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# ON PRIORITIZING BILLS TO IMPLEMENT THE NEW ECONOMIC MECHANISM

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As does every country, the Lao PDR faces the problem of economizing on scarce drafting resources. Every ministry clamors to have its bills drafted instantly; drafters run scarce on the ground. How to prioritize the bills for drafting? At the July Workshop, MOJ asked the participants to consider three bills: A check law, a law on government procurement and a land law. Of these, there existed drafts for the first two, both drafted in Phases One and Two of the Project by consultants under the Harvard Project. The third consisted mainly of a titling bill, sponsored by the World Bank and supported by a \$17,000,000 grant.

These bills hardly seemed to cut to the heart of the Lao PDR's development problems. With all the Lao PDR's difficulties, in many people's priorities a check law would seem relatively low. So also, many people might put a land titling project relatively low in their scale of priorities. Laws creating or transforming institutions like banks, education, agricultural extension, the marketing of agricultural products, worker health and safety, and the environment some might think had a higher priority than a check law -- especially since the trend all over the world emphasizes a sharp reduction in the pieces of paper that banks circulate-- or a titling law -- especially since ethnic minorities hold a relatively large amount of Lao PDR land under systems of customary law to whom the concept of title has little relevance.

What occurred with respect to the laws selected for the summer workshop is evidenced in the prioritization of other laws proposed for enactment. To a great extent, these concern what we might term 'businessmen's laws', concerned mainly with contract and property law in all their manifold forms. Prioritization constitutes the principal modality of government policy-making. Every government has a long wish list of laws they want to see enacted; they never have difficulty in finding projects on which to spend scarce drafting resources. The difficult policy question concerns prioritization. Why do these laws receive priority in drafting, at the ineluctable loss of other laws which also urgently need drafting?

Following a problem-solving methodology, we first briefly examine how Lao selects bills for drafting. In that process, foreign donors play a leading role. Why those donors press for the bills they do depends mainly upon their ideology, very broadly conceived. For example, their notions of how law



\* functions in the process of transition, and how to use economic theory in policy- and law-making. To understand that, in the first Part of this paper, we discuss those concepts together with their alternatives. In the second Part, we discuss why the Lao PDR acquiesces in those demands, an outcome that depends in part upon the economic pressure the donors can bring to bear, but perhaps also in the processes by which the Lao PDR makes its own determinations of priority. Finally, we suggest how the Lao PDR might better prioritize bills.

## I

### TWO PERSPECTIVES ON LAW IN THE TRANSFORMATION PROCESS

The process of prioritization constitutes a process in which the World Bank and other donors play a significant role. For example, the World Bank has made the payment of a \$17,000,000 tranche of a proposed grant dependent upon the Lao PDR's enactment of a check law. It has granted a large sum of money over the next twenty-five years to title 100% of the land in the Lao PDR. It has made another tranche of the proposed grant dependent upon enactment of a government procurement law (**I think!**). The Asia Development Bank has granted \$400,000 to ensure its drafting, enactment and implementation.

Money talks. The World Bank shouted these priorities in the Lao PDR's ears. To understand why the Lao decision-makers selected these bills and not others for drafting, we must examine, first, why the World Bank and other international donors so often select laws concerning businessmen's law for urging on the Lao PDR for priority, and mainly assume that the Lao PDR can successfully copy those laws from other, 'developed' countries, and, second, why the Lao PDR so frequently acquiesces in their demands for what would seem desirable but relatively low priority bills. That depends, self-evidently, primarily upon their ideology, broadly conceived. That ideology came down heavily on one side of a wide-ranging debate among scholars.

Today, nobody doubts that a market economy requires a legal framework. Lao aggressively pursues the objective of creating that framework. Scholars and practitioners alike, however, differ about the substance of the laws that ought to constitute that framework, over two issues. One concerns the question, whether there exists a one-size-suits-all legal framework? Another asks whether that framework concerns primarily the laws that concern businessmen -- mainly property and contract in all their variety, or whether it also concerns the laws that structure the institutions that constitute the infrastructure within which business men chaffer, truck and barter? This Part



discusses each of these issues in turn. Preliminarily, however, we examine the problem of marketization as it appears in the Lao PDR.

