Articles

Law and Development Today: The New Developmentalism

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Abstract

The purpose of this essay is to consider the significance of *new developmentalism* for the field of law and development. New developmentalism refers to a theory and practice of development economics, which appears to have entered mainstream development thinking. Its core elements also seem to have been a factor in the dynamic economic growth that has occurred in a number of emerging economies. This trend is significant for the field of law and development because: (a) conventional economic development orthodoxies are seen to have shaped previous law and development movements; (b) these models and their corresponding law reform projects were arguably inadequately adapted to existing domestic circumstances; and (c) new developmentalism represents a departure from conventional development orthodoxies, as it necessitates both learning and adapting to local settings. Yet such a system also creates new challenges for law reformers and policymakers within the international development community (not to mention domestic reformers), and it remains unclear (if not doubtful) that new developmental states can be engineered by external actors and institutions.

A. Introduction

On March 27, 2009, U.S. President Obama announced a $1.5 billion aid package to support development in Afghanistan and Pakistan.[1] The following week, the G-20 agreed to make $850 billion available – through the International Monetary Fund (IMF) and various multilateral development banks – to support growth in emerging market and developing countries.[2] In addition, the recent budget proposed by the Obama administration envisions

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[1] White House, *What's New in the Strategy for Afghanistan and Pakistan* (2009), available at: http://www.whitehouse.gov/the_press_office/Whats-New-in-the-Strategy-for-Afghanistan-and-Pakistan, last accessed 14 September 2009.

[2] G-20, *Leaders Statement: The Global Plan for Recovery and Reform*, 5 (2009), available at: http://www.g20.org/Documents/final-communique.pdf, last accessed 14 September 2009.

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substantially increased funding for foreign assistance and for the United States Agency for International Development (USAID).[3] Each of these initiatives will undoubtedly allocate funds for policies and projects that fall within the sphere of "law and development." The term "law and development" broadly refers to the theory and practice of promoting economic and social progress through legal reform and institutional capacity building, and can therefore be viewed as the nexus of legal theory, economic development theory, and international development practice.[4] Since its emergence in the post-war era,[5] law and development theory and policy formulation has arguably been a function of prevalent economic development models and their conception of the proper relationship between market and state, which in turn has been reflected in international development practice. This is not to say that law and development theorists posit a one-way causal relationship between legal theory, economics, and the practice of development institutions; rather, the interaction between these spheres is seen to be fluid and dynamic.[6]

Given these connections, it should be recognized that contemporary law and development policies are being planned and implemented in a global economy in which both large countries such as Brazil, China, and India and smaller states as diverse as Botswana, Chile, Mauritius, Malaysia, and Vietnam have sustained high levels of economic growth by departing from standardized economic development models.[7] Instead, growth in countries such as these has largely correlated with what has been called "the new developmentalism."[8] This paradigm envisions development policy as:

> "a *process of discovery* in which the state seeks to empower the private sector and state and market function best when they are linked in

[3] Office of Management and Budget, *Budget of the United State Government, Fiscal Year 2010*, 88 (2009), available at: http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf, last accessed 14 September 2009.

[4] David Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law*, UNIV. OF WISCONSIN LEGAL STUDIES RESEARCH PAPER NO. 1075, 16 (2008), available at http://ssrn.com/abstract=1349163, last accessed 14 September 2009.

[5] See David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WISC. L. REV. 1062 (1974).

[6] David 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, 1, 4 (Trubek & Santos eds., 2006).

[7] Nancy Birdsall, Dani Rodrik, & Arvind Subramanian, *How to Help Poor Countries*, 84 FOREIGN AFFAIRS 136 (2005).

[8] This term may be attributable to Luiz Carlos Bresser-Pereira; see Luiz Carlos Bresser-Pereira, *The New Developmentalism and Conventional Orthodoxy*, 20 SÃO PAULO EM PERSPECTIVA (2006), available at: http://www.networkideas.org/featart/jul2006/Developmentalism_%20Orthodoxy.pdf, last accessed 14 September 2009.

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> collaborative structures that foster experimentation and revision" (emphasis in original).[9]

The growing importance of developing countries (such as those listed above) in the world economy, as well as the current global economic downturn, has been prompting regulators, academics and policymakers to revisit and reconsider the relationship between the market and the state vis-à-vis economic growth. Further, given the enormous sums of money that will continue to be transferred to the Global South in the name of development,[10] it is imperative that the means and ends of the contemporary law and development agenda be understood and critically evaluated. Given that new developmental thinking appears to have entered mainstream international development and economics literature,[11] this paper will consider the significance of new developmentalism in terms of the theory and practice of contemporary law and development.

