

Law and Development Movement



In the 1960s, the U.S. Agency for International Development, the Ford Foundation, and other private American donors underwrote an ambitious effort to reform the judicial systems and substantive laws of countries in Asia, Africa, and Latin America. This "law and development" movement engaged professors from Harvard, Yale, Stanford, Wisconsin, and other leading American law schools and within a few years had generated hundreds of reports on the contribution of law reform to economic development. Yet after little more than a decade, both key academic participants (Trubek and Galanter 1974; Merryman 1977) and a former Ford Foundation official (Gardner 1980) declared the program a failure, and support quickly evaporated.

The guiding assumption of the law and development movement was that law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers. As Merryman (1977) notes, not everyone subscribed to this view. A few participants in the movement argued that only minor changes could be effected through legal reforms, and others contended that law reform should follow broader changes in society; that is, that the proper aim of reform was to adjust the legal system to social and economic changes that had already taken place. But the dominant view of law and development practitioners and theorists alike, although still unproven, was that law reform could lead social change, that law itself was an engine of change.

A second important belief was that educating the bench and bar in developing countries would advance reform efforts. The gap between the law on the books and the law in action in developing countries was widely appreciated, and one of the solutions advanced was professional education (Burg 1977). It was thought that if lawyers and judges were properly educated about law's role in development, they could be enlisted to close the gap. The idea was to turn members of both professions into legal activists through education. Yet as one sympathetic chronicler of the movement observed, this idea was supported by nothing more than "hopeful speculation" that education could overcome values instilled by family, class, religion, and other social forces (Lowenstein 1970).

Those participants in the movement who believe it failed identify several factors. They contend that the movement lacked any theory of the impact of law on development, and practitioners thus had no way to prioritize reforms or predict the effects of various measures. A second failing, they argue, was too little participation by the lawyers and others in the target country who would either have to carry out the reforms or who would be affected by them. Foreign legal consultants, through a combination of expertise and access to funding, were often able to dictate the content and pace of reform. A third problem was that the movement focused on the formal legal system to the exclusion of customary law and the other informal ways in which many in developing nations order their lives (Trubek and Galanter 1974).

Critics assert that the most significant reason for the failure of the law and development movement was the naive belief that the American legal system (and American legal culture generally), which Trubek and Galanter (1974) refer to as "liberal legalism," could be easily transplanted to developing countries. In the United States, judges play a significant role in policymaking, and as a result, lawyers are

often able to engineer significant changes in policy through litigation. This is not true in civil law systems or indeed even in the United Kingdom and other nations that share the same common law background as the United States. As Merryman (1977) put it, the law and development movement reflected the American "legal style," and this was a style that those in other cultures did not find particularly attractive.

On the other hand, not everyone agrees that the law and development movement was an unmitigated failure. In a recent retrospective, one scholar argues that these critics gave up on it far too quickly (Tamanaha 1995). Its critics decreed it a failure after little more than a decade, yet it takes years for legal reforms to bear fruit. Evidence suggesting that taking a longer time period produces a more positive view of the law and development movement comes from an examination of the law programs of the Ford Foundation, some of which date to the law and development era (McClymont and Golub 2000). This study reports that public interest law initiatives and other legal reform programs begun 25 and 30 years ago did ultimately have a positive effect on law and legal institutions.

Learning the Lessons

At a 1995 conference hosted by the British Council, participants debated whether the mistakes of the law and development movement are likely to be repeated as donor institutions now embark on legal technical assistance programs. Faundez (1997) argued that although the old programs and the World Bank's new initiatives appear to be quite similar on the surface, the context in which the Bank's current programs are being carried out is significantly different. Behind the law and development movement was the premise that the state "would initiate and promote the process of economic development." By contrast, today the Bank sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order. Because the state is no longer the protagonist of social change, as in the law and development model, there is less room for error.

Yet as his analysis proceeded, Faundez seemed to be less sure that the mistakes of the law and development movement would be avoided. He recognized that current development theories, inspired by the work of Douglas North and other neo-institutional economists, still contemplate a role for the state. It is, to be sure, a different one from the activist theory implicit in the law and development movement, and it is one that is informed by economic analysis. But Faundez doubted whether this shift in attention from legal institutions to economic analysis would thereby avoid the problems of the earlier attempts at reform. His concern is that all the unanswered questions that lurked behind the law and development movement—the role of law and the formal legal system in development, the relationship between law and politics, and the relationships among democracy, authoritarianism, and development—still remain.

If Faundez is ultimately uncertain whether the mistakes of the law and development movement will be repeated, both McAuslan (1997) and Thome (1997) have no doubts that they will. McAuslan advances a series of reasons why this is likely to happen. Like Faundez, McAuslan underlines the absence of any empirical data connecting reform with development and the consequent disagreement even among reformers over priorities and strategy. Thome goes a step further. He believes the problem is not so much a lack of empirical data as the failure to reflect the data that is available. He asserts that all law reform, and judicial reform in particular, rests on

three premises: first, that development requires a modern legal framework resembling that in the United States; second, that this model establishes clear and predictable rules; and third, that the model can be easily transferred. Yet, he says, empirical research has refuted all three assumptions.

McAuslan and Thome are not entirely negative. They do note that some recent projects reflect the lessons of the law and development movement. Recent World Bank initiatives have involved local lawyers from the beginning in studying the legal system and developing proposals for change, or have trained local lawyers in the skills necessary for market reform. But both critics assert that, even if some of the lessons of the old law and development programs have been learned, pressures to produce results quickly will work against the gradual and incremental approach to law reform warranted by our current state of knowledge about the relationship between law and development.

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