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Redefining and Analyzing Development and the Role and Rule of Law

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Editorial

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Abstract: This article introduces a series of articles prepared in connection with an April 2015 conference jointly sponsored by the Law & Development Institute and the Payson Center for International Development at Tulane University Law School. The introduction first surveys the uncertain and chaotic terrain of current and competing definitions of development and then introduces the articles in this special volume, identifying common themes and differences. In the process, the introduction suggests, law and development studies present great promise to provide greater coherence to development studies and practice going ahead, providing the approach is pluralist and inclusive.

Keywords: role of law in development, pluralism, rule of law, development definitions, curricular reform

1 Introduction: uncertainty and chaos in development definitions

"Development" is different things to different people. At least since the end of the Second World War, in 1945, "development" has in its most common usage been understood to mean economic development, as articulated by U.S. President Harry Truman in the speech containing his celebrated "point four." In that 1949 speech, Truman declared the United States' commitment to "embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas." The President famously concluded with words that helped construct one of the leading definitions of development still today – a definition that focuses on the creation of democratic institutions and promotion of economic growth as the source of individual satisfaction, explaining that "[w]hat we envisage is a program for development based on the concepts of democratic

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fair-dealing. ... Greater production is the key to prosperity and peace ..." Truman added that thus "we hope to help create the conditions that will lead eventually to personal freedom and happiness for all mankind." In these remarks it bears observing that President Truman focused to a great extent on providing ***more*** of everything, explaining that: "[o]ur main aim should be to help the free peoples of the world, through their own efforts, to produce more food, more clothing, more materials for housing, and more mechanical power to lighten their burdens."[1] This view has become a standard one in many quarters, extensively elaborated since 1949, implying as it does a constant improvement, a steady, upward trajectory in states of physical and economic well being. Thus, a celebrated development thinker and actor like Columbia University's Jeffrey Sachs, writing almost 60 years after President Truman's speech, expressed a view much like President Truman's when he explained that "[t]he progression ... from a subsistence economy, to a commercial economy, to an emerging-market economy, to a technology-based economy ... represents a higher level of well-being and a higher level of capital per person."[2]

Of course there are competing views. By the 1980s, the rapid pace of industrial and economic production, concurrent with massive population growth and intense urbanization, among other factors, demonstrably began to exert a strain on the capacity of natural systems to keep up, "producing "multiple environmental crises as never before in history."[3] As a result, in 1992 the United Nations convened a conference of global leaders – for the first time in a "developing country" – on the topic of the Environment and Development. That meeting, the famous "Earth Summit," resulted in the production and signature of numerous documents that helped pave the way for more robust discussions of "sustainable development", including the Rio Declaration on Environment and Development, Agenda 21 (an encyclopedic look at the challenges for development in the twenty-first century) and framework conventions on climate change and biodiversity protection. In many quarters, subsequently, other thinkers began to question the suggestion of Truman and those since him that more of everything is necessarily the ideal development path.[4]

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1 Gilbert Rist, *The History of Development: from Western Origins to Global Faith* (3rd ed., New York: Zed Books, 2008), pp. 71–72.

2 Jeffrey D. Sachs, *Common Wealth: Economics for a Crowded Planet* (New York: Penguin, 2008), p. 209.

3 *Ibid.* p. 18.

4 See, e.g. Joseph E. Stiglitz, *The Price of Inequality: How Today's Divide Society Endangers Our Future* (New York: Norton, 2012), pp. 104–106.

Not surprisingly then, since then many of us now find ourselves simultaneously entertaining and using different definitions of development – sustainable, economic, political, social and cultural, for example – depending on the context and the issue. Sometimes these definitions overlap, and sometimes there is little or no connection. Moreover, the economic- and production-focused definition of development that drove so much cross-national activity since 1945 has been challenged by many and a strong revisionism is demonstrated in the academic and policy literature, and in development practice. Thus, prominent voices have vigorously attacked the notion that ideas like Truman's trumpeted "democratic self-dealing" has in fact been the driving motive of the economic development strategies that have characterized the last 60 years, as in this sample of a virulent critique by the celebrated development economist Ha-Joon Chang:

