

SYMPOSIUM: THE FUTURE OF LAW AND DEVELOPMENT, PART I

THE FUTURE OF LAW AND DEVELOPMENT

*Tom Ginsburg**

Welcome to the Law and Development blog symposium! We are thrilled to have a fantastic array of participants lined up and trust that the discussion will be lively. In our call for participation, we asked people to reflect on the diverse conceptions of “law and development” and to take the opportunity to think about the directions the field is headed. I would like to begin by posing three questions for consideration, though I anticipate that we may end up heading in quite different directions as well.

First, as an initial question, is Law and Development really a field? In a recent paper, Brian Tamanaha argues that Law and Development is “a poorly constructed category that lacks internal coherence Law and development work is better seen, instead, as an agglomeration of projects perpetuated by motivated actors supported by funding.”¹ Much depends, of course, on what we mean by a field. As a field of applied activity, Law and Development seems to have a clear boundary involving reform projects related to legal institutions. As a scholarly field, however, it may be less clear. On the one hand, we have two nascent journals, the *Law and Development Review* and the *Hague Journal on the Rule of Law*, which is surely one sign of the institutionalization of a scholarly field. On the other hand, one might argue that there is sufficient lack of consensus on method and topic to deserve the title “field.” But if not a field, what is it?

Second, what, if anything, have we already learned about the topic? It is canonical in discussing Law and Development to hearken back to the first (or second, depending how you count) law and development movement of the 1960s and 1970s. It is also canonical to point out that we are now seeing activity on a much larger scale than ever before, with perhaps billions of dollars spent in aggregate on projects touching the area each year. Many articles in the field today essentially repeat Trubek and Galanter’s 1970s cri-

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¹ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development* 6 (St. John’s Univ. Legal Studies Research Paper Series, Paper No. 09-0172, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999 (link).

tique of the misconceptions of all this work.² But we surely have developed more sophisticated tools for understanding development outcomes since the 1960s, even if many of these tools (particularly cross-country measures of institutional quality) are highly contested. What do we know that we did not know ten years ago? What is the best Law and Development research? Perhaps one way of framing the latter question is to ask: if you had to suggest that someone outside Law and Development read only two or three recent articles, what would they be?

Third, where should our attention go in the future? Are some scholarly and practical approaches more or less promising? Some institutions more or less deserving of study and/or reform? Surely there are lively debates over what constitute best practices, the design of development assistance, how to measure the rule of law, and the very possibility of institutional change. The tent does not seem to be folding, notwithstanding many concerns about the relationship between legal reform and development outcomes.

I've asked more questions than can be answered. Let's see what our bloggers have to say.

² See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (describing conceptual and practical failures of the Law and Development movement).

THE ALCHEMY OF LAW AND DEVELOPMENT

Salil Mehra*

At the heart of Law and Development currently sits a dilemma stemming from the relationship between activity and study. Tom Ginsburg has kicked off this discussion with three questions that helpfully frame this problem.

To his three questions, I would add a fourth. Specifically, how does the relationship between Law and Development and the alphabet soup of rule-of-law promoting organizations (IMF, WTO, ICN, OECD, World Bank), to which Ginsburg and Brian Tamanaha³ point, provide benefits to Law and Development as an academic enterprise? That Law and Development is disproportionately a collection of sponsored projects—a critique that could be aimed to some degree at other fields also—should not prevent us from asking how Law and Development’s interaction with these international organizations imposes an externally driven logic.

The costs of this relationship, on the other hand, are well-known to the participants in this symposium. Of particular detriment is the tendency for Law and Development scholars to focus on issues that would make for replicable “tools” and “best practices” that could be readily transplanted. For example, the empirically driven attraction of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny (“LLSV”) to the IMF and World Bank,⁴ and the resulting focus of the field on their “law matters” thesis, suggests how Law and Development can be consumed by the search for a development Philosopher’s Stone that will lead to the completion of a new millennium Great Work.

We can observe another example of this tendency in competition law, particularly in the work of the International Competition Network (ICN), which focuses on competition advocacy.⁵ This group does a great job of gathering information about the differing abilities and approaches of national competition enforcement agencies in order to provide competition-based critiques of government policy and to enlist civil society in constructing a competition culture in their nations. But the ICN is, at times, inordinately

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³ See Tamanaha, *supra* note 1, at 2.

⁴ See, e.g., 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). All three pieces analyze the relationship between “legal families,” such as the English common law family and the French civil law family, and investment outcomes.

