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PEANUTS, LAW PROFESSORS AND THIRD WORLD LAWYERS

Beverly May Carl*

To achieve his lofty goal of serving humanity, George Washington Carver concentrated on the lowly peanut. His resulting research program uncovered the nutritional properties of the peanut and developed some 300 derivative products from this legume, including plastics, dyes and medicinal oils. Prior to Carver's work, the peanut had not been recognized as a crop; by 1940, it was the second largest crop in the South, providing a livelihood for countless poor farmers.¹

Recently, a famous peanut farmer, ex-President Jimmy Carter, reiterated that the "greatest problem we face is the relationship between the developed countries and "the poverty stricken nations."² Many of us who teach students from the Third World share Jimmy Carter's concern about "hunger, disease, poverty and political instability"³ in these countries. We would like to do something—to make a contribution toward the solution of these problems. And we hope our teaching can serve this end.

Yet such aspirations compel us to ask repeatedly, "What exactly are we doing? What do we hope to accomplish? Are we doing any good? Are we simply producing attorneys to better serve the interests of the

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1. 3 ENCYCLOPEDIA BRITANNICA 972-3 (15th ed. 1974).

2. R. Kidder, *Chasms to Bridge: Jimmy Carter Laments the Lack of Concern for Global Problems*, Dallas Times Herald, Mar. 29, 1987, at L 1, col. 1.

3. *Id.*

multinational corporations? Or do we have some magic key to social justice and economic development to offer our students? Will the legal skills we impart produce more democratic societies? Or are we merely helping the techno-elites to become further entrenched in their wealth and power?"

For some time, law professors have been agonizing over these questions and the legal literature abounds with discussions of them.⁴ As Abelardo Valdez, general counsel of the Inter-American Foundation, wrote:

The unhappy experiences of past U.S. assistance to legal education in Latin America should serve as an important lesson for future assistance efforts. Our models should be examined critically before we export them to developing countries. They may not be as suitable as we think for reform or development efforts in countries whose legal system and culture are different from our own. And, in the final analysis we may be doing more harm than good.⁵

The law and development movement had assumed that "Third World governments were beneficent, or at least sufficiently committed to their egalitarian and democratic espousals that they were willing to permit [progressive] programs. . . ." However, as David Trubek and Marc Galanter pointed out, "experience revealed that, in spite of their democratic pretensions and avowed redistributive aspirations, Third World Governments often in fact constitute or represent narrow and self-satisfied elites whose vital concern is to protect and augment their dominant positions."⁶

Lawrence Friedman queried whether we "really know enough to give meaningful advice to any country, including our own, about the modernization of law?"⁷ Kenneth Karst, worried about distorted observations and analyses, called on American lawyers "to put aside the disrespect that is implicit in the missionary role" and study the legal institutions of others "for what we can learn from them."⁸ Trubek concluded:

What we need is a new intellectual approach. Up until now, we have really pretended that we had answers to all the big questions about

4. See, e.g., J.A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); and Trubek & Galanter, *Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *WIS. L. REV.* 1063 (1974).

5. Valdez, *Developing the Role of Law in Social Change: Past Endeavors and Future Opportunities in Latin America and the Caribbean*, 7 *LAWYER OF THE AMERICAS* 1 (1975).

6. Trubek and Galanter, *supra* note 4, at 1092-93. Brazil in the late sixties and early seventies offered a striking example of a dictatorship's manipulation of legal institutions to justify repression. See Carl, *Erosion of Rights of Political Offenders in Brazil*, 12 *VA. J. INT'L. LAW* 157 (1972).

