

SYMPOSIUM: THE FUTURE OF LAW AND DEVELOPMENT, PART III

LAW AND DEVELOPMENT AS SOCIAL SCIENCE

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I would like to take up Anna Gelpern's invitation to define the study of Law and Development broadly and to reject the presumption that the inquiry will focus narrowly on the law-related projects of bilateral aid agencies and international organizations.¹

I am interested in the relationship between law on the one hand and, on the other hand, development (however defined), and it is not clear to me that externally directed "Law and Development" projects are always central to understanding that relationship. (Isn't that a reasonable inference to draw from all of the studies that question the impact of those projects?) Don't get me wrong, I think it is often crucially important to take foreign actors into account when trying to understand where the "law" part of the equation comes from, as well as what factors besides law might be influencing development. But I am skeptical of the notion that foreign actors are always central to the story, especially in some of the larger developing countries; do we really understand the legal systems of Brazil, India, and China best by focusing on the components influenced by the World Bank and the IMF?

As far as the future of Law and Development is concerned, I believe that it will and should involve becoming even more of a social science. I also believe, however, that the contributions to this Symposium have identified many of the pitfalls that lie in that direction. To begin with, there are obviously methodological questions about what empirical methods are best suited to uncovering the kinds of causal relationships between law and social outcomes we are looking for and theoretical questions about what legal and social variables ought to be measured. But I think that there are even more profound questions to be asked about the entire enterprise, especially if the purpose is to give policymakers insights into "what works."

The big outstanding questions about Law and Development include: Is it ever likely to be possible to generalize about complex social phenomena? Can scientific theories be treated as independent of the phenomena they

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¹ See Anna Gelpern, *Law & Development Narrow and Law & Development Broad*, in *Symposium: The Future of Law and Development, Part I*, 104 NW. U. L. REV. COLLOQUY 164, 171 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/37/LRColl2009n37SympLaw&DevPartI.pdf> (link).

seek to explain? What role should morality play in guiding the questions that scholars ask? How should policymakers use scientific findings that may attract varying degrees of support, either across different groups within the scholarly community or over time? Treating Law and Development as a social science should involve confronting rather than avoiding these philosophical questions. But since these issues are common to all social sciences, I think that legal scholars will benefit from being exposed to other scholars' efforts to come to grips with them.

Finally, John Cioffi's post touched on the interesting question of whether Law and Development ought to focus on the study of law (broadly defined) only as it affects developing countries or whether developed countries should also be considered.² I do not think that there is any general answer to this question. For some purposes, focusing exclusively on developing countries will seem wrong-headed. For instance, some might argue that in studying the relationship between law and economic development, studying only the developing countries amounts to selecting on the dependent variable, but the appropriateness of focusing exclusively on developing countries depends to some extent on the purpose of the study. If the point of the exercise is to understand "necessary" legal attributes of "under-developed" societies, then limiting the analysis to the societies fitting that description may make sense. The same may be true if one is interested in studying the operations of organizations like USAID or the International Development Association, whose activities are expressly limited to developing countries. Finally, there may be practical justifications for specializing in developing societies or subsets thereof. Here again, the value of assimilating Law and Development to the other social sciences is that it would encourage us to refer to parallel debates. For example, why do so many economists treat development economics as a separate field of study? What is the current thinking in political science about the value of area studies?

I do not know whether the kind of research agenda I have in mind is too broad to be considered a "field." It might be. But, in any event, I think it is a worthwhile agenda.

² John Cioffi, *Law & Development: Past Performance Is Not Indicative of Future Results*, in *Symposium: The Future of Law and Development, Part II*, 104 NW. U. L. REV. COLLOQUY 174, 182 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/38/LRColl2009n38SympLaw&DevPartII.pdf> (link).

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INTERNATIONAL INSTITUTIONS IN LAW & DEVELOPMENT

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On the threshold question, whether Law and Development is a field, I am happy to follow Anna Gelpern's lead and assume away any doubt.³ It seems more fun, and hopefully more profitable, to discuss our definitional quandaries and our concerns about the substance of work within the field we assume to exist.