> In relation to the developing countries, the neo-liberal agenda has been pushed by an alliance of rich country governments led by the US and mediated by the 'Unholy Trinity' of international economic organizations that they largely control – the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO). ... Together, these various bodies and individuals form a powerful propaganda machine, a financial-intellectual complex backed by money and power.[5]

For others, like the development economist William Easterly, there has been a fundamental disconnect on the part of richer, developed nations, to provide the less economically developed world and its populations with the resources and political voice they need. As Easterly writes:

> The tragedy of poverty is that the poorest people in the world have no money or political power ... to address their desperate needs, while the rich can use their money and power through well-developed markets and accountable bureaucracies to address theirs. The foreign aid bureaucracy has never quite gotten it – its central problem is that the poor are orphans: they have no money or political voice to communicate their needs or motivate others to meet those needs.[6]

It merits noting that both of the above authors, articulating views that have had wide reach and influence, worked for years within and for the very economic development institutions they criticize, a fact that may speak to the widespread discontent with traditional economic development interventions.

Others have taken a more constructive approach, trying to design interventions that "abandon the habit of reducing the poor to cartoon characters and

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5 Ha-Joon Chang, *Bad Samaritans: the Myth of Free Trade and the Secret History of Capitalism* (New York: Bloomsbury, 2008), p. 14.

6 William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin, 2006), p. 167.

take the time to really understand their lives, in all their complexity and richness."[7] Still others, the so-called "post-development" theorists, take the view that we need to move beyond "development" altogether, offering a searing critique of the damage they believe that Western-led "development" has imposed on economically less-developed countries. As Wolfgang Sachs wrote in 2010 in the introduction to a post-development text he edited: "The last forty years can be called the age of development. This epoch is coming to an end. The time is ripe to write its obituary."[8] To be sure, Sachs is not alone in his belief that development – or at least development as we know it, is dying or already dead. Consider this powerful critique of the self-described writer and grassroots activist Gustavo Esteva:

> Development has evaporated. The metaphor opened up a field of knowledge and for a while gave scientists something to believe in ... Neither in nature nor in society does there exist an evolution that imposes transformation towards 'ever more perfect forms' as a law. Reality is open to surprise. Modern man has failed in his effort to be god.[9]

These writers would have us believe that the post-Second World War development project so proudly celebrated by President Truman simply needs to be discredited because it has failed: "The conscientious objectors to growth are therefore right when they say we must 'decolonize our imaginary' and stop giving credence to economic 'science.'"[10]

In short, then, at least the notion of development is today very contested. The development field is muddy and uncertain, filled with a cacophony of voices articulating different agendas, priorities and even new theoretical frameworks to replace (or overthrow, depending on your perspective) the economic development norms advanced over the course of the last 60 + years by voices like Harry Truman and Jeffrey Sachs.

2 Wither development? The new law and development

At a minimum, this chorus of revisionist critiques raises as important question: whither development? One answer to that question, importantly, continues to

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7 Abhijit V. Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (New York: Public Affairs, 2011), p. ix.

8 Wolfgang Sachs, ed., *The Development Dictionary: A Guide to Knowledge as Power* (2nd ed., New York: Zed Books, 2010), p. Xv.

9 Gustavo Esteva, "Development" *ibid.* p. 20.

10 Rist (2008), *supra* note 1, p. 243.

come from law and development thinkers, who insist that increased attention to law can be an important avenue to change both development discourse and development practice. Although often highly critical of past and present development practice, it can be said that many of the law and development views are significantly more optimistic about the future of development practice than are other development thinkers – and notably development economists. Consider, for example, the following:

> ... the [Law & Development, or] L&D globalization critique of today addresses the legal specifics of the maturing international legal framework for the global economy. ... An emerging international political economy strand of L&D discourse ... confronts abiding international inequality and grapples with the question, to what extent is the assumption by developing states of legal obligations to liberalize economic policy ... a hindrance or a constraint on a state's freedom to chart development policy?[11]

Moreover, more focused law and development studies have tried to take a more clear-eyed look at the consequences of legal interventions in development projects, nonetheless finding "that the law can be both a help and a hindrance to policymakers."[12]

A similar spirit – one that viewed law as a hindrance and a help – motivated the conference on "New Directions for Law and Development Studies" that took place at Tulane University in New Orleans, USA on April 17, 2015. Jointly sponsored by the Law & Development Institute and the Payson Center for International Development at Tulane University Law School, the conference brought together a wide range of scholars and thinkers about development – and specifically about law and development. The participants were varied not only by discipline – ranging from law and economics to philosophy and public health, but also be geographic region, including contributors not just from North America, but from Africa, East Asia, Europe and South America. The event produced a wide range of academic production – much of which, happily, is collected in this volume.[13] Notably, the contributions reflect the tensions in the

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11 Scott Newton, "The Dialectics of Law and Development," in David M. Trubek and Álvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge, 2006), p. 196.

