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Law and Development 50 Years On

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Abstract

Law and development refers both to organized efforts to transform legal systems in developing countries to foster economic, political and social development and to the academic projects stimulated by these efforts. Begun in the mid-20th century, law and development's dominant ideas and projects have changed over time as theories of development and agency priorities have changed. Law and development efforts accelerated in the 1990s as international financial institutions began to emphasize the rule of law. As the 21st century dawned, ideas and projects of the 20th Century were assessed and critiqued and new themes have emerged.

Law and development refers to organized efforts to transform legal systems in developing countries to foster economic, political and social development. The term also refers to the academic projects associated with these efforts. Begun in the mid-20th century, law and development's dominant ideas and projects have changed over time as theories of development and development agency priorities have changed. Twice in the 20th century a consensus formed and guided practice. As the 21st century dawned, ideas and projects of the 20th Century were assessed and critiqued, new themes emerged, the field fragmented, and consensus disappeared.

In the 20th century, law and development focused on the use of domestic law as a tool to facilitate economic growth, and priority was given to law as an instrument to empower developmental states. Towards the end of the century, this approach gave way to a focus on law as the underpinning of markets and a restraint on the state. (Trubek & Santos, 2006)

In the 21st century, new ideas and forces are once again transforming the field. The increasing impact of global forces has drawn more attention to the role of global institutions and actors; new ideas about how development works have led to calls for more use of law as a framework for public-private coordination and experimentation; and interest in law as an element of development itself has led to stress on guarantees of basic rights. Finally, recognition that much 20th century law and development effort was based on weak or faulty knowledge both about the role of law and the possibilities for reform led to calls for more research and for an evidenced-based approach to planned change.

Law and Development in the 20th Century: Domestic law and economic growth

The idea that a nation's legal system affects its economic and social prospects can be traced back as far as the 18th century. In the 19th century, German sociologist Max Weber argued that European legal systems were an important factor in the development of capitalism. (Trubek, 1972) But it was only in the 20th century that governments and international institutions concerned with development began to organize systematic legal reform projects. The 1960s saw the start of support for legal reform efforts by international development agencies and the beginnings of academic study of law and development. By the late 1970s agency interest had waned and the academic enterprise stagnated. However, in the 1980s new ideas about law's role in development began to emerge. This spurred increasing interest by development agencies, the pace of support for systemic reform picked up, and academic study revived. (Davis & Trebilcock, 2008) International development agencies spent billions on legal reform and scholars in several disciplines began to study the role of law in development.

The second half of the 20th century saw the emergence of various theories and approaches. The focus was on domestic legal systems and the goal was increasing economic growth. 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. (Thomas, 2006) Law, in this view, could serve as a positive instrument of change. Law could increase state capacity. It could offer incentives for people and institutions that are "modern" and who would promote growth while creating disincentives for those who resist change and cling to traditional values. (Davis & Trebilcock, 2008) In what Trubek and Santos (2006) call the "first moment" of law and development, there was a consensus on the importance of the state and the need for modernization and this helped guide development policy which focused on the use of law to strengthen the state and transform society.

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. (Kennedy, 2006)

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. In the second "moment" of law and development, a consensus formed that priority should be placed on the role of law as the underpinning of markets and a means of restraining excessive state intervention. This new consensus guided reform efforts in the 1990s and beyond. Scholars stressed that to function properly, markets require a complex infrastructure of institutions and rules, including legal rules such as the law of contract and property. (North, 1991; Dam, 2006; Trebilcock & Daniels, 2008) They also recognized the importance of qualified legal professionals and judges in ensuring that the laws are effective. (Trebilcock & Daniels, 2008) Markets may also require regulations, like anti-trust and securities law. (Dam, 2006; Trebilcock & Daniels, 2008). 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 20th century, was based on the importance of creating such a "neutral" framework.

The mixed legacy of the 20th Century

The legacy of the 20th century is a complex one. First, the hoped-for academic field of law and development never materialized. In 1974, Trubek and Galanter (1974) criticized scholars' excessive closeness to development agencies and called for greater academic detachment. This article, intended by its authors to strengthen the field, ironically helped bring about its demise by questioning core assumptions and weakening the link between funding agencies and the academic world. For a decade or more scholarly work on law and development declined. But by the late 1980s academic interest increased and several other disciplines including economics took up the topic. However, nothing like a "field" took shape. While the number of studies and publications grew exponentially there still is no association that brings law and development scholars and practitioners together; no agreement on canonical texts; no publication that is widely read and commands broad respect. Brian Tamahana (2011) argues that such a field is neither possible nor desirable while others hope for greater coordination and integration of knowledge in the future.