Section B will provide a historical review to illustrate the consensus in contemporary law and development literature that previous phases of development-oriented law reform were shaped by dominant models of economic development and their respective views on achieving growth through either state or market command.[12] This review will also highlight the common weaknesses of previous law and development approaches, especially that of orthodox development theories that – arguably – had little regard for local conditions and settings.[13] In turn, this conclusion provides the basis for renewing law and development scholarship today, as new developmentalism envisions a more balanced and interactive

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[9] Trubek (note 4), 10. The theoretical development of the concept of a "process of discovery" may be attributed to Hayek. See, *e.g.*, F.A. Hayek, *Competition as a Discovery Procedure*, 5 THE QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS 9 [1968; transl. by Marcellus Snow] (2002).

[10] See, G-20 (note 2)

[11] See, *e.g.*, World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (2005), available at: http://www1.worldbank.org/prem/lessons1990s, last accessed 14 September 2009; Verena Fritz & Alina Rocha Menocal, *Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda*, 25 DEVELOPMENT POLICY REVIEW 531 (2007); Commission on Growth and Development, *The Growth Report: Strategies for Sustained Growth and Inclusive Development* (2008), available at: http://www.growthcommission.org/index.php?Itemid=169&id=96&option=com_content&task=view, last accessed 14 September 2009; Dani Rodrik, *The New Development Economics: We Shall Experiment, But How Shall We Learn?*, Revised Draft, 29 (2008), available at: http://ksghome.harvard.edu/~drodrik/the%20new%20development%20economics.pdf, last accessed 14 September 2009; Birdsall *et al* (note 7).

[12] See, generally, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos eds., 2006).

[13] David Trubek, *The Rule of Law in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, 74, (David Trubek & Alvaro Santos eds., 2006).

relationship between the market and state in promoting growth, as well as a more contextualized approach to formulating economic policy.

Section C will then introduce the idea of the *new developmental state*, as most prominently put forward by Wisconsin Law School Professor David Trubek, a long-time expert and one of the founders of the original Law & Development Research Agenda.[14] The new developmental state will be conceptualized as a departure from development orthodoxy given its inherent primacy of policy *learning* and *experimentation*. This section will also review some of the core legal issues of the new developmental state. In particular, new developmentalism requires a balancing of rules that allow for administrative flexibility, discretion, and engagement with the private sector – and that maintain predictability and prevent corruption. Our concluding remarks will stress that the extent to which new developmental legal regimes and institutions can be effected in the developing world by international agents remains inconclusive, yet maintain that the emergence of new developmentalism should be viewed as a positive progression within the field of development.

B. A Recent History of Law and Development

This section will highlight the evolution of law and development in the post-war period. The significance of this history for a contemporary understanding of law and development lies in the way that economic policies have shaped development thinking, and correspondingly shaped the place of law within development practice. This can be seen in the two dominant forms of development policy that have been implemented since the 1960s, which will be addressed in turn.

I. Law and the Classic Developmental State

Although the relationship between law and economic development has been studied by prominent scholars since (at least) the 19th century,[15] systematic efforts to reform legal institutions became part of international development practice only after World War II.[16]

The first wave of law and development has been referred to as "law and classic developmentalism."[17] While scholars refer to this period by different names, there is

[14] See only David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WISC. L. REV. 1062 (1974).

[15] See, *e.g.*, David Trubek, *Max Weber on Law and the Rise of Capitalism*, Wisc. L. Rev. 720 (1972); Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 Hastings L. J. 1031 (2004).

[16] Trubek & Santos (note 6), 1.

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consensus around its key characteristics.[18] It emerged in the 1960s, and was based on development economics theories that emphasized the role of the state as the driver of economic growth. Under this model, the state played an active role in the economy through planning and industrial policy, as well as state ownership of major industries and utilities. The state was placed at the centre of the economy because dominant thinking viewed the private sector as inadequate for promoting industrial growth. Import-substitution industrialization (ISI) policies were implemented in developing countries to de-link their economies from world markets in order to protect domestic industry from competition and build independent manufacturing capacity.[19]

The state-centric law and development movement of the 1960s-70s was rooted in modernization theory.[20] Modernization posited that underdevelopment was the product of local "traditional" cultures, societies, and institutions.[21] Viewing a kind of linear progression from tradition to modernity that was largely based on the experiences of the advanced countries in which the theory was born, modernization theorists such as Rostow believed that development would result if third world countries could replicate those experiences and traits of the developed world. As state-led industrialization had led to economic growth in advanced countries, ISI became the basic model for much of Latin America, Africa, and Asia.[22]

With its central role in the economy, the classic developmental state required laws and legal institutions that would allow it to direct and mould economic behavior. Legislation served as a tool for effecting national economic planning, and law more generally served to create the framework for bureaucratization and governance of state industry. Lawyers working in development agencies, universities, and other organizations in the United

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[17] Trubek (note 4), 3.

