

BOOK REVIEW

Law and Economic Development: A New Beginning?

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I. INTRODUCTION

Law and development as an academic field of study in the United States began in the 1940s, thrived in the middle to late 1960s, and was declared dead by its proponents in the late 1970s.¹ The publication of *Law and Development*, an anthology of writings compiled by Professor Anthony Carty, signals a budding resurgence in this field, perhaps the result of the economic and political transformations that accompanied the demise of the Soviet Union and occasioned a somber assessment of centralized planning. As transitional economies in Eastern Europe, Africa, and Asia adopt measures to loosen the monolithic hold the state once exerted on the economy, in essence reversing decades of state domination, the relationship between law and economic development is becoming all the more urgent. Despite the unique historical legacies that inform the different mixes of choices and outcomes in each country, a common problem exists: how to restructure the economy to create economic growth without inflicting lawlessness or, conversely, how to institute a legal infrastructure that maximizes order and simultaneously promotes economic growth. This common problem has precipitated a reexamination of the relationship between law and development.

While the current preoccupation with the institutional arrangements of law and development is related to the contemporary wave of lawmaking sweeping Eastern Europe and the developing world, the connection, if any, between law and development has been examined before. As revealed in the wide selection of articles included in Professor Carty's anthology, wrestling with the law of emerging legal and economic orders predates the collapse of the Berlin Wall and, until recently, has been identified not with Eastern Europe but with the struggles of the developing world. For example, the first part of *Law and*

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1. For a discussion of the "crisis" in law and development, see, e.g., 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.

Development includes articles drawn from scholars who subscribe to either of the two dominant paradigms that have defined the field: modernization theory and dependency theory, both of which have pre-Berlin roots. The second part of Carty's work explores the continuing debates in the field about the existence of a "right" to development, and the third part examines the international law of development.

Like other books on law and development, Carty's anthology suffers from a truncated and ahistorical perspective that has plagued the field since its "founders" declared themselves estranged from their research and scholarship. Although most law and development inquiries, like Professor Carty's, start by examining the modernization theory of development that arose in the 1940s and culminated in the 1960s, the field in general and modernization theory in particular have their origins not in the American law and development movement of the 1960s, but in the writings of Marx, Engels, and Weber. The themes identified by those writers are especially relevant for contemporary scholars interested in the relationship between the development of law and the development of economics. In Part II of this review, I examine the historical foundations of law and development that predate both modernization and dependency theories. I also examine these two defining models of the law and development debate and analyze how they have been influenced by the theoretical underpinnings developed by Marx, Engels, and Weber concerning the rule of law and the idea of law as an autonomous versus an instrumental system of governance. In Part III, I examine the right to development and the international law of development, the two areas that form the bulk of Professor Carty's anthology. Part III situates these two phenomena against the background norms and aspirations of the dependency model. In Part IV, I briefly explore a subject not addressed by any contributor to the anthology—the emergence of a global economy—and I examine the possibilities it poses for development.

II. HISTORICAL ROOTS OF LAW AND DEVELOPMENT

A. *Max Weber and Modernization*

The law and development movement has often been considered a short-lived movement that suffered a premature death.² Presumably, law and development began in the late 1940s with the construction of a postwar order and the independence of former colonies—that is, if one views law and development as an American phenomenon. Indeed, the American law and development movement arose out of the Cold War objectives of the United States to "modernize" developing countries and bring them within the orbit of the West rather than the Soviet bloc.³

When used in the United States, the term "law and development" is associated with efforts by American governmental organizations such as the United States Agency for International Development (USAID) and the Peace Corps or foundations such as the Ford Foundation and the Rockefeller Foundation, to encourage and promote the adoption by developing countries of Western-friendly economic institutions and Western-oriented legal infrastructures. In the postwar years, American legal scholars began to research and write about legal institutions or the lack thereof in developing countries. Legal assistance by American lawyers became part of the U.S. government's foreign aid agenda. Supported by

2. See, e.g., David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1990). The author refers to the era during which law and development thinking predominated in the United States as the age of "Imperial Law."

3. See, e.g., JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 6, 38 (1980).

U.S. public and private development assistance funds, an estimated \$15 million in American legal assistance was spent in law and development efforts in Africa, while \$5 million was spent in both Asia and Latin America.⁴ Prescriptions for ailing economies were founded on the view that law could be used as a mechanism for change and that the existing legal processes of developing countries could be altered to promote economic development.⁵ Modernization theorists contended that "[i]n the law and development context, 'development' is a euphemism for progress, and the work of law and development is to lead the way to progress through law reform."⁶ The movement's prescriptions for progress were not limited to existing countries but encompassed newly formed independent countries. For example, René David, author of the Ethiopian Civil Code of 1966, noted:

Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself. The development and modernization of Ethiopia necessitate the adoption of a "ready made" system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal [sic] security in legal relations.⁷

The law and development movement, however, declared itself dead when it became apparent that efforts to impose the laws of modern countries on the developing world was "a flawed and rather inept attempt to offer American legal assistance and implicit American legal models . . . [which] were themselves flawed, vulnerable to executive ordering and authoritarian abuse."⁸ Self-assessments of the reasons for failure focused on the movement's ethnocentricity and its supposedly naïve assumptions that American institutions could be transposed onto developing countries in order to approximate American legal liberalism.

Ironically, even in self-criticism, the movement reveals the very limits it bemoans. First, it assumes that law and development began and ended with the beginning and end of the American experience of law and development. Second, though its scholars are fully aware of the origin of their field, they are strangely removed from it, and their scholarship makes no concerted effort to integrate current theories with the historical background provided by Marx, Engels, and Weber. Hence, the irony that a critique founded on U.S. myopia is itself historically myopic.