Second, the experience of reform was mixed as best: some projects failed and some transplanted laws did not "take". Some decided the whole enterprise was fundamentally flawed and that organized efforts by external actors to promote legal reform were doomed to fail. They argued that it was impossible for external actors to understand how developing country legal systems work and/or craft workable reform strategies. (Tamahana, 2011). Others were more sanguine: they believed that law could matter and properly planned reforms could work. But they admitted that the empirical base for reform was too thin and called for more research to identify what works and what doesn't work. (Davis & Trebilcock, 2008)

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. (Kennedy, 2006) Law and development scholars had trouble incorporating the lessons of the East Asian miracle: while countries like Taiwan and Korea experienced rapid and inclusive growth, their legal systems did not confirm to the precepts of the law and development orthodoxy of the 1990s. (Ohnesorge, 2007; Jayasuriya, 1999) All these issues continue to be debated in the academy and in practice. (Davis & Trebilcock, 2008)

Law and Development in the 21st Century: Continuity and Change

Thus, as the 21st century dawned, Law and Development was faced with unresolved issues and unfinished tasks. Leading scholars looked for lessons to be derived from the expansion of reform efforts in the 1990s and early 2000s; tried to reconcile tensions

among the different ideas about law and about development in the 20th Century; started to deal with new trends and phenomena; and called for the creation of a systematic body of knowledge that could serve as a reliable guide to reform efforts. (Davis & Trebilcock, 2008; Trubek & Santos, 2006). Others suggested it would be best to give the whole thing up as a bad job. (Tamanaha, 2011) For those who felt that law could make a difference in development, and believed that externally supported reform might still be desireable, there was a lot of experience to digest as well as new ideas to incorporate and new challenges to face.

Evaluating the experience of the 20th Century

The dawn of the 21st Century saw an increase in scholarly attention to law and development. Between 2002 and 2011 at least seven important books on law and development in general along with numerous specialized studies were published in the United States alone. Some of the general studies looked at reform efforts (Jensen & Heller, 2003; Carothers, 2006) and underscored the limitations of knowledge about law and development and the obstacles to effective reform including the difficulties of transplanting legal institutions from one country to another. Others offered an overview of the legal reforms needed for capitalist growth and summarized the state of knowledge about specific areas of law and key legal institutions (Dam, 2006; Trebilcock & Daniels, 2008; Trebilcock & Prado, 2011) These studies looked at the role that could be played by reforms in private law, regulation, criminal justice, the role of the judiciary, legal education and the legal profession and summarized what was known about reforms that had been carried out in these areas. The literature included a critical strand: Dezalay and Garth (2002) placed law and development within the context of global forces and the hegemony of neo-liberal development economics while authors in the volume edited by Trubek and Santos (2006) outlined several critiques of mainstream law and development. They noted that the supposedly neutral framework of private law could favor certain groups over others and affect the distribution of income. They also contended that the reform effort of the 1990s had favored economic goals over social protection and inclusion.

New Ideas, New Forces, New Institutions

Much of the literature in the early 21st Century focused on the experiences of the prior decades, codifying what was known, pointing to gaps in knowledge, and critiquing assumptions behind theories and policies. But the new century also saw the emergence of new ideas in development economics, new forms of state activism, and new issues for the field of law and development. New approaches to development economics and the emergence of new kinds of developmental states required new ideas about the role of law. Trubek, Alviar, Coutinho and Santos (2013) produced a study of the revival of industrial policy and other new forms of state activism in Brazil and suggested that these new strategies called for yet another reassessment of law's role in development.
Global forces, including international economic law, began to play a greater role in the shaping of domestic legal systems. And there were calls to go beyond the instrumental

view of law as a tool for development and treat a functioning legal system with basic guarantees as an element of what should properly be called "development". Law and development scholars recognized the limits of their knowledge and called for more empirical research while the capacity for such work by scholars in the Global South began to expand.

Law should facilitate experimentation and innovation

By and large, 20th 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. (Trubek, 2013)

However, in the 21st 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 though public-private partnerships and processes of iterative experimentation. (Rodrik, 2004; Sabel, 2007; Sabel & Reddy, 2003; Houseman et al., 2007). These processes require new forms of governance and law. In such an "experimentalist" developmental state, law can neither be a simple tool for direct state invention, nor merely a neutral framework for private decisions. (Pires 2008) 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. (Trubek, Coutinho & Shapiro, 2012)

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. (Dezalay & Garth, 2002; Trubek et al., 1994) 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. (Davis, 2005; Davis & Kruse, 2007; Santos, 2009) 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. (Trachtman & Thomas, 2009; Shaffer et.al., 2008; Santos, 2012)

Law itself is part of development

All the major ideas about law and development in the 20th century saw law as a *means* to some other goal, whether 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". (Sen, 1999) 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. (Sen, 1999; Rittich, 2005)

Recognition of the need for evidence-based policies

As more evidence about the failures of 20th century reform efforts accumulates there are increasing calls to get beyond abstract debates and develop empirical evidence concerning what works and what doesn't work. (Carothers, 2006; Jensen & Heller, 2003; Davis & Trebilcock, 2008). 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. 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. (Davis, 2005; Davis & Kruse, 2007) 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. (Santos, 2009) 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.

