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Commentary to Professor Stephen D. Krasner

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COMMENT

COMMENTARY TO PROFESSOR STEPHEN D. KRASNER

Professor Krasner identifies the problem of badly-governed states as one that exists today without a historical comparator. These are states such as Haiti and those in sub-Saharan Africa that are effectively empty shells without a functioning form of legal governance. Professor Krasner argues that existing policy tools of governance assistance and transitional administration have proven inadequate to address the enormous range of problems generated by poor levels of governance. He posits an alternate approach of "shared sovereignty" to allow the engagement of external actors in specific aspects of domestic governance.

Although Professor Krasner's opening analysis was relatively broad, his preferred model of shared sovereignty was largely put forward in the context of resource-rich countries, and especially the contemporary issues facing Iraq. In this regard, Professor Krasner's approach implicitly acknowledges the idea that an abundance of natural resources can be a curse for developing countries.[1] An over-dependence on a single resource can encourage corruption and push the value of a domestic currency uncompetitively high, leading to poor economic growth and enormous distributional inequities evident in countries such as Nigeria and Venezuela. Professor Krasner's model of "shared sovereignty" would see the revenues from exploitation of natural resources such as oil and gas paid to trusts, whose purpose would be to introduce better levels of governance in those countries. Those trusts, in turn, would engage external actors to assist in developing specific aspects of domestic governance. He argues that having a state "sign off" on such an arrangement would legitimize this arrangement and act as an adequate response to the idea of loss of domestic sovereignty.

Professor Krasner's model is a useful and promising starting point, in that it engages contemporary theories of economic development that emphasize the need for a given level of institutional investment and capacity.[2] In this regard, some resource-rich Latin American nations, like Chile, Peru and Brazil, have managed to avoid the so-called resource curse through concerted efforts at investment and institutional development. Yet, Professor Krasner's model raises a number of intriguing

1. *But see* Jeff Madrick, *Far from a 'Curse,' Natural Resources Can Form the Basis for Economic Growth*, N.Y. TIMES, Feb. 19, 2004, at C2 (contesting the argument that poor institutional development is intrinsic to nations with oil and other minerals).

2. *See, e.g.*, Dani Rodrik, *Why Do More Open Economies Have Bigger Governments?*, 106 J. POL. ECON. 997 (1998); Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, STUD. COMP. INT'L. DEV. 3 (Fall 2000).

questions. An initial fundamental issue is the types of external actors that would be involved in the shared sovereignty model. Are these to be multinational corporate entities, developmental bodies such as United Nations Development Program, or members of the broad universe of NGOs, to name but a few?

At a minimum, the role of the external actors that were to participate in such a model would need to be carefully circumscribed. In this regard, it is worth considering the important lessons to emerge from the program of structural adjustment loans negotiated by the International Monetary Fund (IMF) in the 1970s and 1980s.[3] The doctrine of structural adjustment meant that a debtor country applying for financial assistance from the IMF had to commit itself to a number of stringent economic and legal reforms. The neo-liberal "Washington Consensus" advocated by the IMF emphasized trade liberalization and a greatly reduced role for the state in the economy, through deregulation and privatization programs. A common idea behind this program was that supplied laws on corporate and financial frameworks—once incorporated into the domestic legal system—would improve the existing legal framework and further economic development. It is now understood that this process of supplying laws from the outside is problematic on a number of fronts. Law and legal frameworks are in a sense cognitive, and the application and success of those rules is a function of their perception by users and enforcers in the receiving country.[4] Professor Krasner's model is clearly different, given its emphasis on creating institutions within countries such as Iraq, as opposed to the implicit hostility to state involvement evident in the IMF's structural adjustment program. However, both approaches seem at some level to involve the transport of forms of legal governance to the receiving country. While this may be practically necessary, the shared sovereignty model should not in its emphasis on the involvement of external actors, ignore the vital need for domestic involvement in law and institutional creation.

A related issue is that of the legitimacy of such a proposal from the perspective of citizens within the state concerned. Professor Krasner argues that having a state "sign off" on such a model would be an adequate response to the idea of loss of sovereignty. Yet, it is worth recalling the instructive lessons of the messy process of decolonization instituted in the aftermath of the Second World War. The countries that emerged from this process demanded not only political, but also eco-

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3. For an insightful account of the doctrine of structural adjustment, see ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 313–17 (2001).

4. Katharina Pistor, *The Standardization of Law and Its Effect on Developing Countries*, 4 G-24 DISCUSSION PAPER SERIES 8 (2000).

nomic independence. Indeed, foreign investment in particular came to be seen as a proxy for colonialism, leading to waves of expropriation of foreign-owned assets throughout much of the developing world. There has, of course, been a pendulum shift in developing country attitudes toward foreign investment in the last decade. Nonetheless, there remains a certain sensitivity, especially in resource-rich countries, of undue influence of foreign interests on their economic affairs. Of course, Professor Krasner's model itself offers a response to these concerns, in that its entire purpose is to use revenues from resource exploitation in the creation of a domestic legal framework. As such, the goals of his model are diametrically opposed to the profit maximization goals of most foreign investors. Yet, it would be a mistake to assume that given its laudable goals, the "shared sovereignty" model would be automatically accepted and understood by the ordinary citizenry of Iraq. At an absolute minimum, the architects of such a model should invest heavily in communicating its goals as part of an overall bottom-up approach to legitimization.

The importance of building a sense of legitimacy for the project is also bolstered by the lessons of the structural adjustment loans negotiated by the IMF. At a superficial level, the countries involved in those loans clearly "signed off" on the program of law reform as a precondition to receiving needed financial assistance. Yet, this consent was provided under duress, given the large balance of payment deficits run by many developing countries at the time. The enormous human suffering to result from the Asian financial crisis in 1997 has been blamed by many countries in East Asia on the overly strong liberalization program mandated by the IMF. This has led to a sense that—despite the "sign off"—the conditionality program was an entirely inappropriate interference in domestic regulatory sovereignty.

Thus, a final question might be to consider how to build such a sense of local ownership in the "shared sovereignty" model. A promising starting point might be to consider the use of the Internet in this endeavor. This, of course, raises the preliminary issue of existing levels of telecommunications infrastructure and Internet access in a country such as Iraq. To the extent, however, that the occupying authority establishes a certain level of access within Iraq, the Internet would seem to offer a two-fold advantage as a tool in the process of bottom-up legitimization of the "shared sovereignty" model. Firstly, it is an extraordinarily successful tool for communication of the goals of the project. Even more crucially, however, the Internet offers the possibility of direct engagement by a host of individual actors in the law-making process of the "shared sovereignty" model itself. The relative anonymity of exchange of ideas through the Internet offers a particularly useful psychological tool for encouraging participation in a country, such as Iraq, where there is no real public culture of engagement, given its recent history of totalitarian oppression. The possibilities of the Internet are not intended as a simple answer to the likely challenges of legitimization of the "shared sovereignty" model. They are, however, a useful starting point to address these challenges in all their complexities.

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