To that end, most of my comments below expand upon Salil Mehra's question about the relationship between international official-sector institutions (the World Bank, IMF, WHO, and development banks, for example) and the field of Law and Development,⁴ with particular focus on the IMF.

As our discussion has unfolded, it has become strikingly clear that these institutions play a central, perhaps dominant, role in the field of Law and Development, however defined. Even if, as many emphasize, the crucial dramas play out in the local context, it is hard to escape the conclusion that these international institutions have significant influence in such contexts. Sometimes their influence is heavy-handed, but often it is indirect, propelling domestic actors in ways that are not easily traceable. India and China, often cited as counter-examples to swathes of Law and Development orthodoxy,⁵ may in fact reflect the pervasive (if indirect) influence of international institutions and actors. Although legal development in both countries has largely been the product of unique, local factors, each country has pursued legal reforms that are largely consistent with the law-and-finance project embraced by the international public sector in recent years. In the areas of corporate bankruptcy and debt collection, for example, both countries have adopted at least some meaningful legal reforms that reflect many of the same goals that the IMF and the World Bank (and INSOL and UNCITRAL) have tried to advance more generally.⁶ Perhaps both countries would have adopted some such legal and regulatory reforms if the World Bank, the IMF, INSOL, UNCITRAL, and other international actors were not pushing or nudging sovereigns to do so. But it is easy to see these types of reforms as evidence that many "homegrown" law-reform projects are at least partly the product of the influence of international institutions' efforts to promote legal development in countries across the globe.

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³ See Gelpern, *supra* note 1, at 171.

⁴ See Salil Mehra, *The Alchemy of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, *supra* note 1, at 166.

⁵ See, e.g., Kevin Davis, *Law and Development as Social Science*, *supra*; Brian Z. Tamanaha, *Distinguishing "Law and Development" from "Legal Development,"* *infra*.

⁶ See, e.g., Adam Feibelman, *Consumer Bankruptcy as Development Policy*, 39 SETON HALL L. REV. 63, 97-98 (2009).

At the very least, these institutions provide a nice focal point from which to consider the broader definitional and substantive questions at hand. And acknowledging the relevance—or the centrality—of these institutions to the field raises interesting questions that cut to the core of our definitional project. Perhaps most fundamentally: What about these institutions is most interesting and/or important to the field of Law and Development? Determining precisely *how* these institutions relate to the field may help elucidate the contours of the field itself; in other words, these international institutions can provide a useful definitional test for Law and Development scholars.

Anna Gelpern's distinction between Law & Development Narrow and Law & Development Broad⁷ in turn provides a nice frame for considering how these international institutions may help us grapple with these definitional questions. Consider the IMF, for example. Again, I suppose it is uncontroversial that some of the Fund's activities would fall within a narrowly defined conception of the field of Law and Development. This is true despite the fact that the Fund itself insists that it is not a development institution. Since the unraveling of the Bretton Woods exchange rate regime,⁸ the Fund's original reason for being, it has increasingly conducted activities that are designed to promote its members' domestic economic growth and stability. Of particular relevance for present purposes, the Fund has encouraged or pressed national governments to adopt and/or reform legal regimes through a variety of projects and activities, including conditionality, surveillance, technical assistance, and the Financial Sector Assessment Program (the Fund's joint project with the World Bank).⁹ These are among the activities by the Fund that Law and Development scholars tend to focus upon, evaluate, and criticize, quite often with good reason.

Yet the Fund conducts these activities in the context of a much broader project—promoting exchange rate stability in the post-Bretton Woods world. What then is the relevance of the Fund's efforts to maintain exchange rate stability, its related surveillance functions, its efforts to help resolve sovereign debt crises, or its evolving role in global governance to the field of Law and Development? The Fund's broader project surely shapes the narrower Law and Development-type activities noted above, though the relationship may often be somewhat indirect. From the Fund's point of view, its efforts to influence domestic legal development will promote domestic stability, which in turn promotes exchange rate stability. But the Fund's more general project relating to exchange rate stability involves an

⁷ Gelpern, *supra* note 1, at 171–73.

⁸ See KENNETH W. DAM, *THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM* 175–210 (1982).