Increasing Law and Development capacity in the Global South

Developing countries need to make a quantum leap in their capacity for socio-legal research. One of the most important developments in recent years is the growth of law and development capacity in the Global South. While scholars in developing countries have always been aware of the role law might play in development, their capacity to study and analyze these issues has been limited. Law and development calls for an interdisciplinary approach and demands empirical research. The legal academies in much of the Global South were ill-equipped for such work. They did little systematic research and what was done was largely doctrinal. Towards the end of the 20th Century this began to change: legal scholars in some countries acquired interdisciplinary knowledge and empirical skills; law schools supported research and teaching on development issues; and some funds for empirical research became available. Legal scholars from some developing countries began to exchange ideas and share experiences: for example, in 2010 scholars from Brazil, Russia, India and China met in São Paulo to discuss selected law and development topics. (Shapiro & Trubek, 2012) As capacity grows, and more

cooperation between developing country legal scholars occurs, "law and development" may be institutionalized in the Global South.

Conclusion: Fragmentation and an Uncertain Future

While reform continues and academic work on the role of law in development is expanding in the Global North and the Global South, there is no consensus on the nature of the challenges or the appropriate policies to follow. Twice in the history of law and development a dominant law and development paradigm emerged which served as a guide to policy makers. (Trubek & Santos, 2006) But today the "field" is fragmented in many different ways. While there is more academic work than ever, no approach is dominant and no policy consensus can be found. A review of the current debates suggests fragmentation along three axes. The first is the basic approach scholars take to the law and development project itself. The second is disciplinary with economists and lawyers often looking at similar issues but using different methods and reaching differing conclusions. The third is substantive: while work on law and development once brought together all relevant topic areas, today these issues are often taken up in separate academic silos with little communication among them.

Attitudes towards the project: Skeptics, Critics, and Optimists

In a masterful review of the recent academic literature, Kevin Davis and Michael Trebilcock (2008) divided the field into skeptics who have serious doubts about the project and optimists who recognize problems but remain hopeful about the enterprise. In fact, the field seems to be divided among *three* groups that take very different approaches to the whole idea of externally-supported legal reform as a tool for development. The first are the skeptics who either believe that law does not matter for development or, if it does, that external actors are incapable of understanding what is needed and will always get it wrong. (Tamahana, 2011) The second are the critics: they know that law matters. They think that external actors know what they are doing and the reforms they promote serve identifiable aims. The problem, say the critics, is not with the effectiveness of the norms but who loses and who benefits from them. For example, some see external reforms working, but in a way that may weaken social protections and benefit global capital. (Rittich, 2005) Finally, the optimists believe that law matters, that legal reforms can be crafted that will benefit all in developing societies, and that external agencies, properly guided by empirically-informed research, can make a difference. (Davis and Trebilcock, 2008)

Disciplinary divide

One of the most important changes in law and development in the 20th century was the discovery of the field by economists. The economics profession paid scant attention to law in the1960s and 1970s but starting in the 1980s development economists began to take law seriously. This led to a series of studies including several about the importance of law in the creation of financial markets. One series widely discussed were the studies

purporting to show that legal systems whose origins were in the common law were superior for financial development than those based on the civil law. (La Porta et al., 1998; 2008). Lawyers found these studies less than persuasive, pointing out numerous flaws in the reasoning employed and suggesting the need for alternative approaches. In a very influential article, legal scholar Katherina Pistor showed that some of the studies of law and financial development by economists employ simple models that rely on unwarranted assumptions about the optimal form of economic organization; fail to capture the complexity of real legal systems and the normative choices they encode; ; misunderstand the relationship between the history of a legal system and its ability to the incorporate specific rules; and rely on questionable assumptions about causal relations between law and economic outcomes. She questions the econometric methods employed in some of the law and financial development studies, preferring an approach partially inspired by comparative law and socio-legal studies to understand what really makes a difference in this field. (Pistor, 2008)

Topical fragmentation

A final source of fragmentation can best be described as topical. As interest in development grew, various legal disciplines began to explore the relevance of their topic for development broadly defined. Thus, we saw the growth of interest in trade and development, finance and development, human rights and development, women's rights and development, and so on. While these topical specializations enriched our knowledge of the prospects and pitfalls of law in development, they often became independent specializations in themselves thus contributing to further fragmentation of the field.

An uncertain future

Academic interest in law and development in the Global North has never been stronger and capacity in the Global South has grown. This promises to provide insights that will influence reform. Yet the proliferation of studies and the fragmentation of the field along multiple axes suggest that we may never see the emergence of another dominant paradigm like those "moments" that existed in the past.

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