#### A. THE PROBLEM FACED BY THE LAO PDR

Beginning with the Chinese Reform and Open Policy of 1979, and accelerated by the demise of the Soviet Union, so many countries have declared the objective of achieving one or another form of a market-driven economy that they have received their own name: "Transitional economies". The Lao PDR falls in that general category. From the revolution of 1975 until the promulgation of the New Economic Mechanism in 1985, the Lao PDR sought to implement a centrally-planned economy. The NEM proclaimed the objective of a market-driven economy.

In that objective, the Lao PDR resembled the other, formerly (more or less) socialist countries that have also declared themselves for a market economy. The phrase "transitional economies", however, paints with a very broad brush. Long before the transition, the highly industrialized, largely urbanized economies like the former German Democratic Republic (East Germany) or Czechoslovakia had achieved a degree of specialization and exchange that embraced practically the entire population. There, the problem of planning had largely become one of coordinating already-existing, relatively modern production units, and ensuring that their output matched consumer demands. The problem of the transition there consisted of changing the mechanism that accomplished those tasks from Plan to one or another sort of Market.

As it is for China and Vietnam, for the Lao PDR the transition poses other problems. There, large portions of the population remain largely excluded from the system of specialization and exchange. In the Lao PDR, most of its population remains rural. As other third world countries seeking to develop, both in the Plan period (1975-85) and since, the Lao PDR has had the task of transforming its institutions from those characteristic of colonial economies to ones characterized by a high degree of specialization and exchange.

Like other colonial economies, the colonial Lao economy exhibited all the characteristics of dependency: In Lao's case, a tiny export sector consisting mainly of logging and opium, and a vast hinterland in which most of the population lived, using hoe agriculture technology and with precious little specialization and exchange. The Lao PDR government since 1975 has taken as its principal task transforming the institutions that constituted that economy to ones with a high degree of



monetization and much higher technology and productivity, without developing the markedly stratified societies that characterize much of the third world. Since (as we discuss below) government's principal instrument for inducing institutional change consists of the legal order, the Lao PDR's task consists of what elsewhere in the Third World has been denoted the problem of law and development.

Overlaid on that primary task, since 1985 the NEM has superimposed another: Moving from the rather hesitant steps towards a planned economy that Lao took 1975-1985, and substituting market imperatives. In the latter, it resembled other transitional societies; in the former, it resembled not the transitional societies, but the developing world generally. That combination constituted Lao's specific version of the problem of transformation. It is against that background that we consider the controversies about the general problem of the legal framework for transitional economies.

#### **B. ONE-SIZE-FITS-ALL OR CUSTOM-MADE?**

Theoreticians of the transitional economies fell into two camps. One -- the conventional wisdom -- perceived their task as one of discovering the universal recipe for the transition. For them, the central dichotomies became Big Bang vs. incrementalism, private vs state property, market vs plan. Resolving those dichotomies would produce the desired universal recipe.

Others took a contrary view: The search for an universal recipe for the transition hunts the chimera. Until expressed in laws and regulations, policies concerning the transition -- concerning the conduct of the economy, ownership of property, and rate of transition -- shout in the wind.<sup>1</sup> Unless they respond specifically to the imperatives of their particular time and place, laws and regulations remain all growl and no bite; context is all. The true dichotomy in development lies between decision-making by cookbook or by context. Cookbook decision-making all but invariably invokes economic theory as metaphor rather than heuristic, and economic theories that deny the centrality of institutions. First, we address this contestation by examining how policy works itself out in the workaday world, that is, through the legal order; second we examine the problem again in light of the peculiar overlay of the law-and-development problem with that of the transition from Plan to Market.

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<sup>1</sup> ANN SEIDMAN AND ROBERT B. SEIDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS: PROBLEM-SOLVING AND INSTITUTIONAL CHANGE IN THE THIRD WORLD (1994) 41.



# 1. From policy to law: the problem of institutional change.

Without more, policy does no more than make newspaper headlines: "Government plans to bring water to every village", or "Government plans to introduce a system of payment by check".

Until transformed into government action, nothing happens. Government policy to move towards a market mechanism has no concrete meaning until government acts.

Government acts through the legal order, broadly conceived as the laws and the institutions that make and implement them. To understand how policy actually works we must therefore examine how law works to carry it out. On that issue, too, no consensus exists.