12 David M. Trubek, "Law, State, and the New Developmentalism," in David M. Trubek, Helena Alviar García, Diogo R. Coutinho and Álvaro Santos (eds.), *Law and the New Developmental State: the Brazilian Experience in Latin American Context* (New York: Cambridge, 2013), p. 16.

13 Two of the articles discussed below, those by Yong-Shik Lee and Chilyene Nwapi, were published in an earlier issue of the Law & Development Review. However, they were both presented at the conference.

field described above, both about the larger questions of the function and ideal character of "development" in the twenty-first century and also, more specifically, about whether law is help or hindrance in the business of development. This introduction will conclude by presenting the articles produced as a result of that conference. In the process, it will take note of the thematic connections between and differences among the contributions.

3 Articles in this volume: a call for pluralistic approaches

The lead article in the volume – the product of a stimulating keynote by Frank Upham – very much reflects the doubts and uncertainties discussed above as to what constitutes "development." But Upham's piece, "The Paradoxical Roles of Property Rights in Growth and Development" also demonstrates the hope of many law and development thinkers that law might prove a way forward to resolve some of the conflicts that have attended the development enterprise. On the one hand, Upham thus criticizes the "incomplete, misleading, and dangerous" idea that legal property rights need have a central place in economic growth. Upham undergirds his case with examples from four different geographical, cultural and temporal contexts to demonstrate how the faith in legal property rights has at different times and places not merely slowed economic development but actually caused wide-scale harm – especially among the least well-resourced portions of different populations. As Upham trenchantly demonstrates in his review of the different cases, legal property rights do not work uniformly to secure economic development. Instead, he explains, "law and property rights have played a variety of roles: sometimes slowing the process of change, sometimes legitimating it, sometimes becoming the very agent of change, and sometimes playing no role at all." The result is his conclusion that we must develop more nuanced, culturally and socially sensitive responses to the use of property rights in development. A one-size-fits all approach is decidedly not the way to go, Upham shows us. Instead, as he explains, his analysis seeks "to give depth to the cliché that one size does not fit all when it comes to legal reform and provide a cautionary note as we consider policies for poor countries in the future." In addition, his essay articulates the need to be skeptical about the use of any single strategy – whether formalization of informal rights or some other development tool – in the business of development. In this, Upham's short but powerful essay helps set the stage for the debates that follow. Like so many of the essays that follow his, Upham endorses a varied, pluralistic and culturally sensitive developmental practice, in law making as in all else.

In a "Call for a New Analytical Model for Law and Development,"[14] Yong-Shik Lee takes up the challenge implicitly laid out by Upham and others to consider the theoretical and practical challenge for law and development interventions in the twenty-first century. Like Upham, Lee rejects one-size-fits-all approaches to economic development, which he believes is the central form of development needed in most countries that endure widespread poverty. While Lee is concerned that law and development studies have drifted, he also advances a view – and sketches out a methodology – to help counter that drift. Law can, he maintains, help identify the more nuanced approach argued for by Upham and others. Lee argues that legal interventions can do this by a focus on what he calls "law, legal frameworks and institutions," or LFIs. To study LFIs, Lee proposes a new Analytical Development Model, or ADM. The ADM, he explains, "aims to provide a theoretical apparatus to examine the impact of LFIs on economic development in specific key areas that are subject to regulatory control by the state and directly relevant to economic development." Importantly, then, Lee's ADM strives to avoid falling into the trap of cultural, political or social anachronism and/or ethnocentrism, by providing a tool that is responsive to different moments in time and varied conditions. Equally, Lee's definition of "law" is not narrowly limited to formal laws and regulations on the books. Rather, he embraces a wide range of practice, formal and otherwise, into his universe of what constitutes law. In the process, Lee's essay usefully provides a comprehensive survey of law and economic development processes over the last four decades, including analysis of their shortcomings.