Law and Development thus begins with current models of development and includes not a single article by, for example, Max Weber himself. Yet Weber had fully explored the nexus between law and economic institutions, and indeed, modernization theory can be said to have its roots in Weber's thesis. Before modernization theorists made the claim that modern law (clearly articulated legal standards that provide a predictable framework for the

4. See *id.* at 8.

5. See, e.g., John H. Merryman, *Comparative and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 461-67 (1977) [hereinafter Merryman]; Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of 'Scholars in Self-Estrangement'*, 25 AM. J. COMP. L. 492, 498-511 (1977) [hereinafter Burg].

6. Merryman, *supra* note 5, at 463 (citations omitted). Merryman conceived of law and development as consisting of three types of law reform: "[t]inkering accepts the existing system, seeks to keep it operating, and makes occasional adjustments to improve efficiency 'Following' refers to the sort of law reform intended to adjust the legal system to social change—to the rise of a credit economy, for example. 'Leading' law reform . . . uses law to change society. Most people, when they think of law reform, refer to some mixture of all three kinds. This is true of some law and development thinking, but for most people the emphasis has been on *leading* law reform." *Id.* at 462 (citations omitted).

7. Burg, *supra* note 5, at 506 (quoting René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187, 188-89 (Remy F. Gross II trans., 1963)).

8. GARDNER, *supra* note 3, at 5-6.

resolution of disputes) is a necessary condition for the progression towards and development of a modern market, Weber had studied this very connection in *Economy and Society*.⁹ In fact, before modernization theorists propounded the theory that societies evolve in sequences towards progressively higher stages of development, culminating in Western-style industrial economies,¹⁰ Weber had arrived at essentially the same conclusion years before. According to Weber, before the development of modern law, members of various social, political, ethnic, or religious groups were subjected to a primitive, "special law" that was of "a strictly personal quality"¹¹ and that resulted in an overlapping and eventual collision of jurisdictions. The resolution: either the emergence, as in Rome, of a "us gentium," which coexists together with the 'ius civile' of each group,"¹² or the imposition, as in England, of a "hierocratic ruler [who] will, by virtue of his imperium, impose upon his courts an 'official law' which is to be the only binding one."¹³

With the increasing "bureaucratization of the activities of the organs of the consensual communities"¹⁴ and the development of a market economy, a third alternative developed in Europe, where there emerged a rational legal system founded on formal, universal rules which were uniformly applied and which transcended the particularistic bodies of law and provided the predictability needed to facilitate an exchange economy. The questions for Weber were twofold: why did a capitalist economy develop in Europe and what were the conditions that were conducive to its development? According to Weber, the answer lay in the role of law and the unique characteristics of Western law in particular. Weber saw a rational legal system as causally related to the development of a capitalist, industrial economy: European legal systems developed more rationally than the legal systems of other civilizations and preceded the Industrial Revolution in Europe.¹⁵ Therefore, the key to economic development for Weber lay in fostering the concomitant development of a modern, rational legal system composed of the three factors he considered normative evidence of legal rationality. First, a rational legal system should be autonomous from other social structures. Second, it should be composed of systematically observable norms and rules that are purposively constructed. Third, such norms and rules must be applied with principled consistency to produce a system of predictable, systematic, formal, and rational law autonomous from prevailing political or religious considerations.

Weber also extended his normative analysis of modern law into a prescriptive elaboration of the connection between predictable law and the capitalist market. Not only did modern law integrate disparate communities of private law into a unified system, it was

9. For an English translation of the entire three-volume text, see MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds. & Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1956).

10. See, e.g., W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* 4-16 (3d ed. 1990).

11. MAX WEBER ON LAW IN *ECONOMY AND SOCIETY* 142 (Max Rheinstein ed. & Max Rheinstein & Edward Shils trans., Harvard Univ. Press 1954) (1925). The portions of *Economy and Society* quoted herein are taken from the eighth chapter of Weber's work, entitled "Sociology of Law." The Rheinstein & Shils translation of this chapter is reproduced in WEBER, *supra* note 9, at 641.

12. MAX WEBER ON LAW IN *ECONOMY AND SOCIETY*, *supra* note 11, at 143.

13. *Id.*

14. *Id.* at 145 (citation omitted).

15. For a counterargument to Weber's assertion that the preconditions for capitalism existed only in Europe, see Maxime Rodinson, *Islam and Capitalism* (Brian Pearce trans., Allen Lane 1974), in *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* 70 (Yash Ghai et al. eds., 1987). Rodinson makes the point that Islamic countries, like European countries, possessed a rational ideology. *Id.* at 75-77. Why the commercial order which existed in Muslim countries did not develop into a capitalist sector akin to Europe's cannot be explained by Weber's claim, according to Rodinson, that "capitalism did not develop in the Islamic world because the ideology prevailing there was inimical to the rationalism needed for such a development." *Id.* at 76. The answer, Rodinson asserts, may never be known, because it is not possible to prove that Muslim societies would have engendered capitalism if they had not been colonized or that they were simply inherently incapable of such development. *Id.* at 78.

also the catalyst for and the cause of an economic system founded on principles of contractual freedom, private property, and competitive markets. Because a rational legal system produced consistency and predictability, and because capitalist arrangements required both the restraint of opportunistic behaviors and the promotion of calculable commercial risks, only a legal order with the elements identified by Weber and described above would be conducive to the development of capitalist exchanges.¹⁶

Although modernization theory has produced varying sub-theories, it is fair to say that it is Weberian in its essential assumptions. According to modernization theory, as epitomized by Rostow's classic treatise,¹⁷ development consists of five historically identifiable sequences: first, the traditional society, organized around agrarian subsistence modes of production; second, the preconditions for takeoff, triggered by encounters with external forces; third, the takeoff, marked by industrial development and increased economic growth; fourth, the drive towards maturity with a sustained level of economic productivity and greater linkages with the international economy; and finally, the age of high mass-consumption, where consumption needs replace basic subsistence needs.¹⁸

Underlying the ability of the economy to progress from one stage to the next is the ability of members of society to engage in capital accumulation and capital investment.¹⁹ One of the objectives of modernization theorists then is to institute the conditions necessary for the creation of surplus capital and the conversion of surplus capital into investment capital, that is, capital which is used for productive investment purposes. The class with the ability to "tempt capital into productive channels rather than into the building of monuments"²⁰ is the capitalist class (as opposed to the traditional classes of moneylenders, landlords or priests).