⁵ See Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 105–116 (2007).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

focused on building a toolkit of best practices—something that may not be appropriate when the contexts in which these agencies are embedded often differ substantially from one another. A really great hammer (though it might work, despite some damage) is not so great when faced with a screw. There is a real risk that the academic field of Law and Development can become similarly obsessed with what comparativists might call applied functionalism.

I think that there is a way forward for Law and Development that involves embracing and addressing differences rather than seeking a universal solvent. By taking this path, Law and Development's close link with its sponsors can prove to be a benefit. Recently, I had the fortune to hear Eleanor Fox speak. She discussed ways we might think about the differences in context and in endowments that different competition agencies find themselves with, and pointed out that it can be useful to simply understand and appreciate these differences in order to better manage conflicts with each other and with other institutions.⁶ In a similar vein, Lan Cao has written about the need for Law and Development to address embedded cultural practices and institutions, rather than taking them as a given, as tends to happen now.⁷ Together, Fox's and Cao's views provide a path whereby Law and Development, rather than focusing on universal tools that may be stymied by varying cultures and institutions, can try to build models and endorse practices that embrace these differences. These differences can then either be accounted for in the translation of "best practices" or be made themselves into objects of development reform. That is, at least, one vision for the future of Law and Development, though perhaps it is an ambitious one.

⁶ See ABA Section on Antitrust, Panel Discussion: The International Competition Network, Moving Forward with a New Chair and New Challenges (Jul. 1, 2009), available at <http://www.abanet.org/antitrust/at-bb/audio/09/AT90701.mp3> (link).

⁷ See Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357 (2007) (link).

THERE IS NO SINGLE FIELD OF LAW AND DEVELOPMENT

Katharina Pistor*

Let me begin—following Ohnesorge⁸ following Trubek and Santos⁹—with the notion that the concepts of “law and development” and “rule of law” are closely intermingled with the process of legal reform in developing countries and the role foreign advisers and multilateral institutions play in that undertaking. Describing the “field” in this fashion reveals that the glue that holds together a set of disparate activities by disparate actors (for under what other circumstances do we assume common ground between family and securities lawyers, or professors and world bankers?) is a shared belief in the virtue of law.

The beauty of the “law and development” ideal and the “rule of law” ideal is that hardly anybody can disagree with the goal of building a neutral and universally accessible institutional framework that is meant to benefit all people irrespective of race, gender, social status, or membership in a particular clan or group. This unity of purpose also means that academics and policy advisers across the political spectrum can join forces. When resources are constrained, we do not have to discuss whether political reforms should precede economic reforms, whether land reform supersedes investments in infrastructure, or whether educational or health reforms should take precedence over building stock markets or establishing antitrust agencies. Instead, we can all promote legal development reforms based on the assumption that building a sound legal system will ultimately further all of the above. Studies indicating a strong correlation between the “rule of law” and economic growth appear to buttress that assumption.¹⁰

Obviously, however, correlations do not prove causation. And it is disconcerting that we lack a sound theoretical basis for explaining why the correlation between legal development and economic growth holds across some countries, but breaks down in others. Nor do we have a good handle on why legal reforms frequently fail to deliver the expected results and, sometimes, correlate to events the opposite of those anticipated.¹¹ In short,

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⁸ John Ohnesorge, “Beijing Consensus” Anyone?, in *Symposium: The Future of Law and Development*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

⁹ THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

¹⁰ See, e.g., Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995); Daniel Kaufmann et al., *Governance Matters IV: Governance Indicators for 1996–2004* (World Bank Policy Research Working Paper No. 3630, 2005) (link).

¹¹ For a general critique of the lack of theory and empirics in the field of Law and Development, see Trubek & Galanter, *supra* note 2. On the failure of wholesale law reform projects to enhance the levels of rule of law in transplant countries, see Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

we continue to know very little about the political economy of legal reforms and their distributional effects. If we believe strongly enough that good law creates a win-win situation whereby today's losers will tomorrow happily join today's winners without dethroning them, we need not bother. But beliefs do not add up to an academic field—and for good reason.

Take, for example, the relation between the “rule of law” and the status of women in society. The status of women in society can serve as a heuristic device. Women represent the systematically disenfranchised: they can be found in all societies, and all societies tend to discriminate against women, or at least share a legacy of discriminating against them.¹² On their face, the ideals that underpin legal reform efforts¹³ suggest that women should benefit from the rule of law as an alternative to entrenched social norms. Yet closer inspection reveals that in most parts of the world there is at best a weak correlation between the status of women in society and the “rule of law,” notwithstanding comprehensive law reform efforts to advance their rights.¹⁴

But this example may not prove much. Indeed, one might argue that, with some patience, law will eventually benefit women in countries around the globe. However, unless we have a sound theory that suggests under what conditions women actually do gain from specific legal reforms and in what ways, this strategy condemns us to an “invisible hand”¹⁵ approach.