One view holds that government appropriately uses law when it identifies a social problem, and describes in normative terms the desired state of affairs. For some who adhere to this view, that implies that law serves only as the rules of the litigation game. It merely prescribes rights and duties, so that judges can justly resolve disputes. Everything after that concerns implementation, not law. For others, law concerns behavior, but they draw a sharp line between the law and its implementation. Writing rules prescribing the desired end result constitutes law's function; all after that constitutes implementation. In either event, one-size-fits-all holds; what constitutes a just and wise objective does not differ from society to society.

The contrary view holds that law works by channelling the behavior of its official and non-official addressees. Law cannot command water to conduct itself to every village. It can direct various actors, both lay and official, about how they ought to behave, and back those directions up with various sorts of conformity-inducing measures (and not only punishments!).

Repetitive patterns of behavior by definition constitute institutions. A marketized differs from a planned economy by the institutions that constitute it: Planned economies, by planning commissions, plan enforcement mechanisms, institutions for supply and delivery that depend not on bargaining but on directives by centralized institutions, enterprises that determine production and prices in obedience to directives, and so forth; market economies, by parties bargaining with each other, enterprises that set productive priorities and prices in response to market signals, and so forth. To change from a planned to a market economy requires massive changes in behaviors by a myriad of economic actors. Government seeks to induce these ~~changed~~ behaviors through the legal order. Thus does government implement policy; thus does it transform institutions.



How does law work to change behaviors? That requires an understanding of why people behave as they do in the face of a rule of law. People do that by choosing among the constraints and resources thrown up by their own country-specific environments -- of which the rule of law and its threats and promises constitute but one among many.<sup>2</sup> These include, not only their objective circumstances, but also their own subjective interests, values and ideologies shaped by their country-specific circumstances. Figure 1 captures that proposition.<sup>3</sup>

FIGURE 1

A MODEL OF LAW AND SOCIAL BEHAVIOR(a)

country-specific  
circumstances

Law makers

feedback

feedback

rule

rule

Implementing  
institutions

sanctions

role

country-specific  
circumstances

occupant  
country-specific  
circumstances

feedback

<sup>2</sup> Cf. FREDERIK BARTH, MODELS OF SOCIAL ORGANIZATION (Royal Anthropological Institute Occasional Paper 23 [Glasgow: University Press] 1966). Seidman and Seidman, *supra* n. 11, Ch. 6.

<sup>3</sup> The model bases itself on legal realism, which held that an essential question always concerns behavior in the face of a rule of law (the realists spoke of the systematic difference between the 'law-in-the-books' and 'the-law-in-action'). See Karl Llewellyn, "Some Realism about Realism"...xx. The model folds into the contemporary analytical positivist perception of the universe of rules [HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1949); H.L.A. HART, THE CONCEPT OF LAW (1962)] the sociological and anthropological notion of action as choices within a range of constraints and resources thrown up by the environment -- not always rational choice, but choice nevertheless. See Barth, *supra* n. xx.



It follows that law-making must take implementation into account. The common complaint, "we have good laws but bad implementation" states an oxymoron. It also follows that a one-size-fits-all legal framework for a market economy cannot work. A law that induces one sort of behavior in one time and place will only accidentally induce the same behavior in another time or place. A legal framework that will induce market-enhancing behaviors in Ruritania will only accidentally induce the same sorts of behaviors in Booga-Booga. The search for a universal formula for a legal framework for a market economy does indeed search for the chimera.

Those propositions have profound implications for the prioritization of law that Lao selects for drafting, along five different dimensions.

a. Three invalid dichotomies. That law addresses behavior disposes of the supposed dichotomies that have so much concerned the scholars of transition. No universal recipe exists for the rate of transition; whether big bang or incremental or in between depends on context. The same holds for the notion that privatization constitutes a silver bullet to resolve all that ails the transitional economies, or that all planning must fade away in the face of the demands of marketization: In these issues too, context is all.

b. The kinds and uses of economic theory. In prioritizing bills, many theorists invoke neoclassical (that is, non-institutional) economics as a metaphor. They consider the real-life situation, and find in it some market-like characteristics. They then abandon the real world to consult the market model presented by neoclassical economics. Based entirely on that model -- not on an investigation into the Lao PDR's specific circumstances, they recommend the prioritization of laws. If the model above holds, for law-making, drafters must use an economic theory that perceives institutions as the critical building blocks of the economy, and that uses theory not to make policy but to guide empirical investigations into the Lao reality.