Modernization theory assumes that development will be equated with some variant of Western capitalism, with each stage more or less predetermined along sequences established by the West. Modern law promotes economic development because a regime of contract and other laws facilitates economic planning. It promotes political development because it restrains arbitrary state action and allows the state to derive legitimacy through rational rules and principles. Thus, the evolution towards progressively higher stages of economic development should result in the reproduction of political, social, and legal institutions akin to those that exist in the West, creating not just a free market economic system but also the foundations of liberal democracy.²¹

Here, Weber's thesis on modern law provides modernization theory with its formulations on law and development. As universal law replaces the laws of the village and the tribe, it must consist of rules that are purposefully enacted, rather than rules that, like their primitive counterparts, emerged with little conscious design. Hence, the idea of

16. A merchant who enters into a contract must know with reasonable certainty that her valid future expectations would be enforced by the state, based on the framework of substantive rules in which both parties operate, should the other party renege on the agreement. In other words, a modern legal system of autonomous rules, uniformly and consistently applied to yield a degree of predictability and legitimacy, promotes and furthers capitalist exchanges, and hence economic growth, because it allows economic players to base their decisionmaking on criteria of formal rationality.

17. See ROSTOW, *supra* note 10.

18. See *id.* at 4-16.

19. See W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, in PARADIGMS IN ECONOMIC DEVELOPMENT 59, 68-72 (Rajani Kanth ed., 1994).

20. *Id.* at 73.

21. See, e.g., DAVID E. APTER, *RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS* (1987); Samuel P. Huntington, *Political Development and Political Decay*, in *POLITICAL SYSTEM AND CHANGE* 95 (Ikuo Kabashima & Lynn T. White III eds., 1986). According to Huntington, there are at least four elements necessary to political development: rational, universal thought, as identified by Weber; "nation-building," or the replacement of the particularism of the village or tribe; democratization; and political participation. See *id.* at 96-97.

modern law as law that consists of rules "to achieve social purposes"²² and "to advance in a rational way toward some knowable goal."²³ The objective was to use law as an instrument to construct a society in which "the state exercises its control over the individual through law," "rules are consciously designed to achieve social purposes or effectuate basic social principles" and "enforced equally for all citizens, in a fashion that achieves the purposes for which they were consciously designed," and in which "the courts have the principal responsibility for defining the effect of legal rules."²⁴

History has shown that this prescription did not necessarily transform ailing economic and political institutions in developing countries into the mirror images of their Western counterparts. Indeed, an instrumentalist concept of law, transposed against a background of sharp social stratification and an authoritarian state, did not produce a replication of the Western experience in the developing world. Captured by the forces of authoritarianism, law did not act as a restraint but became a means by which the executive could further the seizure and centralization of power. In the absence of a pluralist tradition, law became less, not more, autonomous. The explanation for this failure lies in the fact that, where the government is viewed, as it is in many developing countries, as a monolithic entity rather than as one among many other competing entities in the political process, as in the United States,²⁵ the role of law is similarly viewed. Law is seen less as a set of institutional rules used to negotiate the varying conflicting interests in a pluralistic society and more as a mechanism for the entrenchment and legitimization of state power. Even more unfortunate, as the state increased its power and non-state, traditional structures such as the village or the tribe experienced concomitant erosions of power, legal instrumentalism produced the very antithesis of the result foreseen under the modernization theory of development: an increase in state dominance and a decrease in legal autonomy.

The modernization movement has been attacked from within and without for the reasons discussed above—ethnocentricism, myopia, and naïveté.²⁶

22. Trubek & Galanter, *supra* note 1, at 1071.

23. Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 30 (1969). In modern, dynamic systems, "[t]he role of organized society, of government and law, is to insure that change is channeled in the right direction. In the modern world, governments do more than maintain order; presumably, they also solve problems. . . . Law itself is not scared and timeless, but moves with the times. . . . It is plainly manipulated by living people and by organized groups to secure their rights and advance their interests. People believe that law has a purpose." *Id.*

24. Trubek & Galanter, *supra* note 1, at 1071-72. For a discussion of the seven commonly shared assumptions regarding the relationship between law and development, which the authors refer to as the "paradigm" of "liberal legalism" or "the original paradigm of law and development studies in the United States," see *id.* at 1070-72.

25. See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 249-57 (1968) (discussing the results of Professor Robert Dahl's study of the distribution of political power in the context of the city of New Haven. See ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961)). The study disproved the conclusions of theorists who would argue that communities are ruled by single elite classes, insofar as it found that "no single social or economic group either controlled the decisionmaking process or regularly benefited from the results reached. . . . [P]ower in New Haven is held by constantly shifting, issue-oriented coalitions." *Id.* at 250. In the United States, despite the fact that there may be an elite that benefits from a certain mobilization of resources, the existence of such a class is unlikely to result in any sort of dictatorship, primarily because the elite is simply part of a spectrum of political and economic actors and because "[t]he continuing operation of the system, the internal checks and balances . . . limit the changes that can be introduced by any given component part." *Id.* at 257.