[18] "Classic developmentalism" is not the universally recognized term for state-led development. It is employed by David Trubek (note 4) to mark the distinction between this model and new developmentalism, and is used for the same purpose here.

[19] Trubek (note 13), 75.

[20] Important representatives include WALT ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960) THEODORE W. SCHULTZ, TRANSFORMING TRADITIONAL AGRICULTURE (1964) and Neil Smelser, *Towards a theory of modernization*, in ESSAYS IN SOCIOLOGICAL EXPLANATION (1968); for a recent overview of the state of debate, see WALTRAUD SCHELKLE *ET AL.*, PARADIGMS OF SOCIAL CHANGE: MODERNIZATION, DEVELOPMENT, TRANSFORMATION, EVOLUTION (2000); for early formulations, see of course the work by Condorcet, as well as EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY [1893; transl. by W.D. Halls] (1984), and MAX WEBER, THE PROTESTANT ETHICS AND THE SPIRIT OF CAPITALISM (1904/05, Talcott Parsons transl.) (1930).

[21] JOHN ISBISTER, PROMSISES NOT KEPT: POVERTY AND THE BETRAYAL OF THIRD WORLD DEVELOPMENT, SIXTH EDITION, 32-41 (2003).

[22] Kevin Davis & Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. OF COMP. L. 899 (2008).

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States and Europe took up the agenda of law reform in this context. Thus, they held a functionalist[23] conception of law as an instrument with which to facilitate state-led development.[24]

Law and development planners viewed legal formalism as the central impediment to a functionalist legal culture in the developing world (particularly in Latin America). The basic idea of legal formalism is that law contains an autonomous set of abstract principles, and an internal logic that can be deduced and applied. The key problem with this notion for legal reformers was that law was taught, written, applied, and practiced without regard to socio-economic context or policy objectives. Therefore, just as bureaucracies required modernization in order to run a state-centric economy, so too did the legal system.[25]

Law reformers in the 1960s sought to modernize legal culture in part through educational reform. Legal education was seen as the source of legal formalism, thus reforming law schools was the first step toward effecting a more functionalist legal culture. Law and development practitioners attempted to influence legal education by working with legal elites in the developing world. Not only would less formalist-oriented law schools produce more pragmatic lawyers, they would also form the base of critique against formalism through academic writing and think-tanks.[26] Most importantly, the reformers thought that change in the education system would organically effect changes in lawyering and adjudication. On the other hand, the focus on law schools may have been driven by the fact that early members of the law and development movement were European and American legal academics.[27]

This early law and development movement was also marked by the concept of *legal transplants*. As state-led development required modern laws and legal institutions, which the developing countries lacked according to practitioners and scholars, the modern legal institutions of the developed world were transplanted into third world countries. Legal transplants during this era were focused on economic laws. This was not because social and democratic legal institutions did not concern law and development at the time, but

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[23] The term "functionalism" is used here to describe law as a means to achieve a certain economic end. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), cited in Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008) [also available at: ssrn.com/abstract=1128144].

[24] Trubek (note 13).

[25] *Id*., 76.

[26] See, *e.g.*, David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1 (1972); Duncan Kennedy, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY. A POLEMIC AGAINST THE SYSTEM (2004).

[27] Trubek (note 13), 76-77.

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because economic growth was seen as a necessary condition for political change. In line with functionalist thinking, modern economic laws and their resulting development would have a spillover effect and create a liberal-democratic order.[28]

The spirit of the first wave of law and development practices appeared exhausted by the 1970s. While hampered by its internal weaknesses, its demise was chiefly the result of shifts in the global political economy which undermined its theoretical basis, namely the classic developmental doctrine of state-led growth. The developmental state was predominant in developed as well as underdeveloped countries, largely because of the Bretton Woods international economic regime that emerged after World War II. Stemming from Keynesian economics, this regime allowed for a substantial degree of protectionism and domestic regulation both to stimulate growth and protect domestic economies from global shocks. However, as the international economic system shifted away from the Keynesian state, the corresponding rationale for the initial law and development movement was critically weakened.[29]

II. Law and the Market

International development policies shifted from state-oriented to market-oriented economics in the early 1980s. The global shift (back) to free markets can be seen as the result of global integration through trade, the diffusion of transnational corporations, and the massive increase in private foreign investment, which occurred in the 1970s as a result of the dramatic rise in oil prices. The weakening and eventual collapse of the Soviet Union further legitimized the move to market-oriented policies.[30]

This shift to "neoliberalism" transformed economic ordering. It involved a set of development policy prescriptions - commonly known as the "Washington Consensus" - that emanated from the Washington-based international financial institutions (IFIs), namely the IMF and World Bank.[31] These prescriptions championed free markets through privatization, deregulation, and liberalization. The model was revolutionary in that it reversed the classic developmental prescription – public industry, state regulated markets, and protectionism – that had been so prevalent in the postwar era.[32]

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[28] *Id*., 77.

