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LAW AND DEVELOPMENT

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Foreword

The contributions to this volume of Scandinavian Studies in Law are united by the theme of Law and Development. The notion 'Law and Development' is neither uncontested, nor uncontroversial. In a narrow sense it demarcates a research field closely associated with international efforts to promote economic and social development in less developed countries through the means of law and legal development assistance. In a broader sense, Law and Development can be seen to also encompass theoretical enquiries in the role of law for societal transformation, including studies on legal transplants, law reform and legal change. The focus in the present volume is on Law and Development in the narrow sense, although the monograph also includes contributions of more general theoretical nature.

Law and Development evolved as a research field in its own right back in the 1960s and 1970s when major legal assistance programs to developing (or, as they were then called, 'Third World') countries, were set in motion, by the United States, other Western countries, and international organisations. The rapid rise of Law and Development scholarship was however soon followed by a crisis, famously proclaimed by David Trubek and Marc Galanter in their article "Scholars in Self Estrangement".[1] The article reflected a feeling of disillusionment among Law and Development scholars as to the potential of law and legal reform to bring about societal change, and more fundamentally, as to the aims, true motives and methods of legal development cooperation.

Still, whereas the article by Trubek and Galanter triggered a serious introspection and debate, it hardly marked the end of Law and Development. Quite to the contrary, the fall of the Iron Curtain at the turn of the 1990s ushered numerous countries from the former Soviet bloc into a new era of transition to democracy, rule of law and market economy. The collapse of multi-national empires like the Soviet Union and Yugoslavia gave rise to massive nation- and state-building. Newly established democracies seeking accession to international and European organisations faced the necessity to carry out large-scale adaptation of their legal systems to the legal and institutional requirements of membership. In this process of societal transformation of previously unseen proportions law was, once again, called to play a crucial role, this time with a special emphasis on the rule of law and fundamental rights. Not surprisingly, new waves of Law and Development scholarship soon followed, aiming to internalize the lessons from previous failures and sharpen the analytical and methodological tools of the discipline. More recently, novel approaches to economic and legal reform in some Latin American countries, combining economic liberalisation and active state

1 Trubek and Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in the Law and Development Studies in the United States*, Wisconsin Law Review, 1974, 1062-1102.

welfare policy, have prompted scholars to speak of a New Law and Development.[2]

The Scandinavian countries have been at the forefront of development cooperation, both through national agencies like SIDA, NORAD and DANIDA, and through active involvement in international organisations and their development programs. Whereas initially assistance mostly took the form of technical and financial aid, in recent years a greater share of resources has been devoted to supporting legal and institutional reforms in recipient countries. The ambition in this volume is to take stock of the prolific scholarship on Law and Development in the Nordic countries and to give a Scandinavian perspective on the debate in this research field.

The volume is divided into three parts. In the *first part*, scholars analyse some overarching contemporary problems of Law and Development. *Jaakko Husa* asks the question why the crisis of Law and Development and the critical appraisal of the movement never reached the Nordic countries and their legal development assistance policy. He highlights the continuous relevance of the critique to Law and Development, taking the example of the debate on the rule of law in China. Husa sees one of the problems of Law and Development to lie in its insufficient interaction with Comparative Law studies and an ensuing recourse to universal models and lack of sensitivity to local context.

Richard Sannerholm and *Lisen Bergquist* explore the sometimes paradoxical effects of rule of law assistance to authoritarian countries. They look into a broad range of multi-lateral and bilateral support programs to countries in Central Asia and North Africa, noting that rule of law assistance is often directed at strengthening the capacity of the bureaucracy and the *efficiency* of the executive branch. However, in authoritarian countries such strengthening may enhance authoritarian governments' grip on power, providing legitimacy to authoritarian regimes and helping them to modernize repressive law enforcement agencies. In this sense their contribution seems to corroborate Husa's analysis, suggesting that the mechanic transfer of concepts and associated regulatory instruments without sufficient insight in local context may produce unintended and, at worst, counterproductive effects.

Morten Broberg focuses on the problem of corruption in Development Assistance programmes, diagnosing it as a malaise that seriously undermines the success of such programmes and, more generally, the confidence in development aid. He examines the efforts of the European Union to build up effective governance mechanisms for fighting corruption within the Union's own massive funding projects. Broberg argues that a similarly uncompromising attitude toward corruption should be adopted in the Union's Development Assistance policy, conditioning aid on robust mechanisms of supervision, and guaranteeing that the funds go to those in need and to the right objectives.