26. Not all adherents of modernization believed that the U.S. legal model could be easily exported. See Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, in *LAW AND DEVELOPMENT* 3, 18-24 (Anthony Carty ed., 1992). Professor Franck notes that very few countries, even developed countries, rely on lawyers and legal institutions the way Americans do. See *id.* at 18. Moreover, given the fact that other priorities, such as poverty, prevail in developing countries, such countries "are hesitant to create the checks and balances by which lawyers and judges 'weigh in' against dynamic political action." *Id.*

B. *Marx, Engels, and Dependency Theory*

In assessing the failures of the modernization theory, proponents of this model have identified four factors that they consider most responsible for the model's demise: "empirical knowledge of the Third World," "loss of faith in liberal legalism as a picture of United States society," "doubts about the universality or desirability of the American experience," and "skepticism about policy motives [of governments]."²⁷ Other reasons cited include structural deficiencies innate to the developing world—for example, the absence of a rule-of-law tradition, the requirements of rapid nation-building and the resultant history of a strong executive, and an inclination towards the political rather than the judicial or legal process.

Such overall skepticism shares much in common with the skepticism that fueled the dependency model of development. Both the modernization and dependency theories view the exportation to developing countries of liberalism and the market as problematic, although dependency theorists believe that capitalism itself and the links imposed on the developing world by the international capitalist economy constitute the major cause of underdevelopment in the Third World. As modernization theory came under attack, dependency theory gained prominence in the mid-1970s. David Greenberg's article, *Law and Development in Light of Dependency Theory*, which Professor Carty has included in his anthology, provides an excellent articulation of the dependency model.

Historically, however, it was not the founders of the dependency model who first described underdevelopment as a process caused by the exploitation of the capitalist system. The fact that Professor Carty fails to include writings by Marx and Engels again reveals a certain ahistorical view—a view that continues to dominate the field of law and development. The charge that trade and conquest are linked in a manner detrimental to developing nations but beneficial to Europe²⁸ was first articulated by Karl Marx in the nineteenth century. According to Marx,

[t]he discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population, the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signalised the rosy dawn of the era of capitalist production. . . . The treasures captured outside Europe by undisguised looting, enslavement, and murder, floated back to the mother-country and were there turned into capital.²⁹

Unlike modernization theory, which views development as relatively apoliticized, dependency theory views development as intensely political and rife with power dynamics. Even with regard to the basic issue of capital accumulation, the two theories differ markedly in their assessments of the conditions necessary for the accumulation of capital. Modernization theory sees the creation of surplus capital as central to economic development and implicitly assumes that just as Europe was able to engage in capital accumulation, so too would developing countries, provided the right policies were adopted.

27. See Trubek & Galanter, *supra* note 1, at 1090-93.

28. For example, trading between Europe and non-Western civilizations (such as China, India, Indonesia) was difficult because Europe had little that was desirable to these countries. As Europe possessed greater military strength, plunder and conquest became the mechanism through which to enforce trade on unfavorable terms. See David F. Greenberg, *Law and Development in Light of Dependency Theory*, in *LAW AND ECONOMIC DEVELOPMENT*, *supra* note 26, at 89, 100.

29. 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 823-26 (Frederick Engels ed. & Samuel Moore & Edward Aveling trans., Modern Library 1936) (1883).

Marx and the Marxist-influenced dependency theory, on the other hand, view capital accumulation as a historically specific occurrence that is inextricably tied, in the case of Europe, with the plunder of developing countries' economies.

For dependency theorists, colonial laws are instrumental in institutionalizing not just the inequalities of "trade" but also the forcible and violent transformations of traditional societies. Just as Weber provided insights for modernization theorists, Marx provided dependency theorists with an analytical foundation: law as a reflection of the material forces of production.³⁰ Although Engels refined Marxist theory to take into account the fact that determinants other than economics influence the course of society,³¹ both Marx and Engels believed that law derives from, and is essentially secondary to, economics.

As noted by dependency theorists, colonial economies were inextricably linked with colonial laws. Through law, colonizing powers made massive confiscation of land legal.³² Native industries were prohibited in order to prevent competition with goods made by the colonizing countries. As these goods inundated native economies, they visited disastrous consequences upon local industries.³³ In sum, the connection between law and underdevelopment was one in which European "legal systems structured economic relations between colonizer and colonized to the advantage of the former and the detriment of the latter."³⁴

The law and development movement then has produced two very distinct theories, each with antithetical views about the causes of underdevelopment, the solutions for underdevelopment, and the role of law in furthering economic development. As to the last point, the debate concerns the distinction between autonomous and instrumental law. On the one hand, the dependency model assumes that law is not independent of the social, political, and religious spheres of society. On the other hand, modernization theory associates modern law with predictability, rationality, and purposiveness. It conceives of law as a body of legal rules shaped by rational and conscious design³⁵ and "valued for their instrumental utility in producing consciously chosen ends."³⁶ Western liberalism in fact holds that law is autonomous and impartial to the vicissitudes of the nonlaw spheres. Indeed, one of the objectives of law is to act as a restraint on the state; law cannot be subject to the control of the state if it is to perform this function and is to be seen as a legitimate source of autonomous authority. Modern law is to be both autonomous from social interests and instrumental for the purposes of establishing certain social interests—as long as it is not susceptible to capture by authoritarian interests.