In this search for more flexible development planning tools, Lee, like Upham, thus reflects a desire to develop more nuanced and culturally and geographically sensitive approaches or, in Lee's description, a "dynamic" and not a "static" approach. For Lee as for Upham, such an approach will avoid past errors of assuming that all places need be treated equally – whether we are dealing with property, contract or other systems of rights. To be sure, Lee does not believe that the ADM provides the final formulation of the ideal analytical development model. Instead, he argues for constant refining and recalibration of the ADM as he describes it. Nonetheless, he is hopeful that his ADM will help correct the drift and uncertainty that have often characterized the law and development enterprise.

In his short, companion piece to Lee's article, William Hubbard provides a brief and thoughtful reflection on the utility of Lee's approach. Hubbard is in general agreement with Lee that economic development for poverty reduction

14 See *ibid.*

need be the central concern of the development project. They also agree that law and development will succeed if it is empirical and not prescriptive. Hubbard differs from Lee, however, in two respects. Hubbard argues, first, that a sharp distinction between economic and other forms of development is easier conceptually than it is in practice. Second, Hubbard urges that Lee's ADM not repeat the established empirical successes of development economics.

Many of the legal scholars contributing to this volume take as their point of departure a reaction to the celebrated 1974 article of David Trubek and Marc Galanter in which they suggested the failure and death of the law and development enterprise in the United States for being parochial and anachronistic – offering a legal transplant of a model not well suited to many other locales and conditions.[15] While consistently expressing admiration for the work of Trubek and Galanter, the contributors here nonetheless suggest that, to recall Mark Twain's famous saying, the reports of the death of law and development "was an exaggeration."[16]

One such reaction to Trubek and Galanter's sustained lament in this volume comes from Aparna Polavarapu and Joel Samuels, in their article "Initial Reflections on an Interdisciplinary Approach to Rule of Law Studies." Polavarapu and Samuels offer a hopeful and new vision for law and development studies, one focused on a fresh conception of the "rule of law." In this, they echo Lee's call for new analytical approaches to law and development. Their focus, as the title of their article suggests, is on the role of the academy in defining appropriate and pluralistic development intervention strategies. Their precise aim is, they say, to "attempt to lay the initial groundwork for a clearer under-standing of rule of law both as a concept and as a distinct field." Polavarapu and Samuels liken the rule of law to the central nervous system – the brain and the spinal cord. In their telling, the center is useful only if it processes electrical inputs from the periphery: "[t]he brain is ineffective without these inputs from the periphery." Thus, Polavarapu and Samuels maintain, rule of law interventions can only be effective if they consistently seek to connect center and periphery, and to take seriously the messages the "electrical impulses" sent to center from periphery. In this, Polavarapu and Samuels offer what amounts to a challenging manifesto for development studies academics. Their vision privileges law but only as a connecting discipline, as a kind of

15 David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wisconsin L.R. 1062 (1974).

16 Twain wrote in relevant part that "the report of my death was an exaggeration," available at: <http://www.twainquotes.com/Death.html>, accessed 29 November 2015.

meeting place and connective tissue (to mix metaphors deliberately) for other disciplinary efforts since, at the end of the day, Polavarapu and Samuels are clear that "the definition of rule of law must focus on the interconnectedness of its component parts."

Christopher Boom, a philosopher and lawyer by training, also sets his eyes on the task of defining the term the "rule of law." Boom's endorsement of the "thin" conception of the rule of law, as opposed to the "thick" conception, underlines the concern implicit in many of the papers assembled here to define development strategies that minimize the challenges of imported foreign legal cultures and value systems. The difficulties of "legal transplants" have, after all, long concerned legal scholars in particular.[17] For Boom, following Lon Fuller, Jeremy Waldron and Joseph Raz, the "thin" conception of the rule of law corresponds loosely with a "formal" interpretation of the concept, that is one in which states only "impose sanctions (e.g. imprisonment or tort damages) and confer benefits (e.g. enforce contracts or provide social assistance) on its members pursuant to rules rather than ad hoc discretion." By contrast, he says, proponents of the "thick" conception of the rule of law, a group that for Boom includes Amartya Sen, Ronald Dworkin and Richard Epstein, is instead concerned with the content of rules and so interested in the criteria and content of legal rules – so as to achieve, for instance, "good governance." And despite Boom's belief that much development discourse focuses on the importance of a "thick" conception of the rule of law (as evidenced, for example, by human rights arguments), he defends "focusing on the thin conception's unique significance for international development given its commonly accepted justification among contemporary legal philosophers as a means of advancing the reliable guidance of action." Using decision theory, Boom then seeks to undergird his defense of the utility of thin conception of the rule of law. Decision theory, he shows, predicts that the thin conception will promote higher levels of economic growth, rule compliance and human dignity.

