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Book Review

THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, edited by David M. Trubek & Alvaro Santos¹

JANE E.N. MURUNGI²

THIS BOOK IS A COMPILATION of seven chapters on law and development (L&D) by six authors. All of the authors are experts in the L&D research and practice area, while David Trubek has been involved since its inception. *The New Law and Economic Development* chronicles the resilience of the L&D field, which has recovered from its floundering days of the 1970s.³ The authors analyze and compare shifts in development practitioners' perceptions of law since the 1950s, and observe that since the mid-1990s, a new approach to L&D has emerged. These shifts in perception result in elevating the rule of law from a development policy tool to a development policy objective.⁴ Each of the seven chapters uniquely advances that primary argument. This review details the authors' approaches and concludes with a general assessment.

1. THE THIRD MOMENT IN LAW AND DEVELOPMENT THEORY

Trubek and Santos begin concisely, comprehensively, and in an intellectually enriching way to explain the field of L&D—its history, its nature, and the

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1. (New York: Cambridge University Press, 2006) 318 pages [*The New Law and Economic Development*].
 2. LL.B. (Nairobi), LL.M. (Potchefstroom), LL.D. Candidate (NWU Potchefstroom), Visiting Researcher & CLPE Fellow 2008-2009, Osgoode Hall Law School.
 3. David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) 1974 Wis. L. Rev. 1062.
 4. David M. Trubek & Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in *The New Law and Economic Development*, *supra* note 1, 1 at 1.

range of experts and academics involved. The authors point out that assessing L&D's changing dynamics was a delicate task because of the contested nature of the research and practice in this field. They elaborate upon three "Moments" in which law has played three distinct roles in the evolving L&D paradigm.⁵

In the First Moment, law used the state to foster development; the result was an interventionist state. In the Second Moment, law limited state intervention but promoted the market to foster development. In the Third and current Moment, law seeks to remedy the failures of the preceding Moments by addressing social aspects. Clearly, law is malleable. This variability in the role of law in L&D can be described as a responsive, reflexive, and learning mode of law and legal regulation.⁶

The Third Moment acknowledges the market's inadequacies and responds to its disappointing, if not catastrophic, failure to attain substantive development. Much has already been chronicled of the devastating economic consequences of the Second Moment when the "Washington Consensus" reigned,⁷ after which law had to abandon its absolute reliance on the market.⁸ Though not abolishing the market's role, the Third Moment requires that law facilitate development by being sensitive to social and human rights, but with the "rule of law" as a new and central objective.⁹ The introductory chapter ends by identifying the Third Moment's salient features.

Anyone familiar with the United Nations' varying attempts through its "Development Decades" to advance growth in developing countries,¹⁰ or the World Bank's new development agenda (as discussed later in this review),

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5. *Ibid.* at 2. The authors refer to the three periods in the history of L&D as "Moments." The same terminology is used in this review.
 6. Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law" (2008) 56 Am. J. Comp. L. 769.
 7. Joseph E. Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton & Company, 2002) at 16; James Raymond Vreeland, *The IMF and Economic Development* (New York: Cambridge University Press, 2003).
 8. Trubek & Santos, *supra* note 4 at 3; David Kennedy, "The 'Rule of Law,' Political Choices, and Development Common Sense" in *The New Law and Economic Development*, *supra* note 1, 95 at 158-63.
 9. Kennedy, *ibid.*
 10. Peter Jackson, "A Prehistory of the Millennium Development Goals: Four Decades of Struggle for Development in the United Nations" (2007) 44:4 UN Chronicle 7, online: <<http://www.un.org/Pubs/chronicle/2007/issue4/0407p07.html>>.

would, at the very least, readily agree with the book's rationale of the "Moments." The question is whether the book's claims that the Third Moment is "new" are well-developed and persuasive.

II. THREE GLOBALIZATIONS OF LAW AND LEGAL THOUGHT

Duncan Kennedy, in modesty, warns his readers of "sweeping assertions in the text."¹¹ Nevertheless, his well-structured analysis systematically and convincingly elaborates on the varying character of law, legal thought, and legal theory over three globalization periods. The first period is "classical legal thought," the second period is "the social," and the third period is a unique amalgam of the first two.¹² To illustrate how these legal thoughts spread, the analysis draws from easily identifiable, public, international events. These events illustrate the law's role and its impact on economic and social development, and show how participants—be they scholars, academics, politicians, or universities and other institutions—interact with each other and influence the public's understanding of law.

The discussion thus far, which lays the foundation of L&D and expounds on the underlying legal theory, sets the stage for further consideration of the "rule of law." Subsequent chapters describe and analyze the nodal point upon which the "new law" in the Third Moment turns.