Interestingly, the notion of law as instrument presented little discomfort for dependency theory. Inspired by Marxist theory, the dependency model maintains that the

30. See Karl Marx, *Preface to A Contribution to the Critique of Political Economy*, reprinted in KARL MARX & FREDERICK ENGELS, *SELECTED WORKS IN ONE VOLUME* 181 (International Publishers 1969).

31. See Letter from Frederick Engels to J. Bloch (Sept. 21-22, 1890), reprinted in *SELECTED WORKS IN ONE VOLUME*, *supra* note 30, at 692. Although Engels, in his study of ancient Athens, traced the origin of the state to the increased entrenchment of class differences and identified the state's interest with that of the ruling classes, he also acknowledged that the state is not monolithic, nor is it necessarily always an instrument for class domination. See generally FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (Alec West trans., International Publishers 1972) (1942). Contrast the analyses of Marx and Engels with that of Weber, who asserted that in the development of law, economic conditions are not per se decisive; rather, it is only the particular arrangement of capitalist enterprises which require predictable risk calculations that is decisive in the evolution towards modern, predictable law. See *supra* text accompanying notes 9-16.

32. For example, in Southern Rhodesia, Europeans, who made up 10% of the population, took 49 million acres of land and left approximately 28 million acres for native Africans. See Greenberg, *supra* note 28, at 102.

33. See *id.* at 103.

34. *Id.*

35. See Marc Galanter, *The Modernization of Law*, in *MODERNIZATION: THE DYNAMICS OF GROWTH* 153, 154-56 (Myron Weiner ed., 1966).

36. *Id.* at 155.

neutral front offered by liberal law in fact masks the intensely political power expressions that produce systemic inequalities. Indeed, the law enacted by socialist states makes no claims towards autonomy and purports merely to be a reflection of and an instrument for the construction of a socialist society. For example, even in the 1982 Constitution of the People's Republic of China, designed to highlight the importance of law, Article 5 states unequivocally that "[t]he state upholds the uniformity and dignity of the socialist legal system."³⁷

The debate over the autonomy of law is indeed a well-worn one. And yet, it is important to realize that, to the extent that law has been captured by authoritarian interests in certain developing countries, it would be difficult to assert that the institution of the rule of law was the proximate cause of the establishment of authoritarianism or even that authoritarianism would not have been established but for the introduction of the rule of law. Indeed, in all likelihood, authoritarianism would have been imposed whether or not legal rules had been introduced by the law and development movement. My point is that while history should give pause to anyone who might make the grand claim that the rule of law causes economic or political development, and while it is too simplistic to believe that the simple insertion of the rule of law into traditional societies will create the necessary elements of democratic and liberal institutions, one also cannot deny that the rule of law supports the construction of political democracy. Without addressing the more controversial complexities of whether the rule of law and liberal democracy are inconsistent with non-Western, traditional values, certainly one can make the following minimal claim without triggering accusations of cultural insensitivity: where legal rules are applied with principled consistency to both the state and its citizens, they generally restrain rather than expand the arbitrary exercise of state power.

Rather than wallowing in self-criticism, law and development scholars should work to institute a legal regime that promotes the principled application of law in the developing world. As an article by James Paul and Clarence Dias illustrates: "[d]ifferent kinds of law can be used to organize administration and direct it toward prescribed objects, to create different kinds of *institutions* and to allocate *powers* and roles to *actors* within them."³⁸ The article examines the establishment of a rural development program and shows that while "[l]aw is still used to monopolize state control over . . . resources and activities which make development possible for the rural poor,"³⁹ "law may be differently used in order to promote self-reliant participation and more equitable allocation of resources."⁴⁰

Law and development programs can be designed to achieve ends that take into consideration the particular conditions of the developing countries themselves. Bruce Zagaris' article on the various models of legal assistance and the U.S. transfer of legal education and legal institutions to the Caribbean provides an interesting analysis of both the intellectual origins of the field and the actual law reform projects that Congress has funded to "enable the rule of law to build a cornerstone of democracy and be a positive force for just economic and social development."⁴¹ These development programs support the formation of quality legal training, the recruitment of judges on a nonpartisan basis, the training of prosecutors and public defenders, the formation of professional associations

37. XIANFA (1982) [Constitution] art. 5 (People's Republic of China), *reprinted in* 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 1, 5 (Legislative Affairs Commission of the Standing Committee of the National People's Congress ed. & trans., 1987).

38. James C.N. Paul & Clarence J. Dias, *State-Managed Development: A Legal Critique*, in LAW AND DEVELOPMENT, *supra* note 26, at 279, 279.

39. Paul & Dias, *supra* note 38, at 280.

40. *Id.* at 279.

41. Bruce Zagaris, *Law and Development or Comparative Law and Social Change—The Application of Old Concepts in the Commonwealth Caribbean*, in LAW AND DEVELOPMENT, *supra* note 26, at 121, 135 (citation omitted).

such as bar groups, the use of public information campaigns to educate the public about the basic human rights, and the promotion of the concepts of equal protection and equal justice.⁴² While, as the article points out, a danger of being associated or identified with the foreign policy aims of the U.S. government may exist, there are also worthwhile objectives that can be furthered by these programs, which represent constructive, positive applications of law. Despite the self-doubts of the modernization theorists, a ten-year period during which law and development failed to transform authoritarian governments into democratic ones should not lead to the conclusion that law and development is essentially a doomed endeavor.