Just as advocates of free markets assume that market forces will ultimately achieve the most efficient outcome, so too advocates of rule of law reforms assume that they will ultimately serve the best outcome. Yet neither markets nor legal rules are ends in themselves—ultimately, both serve broader social goals. Only with a clearer understanding of what these ends ought to be can we begin to disentangle the relation between specific legal reform efforts and the social and economic indicators used to assess and measure the legal reform effort. And it is only with better goal identification that we can begin to appreciate alternatives to law that may achieve similar social and economic outcomes, the acknowledgement of which brings us squarely back to the Critical Legal Studies debates of the 1970s.

¹² According to the Gender Gap index, even a country like Sweden discriminates against women. See Katharina Pistor et al., *Social Norms, Rule of Law, and Gender Reality: An Essay on the Limits of the Dominant Rule of Law Paradigm*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW* 241–278 (James J. Heckmann et al. eds., 2009).

¹³ Most central is the ideal of “the rule of law.” For a critical review of this concept as a foundation for data collection efforts, see Melissa Thomas, *What Do the Worldwide Governance Indicators Measure?*, EUR. J. DEV. RES. (2009), <http://www.palgrave-journals.com/ejdr/journal/vaop/ncurrent/full/ejdr200932a.html> (link). Another crucial ideal is “freedom.” See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). However, Nussbaum makes the important point that a general reference to freedom is not enough. See Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECON.* 33, 35 (2003). Instead, Nussbaum advocates a list of substantive freedoms. *Id.* at 40–42.

¹⁴ Pistor, *supra* note 12, Fig. 11.3, at 251.

¹⁵ ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV–V* 32 (Penguin Books 1999) (1776).

Accordingly, perhaps it is time to concede that there is no single field of Law and Development. Instead, there are multiple disciplines that share a common interest in the comparative development of (legal) institutions in societies at different income levels.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

LAW & DEVELOPMENT NARROW AND LAW & DEVELOPMENT BROAD

*Anna Gelpern**

I confess an embarrassing aversion to existence debates, one likely born of slogging through too many first chapters of International Law textbooks (“Is It Law?”) and straining hard to care. If we argue long enough about whether Law and Development is a field, a subfield, a project, or a collection of projects, it will surely become field-ish enough soon enough. And Brian Tamanaha has done as much as anyone to shape the field, such as it might be, beginning with his marvelous early work on legal transplants in Micronesia.¹⁶ Thus I am all for marching forward on the assumption that there is or soon will be a field of Law and Development, and focusing on Tom’s second and third questions, which go to what we want this field to look like.

The day’s financial upheaval offers a fine opportunity to rethink what Law and Development should be. I suggest two options, Law and Development Narrow, and Law and Development Broad.

Law and Development Narrow would continue refining our knowledge of the relationship between law and economic growth in the applied Law and Economics vein (more context sensitivity, more/better empirical studies), and broadening our view of the law’s role in human development (better incorporating “the social”¹⁷). It would also press on with the sociology/ethnography/political economy of legal technical assistance, including institutional studies.

Law and Development Narrow has the virtue of definability, and the foundation of history, doctrine, and critique, from Trubek & Galanter¹⁸ to Trubek & Santos.¹⁹ But it can become self-limiting. At worst, it will be the study of legal technical assistance, the inoffensive ninth “deliverable” at every international summit, thrice outsourced to and by bilateral develop-

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¹⁶ See BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993).

¹⁷ See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 9, at 1, 7–8; Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 9, at 203, 203–252 (describing the recent move by international financial institutions to redefine development beyond economic growth, and considering the appropriate progressive response). For Duncan Kennedy, writing in the same volume, “The Social” defines the second wave of globalization in law and legal thought (1900–1968), which marked a “rethinking [of] law as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with greater perceived social interdependence at every level” Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 9, at 19, 22.

¹⁸ See Trubek & Galanter, *supra* note 2.

¹⁹ See THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 9.

ment agencies and multilateral development banks. Since we, law professors from the erstwhile center, ultimately get the consultancy, it might look important—but does anyone outsource the nukes, exchange rates, or structural adjustment? Even in the more “holistic” vision of Law and Development Narrow, we are the legal department to development economists (assume the most respectable, say Stiglitz and Sen²⁰), and marginal critics to Jim Wolfensohn’s Comprehensive Development Framework.²¹ Law and Development Narrow toils nobly in the institutional trenches, glad at the incremental improvement it might prod in the human condition—but can we reach farther, particularly as an (ahem) academic field?