7. Friedman, *On Legal Development*, 24 *RUTGERS L. REV.* 11, 12 (1969).

8. Karst, *Teaching Latin American Law*, 19 *AM. J. COMP. L.* 685, 691 (1971).

law and development. The basic relationships between law and social change were charted out. [T]he only open matters were questions of technique. It is not surprising that little empirical or historical research has come out of the modern law school. We must learn to see law as simply one variable in a more complex general theory of society, and learn how legal phenomena correlate with a wide range of other social and economic factors. In a word, we must stop being reformers and start being scholars.⁹

It seems our aspirations suffered from grandiosity. Perhaps the time has come for us to emulate Mr. Carver and concentrate on the peanut. The word peanut in English has connotations of small, humble, lowly. We American law professors may not be able to create democratic governments, increase economic production or improve wealth distribution in the developing countries. But we may have something of a more modest nature to offer our Third World colleagues—something peanut-sized.

Any insight I have gained into the character of that contribution has come not through my own cogitations, but from the words and deeds of my students. This realization first dawned on me during a visit in Indonesia with Maria Sumardjono who had earned a Master's degree at the law school where I teach, Southern Methodist University. Now a professor in Indonesia, she was teaching land law. Traditional legal education in that nation consisted of studying the local version of the Dutch Civil Code, perhaps together with a 19th Century treatise of a learned authority from Holland. Although the older generation of lawyers had studied Dutch, the young students preferred English for their second language. Consequently, many of the legal materials were inaccessible to today's student population.

Professor Sumardjono said she had been impressed by the case method of teaching in the United States, but added that Indonesia did not follow the system of precedent. Moreover, judicial decisions, even those of the Indonesian Supreme Court, were not published. To circumvent these obstacles, she distributed photocopies of reports in Indonesian newspapers of current land disputes. Before class met, the students were required to read these articles and analyze the conflicts in terms of the Indonesian Agrarian Law,¹⁰ the Civil Code, and any applicable *Adat* (ethnic group) law. Class time was devoted to discussion and interchange with the students.

9. As quoted in Gardner, *supra* note 4, at 224-25.

10. Undang-Undang Tentang Peraturan Dasar Pokok-Pokok Agraria (Law Concerning Basic Provisions of Agrarian Law), Law No. 5 of Sept. 24, 1960, L.N. 104/1960.

This modification of the Socratic technique by Professor Sumardjono served a number of ends. First, she avoided using judicial opinions from some common law nation; with their strange vocabulary, such cases—even when translated—are frequently unintelligible to students in a civil law system. She allowed the students to work in their own tongue—not Dutch and not English. Moreover, this approach engaged the students as active participants in the learning process; no longer could they just passively memorize contents of a formal lecture. Finally and most importantly, she was directing the attention of her students neither to ancient Rome nor academic Holland, but to real problems of the Indonesian people in the 1980s.

Professor Sumardjono's approach will probably strike any professor of common law as eminently sensible, but no American lawyer told her to do it this way. Nor could we have done so. We do not know enough about Indonesia, its laws or its customs to do so. Rather, she came here to a foreign environment; she listened, she observed and she thought. Then she went home and devised her own techniques for the Indonesian classroom. One might say she carried our peanuts and planted them in her own garden.

The more we listen to our Third World colleagues, the better we will understand how we can be truly helpful. Sometimes it is easy. On occasion, they know what they need and can tell us. When requested to teach a course to senior attorneys from six national oil companies in Venezuela, I was told precisely what they wanted. Their companies were selling petroleum to the United States, disputes were occurring, and lawsuits were being instituted. These lawyers wanted to know when their companies could be sued in American courts. This called for an understanding of our federal/state system, as well as our notions of personal jurisdiction. Likewise, they sought a basic comprehension of the Uniform Commercial Code, especially Article Two. Finally their past experience had already taught them that U.S. lawyers approach contract drafting rather differently. They were baffled by our insistence upon detailed force majeure clauses, when their civil law system would have led them to prefer a more general provision. What was the explanation for the American attitude?

A similar development may occur when dealing with senior government officials. While gathering materials for a course in Tax Incentives at the Taiwanese Ministry of Finance, I was asked to include the Caribbean Basin Initiative.¹¹ I did so, but wondered why the Taiwanese were inter-

11. 19 U.S.C. § 2701ff (1982).

ested in this peculiar U.S. statute. It turned out that they had sound reasons. With the United States deficits continuing to mount, the Taiwanese fear that we will increase barriers to their trade. Consequently, they were seeking ways to avoid such obstacles by, for instance, moving a factory to Jamaica.