⁹ See International Monetary Fund, *IMF Executive Board Reviews Experience with the Financial Sector Assessment Program*, Apr. 6, 2005, available at <http://www.imf.org/external/np/sec/pn/2005/pn0547.htm> (link).

elaborate legal framework, and this entire framework is aimed, at least in part, at increasing domestic growth and, perhaps, development. In the broadest sense, then, understanding the internal legal domain of the Fund (for example, its organizational structure, governance, and jurisdiction) is an independent Law and Development topic.

I suppose that all of this is a roundabout way of agreeing with Gelpern (at least I think she agrees) that Law & Development Broad is an appealing way to conceive of the field. Perhaps I am pushing further and suggesting that this conception is inevitable. It not only helps capture the full set of factors that influence the practice and process of Law and Development (as well as legal development, if these are different things¹⁰). It also encompasses the role of international legal regimes (and legal aspects of global efforts) that aim to address macro-economic concerns of developing and developed economies. And as Gelpern rightly observes, it therefore has the potential to reverse the “directionality” of the field in very promising ways. Continuing with the Fund as an example, the current economic crisis arguably reflects serious weaknesses in the Fund’s regulatory surveillance of the threats to external stability stemming from the domestic policies in developed economies, threats that may have devastating effects in developing ones. To the extent that this is possible, it suggests that the Fund’s surveillance over developed members should be understood as falling well within the scope of the field of Law and Development.

¹⁰ See Tamanaha, *supra* note 5.

DISTINGUISHING “LAW AND DEVELOPMENT” FROM “LEGAL DEVELOPMENT”

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In a recent essay, *The Primacy of Society and the Failures of Law and Development*, I asserted that it is best not to see Law and Development as a “field.”¹¹ My aim was not to provoke a sterile debate over whether it qualifies for this designation—anything can constitute a “field” if enough people count it as such—but to help underline a sharper distinction between *legal development*, which happens everywhere all the time without any particular label, and *Law and Development*. Law and Development, I suggested, is best understood as a label we attach to a host of projects funded and carried out by an array of development organizations aimed at countries that are tagged as insufficiently advanced capitalist economies or lacking features of liberal democracies. This is not offered as a cynical characterization but rather as descriptively accurate.

Legal development is not the same as “Law and Development”—a distinction that the latter phrase tends to conceal. To illustrate the difference, imagine how things would look if all current Law and Development projects around the world were to cease immediately. In core respects, very little would change. Legal institutions in all of the affected countries would continue what they are doing, legal actors would go about their business constructing the law on an ongoing basis, and these legal systems would suffer from multiple flaws, as do all legal systems. Actors within these societies—government, businesses, organizations, individuals—would continue to interact with the legal system in their usual ways (invoking it, avoiding it, adhering to it, trying to control it or use it to their advantage). Actors both legal and not would continue to push and prod the legal system in connection with demands that emerge within society. Assuming the existence of at least a minimally functioning legal system, this series of interactions is the dynamic ongoing process of legal development that takes place in every organized society.

That is not to say that no consequences would follow from the termination of “Law and Development” projects. Money that now goes into these projects, estimated at around \$4 billion since 1990, would disappear, as would the small (widely dispersed) army of Law and Development practitioners. When divided up by country and spread over time this apparently large sum is less impressive. For large countries, taking away this aid will have hardly any impact on the daily functioning of the system. For small or very poor countries, the financial loss would be felt, but the consequences

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¹¹ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development* 6 (St. John’s Univ. Legal Studies Research Paper Series, Paper No. 09-0172, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999 (link).

of the loss would depend on what the Law and Development money was being spent on at the time of the cutoff. Development organizations from donor countries use some of the money to fund their operations, money that recipient countries never see and therefore won't miss. Law and Development money is rarely used to pay the salaries of legal officials, moreover, so the legal systems in recipient countries likely would continue operating as before; certain costly and technical projects, like computerization, likely would not. There would almost certainly be fewer judicial training seminars run by outsiders, fewer conferences, and fewer trips abroad for local officials.

Some of the projects that now take place through Law and Development would likely still be proposed. Many of the same reformist ideas circulate in every society today (promoted by activists, elites, economic actors, lawyers committed to legal reform, etc.). Corrupt or poorly functioning legal systems are universally lamented. Businesses and local communities need reliable and timely ways to resolve their disputes. The rights of laborers and women are issues grappled with in every society. Attempts to address these problems might well continue, though the amount of money spent on such issues might diminish.