A problem area with relevance beyond the context of Law and Development is the much debated issue of corporate social responsibility (CSR), which is at the centre of *Mauro Zamboni*'s contribution. In times of globalisation, when states lose control over global markets and much economic governance is in

2 Trubek , Coutinho and Shapiro, *Towards a New Law and Development*, Univ. of Wisconsin Legal Studies, 2012, Research Paper No. 1207.

the hand of private economic actors, it appears crucial to ensure that corporations are held responsible for the social effects of their commercial activities. Zamboni approaches the problem with the tools of positive legal analysis, nevertheless adapted to the nature of transnational law. He is in search of methods to increase the social engagement of the corporation without going in conflict with the rationale and core functions of corporations, namely making profit for its share-holders. The institute of the in-house Corporate Ombudsperson is advanced as a flexible governance figure, combining hard-law, soft-law and non-legal channels for effectuating a structural change toward a socially responsible transnational corporation.

Antonina Bakardjieva Engelbrekt revisits the debate on legal transplants in legal scholarship and examines how this debate has been interpreted and used in economic theory, in particular by exponents of the so called New Comparative Economics. Whereas the interdisciplinary dialogue between Law and Economics is positively assessed, some problems of "translation" are also identified, potentially leading to misguided normative advice in legal development cooperation.

The *second part* of the volume presents a panoply of case studies on the role of law and international legal assistance in selected developing, transition and post-conflict societies. The studies include analyses on a broad range of topics, such as the international legal regime of child labour and its implications in Ethiopia, the role of international tribunals for reconciliation and restoring justice in Cambodia, the governance of land use in Uganda and Russia, and freedom of speech and control over the Internet in China. Most of the studies apply a critical perspective and reveal the complex, often unpredicted and sometimes disappointing, effects of legal development assistance and of international involvement.

Thus, the case study by *Dahlen and Rubensson* based on interviews and fieldwork in Ethiopia demonstrates that the ILO Conventions on Minimum Age may not be fully adequate to the perceptions of Ethiopian children for whom work is both a means of access to school and a way of taking on responsibility for their family. The authors emphasize the double-faced nature of the Convention on the Rights of the Child, which stresses children's vulnerability and need for protection, but also seeks to empower children through rights to freedom of association, thought and conscience and to express their views. Seen in this light, for older children work can be a way of assuming responsibilities and of exercising agency as independent actors contributing to their own development.

The contribution of *Michael Baaz* focuses on the ongoing transitional justice process in Cambodia, and in particular on the activity of the extraordinary Chambers in the Courts of Cambodia (ECCC). The analysis is based on close observation of one of the trials and shows the difficulty that International Criminal Law faces when called on to contribute to reconstruction and reconciliation in a politically contested post-conflict environment.

The analysis of *Pål Wrange* focuses on the multi-layered regime of land use in Uganda. In his account international law appears fragmented and irrational, failing to provide a remedy for land deprivation of women in post-conflict Uganda. Neither human rights covenants, nor other international instruments

seem to grant adequate protection against land grabs, whereas international investment treaties may even come to exacerbate an already unjust wealth and resource distribution.

Land use and property rights are also at the centre of the contribution of *Soili Nysten-Haarala*, which builds on field work and interviews with representatives of businesses and of the local population in the Pomor regions of Russia. Nysten-Haarala traces the history of weak property rights in Russia throughout centuries of political and economic development. In the absence of robust property rights in land, she describes an ongoing struggle for property rights in natural resources between the regional and the federal level. The people in areas of natural resource extraction, continuing to act according to expectations and strategies from the Soviet past, are caught in the vicious circle of failed property rights and have no chance to get a fair share of the new Russian economy. The analysis of the evolution of property rights draws on institutional economics (historical institutionalism) and the prognosis is pessimistic: History seems to repeat itself, following a familiar pattern of postponing reforms to keep the status quo in favour of a powerful rent-seeking elite and to the detriment of those in need.

Finally, *Per Sevastik* paints a bleak picture of the state of freedom of expression and opinion in China with a pervasive system of control and censorship of the Internet and effective attempts of the Chinese government to stifle political dissent. The system builds on a combination of restrictive legislative acts, licensing regimes, technical surveillance measures, sanctions and imposed self-regulation. These restrictions occur despite formal commitments to protection of human rights and freedom of expression and information in the Constitution of China and despite China's ratification of a number of international human rights instruments.