When the Council for the Promotion of International Trade of the People's Republic of China invited me to give a short course on personal jurisdiction and the Foreign Sovereign Immunities Act, their interest had a solidly practical basis. Someone had succeeded in suing their government in a United States court¹² and this ran contrary to traditional Chinese learning about absolute sovereign immunity. These officials needed immediate help in understanding, not only this case, but also the ramifications of these new norms for PRC-US trade.

Nonetheless, young students may not be able to articulate their needs so clearly. In this situation it may be best for the U.S. instructor simply to present the materials in the most objective fashion possible. For instance, the Socratic technique can be demonstrated, not to prove it superior to doctrinal lecturing, but just to show a foreign audience how we teach. Economic considerations can be presented not to champion the conservative positions of the U.S. "law and economics" movement, but to indicate how economic factors can be woven into a legal analysis. In a culture where students are not hesitant to speak up, those with more leftist leanings can be urged to present counter arguments.

I tried this approach with classes at Catholic University and the University of Lima Law Schools in Peru using a translation of *Peevyhouse v. Garland Coal & Mining Co.*¹³ That case deals with two alternative measures of damages—diminution of value and cost of completion—both valid legal norms. Choosing which rule to apply called for a typically common law consideration of the facts. At first, the Peruvians, with their civil law training, were bothered by the idea of two apparently contradictory norms. Ultimately, however, some students suggested that this was not really a matter of conflicting rules; rather one norm (cost of completion) could be viewed as the general rule and the other (diminution of value) simply an exception to that rule. A rule and an exception thereto did not seem so different from their own code approach. What did seem

12. *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D. Ala. 1982); 596 F.Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986); *cert. denied*, U.S. , 107 S. Ct. 1371 (1987).

13. 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).

strange to them was the absence of rule-like criteria as to when to apply the exception. The “weighing of relevant factors,” which we do so readily in common law, appeared rather fuzzy or vague to them.

On the other hand, as nationals of a developing country, they were intrigued by the court’s notion of “economic waste” and the prospect of bringing current environmental concerns into the decision making process. Finally, the students pointed out that the provisions of their own Civil Code on tort and contract damages were very general, simply providing for “*danos*” and “*prejuicios*” (losses and damages). Consequently, similar socioeconomic considerations could be brought into play when interpreting this code provision.

Ideally, the posture of the American law instructor before the foreign student, either here or abroad, should be totally unobtrusive. We should try simply to describe the problem that arose in our country, how our legal institutions and norms responded and what we think the results are. Then let the foreign listeners decide for themselves whether what we have said has any relevance for their own societies. They will fail to respond to some things that we consider important. Conversely, other matters to which we may have paid slight heed can impress them deeply. While teaching a course, Introduction to U.S. Law, in Peru, I mentioned in passing the institution of common law marriage and summarized its characteristics. Immediately a number of Peruvian students picked up on this and mentioned the need for a similar de facto marriage in their country where bureaucratic and financial obstacles discourage many poor people from contracting legal marriages.

When we subject civilian students to reading common law cases, we might better present them as a series of stories, rather than as the formidable source of common law. Code systems do not make their rules this way, but code countries do have human beings and human beings become involved in stories, some of which have legal consequences. Studying a related group of such tales can be enlightening to any society. The United States with its vast collections of case reports offers a rich mine of such stories—probably more than any other nation.

For a Third World country that wants to develop a healthy capital market system, a study of U.S. decisions on securities regulations can reveal the variety of manipulations and machinations that people devise to cheat one another. In turn these stories can be used by legislative drafters in a developing country to anticipate the types of problems with which their new rules will have to deal. Familiarity with our cases on the fiduciary duty of a controlling shareholder may prompt a civil law country to enact a statute imposing liability on a controlling shareholder who

engages in an “abuse of power.” Brazil, which followed this course, avoided importing the foreign common law concept, “fiduciary duty,” by substituting a civil law notion derived from the French doctrine, “abuse of right.” In these kinds of situations, the American case-stories can help foreign lawyers anticipate future problems, but this does not imply that our solution is the only appropriate one.