Without enjoying an artificial boost from money and pressure from the outside, legal development projects would have to marshal sufficient local support from influential players to prevail in local social/political contests over reform. Local agendas and priorities would be pursued. The projects would be designed, run, and implemented by people who understand the situation, who know what is possible and understand what compromises must be made, and who have long-term relationships (social and political capital) to draw on in the course of implementation. None of this assures the success of these new localized legal-development initiatives—legal development in every country is halting and uneven—but this consummately local process of legal reform avoids several of the key flaws that plague current Law and Development projects.

Despite the lengthy record of failed Law and Development projects that has developed in the past five decades, one implication of this thought experiment is that this record does not necessarily imply that *legal development* is failing. Rather, it means that while Law and Development goals (mostly related to liberal democratic values and capitalism) and Law and Development projects are not showing much success, legal development still takes place. China, for example, is regularly cited as a failure in Law and Development literature for not establishing independent courts, for corruption, for the harassment of activist lawyers, and for continued Party control over the judiciary¹²; yet in the past twenty-five years many new laws have been passed, the number of cases handled by the Chinese court system

¹² See John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87 FOREIGN AFF. 2, 10–13 (2008).

has increased tenfold, a national code is being prepared, a master's degree in law is virtually required for a senior judicial position, the number of lawyers in private practice has gone from zero (previously all lawyers were employees of the state) to 118,000 licensed lawyers in 12,000 firms, and now "more than 150,000 suits are filed annually *against* the government."¹³ That is substantial legal development. And it is not evident that any of this development can be directly or indirectly attributed to Law and Development projects.

My thought experiment helps expose the fact that Law and Development projects are interventions in a legal system by outsiders. This observation is not itself a reason for condemnation—many Law and Development initiatives are well-intentioned and might well be beneficial *if* they worked. But this observation does highlight a crucial factor that conditions the operation and likelihood of success of most Law and Development projects. External interventions into any society face barriers that internally produced initiatives do not. Law poses a particular challenge for external initiatives because it lies deeply imbricated within a thick complex of internally evolved normative orderings, power bases, and incentives that can be nearly invisible from the outside.¹⁴

This thought experiment, finally, makes it clear that although Law and Development projects are uniformly presented as projects *for* the benefit of recipient countries and their citizens, they are often neither instigated nor conducted by these recipients. Law and Development organizations and practitioners must be called upon to justify, and to secure the genuine acceptance of, Law and Development projects (goals, designs, and modes of implementation) to locals. Otherwise, these projects may invite resistance, seen as more of the same old top-down, Western-imposed neo-imperialism. Lurking in the background of the Law and Development enterprise is the truth that many of these legal initiatives are not consensual but are imposed in the form of "good governance" conditions that must be met by recipient countries to secure loans from international funding institutions.¹⁵ Historically, the economic and political agendas of donors and their operatives—not pure altruism—have shaped which countries get help and what programs are carried out.¹⁶

The extraordinary attention now given to the promotion of the "rule of law" is the most spectacular example of a Law and Development-driven agenda that is ill-conceived in connection with recipient countries. Many

¹³ *Id.* at 10–11 (emphasis added).

¹⁴ For an overview of the difficulty outside Law and Development practitioners may face when implementing projects outside their home countries, see BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001). One of the best studies of the barriers that law must confront is SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

¹⁵ See WILLIAM RUSSELL EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 146, 234 (2006).

¹⁶ This point is powerfully demonstrated in EASTERLY, *supra* note 15.

legal theorists consider the rule of law to be “an essentially contested concept,” lacking any clear or singular meaning.¹⁷ In light of this, it is surprising that Law and Development organizations claim to have statistical measures of the rule of law. These measures include a variety of factors, from opinion polls, to ratings by businesses or institutes, to crime statistics, to various indicators of contract enforcement and property rights—factors that are combined in questionable ways. Relying upon these statistical measures, researchers assert that the rule of law correlates with economic development (duly acknowledging that causation remains unanswered),¹⁸ and aid organizations make decisions about eligibility for loans.