Contributions in the *third part* of the volume scrutinize the role of international, and primarily European, organisations such as the European Union and the Council of Europe, in supporting the rule of law, human rights and democratization in accession and developing countries. *Andreas Moberg* takes a closer look at twenty years of conditionality in the international agreements between the EU and the African Caribbean and Pacific States (ACP), i.e. the possibility to suspend cooperation upon the other party's failure to respect democratic principles, human rights and rule of law. The article critically reviews the rare incidents of invoking the conditionality clause for breach of commitments undertaken by the Union's partners in the area of human rights, taking as a benchmark the UN Human Rights Council's estimation of the situation of human rights protection in ACP states under its jurisdiction. The result seems difficult to reconcile with claims that human rights are universal and form an indivisible part of EU development cooperation policy.

Anna Jonsson Cornell analyses Russia's accession to the Council of Europe through the prism of theories of international socialization as advanced by political scientists. Following Schimmelfennig she identifies several major factors that make the process of international socialization difficult: major changes in Russia's domestic policies and its relation to the West, Russia's strengthening economic power and the absence of tangible gains from Council

of Europe membership. Furthermore she highlights the particular challenges of Russia's constitutional socialization.

Lovorka Jonic Kapnias looks into the complexities of EU involvement in institution-building in the accession countries in Central and Eastern Europe through the instrument of institutional twinning. After tracing the genealogy of the concept of 'twinning' in international development cooperation, the author highlights the specificities of the instrument as used in the context of EU enlargement and the conceptual inconsistencies in using the instrument in practice.

Finally, *Erik Wennerström* and *Åsa Valter* study comparatively different mechanisms for evaluating rule of law compliance employed by international organisations, notably the EU, and by credit rating agencies. The different political and economic effects of these mechanisms are critically examined noting the sometimes pervasive consequences of non-rule of law actors' involvement through market forces, and the limited success of political and legal means of control.

The concluding *fourth part* of the volume approaches some topics beyond Law and Development. In their contributions *Jørn Vestergaard* and *Bjarni Már Magnússon* address the complex interplay between national and international law. Vestergaard demonstrates how anti-terrorism legislation in Denmark, often transposing verbatim provisions of international and EU law, has spill-over effects to other areas of national criminal law, causing some unintended and undesirable consequences regarding rule of law and due process. Már Magnússon, in his chapter, draws attention to subtle techniques of integrating international law into national legal acts, which then function as bridges between international and national law and contribute to developing and domesticating international law within a dualistic legal systems, such as the Icelandic one.

In a contribution that concludes this volume *Håkan Hydén* approaches the fundamental question about the relationship between law and societal development. He presents a sociological theory conceptualizing societal development as waves breaking forth in a cyclical manner. Legal development according to Hydén follows societal development, with some delay, whereby old legal arrangements rooted in the old society give way to new types of law, without completely disappearing. This view encompasses both a dynamic and a static perspective on law, captured well by the metaphor of the 'locomotive of legal development'. The contribution opens further questions and fields of exploration. For instance one can ask whether cycles occur in a different manner in developed and developing countries, or in a democratic country governed as compared to an authoritarian regime.

Summing up, the volume illustrates the breadth of Law and Development as a research field and the variety of issues and perspectives that it integrates. As suggested by Trubek in a recent contribution, law is no longer seen simply as means for economic growth and development. The Rule of Law and adequate protection of human rights are increasingly conceived of as part of development itself. At the same time, there are obviously no universal solutions and quick fixes. The contributions in this volume show that empirical evidence and intimate knowledge of local context constitute important

prerequisites for understanding the link between Law and Development and for making legal development assistance work. Notably, the volume demonstrates the need for improved communication between scholars from different disciplines, governmental agencies and private actors engaged in the field.

Antonina Bakardjieva Engelbrekt

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Scandinavian Studies in Law (Sc.St.L.) is produced by the trust *Stockholm Institute for Scandinavian Law*. The first issue of the series was published in 1957 and so far more than 850 articles have been presented. The editorial board of Sc.St.L. is affiliated with the *Stockholm University Law Faculty*. The overall objective is to present Scandinavian law and legal theory to a wide readership in the English language. The scientific coordinator for this volume has been professor *Antonina Bakardjieva Engelbrekt* at Stockholm University Law Faculty.

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