To relieve the pressure inherent in assuming such a neutral stance, one can turn to “having fun.” In the Common Law courses in Indonesia and Peru, I gave several lectures on procedure. Our courtroom dramas with their confrontations between opposing attorneys, playing to lay jurors and invocation of complex evidence rules, had no counterpart in either nation. But both countries are heavily dependent upon imports of American TV programs and movies for their entertainment. The students had been simply baffled by courtroom scenes, which appear frequently in these productions. Hence they were keen to hear my explanations. American lawyers are often said to be frustrated actors, so I “hammed it up” by doing some imaginary trial scenes. Such antics from a professor provided a new experience for them and invoked laughter from all of us. The film, “Paper Chase,” had been viewed and misunderstood by most of the Peruvian students; again they were delighted to find someone who could explain what it was all about.

In working with foreign students within the United States, we must never forget that we have a number of unpaid teaching assistants helping us—the American students in the class. And it works both ways—the foreign students also educate the Americans. Many of us have thought at times that the most valuable part of these programs is the exchange that takes place between these two groups of students. They teach each other legal norms, cultural perspectives and mental attitudes. Often the best role for the professor is that of a catalyst.

An American graduate attorney in one of my international courses missed several classes to fly to Africa for negotiations on behalf of his petroleum company employer. Having worked in this area for some time, he was already familiar with many of the legal prescriptions we were covering. I expressed to him my concern that he was learning nothing new in the course. He responded that, “Yes, I do already know many of these formal rules. But previously I thought the developing countries were simply unreasonable in promulgating such laws and decrees. Now through the course—and through discussions with the foreign students—I am beginning to understand the reasons behind these rules.” He felt this new comprehension would aid him in future transactions.

We should bear in mind that Socratic dissection of appellate decisions is not the only tool in our bag of techniques. American professors are also accustomed to creating hypothetical situations or transactions that the student is asked to analyze. This approach is especially appropriate for courses in international transactions where the importance of courts gives way to that of administrative interpretation of investment statutes, trade agreements, and technology transfer laws. In teaching this course in Peru and Indonesia, I prepared books consisting of primary materials (treaties, legislation, and regulations), politico-economic articles, and hypothetical transactions. Much of the classroom time was devoted to discussion of how primary materials applied to those problems.

In both countries the students found this approach different. The Peruvians were stunned when I launched right into an imaginary transaction without a preliminary discussion of the theoretical foundations and philosophical structures into which to place these laws. Initially, the students had no idea how to approach these problems. Although problem examinations (or "*casos practicos*") had been given previously by some of the Peruvian teachers, those exams normally also listed the legal questions to be answered by the student. In contrast, I had simply stated the facts and expected the student to identify the legal issues. The importance of issue recognition was further highlighted by making the exams "open book" so the student could look up the law once the appropriate question had been formulated. Despite initial confusion, students in both nations soon mastered this new technique.

Let me reiterate that the problem teaching method should be offered, not because this approach is inherently better, but simply because it provides an alternative experience for the civilian student. By the end of my course, the Peruvians, most of whom were practicing attorneys, gave this method high marks for its practical utility. They also thought it would enhance their skills in bargaining with North American attorneys. At the same time, we American teachers should be mindful that, in our obsession with the "practice" of law, we have sacrificed much that is truly academic. In this regard, the civilian law professor may well outpace us.

A matter of grave concern to the Third World is the unequal bargaining power between the multinational enterprises and the developing nations. Not only do the companies enjoy superiority in technology and capital resources, but also they have better access to new information and sophisticated legal skills. The U.S. law professors can contribute toward equalizing the latter portion of this equation, especially in their role as information suppliers.