[29] *Id*., 80-82.

[30] *Id*., 82-83.

[31] See, *e.g.*, JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002), NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS (2006), JAN ART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION, 2nd ed. (2006), THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (Narcís Serra & Joseph Stiglitz, eds., 2008).

[32] Trubek (note 13), 84.

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Most importantly for the purposes of this paper, market-centric economics fundamentally altered the role of the state in promoting economic growth, and thereby triggered a new law and development orthodoxy centered on promoting a market-oriented rule of law.[33] Under this law and development doctrine, the primary function of law reform was to dismantle command or authoritarian institutions and protect private rights against state interference. David Kennedy goes so far as to argue that law rose to become *the* instrument of development policy under neoliberalism. Reversing the state structures supporting ISI required legislative and administrative devices. Entirely new legal frameworks were needed to allow the market to function freely, and especially to protect market participants. These included new regimes for finance and banking, corporate/commercial law, intellectual property, insurance, privatization, trade, and foreign investment, among others. With these new regimes, private law became the primary tool for limiting state interference in the market through property and contract rights, and consequently private law regimes came to order the economy rather than public law.[34]

Initially, these law reforms were institutionalized through large-scale transplants, also known as "shock therapy" or the "big bang" approach. Constructing a neoliberal rule of law was viewed by international development actors as an essential step toward creating the conditions for market-led growth because systems of state regulation and intervention were viewed as inefficient, stagnating, and corrupt. While law reform was never at the core of development efforts in the 1960s, rule of law reform was implemented across all aspects of legal systems in the 1980s and early 1990s. Rule of law assistance became a multi-billion dollar enterprise that involved massive overhauls of legal regimes all over the world. A central characteristic of this rule of law project was the idea that the formalization of Western-style laws in the developing world was sufficient for promoting economic development. The idea was that implementing the market-based legal framework – or getting the rules the right – would create the necessary conditions for growth. As this rules-based system would require effective enforcement, rule of law builders were also heavily focused on effective adjudication and judicial independence.[35]

The Washington Consensus was expanded to incorporate a wider range of development goals by the late 1990s. In particular, IFIs increasingly proclaimed an interest in equitable growth and human rights. This is referred to as "comprehensive development" by University of Toronto law professor Kerry Rittich. By incorporating these humanitarian and

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[33] John Ohnesorge, *Developing Development Theory: Law and Development Orthodoxy and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 247 (2007).

[34] David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, 95, (David Trubek & Alvaro Santos eds., 2006).

[35] See, generally, Trubek & Santos eds. (note 12).

social concerns, Rittich notes, law itself became both the means and ends of development. The role of legal reform as an instrument of economic development was broadened to reflect human rights as well. Further, while building a market-oriented rule of law remained central to law and development, the strict legal constraints imposed on the state in terms of its ability to regulate the market were also loosened.[36] For many, this was a significant change from the more rigid, dogmatic approach embodied by the neoliberalism of the 1980s and early 1990s. Indeed, an entire collection of leading law and development scholarship grew out of the idea that a "major shift"[37] in law and development was occurring along with development policy more generally.[38] However, in reality the shift seems to have been no more than a "chastened neoliberalism."[39] There were revisions and additions to the basic model, but, at least until recently, the legal and institutional architecture of development did not appear to have substantially changed.[40]

III. Different Approaches, Common Problem: Engineering Law Reform

The shift to comprehensive development was largely a result of the various shortcomings attributed to the method of implementing legal reforms under the market-centric paradigm – namely the legal transplant. As mentioned, legal regimes, institutions, and frameworks were transplanted *en masse* into developing countries despite the "complex and disappointing history of legal transplantation."[41] Yet as this quote highlights, the problem of legal transplants was not unique to the modern era; reform efforts attached to classic developmentalism also incorporated legal transplants, albeit on a much smaller scale.