Law and Development Broad is disturbingly amorphous. It takes from the Law and Development work done so far a rare and valuable perspective, a view of the relationship between law and economics from what was until recently the political and economic periphery. It takes the empiricism inherent in legal reform projects, the trove of qualitative and quantitative studies of legal transplants, the theories of legal pluralism, and the politics of post-colonial law reform. And, like Trubek & Santos, it takes the institutional studies, but it does not use a brand of existing development institutions to delimit the field.

Law and Development Broad is perfectly placed to respond to the latest cataclysm of financial integration, whose epicenter happens to be in New York and London, precisely because it saw it all before in Manila, Moscow, Lagos, and Buenos Aires. The past year has brought a slew of Egg-on-Our-Faces reports from the traditional providers of legal technical assistance, a parade of Regulators-in-Self-Estrangement confessionals.²² Turns out our own law and development were not all they could be. But

²⁰ Joseph Stiglitz and Amartya Sen are both Nobel Prize-winning development economists.

²¹ The Comprehensive Development Framework (CDF) was launched in 1998 by then-World Bank President James Wolfensohn and represented the latest move to expand the remit of development policy to incorporate the social, cultural, and political context of developing countries, and a broader range of stakeholders. See The World Bank, Comprehensive Development Framework, www.worldbank.org/cdf/ (last visited Oct. 2, 2009) (link). For background, see SEBASTIAN MALLABY, *THE WORLD’S BANKER: A STORY OF FAILED STATES, FINANCIAL CRISES, AND THE WEALTH AND POVERTY OF NATIONS* (2004).

²² See, e.g., THE GROUP OF THIRTY, *FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY* 13 (2009), <http://www.group30.org/pubs/reformreport.pdf> (link); FINANCIAL SERVICES AUTHORITY, *THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS* 11 (2009), http://www.fsa.gov.uk/pubs/other/turner_review.pdf (link); THE DE LAROSIERE GROUP, *THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU: REPORT 6* (2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf (link); UNCTAD SECRETARIAT TASK FORCE ON SYSTEMIC ISSUES AND ECONOMIC COOPERATION, *THE GLOBAL ECONOMIC CRISIS: SYSTEMIC FAILURES AND MULTILATERAL REMEDIES* 1 (2009), http://www.unctad.org/en/docs/gds20091_en.pdf (link); UNITED NATIONS, *REPORT OF THE COMMISSION OF EXPERTS OF THE PRESIDENT OF THE UNITED NATIONS GENERAL ASSEMBLY ON REFORMS OF THE INTERNATIONAL MONETARY AND FINANCIAL SYSTEM* 5 (2009), http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf (link). These are just a few examples of the many reports by ad-hoc and standing international bodies describing the causes and consequences, and recommending responses to, the global financial crisis of 2007–2009.

because financial integration is real, “our” law has an immediate and dramatic impact on “their” development, and, increasingly, vice versa.²³ This observation is not new, but feels much more obvious today than it did even a few years ago.²⁴ We cannot apologize and pack up; we need “them” to keep buying Treasury bills. The unequivocal directionality that defined Law and Development, which Brian highlights in his latest essay,²⁵ fits awkwardly with the ascendance of the G20, BRIC summitry, global imbalances, and, as John points out in his blog post, the could-be Beijing Consensus (will Beijing want a consensus in its name?).²⁶

Law and Development Broad, then, is in a privileged position relative to many more established fields to tell the complicated story of law and integration, law and interpenetration, law and plural, multilevel, relational governance. It knows of power, of institutions, and of practice far beyond funded law reform. It has been through public and private, and is not easily bewitched by either. It is intensely self-aware, but has moved past navel-contemplation. And it knows that bringing together law and human development, richly defined, demands untold amounts of humility, personal and intellectual commitment for the long haul. I could live with such a field—or call it what you will.

²³ This is, arguably, at least part of the story of the financial crises of 1982 and 1998.

²⁴ The moderately diverse G20 squeezing out the hopelessly Eurocentric G8 as the preeminent forum for global economic coordination is only the latest example of institutional shifts supporting this proposition. See, e.g., The Pittsburgh Summit, *Leaders' Statement* ¶ 19, at 3 (2009), <http://www.pittsburghsummit.gov/documents/organization/129853.pdf> (mentioning the inclusion of major emerging economies in the new Financial Stability Board) (link).

²⁵ Tamanaha, *supra* note 1, at 28–30. The standing critique of Law and Development, which his essay adopts, sees it as a vehicle for exporting a particular view of the law, its contents, and its relationship to economics, from the center to the periphery. *Id.* at 31–38.

²⁶ See Ohnesorge, *supra* note 8.