A concern with the particularity and variety of experience and the way in which development law and practice should respond to that variety also animates the contribution here from Ada Ordor, "Tracking the Law and Development Continuum through Multiple Intersections." Ordor begins by providing a useful survey of many of the changes in the law and development landscape in recent decades. Like many of the contributors here, her call is ultimately for a pluralist

17 See, e.g. Alan Watson, *Legal Transplants* (Athens: University of Georgia Press, 1993); Sujit Choudry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

and inclusive and – in her case – what she calls a "people-centered" law and development practice. Like Polavarapu and Samuels, she concludes by making the case for a broad and multi-disciplinary approach to development studies, insisting that only in this way will the field continue to be vital.

Another piece inspired by but ultimately rejecting Trubek and Galanter's pessimism is that of Stephanie de Moerloose, who maintains that the World Bank's continued endorsement of the principle of "sustainable development" is evidence of the persistence of the hold of law and development ideas and practice. de Moerloose offers a call to arms for more field research by local legal scholars on the meaning, process and success of sustainable development efforts. To make her case, she focuses on a case study from Argentina – namely the effort to clean up and introduce sound social-environmental practices in the Riachuelo-Matanza Basin there, which she labels "one of the most polluted places in the world."

Notably, de Moerloose shares the concern of many of the participants in this conference – and in their articles in this volume – that such efforts will only be successful with more sustained involvement from local actors. Again, the local actors she believes to be key here are local legal actors and above all legal academics because of their access to all stakeholders. In de Moerloose's telling, the lack of successful implementation of cleanup efforts in the Riachuelo-Matanza Basin, despite loan conditions and other conditionalities imposed by the World Bank, could greatly benefit from the intervention of local legal actors to educate all parties. Specifically, she suggests that local legal actors are ideally placed to build bridges between international and domestic actors – and to inform each of them about the limitations and challenges they all face. In this, de Moerloose makes an aggressive case for the continued need for law and development studies, if reconceived so as not to preference legal transplants but instead to promote dialogue and mutual comprehension to secure more successful development interventions. To avoid a "dialogue of the deaf," de Moerloose helpfully concludes, for example, that"[l]aw and development scholars could study the executive branch's theory of development and work as a nexus for analysis, information and adaptation between institutions such as the World Bank and the state."

In addition to the more theoretical pieces in this volume discussed above, a number of the contributions provide focused case studies on different aspects of development policies and interventions. A focus on unequal consequences of the administration of international and national economic development policies is the focus of several of them. As such, these analyses implicitly make the case for the more dynamic, flexible development policies argued for by Upham and Lee.

For example, in "Policy Space and Policy Autonomy," Ana Siquiera and Julia Cadaval Martins compare the consequences of World Trade Organization (WTO)

policies and their effects on national industrial policy in two different countries, the United States and Brazil. Siquiera and Cadaval Martins "suggest that the international trading system is more likely to accommodate some types of industrial policies than others." Specifically, Siquiera and Cadaval Martins advance the view that institutional arrangements (in their case those of the WTO) typically do provide "policy space" for individual nations to act– that is the same terms and conditions for executing policy – but do not in the process necessarily permit the exercise of "policy autonomy." This may occur, they assert, by virtue of what might be called un-dynamic, one-size-fits-all international trading regime procedures. In short, Siquiera and Cadaval Martins demonstrate in their comparison how the international trading system's rules work to prompt countries to make traditionally "liberal" trading policies choices at the sake of exercising the decisional and practical "policy autonomy" they might prefer given their own national circumstances and conditions.