The central challenge of legal transplantation and of law reform more generally lies in overcoming the difficulty of creating legal institutions that are able to achieve certain ends by mixing foreign laws with domestic social, political, economic, cultural, and legal circumstances. Pistor and Berkowitz offer four explanations for this. One, less economically developed countries may lack the expertise to make the foreign laws function, and thus

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[36] Rittich provides the leading analysis on the place of social concerns within the transition from "first generation" to "second generation" neoliberalism. See Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. (2004/2005) [a chapter by the same title is also included in Trubek & Santos eds. (note 12), 203].

[37] Trubek & Santos (note 6), 3.

[38] Trubek & Santos eds. (note 12).

[39] This term may be attributable to David Kennedy (note 34), 150.

[40] Michael Barr & Reuven S. Avi-Yonah, *Globalization, Law and Development: Introduction and Overview*, 26 MICH. J. INT'L L. 1, 5 (2004/2005).

[41] Trubek (note 13), 87.

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the laws may exist on paper but not in reality. Two, formalist laws that are intended to be applied without regard to policy or ideology may be rejected by domestic actors that perceive to be threatened by changes to the status quo. Three, transplants will have difficulty being effective in countries where social ordering is not achieved primarily through law. Four, while laws may not be rejected, they may be adjusted and altered from their originally intended form when they are placed in new contexts, and thus not function as they appear to in other settings. Pistor and Berkowitz go on to argue that contextual factors such as political conditions and pre-existing institutions are the chief determinants of the outcome of law reforms.[42]

These findings are in accordance with several other leading authors' positions on the subject.[43] The consensus is that "one size fits all" approaches to law and development have not produced their intended results. It seems clear that no universal system of law can be effectively imposed on a given country, let alone one that does not share the characteristics of a modernized or advanced capitalist state that would seem hospitable to such a system. In this light, the conclusion offered by Bridget Hauserman in an early review of Trubek's and Santos' volume for the German Law Journal seems instructive:

> "[T]here is no sure fire formula for development—the best that can be done is to proceed from a contextual and detailed analysis. Then, in a sea of 'contending ideas, contending interests, contested theories, and complex unknowables…we must decide… [and perhaps] even experiment."[44]

Though conclusions such as this have been well-documented and repeatedly demonstrated in academia and development institution reports, their utility is fairly questionable. As Thomas Carothers argues, this kind of "lesson learned" suffers from being too general and too obvious.[45] It will be important to take this into account as we move on to consider the potential evolution of contemporary law and development.

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[42] Katharina Pistor and Daniel Berkowitz, *Of Legal Transplants, Legal Irritants, and Economic Development*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY, 347-348 (B. Kogut and P. Cornelius, eds., 2003).

[43] For example: Davis & Trebilcock (note 22); David Kennedy, *Laws and Developments*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY (A. Perry-Kessaris and J. Hatchard, eds., 2003); Ohnesorge (note 30); Ronald Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. (2004/2005).

[44] Bridget Hauserman, *Exploring the New Frontiers of Law & Development. Reflections on Trubek/Santos eds., The New Law and Economic Development (2006)*, 8 GERMAN LAW JOURNAL 533, 547 (2007), available at: http://www.germanlawjournal.com/article.php?id=834, last accessed 14 September 2009.

[45] Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project, 11 (2003), available at: http://www.carnegieendowment.org/files/wp34.pdf, last accessed 14 September 2009.

C. New Developmentalism: The End of Orthodoxy?

In 2008, David Trubek summarized the state of law and development scholarship as follows:

> "The past looks like a battle field on which all sides lie defeated. We have lost faith in big ideas and universal solutions. Neither markets nor states seem like the panaceas they once were thought to be. We have confronted the complexity and embeddedness of legal systems, cultures and traditions and learned that one size does not fit all. We have seen that the developmental state can be a tyrant as well as an emancipator, the market a source of oppression as well as of energy and innovation, external assistance a tool of hegemony as well as a gesture of good will."[46]

Yet soon after, Trubek and others launched the "Law and the New Developmental State" research project.[47] It stemmed from the growing observation that states are re-assuming an active role in promoting economic growth - not by simply returning to the discredited ISI policies implemented in the 1960s and 1970s - but with more sophisticated methods of intervention and, thus, new laws and institutions.[48]

The rise of new developmentalism has prompted a rethinking of the role of state. While the market is still key to economic growth, it is now generally recognized that developing countries require the state to enable markets to grow. As in the classic developmental era, markets in the developing world are seen to lack the capacity to function efficiently and create incentives to make long-term investments in areas like innovation and skills-development. This is a significant shortcoming in a globally integrated economy driven largely by innovation. But rather than replace the market as the driver of industry and growth, the new developmental state seeks to *empower* the private sector through extensive collaboration and communication between public and private sectors in policy formulation, promotion of foreign direct investment towards growth sectors, and pushing firms and industries towards competitiveness rather than shielding them with protectionism. It organizes systems for public-private information sharing; searches for promising products and markets; initiates cooperative public-private efforts to construct competitive and efficient regulatory systems; makes investments in education, R&D, and

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[46] David Trubek, *The Owl and the Pussy-cat: Is there a future for "Law and Development"?*, 25 WISCONSIN INTERNATIONAL LAW JOURNAL 235 (2007), available at: http://www.law.wisc.edu/facstaff/trubek/WILJ_owl.doc, last accessed 14 September 2009.