This information can take a variety of forms and I strongly urge all industrialized country lawyers visiting Third World nations to take appropriate legal materials to give host country educational institutions. In preparation for my stays in Indonesia and in Peru, I contacted the American law book publishers. Without exception, they generously provided me with free copies of relevant books for donation to the foreign law schools. West Publishing Company's Nutshell series proved particularly helpful in providing the foreign student with an overview of U.S. law on a specific subject.

My teaching materials for Peru and Indonesia were prepared in the United States prior to departure because it is far easier to obtain most of the requisite documents here than in the developing countries. I would strongly recommend any First World law professor planning to teach overseas to collect the basic materials in his or her own country.

Aware of the importance of information, the export promotion agency of the Peruvian government sent me to Cuzco and Arequipa to give short courses (six to eight hours) on "international contract law." Peru, especially with its current debt problem, has an urgent need to export. Yet, outside the capital city of Lima, attorneys and law students know little about transnational law. Likewise, their access to relevant legal materials is virtually nil. Hence, they were hungry for the Spanish legal materials I took them, such as the United Nations Convention on Contracts for the International Sale of Goods and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Professor James A. Gardner in his book, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*, criticizes the U.S. "legal missionaries" for ethnocentricity, pointing out that some "knew neither the law nor the language of the 'recipient' country"; moreover, they often erred by distributing "untranslated American legal texts."¹⁴

The question of language is a knotty one for Americans. We have tended to be a rather provincial people who take an almost perverse pride in our inability to master other tongues. On the other hand, we are often too embarrassed to employ what limited language skills we may have. Those same professors who display great lenience toward broken English from a foreigner often refuse to lecture in a foreign idiom of which their command is less than perfect. This seems especially true of law professors who impose upon themselves high standards for verbal capacities.

14. Gardner, *supra* note 4, at 243.

We should urge American teachers who wish to work in the Third World to set aside their reluctance and to dare use of the local tongue regardless of the mistakes. Generally, students, especially those from developing nations, are appreciative if a foreigner tries to speak their language. Usually, they will attempt to help the teacher by supplying an unknown foreign word. If one student grasps what the foreign professor means, he or she frequently will explain it to the rest of the class in their own language. At times, my Peruvian students would seek out a Peruvian professor to ascertain the precise term for a technical concept and then relay it back to me.

In gathering materials to take abroad, one should endeavor to obtain as much as possible in the local language. It proved easier for me to locate Spanish versions of certain documents—such as the GATT agreement or the U.N. Commodities Fund Convention—in the United States than in Latin America. The international organizations located in Washington and New York can be excellent sources for materials in other languages, and one is far more likely to find materials about neighboring countries in a good comparative law library in the United States. For example, if one wishes to describe a Mexican law to a Colombian class, the chances of securing the Mexican legal documentation is better in Texas than in Colombia.

After pulling together the requisite legal materials for the Peruvian course, I wrote a number of problems in Spanish. Latin American graduate students studying at Southern Methodist University were employed to recast my Spanish in a form more easily comprehended by native speakers. Once in Peru, the university there provided a student assistant who translated English materials, researched Peruvian law, and corrected my Spanish writing. With this kind of extensive help, I suggest many other American professors could also teach in a foreign language.

Indonesia presented a different situation. Although I finally learned enough of the local tongue “to get around,” there was no way I could teach in that language. The students knew in advance the course would be in English. Initially they had trouble with my American accent because they were accustomed to Australian English.

This difficult situation was eased in several ways. First, I had brought with me all the requisite legal materials in English. The students were given copies and could spend as much time as they needed in pouring over the English texts. Next, as in most countries, the foreign investment statute had been translated into English. The Bahasa Indonesian version was assigned to the students while I used the English translation.

I had also taken a small recorder which allowed me to give the students tapes of the class meetings for further study at their leisure. Finally two professors at the law school where I was teaching had completed graduate work at American law schools. They attended all my lectures and held extra sessions with the students afterwards in Indonesian to clear up any confusion. Thus, even a formidable language barrier was at least partially overcome.