Africa provides the regional focus for thinking about twenty-first century development challenges that concern many of the contributors to this volume. This is perhaps unsurprising given the fact that Africa is resource rich but still registers the world's highest rates of income poverty and its associated social and economic ills.[18] The "resource curse" remains nowhere truer than in the African sub-continent.[19] A concern both to address the African situation and also an appeal for a more pluralistic approach to development runs through many of the papers. For instance, in their paper, "Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: What Role for Law and Development?," David Hiez and Séverine Menétrey explore the weaknesses of unified development approaches in a regional case study of former French colonies. Hiez and Menétrey do this by examining the failures and achievements in a single case study, namely the work of the Organization for the Harmonization of African Commercial Laws (OHADA in its French acronym). Like many other thinkers in this volume, they are concerned with the negative consequences of unitary policy approaches. In part, they suggest, this may be because "law and development" has been slower to take root in the

18 See, e.g. Miriam Mannak, DEVELOPMENT-AFRICA: Why The Richest Continent Is Also The Poorest, Inter Press Service News Agency (5 September 2008), available at: <http://www.ipsnews.net/2008/09/development-africa-why-the-richest-continent-is-also-the-poorest/> accessed 29 November 2015; see generally UNDP Regional Bureau for Africa Annual Report 2014, available at: <http://www.africa.undp.org/content/rba/en/home/library/reports/undp-africa-annual-report-2014/> accessed 29 November 2015.

19 Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge, 1993).

French and French-derived colonial legal traditions than elsewhere. In particular, Hiez and Menétrey echo the concerns of Upham and Lee that law and development strategies ignore informality at their peril. For Hiez and Menétrey, "OHADA law most closely approximates the concept of [law and development] as it stood in the 1960s, which considered transplanting legal systems or law a legitimate means of encouraging economic development."

Hiez and Menétrey therefore conclude by outlining a new legal project to replace OHADA and similar (in their view) uncritical legal transplants – namely a project that seeks not to say what the law should be in a particular developing country, but what it *could* be given local circumstances and realities. In this way, Hiez and Menétrey hope, law can begin to connect formal and informal legal systems, presumably among other features of non-developed country legal orders.

Chilenye Nwapi, in his article "Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries"[20] provides yet a different take on how law should be adjusted to serve the goal of economic development. Africa is again the locus of Nwapi's primary attention – although the utility of his observations extend far beyond the sub-continent. Nwapi is concerned, in brief, with the definition of the term "local" in the context of the increasingly popular practice of including "local content requirements", or LCRs in foreign direct investment (FDI). He shows that, far too often, "local" is defined as merely a national of the country where the FDI occurs. This, in his view, not only often leads to internecine conflict but also "impedes the potential of LCRs to engender real economic development." Thus, Nwapi helpfully amplifies the discussion in many of the papers collected here in that he expands the definition of pluralism in development. That is, where other authors here (Upham, Hiez and Menétrey, for example) have focused on the role of informal actors, Nwapi draws our attention to other subset of development actors whose interests are often obscured in larger development interventions, namely what he calls the "subnational" players. Nwapi's penetrating analysis focuses on the oil and gas industries (and in this portion cites examples from across the world), although his call to focus on subnationals surely extends far beyond the energy sector.

Nwapi's analysis does not shirk from the difficult challenge in staking a claim for subnationals; he analyzes objections to his thesis from the point of view of relevant legal regimes, and notably the international trading regime. Nonetheless, Nwapi concludes with a vigorous and detailed defense of a localist model that invites articulation by law and development scholars concerned not

20 See *supra* note 13.

only to promote equality between national actors but also among populations within different nation states. As he powerfully concludes, despite the trade-offs involved, localism ultimately the better choice because it is about ensuring that there is "buy-in" by and public support from everyone touched by development interventions.