c. Copying the laws of other countries. The proposition that law addresses behavior declares invalid a variety of claims frequently made about the laws that Lao should adopt: That Lao should copy either some other country's law (as Professor Schmit claimed that Lao should copy Holland's entire Code), or a supposed 'international standard' law (such as the proposed check law). Whether Lao ought to adopt any particular law depends upon an empirical study of that law's consequences in the specific Lao circumstances.



d. Copying the priorities of other countries. That proposition also declares invalid the claim that a particular law -- say, a check law or a titling law -- holds a priority place in every market economy, and therefore also in Lao's transition to a market economy. Lao's transition to a market economy has of course some general resemblances to other transitional economies -- but many, many more differences. Whether it ought to adopt a check law or a titling law ought to depend upon an empirical study of Lao's specific circumstances, and a mature judgment that those laws really do have a practical importance that warrants the high priority given them.

5. Prioritize problems, not laws. That proposition suggests that Lao ought not to prioritize the law that it wants drafted, but rather the social behaviors that constitute the difficulty that Lao wants the new law to address. For example, whether Lao needs a check law remains subject to some doubt. That Lao needs a better payment system than carrying around trunk loads of kip notes, however, hardly bears argument. Many transitional economies have problems with payment systems. Whether a check law or some other system (for example, electronic transfers or a GIRO system) would serve Lao better than a check law, however, again requires empirical research.

These propositions become even more persuasive when considered against the backdrop of the Lao PDR's need for laws that transform not only its economy from Plan towards Market, but from the dependent, dichotomized colonial economy to a highly productive, integrated relatively independent economy.

## 2. One-size-fits-all and the problem of law and development

That context is all becomes inescapable when considering the second demand on the Lao PDR's laws: The requirement that they aid not only the transition from Plan to Market, but also the transformations required to create a productive, relatively modern economy, that is, one with a high technology, greater job opportunities for all, and a high degree of specialization and exchange. We examine one law as a case study: The law that within twenty-five years would title 100% of the parcels of land in the Lao PDR.

Neoclassical economics argues that people cannot buy and sell land unless someone exists with the power to sell, that the law clearly designates that person and the precise dimensions of the land that he or she holds. Land in Lao does not meet these requirements. In the cities, probably the system of tenures presently in force among the people does recognize a single owner, but obscurely, and boundary lines also seem vague. In the



countryside, however, more serious difficulties to titling exist.

40% of the Lao PDR's population consists of members of ethnic minorities. Most of these live in the mountains, subsisting by hoe agriculture. They hold their land by customary tenures. Typically in customary tenures -- especially those employing shifting agriculture -- nobody has the power to sell land; land belongs to the community, both those now alive and those still unborn. Moreover, many people have various sorts of complicated rights in the land. Especially, women frequently have rights of user in land otherwise under the control of the husband. To translate these complicated customary tenures into a single owner with a clear power to transfer title sets these customary tenures all at windmills, to the serious detriment of many of those in these communities -- with especial danger to women. More: Without considerable empirical research, no one can be positive that marketization of the land constitutes the best way to develop Lao's agriculture. Whatever the strength of the case that one can make for title in Lao's urban and peri-urban areas, whether it constitutes the priority law for transforming agricultural landholding institutions requires extensive study. Context is all.

#### **B. BUSINESSMEN'S LAW AS PRIORITY, OR AS CO-EQUAL WITH 'INFRASTRUCTURAL' LAWS?**

Max Weber argued that capitalists require above all certainty in legal relations (especially, those generally related to contract and property). In accord with his notions, and with some versions of neo-classical economics, some academic lawyers (mostly in the US) maintained that what an earlier generation called 'private' law<sup>4</sup> -- contract, property, and tort in all their elaborate variations enforced principally by private litigation in the ordinary law courts -- constituted the primary legal framework for market economies. That view identified the legal framework of market economies with the sorts of law that businessmen invoked in their day to day legal relationships. It told the Lao PDR that businessmen's laws took pride of place in drafting laws.