The effort to produce a “rule of law index” strikes me as deeply misleading. The rule of law is a political ideal. Law plays a multitude of roles, and it has an infinite variety of manifestations. It is dubious to suggest that this ideal—and its degree of realization—can be captured by any statistical measure. The problem isn’t just that the rule of law—like any ideal—is understood in different ways (ways that change by place and time); the problem is that no two realizations of the rule-of-law ideal are alike. The rule of law in Japan is not like the rule of law in the United States, which is not like the rule of law in France, and so forth.

These final comments are directly tied to the distinction between legal development and Law and Development set forth above. Talk about the rule of law is the product of the Western-driven Law and Development enterprise, not legal development. Rule-of-law talk is immensely popular with funding agencies, reflecting the prominence of the rule-of-law slogan in global political discourse. Legal development is not immediately about developing the rule of law (although the latter may follow from the former). No one knows what the “rule of law” is in any concrete sense, and no one knows how to bring it about. Legal development involves specific problems involving the construction and functioning of law and legal institutions and concrete, directed efforts at reform. Legal development is a retail enterprise—it’s about improving the functioning of legal institutions, getting them to serve the needs of the populace, the government, and the economy. Although I have doubts about the Law and Development enterprise, about legal development I am optimistic.

¹⁷ See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

¹⁸ An excellent overview of the research is found in Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 205–12 (2008).

AN ASIAN PERSPECTIVE ON LAW AND DEVELOPMENT

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First, as to the issue of whether Law and Development is a “field,” I don’t see much need to decide between the answers given by contributors based on the respective focus and/or purpose of studies. There are varieties of answers (L-for-D, L-v.-D, L-beyond-D, legal development, etc.), and any discrimination among them will limit our future. I would prefer a definition based on our methodological common ground, a common ground in which I will join Anna Gelpern for her basic empiricist description of “Law and Development Broad.”¹⁹ One of the attractions of the Law and Development school is that we commonly approach “law” and “development” by induction from the facts, instead of deduction from some given set of values or thoughts (for example, rule of law, convergence, legal origin, etc.). This inductive approach can yield values and theories but only as hypotheses open to the possibility of disproof. We never stop revisiting dynamic frontiers of legal development and find great enthusiasm in encountering phenomena. Applying different analytical methods, we often maintain a constant, arms-length distance (as delicate as that of war correspondents) from phenomena. In this orbit, out of what seems at first glance a patchwork of anecdotes, we will continue to develop some larger, consolidated discipline of critical studies.

But can this minimum kind of methodological definition add anything new to the stream of critical studies since the 1960–70s, as Tom Ginsburg’s second question asks?²⁰ Perhaps, methodologically, we are still in pursuit of the same attempt initiated by Trubek and Galanter,²¹ and we must stick to the routine of testing every possible combination of traditional legal approaches (such as text analysis) with various empirical approaches (both qualitative and quantitative) learned from such fields as sociology, anthropology, historical studies, and economics, as far as this field claims a science.

As to the substance, however, we could have reached some new dimension by now. But we are still circling around the same questions (of “Law and Development Narrow”²²) asked in the 1970s. One of our shortcomings in this area is the lack of response to the deepening dualism seen in attempts at defining “development.” We know there is, on the one hand, a group of economic growth-oriented donors (World Bank, ADB, USAID,

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¹⁹ Gelpern, *supra* note 1, at 172–73.

²⁰ See Tom Ginsburg, *The Future of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, *supra* note 1, at 164–65.