[47] The LANDS website is available at: http://www.law.wisc.edu/gls/lands.html, last accessed 14 September 2009.

[48] Trubek (note 4), 5.

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technological innovation; uses tariffs, taxes and subsidies to create comparative advantage; creates public-private partnerships; and makes major investments in infrastructure to connect domestic markets to the global marketplace.[49]

An integrated, technologically sophisticated, and highly competitive global environment has shaped the core elements of the new developmental state. This helps explain the emphasis on innovation, integration, and creating competitive industries - yet ultimately relying on the market to promote growth. Thus, the main function of the new developmental state is to strategically assist the private sector to compete in a globally integrated economy. Furthermore, in contrast to previous development orthodoxies, new developmentalism does not involve a rigid "either/or" conception of state and market, but involves a substantial degree of collaboration and overlap, and places both public and private actors in new roles.

I. Two-Way Learning

It is worth repeating that this conception of development is defined as a "*process of discovery* in which the state seeks to empower the private sector and state and market function best when they are linked in collaborative structures that foster experimentation and revision."[50] 'Experimentation' in this context can refer to "a predisposition to find out what works through policy innovation."[51] New developmentalism places learning at the centre of economic growth in this way, thereby representing a sharp distinction from previous thinking. The classic developmental model assumed that the state independently possessed the capacity and expertise needed to stimulate growth through centralized planning, and similarly market economists posited that private actors possessed the knowledge to achieve the optimal conditions for growth on their own. New developmentalists take a kind of middle ground, but go beyond a mere compromise. They emphasize that the state can empower the market by providing inputs and information to private actors, which can otherwise form their own decisions and strategies. Developmental policy therefore involves a large degree of knowledge coordination between governments and market participants, as well as "search, experimentation, and tailoring of public action to specific needs and contexts."[52] In this way, it is argued that learning is the "central ingredient" to developmentalism.[53] While talk of ingredients may

[49] *Id*., 6-12

[50] *Id.*, 10; on this see also: Richard Nelson, *Economic Development From the Perspective of Evolutionary Economic Theory*, Working Papers in Technology Governance and Economic Dynamics no. 2 available at: http://hum.ttu.ee/wp/paper2.pdf (2006).

[51] Rodrik (note 11), 29.

[52] Trubek (note 4), 8.

[53] *Id*.

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remind one of the failed recipes of the past, a further explication of the new developmentalism indicates that the model may embody the very detailed and contextualized analysis called for by a number of critical law and development scholars today.

While *learning* is seen as the core tenet of the new developmentalism, it really does not offer any readymade solutions. Rather, the opposite is, and, in fact, must be true.[54] New developmentalism rejects one size fits all strategies; learning and experimentation are not directed at the entire economy but tailored to allow for a set of policies that vary across economic sectors and between geographic locations. Thus, new developmentalism takes into account disparities that exist within developing countries as well as between them.[55] In addition, the only commonality that exists across new developmental states is that bureaucracies should converse with the private sector in order to identify and take advantage of market opportunities, and correspondingly should have the flexibility to revise policies and take action when opportunities are identified.[56] This follows from a decidedly anti-orthodox assumption that it is impossible to know *ex ante* which development policies will be successful, and therefore we need to engage in experimentation and revision. In turn, this novel approach of learning, collaboration, and flexibility requires a new legal framework – a theoretical orientation which powerfully mirrors the assessments of domestic regulatory law over the last decades.[57]

II. Roles for Law in the New Developmental State

There is no single conception of the place of law within the new developmental state. This is largely because the common elements associated with new developmentalism have not crystallized into a complete model. Correspondingly, there is no overarching theory of law that can be put into practice in support of a developmental state, and indeed little data on

[54] On this see, *e.g.*, Peer Zumbansen, *Transitional Justice in a Transnational World: The Ambiguous Role of Law*, CLPE RESEARCH PAPER 40/2008, available at: http://ssrn.com/abstract=1313725, last accessed 14 September 2009, at 22; see also Zumbansen, *Comparative Law's Coming of Age? Twenty Years after 'Critical Comparisons'*, 6 GERMAN L.J. 1073 (2005), 1077-1084 (available at: http://www.germanlawjournal.com/article.php?id=614, last accessed 14 September 2009).