III. THE RIGHT TO DEVELOPMENT AND THE INTERNATIONAL LAW OF DEVELOPMENT

In the 1970s, a movement emerged to declare a "right" to development and create an international law of development. This movement is amply documented in Professor Carty's anthology. The international law of development deals with corrective measures designed to alter structural deficiencies considered damaging to the economic development of developing nations. The right to development movement is related to the international law of development in the sense that the former attempts to enshrine the latter's efforts in the formal language of rights. The newly claimed right to development is considered part of an array of rights that follows the establishment of the first generation of human rights (political and civil rights) and the second generation of human rights (social, economic, and cultural rights). As former colonies gained independence and became members of the United Nations (UN), they began to push, through the auspices of the UN General Assembly, for the declaration of new rights, such as the right to a new international economic order⁴³ or the right to development. Because developing countries constitute the majority in the General Assembly (which functions under a one-country, one-vote rule), a concerted effort was made to utilize the General Assembly as a forum for lawmaking. As Professor Philip Alston notes in his article defending the right to development: "in practice, a claim is an international human right if the United Nations General Assembly says it is."⁴⁴

The objective of this emerging movement is to link human rights with development and thus create a human right to development. As Professor Jack Donnelly, an opponent of the right to development, remarked in an article also included in *Law and Development*, in 1977 the UN Commission on Human Rights first put forth "[t]he international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs."⁴⁵ Since that time, the General Assembly has issued resolution upon resolution concerning a right to development, presumably in order to call upon developed nations to agree to some sort of

42. Zagaris, *supra* note 41, at 135-38.

43. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 6th Spec. Sess., Supp. No. 1 at 3, U.N. Doc. A/9959 (1974).

44. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, in LAW AND DEVELOPMENT, *supra* note 26, at 207, 207 (quoting Richard Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 173).

45. Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, in LAW AND DEVELOPMENT, *supra* note 26, at 169, 170-71 (quoting *Question of the Realization of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Relating to Human Rights in Developing Countries*, Hum. Rts. Comm. Res. 4, U.N. ESCOR, 33d Sess., Supp. No. 6, at 75, U.N. Doc. E/5927 (1978)).

redistribution of economic resources on a global scale.⁴⁶ As described by proponents of the right to development, such a right exists, but "as with all human rights the bases are not restricted to legal principles, but include broader moral and ethical concerns."⁴⁷ The right is thus founded on a mix of precepts, including, for example, moral duty, restitution for past colonial wrongs, notions of international cooperation, and a cause-and-effect argument that "underdevelopment is not just a matter of backwardness or retardation [but] [r]ather, it is the by-product of the development of Western countries."⁴⁸

For the most part, the right to development movement and the international law of development are linked to and inspired by the analysis of international economic relations offered by the dependency model of law and development. Both schools subscribe to some variant of the dependency model's structural view of the international economy. According to dependency theorists, because underdevelopment is caused by structural barriers that have survived colonization and continue to dominate the relationship between the developed and the developing worlds, the integration of developing nations into the global economy will only perpetuate dependency. Raoul Prebisch, one of the main proponents of the structuralist school of thought, argues that developing countries serve the needs of developed countries to the detriment of the former by exporting agricultural or primary commodities in exchange for manufactured goods from Europe. Because demand for agricultural commodities fluctuates in wild swings, developing countries dependent on export for their foreign exchange earnings will suffer economic fluctuations whenever agricultural commodity prices fluctuate in the international market.⁴⁹ As a result of Prebisch's analysis, developing countries, especially those in Latin America, began to pursue import substitution rather than export promotion. Instead of the production for export of goods that comport with their comparative advantages, import substitution meant looking inward, building local industries, and producing as substitutes for local consumption products that were formerly imported.

Import substitution necessarily entailed protectionist measures to insulate local industry and economic nationalism to control foreign investment,⁵⁰ as well as heavy state involvement in the economy and state mobilization of capital resources (primarily in the form of debt) to finance a new economic infrastructure. *Law and Development* includes an excellent analysis of how developing countries that chose the dependency-inspired import substitution model engaged in a process aptly termed "[r]enegotiating the [b]argain."⁵¹ Part of this process involves the establishment of a right to a restructured international economy on historically different terms. As discussed in Professor Kofele-Kale's article, in

46. See Donnelly, *supra* note 45, at 199-200 ("one standard interpretation presents the right to development as primarily or exclusively an economic right, a right `parallel, on the economic level, to self-determination on the political plane.' It is regularly referred to as `the right to economic and social development;' . . . `the right to an adequate standard of living;' or simply `economic and social rights, or the right to development.'") (citations omitted).

47. Roland Y. Rich, *The Right to Development as an Emerging Human Right*, in LAW AND DEVELOPMENT, *supra* note 26, at 223, 225.

48. Rich, *supra* note 47, at 228 (citation omitted).

49. Prebisch published this and other arguments in a 1949 study entitled "The Economic Development of Latin America and Its Principal Problems," which he prepared for the Economic Commission for Latin America. See DIANA HUNT, *ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS* 130 (1989). For a critique of Prebisch's theory, see David Osterfeld, *The Liberating Potential of Multinational Corporations*, in PERPETUATING POVERTY: THE WORLD BANK, THE IMF, AND THE DEVELOPING WORLD 271, 284-92 (Doug Bandow & Ian Vásquez eds., 1994).

50. Control of foreign investment included imposing mandatory joint ventures on foreign investment rather than allowing wholly-owned, foreign-invested enterprises; favoring local capital and local investors over foreign capital and foreign investors; excluding foreign investment from certain sectors of the economy; and restricting the repatriation of profits by foreign investors.

51. See Joseph J. Jova et al., *Private Investment in Latin America: Renegotiating the Bargain*, in LAW AND DEVELOPMENT, *supra* note 26, at 333.

accordance with the aims of proponents of the international law of development, developing countries began to push for structural accommodations for certain developing-country preferences within the General Agreement on Tariffs and Trade (GATT).⁵² A new Part IV, entitled "Trade and Development," was added to the GATT in 1965 to address the development needs of developing nations. The GATT also adopted a Generalized System of Preferences (GSP) to give developed countries discretionary authority to grant duty-free or preferential treatment to products from developing countries without demanding reciprocity of those developing countries.