An alternative view contested Weber's. The market works not only because of businessmen's laws, but also because of an infrastructure, institutional and legal as well as physical. A market requires a whole mob of those institutions and the laws necessary to create, buttress and when necessary to change them:

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<sup>4</sup> Weber, no. 26; But see xx....Cohen [on contract as a form of public law].



To ensure appropriate controls over the money supply and credit, the banks; to ensure government fiscal responsibility, the processes of budget formation and budget discipline; to ensure an educated work force, the educational system; to ensure a mobile work force and social stability, publicly financed old age and disability pensions; to ensure a progressive agricultural sector, the agricultural extension service; to protect the environment against the ravages of private greed, effective environmental protection agencies -- a long list. That view held that in choosing priority laws to draft, the Lao PDR should weigh the claims not only of businessmen's laws, but also of all the laws required to bolster the market's institutional infrastructure.

Weber was wrong. Consider, for example, the problem of bringing rice from the farmer to the consumer. It requires farmers who produce for the market (with all the supporting institutions that that demands), a rice processing plant, storage facilities, a wholesaler, a retailer, someplace or other a bank, and transport between all these. If these institutions exist, but property and contract laws remain weak or non-existent, it makes sense to suppose that enacting those laws will enable businessmen to make contracts between these enterprises, and to allow capital to move towards those sectors where profitable opportunities exist -- that is, to marketize the whole. A businessman who sees an opportunity for a new retail store in Vientiane might then buy the land knowing that he will get good title, make contracts to build a store, knowing that contract law makes it more likely that the contractor will perform, and enter into purchase agreements for stock and fixtures.

Suppose, however, that none of these institutions exist. Titling real estate and strengthening contract law -- or developing a check system -- alone will not likely create a rice producing and marketing system. Businessmen may then have some legal assurance that their engagements will come to fruition, and that when they buy a piece of property they will likely acquire title. That alone will not lead them to invest. Nobody will build a rice processing plant unless farmers are producing for the market. Nobody will build storage facilities unless the processing plant and wholesalers exist. All will die aborning unless a bank and credit facilities exist. Without these basic institutions, no businessmen will exist to invoke businessmen's law.

In the Western, developed countries, these enormously complicated networks of production, trade and credit arose incrementally, over hundreds of years. The Lao PDR proposes to jump start into a modern economy. That requires careful consideration not only of the laws that businessmen require, but



also of the laws that will make the development of the market's infrastructural institutions more likely.

Thus far, we have only succeeded in complicating the problems of prioritization. Instead of the relatively easy job of copying law and other countries' priorities, we have said that Lao must develop her own laws and priorities. Instead of that sacred cow of transitional economics, privatization, we have said that Lao must determine case by case whether privatization ought to go forward. Instead of the easy out of making law by metaphor, we have said that Lao must make law on the basis of demanding empirical research. Instead of limiting its attention to laws required for the transition from Plan to Market, we have suggested that Lao must include in the calculus laws looking to the development of what remains a somewhat colonial economy. Instead of limiting the laws considered for prioritization to 'businessmen's laws', we have suggested that the Lao PDR should consider the claims of the laws creating the market's infrastructure. How to prioritize in the face of these broadened requirements?

## II

### ON THE PROCESS OF PRIORITIZING

Faced by a multitude of demands for new laws, and barred from all the screening devices that so handily (if erroneously) seemingly come to the aide to those using that alternative legal ideology, how can the Lao PDR appropriately prioritize its drafting assignments? On purely pragmatic grounds, we propose these principles for prioritizing the bill-drafting task.

1. Prioritize in terms of social problems, not laws.
2. Only prioritize in terms of a five year plan, not in terms of social problems considered singly and devoid of alternatives.
3. Canvass widely to prepare the original list of social problems.
4. Choose by exclusion, not by apparent desirability. (i.e., instead of selecting the 'most important' laws, put at the bottom of the list social problems that, while important, are not so pressing at the moment. (In Charles Lindblom's terms, select for priority drafting the most urgent, not necessarily the most



5. Choose the problem from which you will learn the most.



6. And pay attention to the 'don'ts' earlier mentioned, e.g., don't copy laws, don't copy priorities (but learn from other countries' experiences), don't use economic theory as heuristic, remember that the Lao PDR has a dual problem of transition and of development, etc.