²¹ See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

²² Gelpern, *supra* note 1, at 171–72.

etc.), and a group of human development-oriented donors (UNDP, EU, etc.) on the other. This divide causes serious confusion in the legal-development process of many recipient countries. The former group appears to have amended its definition to be closer to that of the human development group, but each has always given funding in one of the two separate contexts, and they have never met to produce an integrated definition. The latter has specifically aimed at areas separate from economic development, as if there were an implicit conspiracy among donors to live separately. Donors can thus be pluralistic, but each targeted legal system is a single reality. What has resulted is a problematic legal pluralism: the formal law of developing countries is pressed for the transplantation of “model laws,” often copying the recent deregulation agenda of U.S. law (a result of U.S. political capture, according to Daniel Kaufmann²³), while the intersection between this changing formal law and the existing order has been left untouched amid normative confusion. Yet it is this very intersection where an integrated normative answer must be sought in order to conciliate the various socio-economic tensions that arise in the course of development. Our academic works tend to stay away from this touchy area, sticking to either side of donors’ divided definitions. Without stepping into this intersection and closely observing the local struggles for an integrated normative regime (or, put in Tamanaha’s way, redefining Law and Development-oriented projects through legal development, or, more simply, law beyond development²⁴), it is difficult for us to concretize any post-modern alternative definitions of the field that go beyond the 1970s’ anti-modernist context.

As to the future of our field, I can think of two roles: Law-for-Development criticisms, and Law-beyond-Development studies. We have heard enough discussions of law as an instrument of development (Law-for-Development), where the definition of development has often been monopolized by new-liberalists’ interpretation of U.S. models. For example, we see a bankruptcy law model based on the rescue myth of Chapter 11; the corporate law model copying Delaware deregulation; the property law model maximizing the full effect of ownership over other preferential rights; the competition law model of the Chicago school with efficiency-based exceptions under the total welfare test; all of which are imposed through compulsory mechanisms such as loan conditionalities and performance ratings such as the ROSC, often controlled by the World Bank (which cautiously avoids criticisms, as does the IMF) and are backed by remarkably attractive academic justifications, such as LLSV’s legal origins, convergence, and legal transplant theories. One of the indispensable tasks in our Law and Development field is the critical evaluation of the outcomes seen when applying these models. This task, however, seems to be almost

²³ Daniel Kaufmann, *The Rule of Law Matters*, in *Symposium: Law and Development, Part IV*, 104 NW. L. REV. COLLOQUY (forthcoming 2009).

²⁴ See Tamanaha, *Distinguishing “Law and Development” from “Legal Development,” supra*.

done, since the very origin country of the models is now in an unprecedented financial crisis. It is also ironic that the recipients who were the most earnest in adopting the same models have turned out to be the ones most seriously affected by the world financial crisis.²⁵

Our next task, then, could be to propose alternative models. Some of the symposium contributors refer to specific candidates or a single universal alternative,²⁶ and I myself have been working on liberal alternatives for re-regulation learned from various comparative-knowledge studies, including that from pre-deregulation U.S. laws.²⁷ John Cioffi appears to be working in the same direction,²⁸ but recipient countries seem fed up with universal models already²⁹—especially after the undeniable failure of the vigorously campaigned for new-liberalists' models. We must face this loss of trust in the legal assistance provided by individual (either bilateral or multilateral) donors. Instead, we should expect an increasing role for a truly multilateral approach, for example, in such well-represented forums as UNCITRAL, which have a long tradition of appreciating differences among jurisdictions and of addressing these differences and conflicts of laws.³⁰ It should be a task of those in the Law and Development field to guide such truly multilateral efforts in order to ensure they better meet different local needs, as suggested by Salil Mehra,³¹ Daniel Sokol,³² and other practitioners.

Even if we pursue multilateral approaches, however, there still seem to be some areas left for individual legal assistance, to accompany each different path of legal development, as Tamanaha implies.³³ Given the economic growth-oriented bias of formal lawmaking in many countries, it will continue to be the task of Law and Development practitioners to watch over the

²⁵ In Asia, for example, Pakistan, Korea, and Vietnam have so far been seriously affected in the World Financial Crisis. All three countries are known for pursuing legal reforms based on American models.

²⁶ See, e.g., John Onesorge, "Beijing Consensus" Anyone?, in *Symposium: The Future of Law and Development, Part IV*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

²⁷ Yuka Kaneko, Outcomes of Conditionalities on Legal Reform in a Decade after the Asian Crisis (2008) (unpublished paper presented at the 2008 Joint Annual Meeting of the Law and Society Association and the Canadian Law and Society Association, on file with the Northwestern University Law Review).

²⁸ See Cioffi, *supra* note 2, at 183–85.