Ironically, even though dependency theorists like Marx and Engels downplayed the importance of law, the dependency model has succeeded in spawning an international law of development, which includes a range of issues represented in the collection of articles included in Parts II and III of Professor Carty's anthology. Besides preferential treatment or GSP concessions granted within the framework of the GATT, the international law of development also includes issues such as debt forgiveness or debt relief, below-market rates for new loans, preferential terms in the transfer of technology, and commodity agreements for the establishment of a common fund covering certain primary commodity exports to minimize commodity price fluctuations that could decimate export earnings.⁵³

The proliferation of General Assembly resolutions purporting to declare the rights of developing nations and the correlative duties of developed nations is remarkable because it has successfully created a new area of international law spearheaded by the very model of development that deems law to be a mere reflection of economics. As a result, while scholars engaged in the international law of development work to alter GATT rules, for example, the legal framework is considered merely an instrument for the correction of structural inequities. Thus it is no surprise that Professor Kofele-Kale, a proponent of a new legal trading regime, states that "[t]hese policies reject the orthodox GATT view of international trade as an end in itself rather than as an *instrument* of economic and social development."⁵⁴

The international law of development has been successful in bringing to the forefront the persistent economic problems faced by developing nations. However, its counterpart, the movement to declare a right to development, will not be recognized any time soon. Professor Donnelly's article delineating all the conceptual and practical reasons for this provides a good starting point for anyone interested in the debate. On practical grounds alone, there is simply no consensus among states that such a right exists. International law is in part still based on the notion of state consent. Although international human rights is indeed founded on a post-Nuremberg scheme that calls into question the notions of state sovereignty and state consent, the rights that are generally acknowledged to be sufficiently "universal" to reverse the usual deference paid to state sovereignty are those solidly within the parameters of the first generation of human rights, not those from the second, third, or fourth generations.

There are legitimate criticisms of the bifurcation of rights into first and second generations, and indeed, of the characterization of political and civil rights as "negative" rights and of economic, social, and cultural rights as "positive" rights.⁵⁵ Nonetheless, despite considerable efforts, economic rights have not been accepted as human rights by the

52. See Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, in LAW AND DEVELOPMENT, *supra* note 26, at 363.

53. For a discussion of the Integrated Program for Commodities (IPC), see ROBERT S. WALTERS & DAVID H. BLAKE, *THE POLITICS OF GLOBAL ECONOMIC RELATIONS* 49-52 (4th ed. 1992).

54. Kofele-Kale, *supra* note 52, at 405.

55. See generally G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in *THE RIGHT TO FOOD* 97 (Philip Alston & Katarina Tomaševski eds., 1994).

rich, capital-exporting states—the very actors whose cooperation constitutes a prerequisite for any interstate transfer of economic benefits.⁵⁶ The so-called third generation right to development had likewise met with rejection. The right to development has generally been characterized as a collective right, that is, a right "emphasizing the struggles of peoples, nations, and States for the elimination of obstacles which impede development" or "a collective right of sovereign States or of peoples fighting for their independence."⁵⁷ As such, it may be even more difficult to persuade states to accept this right. It not only embodies all the conceptual difficulties characteristic of economic rights (because it embodies at least the economic development objectives laid out in the New International Economic Order), but also presents an additional conceptual hurdle because of its collective rather than individual base. Its collective quality goes against the origin and grain of Western concepts of human rights as rights from and against the state. While it may even be said that human rights can be expanded beyond "rights from" to include "rights to" (that is, rights to food or shelter, which the state has an obligation to provide), it is another thing to say that the state itself possesses the right to development. If this were the case, an authoritarian state such as China or Myanmar would qualify as a rights holder and could proclaim rights for itself and assert that capital-exporting states have an affirmative and correlative obligation to redistribute economic benefits that may or may not reach their citizenries.

To the extent that the right to development has influenced the international law of development and brought to the forefront the historical and structural impediments to economic development, it has had a positive effect. As discussed above, issues such as debt relief, the volatility of primary commodities, technology transfers, nonreciprocal tariff preferences, and codes of conduct for transnational corporations have become routine legal matters within the field, thanks largely to the efforts of the international law of development and the right to development movement.

IV. REASSESSMENT: GLOBALIZATION AND ECONOMIC DEVELOPMENT

Both modernization and dependency theorists have been proven incorrect in their analyses of the causes of and solutions to underdevelopment. The modernization model oversimplifies the process of development by viewing it as a series of progressions culminating in an essentially Western-style economy with a Western-style liberal democracy. Modern law consisting of universally applicable rules is supposed to allow law to be both autonomous from the social and the political and at the same time instrumental and purposive, that is, enacted with a purpose in mind, rather than arising unconsciously through the mere force of tradition. Experience has shown that a legal system of predictable rules and regulations, interpreted with reasoned elaboration by neutral arbiters not susceptible to the whims of extralegal forces, does in fact promote the stable environment needed for long-term investment.⁵⁸ At the same time, however, experience

56. Other reasons exist for why economic rights present conceptual difficulties. The term "human rights" as used in the United Nations Charter emerged from the post-World War II context and referred to rights that had been abused by the state. These rights have been "identified with the liberal state, the freedoms and immunities now known as 'civil and political rights.'" LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 190 (1995). Economic rights have also been problematic for the developed world in particular, which feared not just redistribution of wealth within a state itself but also redistribution from rich to poor states. *See id.* at 190-92.

57. Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, in *LAW AND DEVELOPMENT*, *supra* note 26, at 169, 191.