III. THE "RULE OF LAW" IN DEVELOPMENT ASSISTANCE

The significance of Trubek's contribution, concerning the genesis of L&D, is that it gives insight into the L&D actors and their motivations, and exposes their blind spots.¹³ For instance, some actors assumed that social benefits would automatically flow from a market-based economic system. The reader can understand and assess the causes of failure or success of L&D's ambitious beginnings, appreciate its challenges as a legal field, and understand the field's transition to a focus on the rule of law. The reader learns how the concept of

11. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000" in *The New Law and Economic Development*, *supra* note 1, 19 at 20.

12. *Ibid.* at 21. See also Duncan Kennedy, "Two Globalizations of Law and Legal Thought: 1850-1968" (2003) 36 *Suffolk U.L. Rev.* 631.

13. David M. Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in *The New Law and Economic Development*, *supra* note 1, 74.

the rule of law became an attractive, seemingly unifying goal for pro-democracy and pro-market interests, which might be seen as at odds. Trubek also shows how these interests joined forces to attain their objectives, only to realize that the rule of law is neither a universal value nor easy to achieve because of the concept's multifarious meanings.

Trubek depicts the phases of the rule of law within the Moments and shows how the conception of law during each phase contributed to the nature of the rule of law that was followed. Having introduced the broad range of actors and analyzed the transition to a focus on the rule of law, the book next examines one set of actors: the development experts.

IV. POLITICAL CHOICES AND DEVELOPMENT COMMON SENSE

David Kennedy's chapter traces how development experts have, in four phases from 1945 to 2000, interacted with politics and economics, and examines the consequences on their views and on the utility of law.¹⁴ Through the succeeding phases—which can be thought of as a movement from “postwar modest interventionist consensus” to “crisis and retrenchment,” “transition from socialism,” and, finally, “chastened neoliberalism”¹⁵—he traces changes in the vocabulary of development experts as influenced by their dominant approach to progress. In the initial phases, when economic approaches were paramount, law was seen as a conduit to realize economic strategies. In later phases, after increasing frustration with economic policies, political ideas ascended as an answer to achieve development. Changes in vocabulary to include measures for health and life expectancy indicators replaced previous economic terms such as modernization or industrialization.

Nevertheless, as formidable challenges in achieving development endured, legal ideas replaced political ideas. The chapter shows how the rule of law became an easier alternative, or escape route, for development experts. Avoiding the more challenging but beneficial approach of using law as a platform to debate and formulate development policy based on economic ideas, the experts chose law (*i.e.*, the rule of law) as the development focus. Thus, “[t]he ‘rule of law’ promises an alternative—a domain of expertise, a program for action—that obscures the need for distributional choices or for clarity about how

14. David Kennedy, *supra* note 8.

15. *Ibid.* at 95. See also Trubek, *supra* note 13 at 90.

distributing things one way rather than another will, in fact, lead to development. Unfortunately, this turns out to be a false promise.”¹⁶

This chapter is a crescendo of the symphony on the background of L&D that began earlier. The next chapter by Scott Newton is like the pianissimo part of the symphony, looking at L&D as a whole.

V. REFLECTIONS ON LAW AND DEVELOPMENT

To this point in the book, readers might be tempted to think that they have learned all there is to know about L&D, but then comes Newton’s reflective chapter.¹⁷ Without being repetitious, it meditatively takes a walk back through all one has read so far, giving a dialectic perspective. The chapter canvasses what L&D could be, and what it actually is. Newton analyzes and describes how L&D as a discipline responds to the Moments. He attempts to delve into the minds of developing countries’ L&D actors to see the interplay between what they hoped to achieve from the laws or policies they formulated and the actual outcomes. Further, he discusses the interplay between formalism, anti-formalism, and L&D. Newton looks at the contest between the international political economy and L&D, different actors’ attitudes—those pro-market and those with an “allergy to market dynamics”¹⁸—and the repercussions of missed opportunities for developing L&D.

To explore the real world implications of L&D, the book includes two case studies on the Third Moment.

VI. THE FUTURE OF LAW AND DEVELOPMENT

Kerry Rittich’s contribution, which is the first case study, explores whether the rhetoric encapsulated in the Third Moment—poverty alleviation and incorporation of social aspects of development—actually describes the reality.¹⁹ She notes that the World Bank has two (in her view, competing) goals: to generate economic prosperity, and to serve the global economy. Rittich’s

16. David Kennedy, *supra* note 8 at 172.

17. Scott Newton, “The Dialectics of Law and Development” in *The New Law and Economic Development*, *supra* note 1, 174.

18. *Ibid.* at 187.

19. Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in *The New Law and Economic Development*, *supra* note 1, 203.

narrative vividly describes the difficulty or impossibility of international financial institutions serving these two masters. The goal of “generating economic prosperity” arguably takes precedence, but the market captures and drives the global economy at the expense of true economic progress for poorer states.

For those who hoped the World Bank’s new development agenda would yield more positive results, it is disturbing to read how, for instance, states have been beaten into further submission through the seemingly innocuous reforms of the Second Moment. Although Rittich’s chapter sets out to investigate the reality of international financial institutions, it is not clear what role a state itself has to play in further undermining its own powers, particularly in the context of the World Bank’s Comprehensive Development Framework (CDF). Research on how the CDF works in practice suggests that state support is absolutely essential for CDF success.²⁰ But does participation in the CDF undermine the state?

The rhetoric that development now means poverty alleviation raised expectations that, at last, something positive for the poor would result. It is therefore disappointing to read that, in practice, the focus on social aspects of development selects only that which is germane to economic or market promotion. Worse still, this focus deals only with the very poor, and does not address poverty overall.

Rittich confirms that a new law exists in the Third Moment, but raises doubts about its ability to withstand market forces and the World Bank’s will towards a return to the status quo of Second Moment thinking. Rittich argues that the Third Moment’s “achievements” ostensibly done in the name of poverty alleviation entirely contradict that goal. Instead, the Third Moment further entrenches what was criticized in the Second Moment.

Those familiar with Rittich’s extensive work on development issues²¹ will note that she has over the years maintained the same criticism of international financial institutions’ hypocrisy. For those unfamiliar with that critique, her chapter might be a shocking revelation. One wonders how it is possible that

20. Nilima Gulrajani, “The Art of Fine Balances: The Challenge of Institutionalizing the Comprehensive Development Framework Inside the World Bank” in Diane Stone & Christopher Wright, eds., *The World Bank and Governance: A Decade of Reform and Reaction* (New York: Routledge, 2007) 48.

21. Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002).

international financial institutions' positive rhetoric could result in adverse consequences. The reader may feel angry at international financial institutions. This sense of despair is echoed in Tallyrand's observation of the Bourbons, as mentioned by Trubek: "they had forgotten nothing and learned nothing!"²² The conscientious reader might ask what can be done. Part of the answer may come from Santos's chapter on the internal workings of the World Bank.

VII. THE WORLD BANK'S USES OF THE "RULE OF LAW"

Santos's chapter provides the second case study, which takes us into the World Bank's offices and departments.²³ There, he observes the organizational and departmental dynamics and inter-relationships, and explains how these determine the way the rule of law is understood and practised within the World Bank. Santos explains why the rule of law thrives, what drives it, and how its multi-dimensional character—which lends itself to four possible approaches—allows it to be an idea that World Bank insiders strive towards but also debate. This chapter shows how a focus on the "rule of law" as a development objective in some ways undermines actual development. Still, it begs the question of what should be done to improve the situation at the World Bank, where only the best practice under the rule of law seems to thrive.

VIII. CONCLUSION

A book of seven chapters from six authors can lose its thread of thought. This one does not. A harmonious symphony is maintained from start to finish, and all of the book's stated objectives are met. *The New Law and Economic Development* convinces the reader that the present view of law is fundamentally different than before—but how depressing.²⁴ The potential for obscure terminology (such as the different terms the authors use to describe the Third Moment) is anticipated, and readers are advised beforehand. There is also an index for better reference.

22. Trubek, *supra* note 13 at 86.

23. Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in *The New Law and Economic Development*, *supra* note 1, 253.

24. For a critique on this depressing view, see Kevin E. Davis & Michael J. Trebilcock, "The Relationship between Law and Development: Optimists Versus Skeptics" *Am. J. Comp. L.* [forthcoming in 2009], online: <<http://lsr.nellco.org/nyu/plltwp/papers/72>>.

The New Law and Economic Development is worth reading. Anyone interested in L&D, regardless of their academic background, should do so. Unlike other books about L&D, which discuss only some areas and require one to read several books to get the entire picture, this book comprehensively discusses all aspects of the field. *The New Law and Economic Development* has an encyclopedic character, and is a one-stop shop for the most integral aspects of L&D—its nature, history and development, and relationship to the role of law and rule of law. This book is a required foundation for other important books, such as Kenneth W. Dam's *The Law-Growth Nexus: The Rule of Law and Economic Development*²⁵ and Thomas Carother's *Promoting the Rule of Law Abroad: In Search of Knowledge*.²⁶ For more familiar readers, the book provides a perfect opportunity to begin to redirect L&D's focus from the "rule of law" to genuine efforts for redistribution.

25. (Washington, D.C.: Brookings Institution Press, 2006).

26. (Washington, D.C.: Carnegie Endowment for International Peace, 2006).