protection for constitutional values and human rights, including economic and social rights, must form part of the law and development agenda along with economic law and judicial reform.

**Law and development policy should be evidence-based:** We need to get beyond abstract debates and develop empirical evidence concerning what works and what doesn't work. There is very little empirical work of any kind on the role of law in developing countries yet the whole law and development enterprise requires such knowledge. Developing countries need to make a quantum leap in their capacity for socio-legal research. That will include developing tools to diagnose problems and measure the results of reforms. The creation of cross-country legal indicators by agencies like the World Bank is a reflection of the search for such tools. But this process is still in its infancy and there are questions about some of the indices being used and the policies derived from them. Indicators can be misleading if they rely only on the formal written law, not the law as it is actually applied, or are drawn from user surveys that are not truly representative. Moreover, even when the data reflected in the indicator is accurate, sometimes policy makers make questionable leaps from the data by proposing reforms that are either inappropriate or beyond the capacity of the government to carry out.

Because they recognize that law is an important resource for development, many countries are now encouraging systematic research on the role of law in development and are seeking to take into account the lessons of the 20<sup>th</sup> Century and the challenges of the 21<sup>st</sup>. Governments, academics, judges, and leaders of the bar in places like Brazil, China and India have taken up the challenge of building a body of knowledge about law and development appropriate for our times. New law schools, like those at FGV in Brazil and similar schools in China and India are developing research and training programs on law and development. Success in building more comprehensive knowledge and more robust

reform efforts will require close cooperation among governments, the private sector, international agencies, and universities in the North and South.

## **Selected References:**

Kevin Davis, "What can the rule of law variable tell us about the rule of law reform? .24 Michigan Journal of International Law 141-161 (2005).

Kevin Davis and MB Kruse, "Taking the Measure of Law: The Case of Doing Business Project." 32 Law & Social Inquiry 1095-1119 (2007)

Yves Dezalay and Bryant Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, (U.Michigan, 2002)

Kanishka Jayasuriya, ed, *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, (Routledge, 1999)

Erik G. Jensen & Thomas C. Heller, eds. *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, (Stanford 2003)

John K.M. Ohnesorge, "Developing Development Theory: Law and Development Orthodoxies and the Northesast Asian Experience", 28 University of Pennsylvania Journal of International Economic Law 219 (2007)

Amartya Sen, *Development as Freedom*, (Knopf 1999)

Gregory Shaffer , Michelle Ratton Sanchez and Barbara Rosenberg "The Trials of Winning at the WTO: What Lies Behind Brazil's Success" Cornell International Law Journal, Vol. 41, No. 2, 2008.

David M. Trubek "Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas," (co-author) Vol. 44, No. 2, Case Western Reserve Law Review 407-498 (1994)

David M. Trubek, "Law and Development" in N. J. Smelser and Paul B. Baltes (editors) 2001 International Encyclopedia of the Social & Behavioral Sciences. Pergamon, Oxford. p. 8443

David M. Trubek & Alvaro Santos, eds. *The New Law and Economic Development: A Critical Appraisal* (Cambridge, 2006)

David M. Trubek, "Developmental States and the Legal Order", University of Wisconsin Legal Studies Working Paper 2008 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1349163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163)

David M. Trubek, *O Novo Direito e Desenvolvimento: Presente, Passado e Futuro* (Saravia 2008)