58. In order to transform the economy into what is called a "'socialist' market" economy, China engaged in a frenzy of lawmaking to establish a predictable framework satisfactory to market actors. Under the 1989 Five Year Plan, the government proposed to draft 22 priority laws, including, for example, a Banking Law, a Domestic Investment Law, a Securities Law, a Fair Competition Law, a Foreign Trade Law, International

has also shown that the rule of law, though necessary for promoting economic development, does not necessarily cause political liberalization. By the same token, neither does it cause or contribute to authoritarianism in the Third World.⁵⁹ Once-authoritarian states like Taiwan, South Korea, Chile, and Argentina illustrate the possibility that political liberalization may indeed follow upon the heels (though not always immediately) of economic development.

Inspired by Marx's determination that law functions as a superstructure imposed upon a more primary economic base, dependency theorists do not claim that law is independent of society. On the contrary, because law is already a reflection of the ruling interests, they see no inconsistency in utilizing law for the instrumentalist objective of furthering the interests of the nonruling class. Instead of viewing development in ahistorical terms, the dependency model views dependency and underdevelopment in stark historical terms, without any claims that the process of development is neutral or sequential. At the same time, however, the model overestimates the barriers that prevent or retard development. Indeed, the record shows that developing countries that have adopted an export-promotion strategy (that is, a strategy emphasizing linkages with the international economy and integration with the liberal trading norms of the GATT) have had a more enviable record of economic growth than developing countries that have adopted the import-substitution, delinking policies advocated by the dependency model.

Until now, one of the main preoccupations of development has been the relationship between the state and the national economy. Yet, with the increasing globalization of the economy and of economic actors, one must wonder whether development can continue to be seen primarily as a state-centered endeavor. A number of transformations have occurred which have significant implications for development.⁶⁰ For example, it is no longer possible to determine accurately the nationality of corporate actors (beyond the technical formality of an entity's state of incorporation or even the place of the corporate seat), not just because of the tendency towards cross-ownership among corporations but also because corporations are no longer bound to the traditional restrictions of territoriality. All the major factors of production—capital, technology, production, information—routinely flow across national boundaries. States no longer possess the ability to enforce or impose restrictions on the inflow or outflow of these factors of production. Similarly, and perhaps in response to the increasingly nonterritorial needs of business, corporations are shifting from a top-down command structure of parents and headquarters on the one hand and subsidiaries and branches on the other, to a system of global webs of overlapping centers with operations worldwide. Products are no longer made in one or two countries but in a number of countries. The production process, including the design, financing, assembly, manufacturing, and distribution of a product, is no longer confined to the territorial borders of any one state. As intellectual property displaces real property as the currency of choice,

Arbitration Regulations, and Regulations Relating to Foreign Mining Investment. See Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 3-4 & n.16 (1996).

59. Scholarship from both sides of the debate generally acknowledges that law can indeed be utilized for either authoritarian or participatory ends. See, e.g., Franck, *supra* note 26, at 24-25 ("law, as such, is neither good nor bad, either for development or for anything else. . . . [L]aw is neutral about development and about kinds or directions of development."); Yash Ghai, *Constitutions and Governance in Africa: A Prolegomenon*, in LAW AND CRISIS IN THE THIRD WORLD 51, 60 (Sammy Adelman & Abdul Paliwala eds., 1993) ("because communist constitutions are intended to facilitate the transformation of society in pursuit of the teleological view of human destiny governed by historical materialism, their instrumentalism is overt.").

60. For a discussion of these transformations and the implications posed, see, e.g., ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21-ST CENTURY CAPITALISM* (1992); *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James N. Rosenau & Ernst-Otto Czempiel eds., 1992). The analysis that follows can also be found in Lan Cao, *Towards a New Sensibility in International Economic Development*, 32 TEX. INT'L L.J. 209 (1997).

the global economy itself is also shifting from the traditional high-volume manufacturing of standardized products to a high-value production of specially tailored services and commodities, which facilitates a concomitant shift in the traditional modes of manufacturing. Production of intellectual property does not require a traditional territorially based corporation but rather only an aggregate of decentralized and dispersed webs, each engaged in the design and production of high-value activities. Production shifts have also meant that it is no longer accurate to view developing countries primarily as manufacturers of raw materials and importers of manufactured goods. In other words, the rules have changed and the world itself has changed.

Like other grand-scale transformations, the globalization of capital and production and the existence of a global economy have created uncertainties and unease, both in developed and developing countries. Paradoxically, while the colonial legacy meant a fear of international trade by poor countries, with increasing frequency we now hear anxieties about the global economy from the developed rather than the developing world. With the increasing frequency and ease with which the factors of production move across national boundaries, the interdependence of the world's markets surely calls for a different conceptual understanding of the relationship between the world's poor and rich countries. The questions to be addressed should include the implications created by the changes described above. For example, what is meant by comparative advantage, given the primacy of intellectual as opposed to real property in today's high-technology, information-oriented society? Given the mobility of international capital and the internationalization of production, how much of a threat is the so-called low-wage comparative advantage of the poor world? Does the growth of emerging economies present a threat or a potential stimulus to the developed economies? What should be the role of government in both developed and developing countries, given the adjustments that would be required, for example, as low-wage, low-skilled manufacturing jobs move into the Third World? As national economies and national corporations become more international, what economic policies should both developing and developed countries pursue? With the increasing irrelevance of corporate nationality, does it make sense to protect national interests by protecting the national corporation or the national economy from "too much" international competition? Against this new background, what legal regime will best promote economic growth. Last and most importantly, of course, what is the relationship between law and development? These are some of the critical issues that future works on law and development must attempt to explore and address.