

SYMPOSIUM: THE FUTURE OF LAW AND DEVELOPMENT, PART V

“BEIJING CONSENSUS” ANYONE?

*John Ohnesorge**

There are enough questions on the table to get us going, so I'll focus on responding to some of them. First, to an issue raised by Salil Mehra¹ and Tom Ginsburg,² I generally follow the approach taken by Trubek and Santos in *The New Law and Economic Development*.³ Their approach defines the field (“doctrine”) of Law and Development to encompass the activities of legal assistance providers,⁴ as well as the ideas about law, and about development economics, that animate their work. There are different strategies for studying the providers’ activities, and Terence Halliday and Bruce Carruthers’ research for their book, *Bankrupt*,⁵ provides an outstanding example of the detailed sociological work some Law and Development scholars undertake. But the academic enterprise doesn’t really seem separable from the activities of the providers. We could discuss the pros and cons of that dependence, but I do not think we can avoid it. The institutional players in the field rise and fall in importance over time, the ideologies concerning law and economics that animate their work change over time, the external environment affecting the institutions changes over time, and this complex, dynamic stew provides the academic core of Law and Development. The academic field is not merely the sum of the projects, as Tamana-ha appears set to argue, but is instead the study of those projects in their political, historical, and ideological contexts. The problem this background

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¹ Salil Mehra, *The Alchemy of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, 104 NW. U. L. REV. COLLOQUY 166, 166 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/37/LRColl2009n37SympLaw&DevPartI.pdf> (link).

² Tom Ginsburg, *The Future of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, *supra* note 1, at 164.

³ THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

⁴ Such providers would include national agencies such as USAID, international organizations such as the World Bank or the IMF, and nongovernmental organizations such as the Ford Foundation, the American Bar Association, or the private firms that carry out assistance projects on a contract basis.

⁵ TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* (2009).

poses for the scholar is that he or she must first figure out a level of engagement with the institutional players that will allow the scholar to understand what is actually going on inside them, and in their relations with national governments, while leaving the scholar free to provide serious academic analysis and critique. I sometimes joke that Law and Development is a field where those who know don't talk, and those who talk don't know, but it is actually a serious problem for a scholarly field.

A second response I have to Salil's post is that LLSV⁶ and the International Competition Network (ICN)⁷ provide two great examples of why claims about law and economic development put forth by academics or provider organizations ought to be evaluated in light of actual episodes of successful economic development. The episodes I have studied occurred, in large part, in Northeast Asia (Japan, South Korea, Taiwan, and now China) during the 1960s, 1970s, and into the 1980s. I think most observers would agree that corporate law during those episodes did not fare very well by LLSV criteria, and that competition law, likewise, did not exactly succeed in enforcing "competition cultures" in those economies.⁸ Both minority shareholder protections and competition law have become more important in Northeast Asia in recent years, but this is coming long after the periods of rapid economic growth have ended. Rather than searching in a more context-sensitive way for different tools that might work to invigorate a competition culture in different national settings, as Fox advocates, I think the Northeast Asian experience demands that we take the Law and Development inquiry back a level, to ask ourselves what exactly it is we think developing countries need from corporate or competition law. Doing this forces us to ask whether we are working on goals for them or for us. Are we interested in minority shareholder rights in South Korea because we actually believe, in the face of Korea's own experience, that minority shareholder rights are important in a developing economy, or are we just trying to make the world safe for our institutional investors, to help us diversify our portfolios? Of course, it is possible that what is good for us is also good for South Koreans, but we should not simply assume so. Northeast Asia's highly successful economic development has been accompanied by a series

⁶ See Mehra, *supra* note 1, at 166 n.4 (citing Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) (link); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (link); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 4714 (1999) (link)).

⁷ See D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 105–117 (2007).

⁸ Korea's development was spearheaded by the insider (family)-dominated *chaebol*, and government industrial policy carried out through the executive branch was much more important than competition law in shaping Korea's industrial structure. While Japan's major corporations generally lacked a single controlling shareholder, the legal rights of minority shareholders were also weakly enforced. Formal competition law in Japan was also much less important than industrial policy in determining the shape of industry.

of bruising battles with the United States and Europe over the way those countries implemented trade, investment, intellectual property, and competition policies, which ought to suggest that our prevailing Law and Development common sense may radically overstate the importance of these areas of law for developing countries.

Turning to Tom's second question, the fact that so few of us want to use history to examine critically our assumptions about law's relationship to economic development suggests that we have not learned enough about Law and Development since the advances made in the 1960s. Even today, many of us still seem, explicitly or implicitly, to believe in the inherent goodness of law and legal institutions, that law is a seamless web, so that economic reforms will necessarily spill over into political reforms, and that our societies have something called the Rule of Law that we could export to practically any society, given sufficient time and resources. Why do we believe these things? Perhaps a better question is whether it would be possible to engage in the work of Law and Development without believing in at least a weak version of these oft-criticized propositions.

As to the future, I think that just as the Asian financial crisis of the 1990s worked to delegitimize the idea of an Asian development model,⁹ the fact that blame for the global financial crisis is being pinned largely on the United States will encourage renewed interest in alternative styles of capitalism—and will make it harder to sell legal reform packages that are obviously derived from U.S. models. Whether this reaction will be a good thing overall will depend upon one's fundamental political values, because the oft-criticized political nature of Law and Development projects¹⁰ means that basic political values will also be implicated in any shift away from a liberal, market-oriented economic governance paradigm. "Beijing Consensus,"¹¹ anyone?

⁹ See Ajit Singh, "Asian Capitalism" and the Financial Crisis, in *GLOBAL INSTABILITY: THE POLITICAL ECONOMY OF WORLD ECONOMIC GOVERNANCE* 9 (Jonathan Michie & John Grieve Smith eds., 1999).