²⁹ Western donors and academics should pay more attention to the recent trend in Asian academism increasingly hostile toward the results of Western legal transplants. There is a rise of collaborative academic networks in Asia, including the Asian Law Institute. See Asian Law Institute, Welcome to Asian Law Institute, <http://law.nus.edu.sg/asli/> (last visited Nov. 10, 2009) (link).

³⁰ Yuka Kaneko, *A Review of Model Laws in the Context of Financial Crises: Implications for Procedural Legitimacy and Substantial Fairness of Soft Laws*, 17 J. INT'L COOPERATION STUD. (forthcoming).

³¹ Mehra, *supra* note 4, at 167.

³² See D. Daniel Sokol, *Law and Development: The Way Forward or Just Stuck in the Same Place?*, in *Symposium: The Future of Law and Development, Part IV*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

³³ Tamanaha, *Distinguishing "Law and Development" from "Legal Development," supra*.

intersection of formal law and informal norms. If this redefinition process requires any involvement by legal assistance donors, they must be a new type of donor, one that seeks to assist local initiatives for change rather than to transplant externally developed models.

A question in this vein is whether the typical approach of human rights-oriented donors (such as UNDP and EU), which try to isolate and preserve informal norms separately from the formal law regime,³⁴ is correct. Experience has shown that this type of separate reform only maintains the normative gap and is doomed to gradually diminish and, ultimately, lead to the extinction of communal rights.³⁵ It is probably more realistic to provide for efficient procedural mechanisms (or “secondary rules” in H.L.A. Hart’s sense) that allow the local people to assert their own informal norms within the formal system and to re-write the “captured” formal law from the bottom up. Watching this internal dynamism toward integrated legal development (or Law-beyond-Development) will continue to be the most attractive part of Law and Development studies.

I would like to interpret the “what works” approach of Katarina Pistor³⁶ and Mariana Prado³⁷ in this context of reliance on “secondary rules.” We may assist the search for workable procedural rules for local people to develop their own norms, but we should be prohibited from pressing on them any more external models of primary rules. To demonstrate the point, I would like to touch on a radical implication of Japanese bilateral legal assistance.

Although Japan has been considered a source of the “statist” model, and, therefore, its economic distress in the 1990s (which was actually not as serious as it was portrayed by neo-liberalists) is deemed as evidence of the “retreat of state,”³⁸ its legal experience should be more holistically understood within the intersection of statist public law and civil law development. I will not deny that Japan’s economic success was a result of an export-oriented growth strategy led by bureaucrats (who were guided by the U.S. Pax-Americana strategy of creating bilateral spokes of economic dependency worldwide, where the United States is always a sole hub) and based on the myth of bottomless U.S. consumption guaranteed by the strong-dollar

³⁴ See, e.g., 1 COMM’N ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE 29–40 (2008), available at [http://www.google.com/url?q=http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%2520\(final%2520rpt\).pdf&ei=5v75Suv9OZS0NoPzIMsK&sa=X&oi=nshc&resnum=1&ct=result&cd=1&ved=0CAgQzgQoAA&usg=AFQjCNHyPJPU19WS_PgV_CmIdAiFmKaOrg](http://www.google.com/url?q=http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%2520(final%2520rpt).pdf&ei=5v75Suv9OZS0NoPzIMsK&sa=X&oi=nshc&resnum=1&ct=result&cd=1&ved=0CAgQzgQoAA&usg=AFQjCNHyPJPU19WS_PgV_CmIdAiFmKaOrg) (link).

³⁵ Yuka Kaneko, *New Trends in Land Dispute Resolutions in Asia: Interaction Between Formal and Informal Forums* (2009) (unpublished paper presented at the Annual Meeting of the Law and Society Association, on file with the Northwestern University Law Review).

³⁶ Katharina Pistor, *There Is No Single Field of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, *supra* note 1, at 168.

³⁷ Mariana Prado, *The Misuse of Law and Development?*, in *Symposium: The Future of Law and Development, Part II*, *supra* note 2, at 174.