Finally, the American law professor may serve as a channel for information about what is happening in other developing nations. U.S. transnational lawyers have a wide network of contacts throughout the world which gives us a unique ability to bring together peoples and ideas from other countries. We also enjoy the enormous advantage of working in the universal language, English. Thus, I was able to provide a Peruvian lawyer with a book in English about oil production sharing contracts in Indonesia. For an Indonesian drafting an environmental protection statute, I could obtain English translations of similar legislation from other developing, civil law countries.

Some American law libraries are giant repositories of materials describing legal experiments in various developing countries. We who have the research tools to locate these resources can teach others how to do so, and we can forward reprints of pertinent publications to our colleagues in developing nations.

This may be the ultimate frontier for "law and modernization" studies. The approach should be not to inquire what the United States or Great Britain has done about a particular problem, but to explore how other similarly situated developing nations have handled it. Years of working in Asia, Africa, and Latin America have persuaded me that, despite cultural and historical differences, the developing countries have more in common with each other than they do with the rich nations of the North. Yet what do African jurists know about legal experiments in Latin America? Are there approaches used in Singapore which could be appropriate in South America. Brazil created a unique set of laws to develop an aircraft industry.¹⁵ Could another nation shape a comparable scheme to foster a different priority industry? As part of the South-South trade and investment move, it would be invaluable if a clearinghouse could be established for the exchange of legal ideas and experiences among and between Third World lawyers. First World professors could also play a

15. Carl, *The Brazilian Aircraft Industry and the Use of Law as a Tool for Development*, 50 J. OF AIR L. & COMMERCE 513 (1985).

part here as expeditors of the information flow. Likewise, the computerization of legal data can help accelerate such communication.

Perhaps the International Development Law Institute, described elsewhere in this journal, could play a key role in such exchanges by stressing the value of the knowledge and experience of Third World legal experts in specific fields. For instance, Brazilian tax and securities specialists might be invited to lecture on their nation's legislation crafted to develop a modern capital markets system. The Brazilians, who started twenty-five years ago with a very primitive securities market, could describe novel incentives, never tried nor needed by the more sophisticated economies of the North. Alternatively, economic integration associations in Latin America and Asia might profit from lectures on the operation of the compensation systems used in the African integration associations.¹⁶

Finally, the message of American academics about the importance of facts may be bearing more fruit than we realize. Several years ago, after reading Kenneth Karst's article on "informal legal systems" in the Caracas slums,¹⁷ my Latin American students protested, "That is not law!" Now, however, a Peruvian group has produced a book on the "informal economic sector"¹⁸ which accounts for a significant portion of the nation's production. The book has topped the best seller list in Peru and leading Peruvian jurists are calling for revision of the formal legal system to mesh with the norms being created by the "informales." Clearly, a concern for factual realities is being manifested here.

In 1973, E.F. Schumacher published a seminal book, *Small Is Beautiful*,¹⁹ calling for the creation of technology more appropriate to the actual needs of developing nations. First World law professors should likewise think in terms of legal education models more appropriate to the Third World, and "appropriate" in this context probably means that grand schemes are now obsolete. Rather, let us focus on providing these

16. See, e.g., B. CARL, *ECONOMIC INTEGRATION AMONG DEVELOPING NATIONS: LAW AND POLICY* (1986).

17. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971).

18. This book, *EL OTRO SENDERO [The Other Path]* (1986), is also on the best-seller list in Colombia and has become the object of fierce political debate throughout the Spanish speaking world. English and Portuguese translations are expected soon. This work is described in George Melloan's article, *A New Latin Hero Has a Message for Capitalists*, Wall St. J., Mar. 17, 1987, at 35, col. 3.

19. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (N.Y.: Harper & Row, 1973).

peanut-sized offerings that the developing countries can then plant in their own soil and prune to their own liking.