¹⁰ See, e.g., JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

¹¹ "Beijing Consensus" was coined to suggest that China today offers a coherent, positive model of development able to serve as an alternative to the "Washington Consensus." JOSHUA COOPER RAMO, *THE BEIJING CONSENSUS: NOTES ON THE NEW PHYSICS OF CHINESE POWER* 3–4 (2004), available at http://joshuaramo.com/_files/pdf/The-Beijing-Consensus.pdf (link).

DISPLACING “DEVELOPMENT”: THE NEW AGENDA FOR RULE OF LAW ASSISTANCE

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I find Brian Tamanaha’s differentiation of Law and Development and legal development¹² both helpful and persuasive. I wonder, however, whether we should rigorously rethink offering “Law and Development” as the defining name for an academic field. The problem of causality and direction in coupling “law” and “development” has been exhaustively debated, so we will leave that to one side. Let me give three suggestions why new dimensions of rule of law seem to map outside “Law and Development” and displace it as a meaningful field marker.¹³

The first cleavage between “law” and “development” is in the financial flows directed at the militarization of rule of law. Colonial powers and twentieth-century invaders frequently used the military to organize and deliver both military and civilian justice.¹⁴ The twenty-first-century version of this military “standing-up” of legal institutions can be seen in the police forces, prison systems, prosecution services, and courts in places such as Iraq, Afghanistan, Timor Leste, the Solomon Islands, and Somalia. More controversial is the way in which U.S. and allied Provisional Reconstruction Teams (PRTs) in Afghanistan and Iraq confer with local leaders and communities about justice issues or offer resources. On one view, these short-term military tasks are distinguishable from long-term “developmental” tasks such as clarifying property rights, regulating the finance system, or educating the next generation of legal professionals. On another view, however, they create confusion in conflict zones because they seem to duplicate activities that would usually be led by civilian development specialists, while not being coordinated with civilian-law reforms that proceed in parallel in urban centers.¹⁵ As the conflicts continue in Iraq, Afghanistan,

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¹² Brian Z. Tamanaha, *Distinguishing “Law and Development” from “Legal Development,”* in *Symposium: The Future of Law and Development, Part III*, 104 NW. U. L. REV. COLLOQUY 191, 191 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/39/LRColl2009n39SympLaw&DevPartIII.pdf> (link).

¹³ See Veronica L. Taylor, *Frequently Asked Questions about Rule of Law Assistance (And Why Better Answers Matter)*, 1 HAGUE J. ON RULE L. 46 (2009) (link).

¹⁴ See, e.g., John W. Dower, *A Warning from History: Don’t Expect Democracy in Iraq*, BOST. REV., Feb. 2003, at 6 (discussing the ways in which the legal reconstruction of Iraq by the United States and its allies differs from the post-WWII military-led legal reforms in Germany and Japan) (link).

¹⁵ We see the same blurring in post-humanitarian crisis legal reform as well. The reconstruction of Aceh is as much concerned with permanent pacification of a rebel province as it is with “development” in what was—and is likely to remain—the poorest part of Indonesia. See The World Bank, *Indonesia: Reconstruction Progress*, <http://go.worldbank.org/TE61DUE9G0> (last visited Jan. 9, 2010) (link).

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and Somalia, this short-run militarized rule-of-law programming looks more and more like a permanent rule-of-law modality.

Second, rule-of-law assistance continues apace for non-development reasons, reasons that are diplomatic, commercial, cultural, and military.¹⁶ The last decade of Asia-focused legal reform projects sponsored by the Japanese government, for example, included assisting Vietnam and Cambodia with Code-drafting and establishing Japanese law centers at universities in Vietnam, Cambodia, Uzbekistan, and Mongolia.¹⁷ Although these endeavors are worthwhile and also advance Japan's national profile in these regions, they are only related to "development" (however defined) in a fairly tenuous way.¹⁸

Third, rule-of-law assistance is now completely intertwined with the projection onto target countries of post-industrial regulatory techniques that are themselves a technocratic export. Those regulatory exports (for example, South Carolina's prison system to Afghanistan) frequently have little to do with the "development" of the target country and quite often take a domestic regulatory failure and spread it further. Because law and regulation are service sector exports within a global industry, however, I am less sanguine than Tamanaha about what would happen if the distorting effect of donor funding ceased tomorrow.¹⁹ Although the pace of implementation might be slow, I am not confident that locally responsive, indigenous legal development would simply rise up to fill the donor-driven rule-of-law vacuum.

If there is an upside to the globalization of rule-of-law assistance, it may be its visibility, and, thus, its vulnerability to critique. But increasingly, I think, any critique offered must be grounded in more than a demonstration of developmental failure because, whatever the rhetoric, the implementation design in so many cases of rule-of-law assistance clearly betrays a military, commercial, or diplomatic agenda that has little to do with "Law and Development."

¹⁶ CAROL LANCASTER, *FOREIGN AID: DIPLOMACY, DEVELOPMENT, DOMESTIC POLITICS* (2006) (offering a typology of foreign aid).

¹⁷ Veronica L. Taylor, *Rule of Law Assistance Discourse and Practice: Japanese Inflections, in LAW IN THE PURSUIT OF DEVELOPMENT: PRINCIPLES INTO PRACTICE?* (Amanda Perry Kessar ed., forthcoming 2010).

¹⁸ See Veronica L. Taylor, *New Markets, New Commodity: Japanese Legal Technical Assistance*, 23 WIS. INT'L L.J. 251 (2005).

¹⁹ See Tamanaha, *supra* note 12, at 191–93.