[55] Trubek (note 4), 9.

[56] Ricardo Hausmann, Dani Rodrik, & Charles F. Sabel, *Reconfiguring Industrial Policy: A Framework With an Application to South Africa*, CENTER FOR INTERNATIONAL DEVELOPMENT AT HARVARD UNIVERSITY, WORKING PAPER NO. 168, 5 (2008).

[57] Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-regulatory Law*, in: DILEMMAS OF LAW IN THE WELFARE STATE 299 (Teubner Ed. 1986); Zumbansen (note 23); Peer Zumbansen, *Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory*, 10 GERMAN LAW JOURNAL 417 (2009) [also available at: ssrn.com/abstract=1415565, last accessed 14 September 2009].

developmental legal processes is available. Yet these evolving ideas about development do point to new roles and challenges for law.[58]

In general, law may serve three purposes with respect to the developmental state. First, it may be employed to define the goals of the developmental state through regulations and legislation. This would involve clarifying the underlying norms, strategies, and policy objectives regarding the relationship between the state and the market. Second, law may identify the tools for achieving these goals, such as enforcement methods for inducing compliance. Third, law may establish the institutional framework with which to structure the developmental state as well as new relationships between public and private actors. Thus, a developmental legal regime would guide and direct public and private institutions in the implementation of development strategies.[59]

These roles present problems for lawmakers and reformers given the dual function that developmental law - as a hybrid of state-led economic law and neoliberal economic law - must carry out in the new developmental state. Under the former, of course, law was directed at increasing the power and flexibility of the state to carry out its policy objectives. And under the latter, laws were created to protect stable and predictable private rights such as property and contract in order to facilitate investment and prevent state interference. The new developmental state requires features from both regimes. In particular, the legal framework must afford the state a fair amount of flexibility if it is to experiment with various development paths and strategies. The rules must be fluid enough to allow the state to engage with the private sector in its various collaborative decisions and projects, but also maintain a level of stability and legal protection that is adequate for maintaining investor confidence. Moreover, developmental laws must grant the state discretion to pursue market "experiments" and invest in particular firms and industries, yet prevent actual or perceived corruption.[60]

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[58] Trubek (note 4), 17-18.

[59] Diogo Coutinho & Paulo Mattos, *LANDS – Law and the New Developmental State (Brazilian pilot project)*, 9 (2008), available at: http://www.law.wisc.edu/gls/documents/lands_brazilian_pilot_study_oct08.doc, last accessed 14 September 2009.

[60] Trubek (note 4), 19-20. On the importance of structuring public-private interactions in this context, see also Dani Rodrik, *Industrial Policy for the Twenty-First Century*, 3 (2004), available at: http://ksghome.harvard.edu/~drodrik/unidosep.pdf, last accessed 14 September 2009: "The right model for industrial [*i.e.* developmental] policy is not that of an autonomous government applying Pigovian taxes or subsidies, but of strategic collaboration between the private sector and the government with the aim of uncovering where the most significant obstacles to restructuring lie and what type of interventions are most likely to remove them. Correspondingly, the analysis of industrial policy needs to focus not on the policy outcomes—which are inherently unknowable ex ante—but on getting the policy process right. We need to worry about how we design a setting in which private and public actors come together to solve problems in the productive sphere, each side learning about the opportunities and constraints faced by the other, and not about whether the right tool for industrial policy is, say, directed credit or R&D subsidies or whether it is the steel industry that ought to be promoted or the software industry."

Trubek points to various legal ideas and mechanisms that have recently emerged in legal scholarship to offer solutions for dealing with the contrasting functions of the developmental state. One is a hybrid system that combines legally binding "hard" laws with more norms-based regulatory guidelines, referred to as "soft" laws. Another approach is to require broad participation – beyond the state and industrial actors – in collaborative decision-making, particularly where funds are being allocated to the private sector. Whether or not third party interests would actually be taken into account by way of broader participation, this method could bring a greater degree of transparency and legitimacy to the developmental regime.[61]

D. Conclusions

This paper has sought to consider the significance of new developmentalism in the context of law and development. Admittedly, it presents a somewhat cursory view of several related topics, each of which is deeper and more complex than could have been presented here. Despite this, our observation of the progression from state through market on towards a more market-empowering state has revealed that, above all, *context matters* when formulating laws, policies, and institutions that may facilitate economic development.