³⁸ See Cioffi, *supra* note 2, at 183.

myth (financed by China/Japan's export earnings), but with two important reservations. First, this Japanese experience was a law-centered one, as opposed to the usual statist description: bureaucrats are extremely law-centered people (at least in the sense of *Rechtsstaat*); even the Ministry of International Trade and Industry's notorious anti-cartel guidance had to be based on each individual bill passed at the Japanese Diet, where both communist and socialist parties had voices.³⁹ And industrial sectors are bound by sophisticated commercial-law regimes, where the famous negotiation culture is built on the common understanding of what the law is; even every household has a pocket-size code book! Second, Japan's successful economic development could have been miscarried if not for internal modifications, developed through social struggles, which worked to redefine the excessive capitalist orientation of the government from the bottom up. Such modification has often taken place through civil dispute resolution.

When viewed through this civil struggle, the Japanese experience is far from a statist model. The East Asian model seems nothing but a partial, distorted interpretation of the Japanese experience, created by the authoritarian ASEAN political leaders' "Look East" policy, which was, via ASEAN-Japan economic ministers' meetings, imported and re-exported by careless MITI bureaucrats in the new clothes of the "East Asian miracle," which has been harshly criticized in the Japanese academy.⁴⁰

What deserves more serious notice is the civil litigation system in Japan. Although it has been criticized by American scholars due to its low usage and slow speed, the Japanese litigation system does have another aspect: it has occasionally been used as a radical tool for social change, especially where everyday disputes rise to the level of social conflict.⁴¹ Lower court judges have been trying their best, within the limits of legal formalism and judicial integrity, to respond to social calls for solving various normative conflicts in the course of capitalist development (such as land/housing tenant protection, communal rights protection, pollution victim compensation, restriction of dismissal, small-and-medium-sized enterprises (SME) protection against exploitation by large corporations, and women's equal opportunity for employment) in ways that reach beyond the limit of formal written laws, which often are captured by state and industrial interests. Major weapons for judges are the techniques of legal interpretation based on general principles of civil code and constitutional norms, which provide sophisticated justifications for defending their own judgments. Given the

³⁹ This is the point that the Japanese government has asserted in its reports to the WTO's Working Group on the Interaction Between Trade and Competition Policy.

⁴⁰ See, e.g., *THE ROLE OF GOVERNMENT IN EAST ASIAN ECONOMIC DEVELOPMENT: COMPARATIVE INSTITUTIONAL ANALYSIS* (Masahiko Aoki, Hyung-Ki Kim & Masahiro Okuno-Fujiwara eds., 1996).

⁴¹ See JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* (1998); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

well-known passive stance of Japanese judges in administrative suits, these activist techniques in civil litigations are notable.

This historically tested Japanese knowledge could be useful, especially in a similar socio-political setting where the government is extremely growth oriented and the secondary rules for bottom-up normative modification are necessary. Actually, Japan seems a unique donor in the context of secondary-rule contribution.⁴² Its primary assistance (operated by the Ministry of Justice) has been concentrated in the civil law area—especially in the drafting of civil and civil procedure codes, and also in judicial training—with a slight technical contribution in commercial law. It has, however, never been attempted in the public law area, which may go against the often-held image of Japan as an exporter of the developmental-state, or Asian-miracle, model.

It deserves notice that, in this view of Japanese civil law assistance, persistent stress has been put on the “independence of individual adjudication,” which is quite in contrast to the usual concern of many donors for the “institutional independence” of the judiciary from the other state organs. The Japanese prescription has been to improve the quality of judgments through technical training in application of laws and reference to judicial precedents. The logic behind this approach is that improved quality of individual judgment is the best means of defense for adjudicative independence against not only external, but also internal, pressures in the judiciary—especially when backed by a comprehensive judgment-disclosure system and qualified social critiques. This unique essence of Japanese assistance has been developed by ex-judges who have the experience of sitting on the bench for their whole careers amid both internal and external pressures on their adjudicative independence. Without first understanding this kind of holistic socio-political setting behind each case, we cannot discuss “what works” in any individual context.

⁴² See, e.g., Yuka Kaneko, A Japanese Internist Approach to the Judicial Reform in Vietnam: A Review of Civil Procedures and Cassation Cases (2009) (unpublished paper presented at the Annual Meeting of the Law and Society Association, on file with the Northwestern University Law Review).