Reviewing the models that informed previous law and development movements reveals that law reform projects have reflected the dominant international development practice and economic theory of their given era. As a result they are seen to have maintained false assumptions about the universality of their respective ideas, *i.e.*, the notion that success in one country would be replicable across all developing countries, regardless of vastly different historical, political, legal, economic, social, and cultural contexts. This is particularly instructive given the apparent emergence and efficacy of new developmentalism, a way of conducting development policy which compels consideration of a given country's particular circumstances. Indeed, the possibility of a new moment in law and development taking hold seems to have been established by the burgeoning conventional wisdom that development policy must be attuned to particular conditions. Yet, while the orthodox law and development approaches of the past may have generally lost their credibility and place in today's world, and "the developmental state is back at the centre of the international policy debate,"[62] it remains unclear what exactly will take their place today.

Further research is needed to determine precisely what kinds of laws, policies, programs, and institutions are being implemented in new developmental states, if indeed a

[61] Trubek (note 4), 22-23.

[62] Fritz & Rocha Menocal (note 11), 531.

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recognizable pattern emerges at all. Scholars may also conduct case studies to find out how various economic, institutional and legal components can function effectively as a unit. While they should not attempt to formulate a universal model that can be implanted around the world, it may be useful to highlight success stories in order to form a better understanding of how new developmental learning and experimentation can be employed effectively. While experience demonstrates the difficulty of transplanting entire systems, perhaps discrete lessons and isolated policies will be adaptable. Moreover, simply identifying relevant legislative and policy issues may be a more useful approach than listing a set of required legal reforms.[63]

In addition, it remains unclear whether law and development practitioners will be able design laws that facilitate the creation and/or administration of a developmental state at all. How can outside reformers realistically bring about the level of bureaucratic expertise and resources needed to formulate and implement such knowledge-intensive policies, both where this capacity does not yet exist, and where existing actors and other factors pose as significant impediments to this kind of enhanced administrative authority? Given these challenges, and the historical record on law reform, perhaps the development community should relegate itself to a secondary role in reform projects, such as information gathering and sharing, thereby enabling but ultimately leaving it up to developing countries to decide how best to design their own developmental states.

Despite this uncertainty and inconclusiveness, we should remain decidedly optimistic about the prospects of new developmentalism. Its emergence represents a very positive progression in contemporary law and development thinking, *i.e.* the shift away from universal formulae and toward a more sophisticated and nuanced yet practical and results-oriented consideration of how of how to effect economic development. Thus, where there was orthodoxy, there is now heterodoxy. Where there was dichotomy, there is hybridity. Where there was instructing, there is learning. Where there were recipes, there is experimentation. Where there was rigidity, there is flexibility. This is a welcome sign of progress.[64]

Moreover, the conceptual framework of new developmentalism can and should be applied not only in the context of international development practice, and not just in the developing world, but also in developed countries as they attempt to recover from the recent global economic crisis. The United States, for one, has seen an enhanced state role in the economy with the new administration's proposed budget and policy reforms, in addition to its unprecedented stimulus package, intervention into U.S. financial markets,

[63] For example, this approach is followed in *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, BROOKINGS INSTITUTION—UNIVERSITY OF BERN: PROJECT ON INTERNAL DISPLACEMENT, 6 (2008). In the context of economic policy see Rodrik's "design principles for industrial policy" (note 60), 21-25.

[64] For a shared sense of this optimism, see Rodrik (note 11), 32.

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and reorganization of the automobile industry. As these policies reflect new developmental thinking,[65] the global recession may ultimately benefit the United States and the world if they are indicative of a broader acceptance and embrace of new ideas such as the new developmental state.

Above all, then, new developmentalism may be bringing us toward the creation of a legal and intellectual space in which law and policymakers can frame regulatory landscapes and make policy choices according to realistic conceptions of what works for their economies, and ultimately for people.

[65] Daniel Gross, *The Recession Is Over. Now what we need is a new kind of recovery*, NEWSWEEK (August 3, 2009), http://www.newsweek.com/id/208633: "The Obama administration's strategy rests on what some might call industrial policy or excessive government intervention—or even creeping socialism. I call it "the smart economy." It means eschewing the blunt economic instruments we've always used and focusing resources and rhetoric on strategic sectors: renewable energy/green technology, infrastructure, broadband, and health care. It means making investments to run vital systems more intelligently and efficiently, thus creating a new infrastructure on which the private sector can work its magic. This philosophy, legislated in the $787 billion American Recovery and Reinvestment Act, holds that a mixture of targeted investments, tax credits, subsidies, reforms, and direct purchases can preserve or create jobs in the short term, improve America's economic competitiveness in the long term, and catalyze private-sector investment."