Africa also provides the departure point and example for the need of a new development model for Sara Ghebremusse. In "Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa," Ghebremusse provides an encouraging look at the development state models of Botswana, Mauritius and South Africa. Based on their successful examples, she suggests, a model of what she calls a "graduated" development state model might be successfully applied elsewhere in the sub-continent, "driven by state capacity, both fiscally and structurally." Like so many of the contributors to this volume, Ghebremusse views the present moment as a new and defining one for law and development. No longer, she says, do or can states view themselves as the single guiding hand for development choices. Instead, she maintains, the new developmental state proceeds from the assumption that there exists:

> [T]he revised relationship between the state and the private sector. No longer is the state acting as the guiding hand of the economy; neither is the private sector seeking to act unilaterally with little involvement from the state. Instead, new developmentalism acknowledges that optimal development goals will be realized if the state and the private sector collaborate. New developmentalists posit that this can include public-private partnerships, and other joint efforts that originate from state promotion of industrial innovation and competitiveness.

Ghebremusse's analysis also stresses the importance of development-oriented political leadership and good governance institutions in achieving economic development goals. In this, her analysis recalls Hubbard's contention (mentioned above) that political and economic development goals cannot always be easily disentangled. In this, she also indicates that sound local legal structures have an important role to play in securing development goals and improving quality of life for all. Importantly, however, Ghebremusse is no starry-eyed optimist and like so many others here she rejects one-size-fits-all strategies. On the contrary, she looks at the challenges of importing developmental state models into African countries that lack strong institutions or traditions of focused development interventions. Her important contribution to the developmentalist literature, therefore, is precisely her detailed suggestion for how gradually to implement a developmental state model.

In "Trade, Development and Child Labor: Regulation and Law in the Case of Child Labor in the Cocoa Industry," William Bertrand and Elke deBuhr provide a

welcome balance to the more theoretical and analytical contributions of the legal scholars at the conference. Their paper "examines one of the oldest and most prominent examples of a voluntary industry agreement in agriculture, the Harkin-Engel Protocol ..., which is targeted at addressing the worst forms of child labor (WFCL) in the cocoa sectors of Côte d'Ivoire and Ghana." In part, Bertrand and deBuhr thus track Ghebremusse's observation that the new developmentalism does not relegate development interventions by focusing on the efforts of state actors alone.

Of great concern for those who believe in the power and potential of law and development, Bertrand and deBuhr document an experience conducting empirical research under a set of guidelines developed primarily by lawyers. The problem with the guidelines, they show, is that they were articulated without being clearly informed by what is empirically sound and/or possible. In this, they implicitly endorse some of the theoretical arguments advanced elsewhere in this collection of essays (notably by Lee and by Polavarapu and Samuels) calling for analytical law and development models that are both empirically rigorous and pluralist. Specifically, Bertrand and deBuhr recount their experiences since 2006 on a U.S. Department of Labor-funded effort to reduce the WFCL in West Africa. Their detailed account surveys the complex mix of factors that led to the Harkin-Engel Protocol, and specifically the fears of chocolate producers that a monitoring and labeling system would both be complicated to execute and also could lead to a fierce consumer backlash. In addition, they recount how their empirical work documented the challenge of preventing the WFCL in the cocoa industry since most of the child workers perform their labor in family units and represent an important family income source, often at the subsistence level. Other challenges, they explain, included the market asymmetry that placed much of the buying power in a few purchasers and the reluctance of major chocolate producers to accept responsibility for some time when confronted with emerging data on the WFCL.

Bertrand and deBuhr also describe how the early involvement of lawyers worked against eliminating the WFCL in that they represented well-heeled chocolate industry interests. However, lawyers could effectively be deployed to help fight these practices, they suggest, as follows:

> We believe that there needs to be a regulatory structure at the local and international levels that reflects the importance of legal frameworks in these environments and the need for enforcement and financing of agreements and their required activities. Effective frameworks, combined with proven social interventions such as farmer field schools, can increase productivity and income for local producers while reducing child labor and the WFCL at the same time. In all these areas there is room for legal involvement if resources are available to support them.

In this, Bertrand and deBuhr's article provides a case study with which to begin rethinking the rule of law in the way advocated by Polavarapu and Samuels (discussed above). Indeed, the pair concludes by urging that legal education should include training in statistical evidence precisely so that development interventions can follow procedures that are empirically sound and that appropriately measure a problem and find solutions going forward.

4 Conclusion: law's role and its rule in development

In sum, the articles collected here lay the foundation for continued new thinking about law and development. Three final summary conclusions can be offered. First, as indicated already above, this collection of articles argues forcefully that law and development must be above all pluralist in its orientation. Second, and more specifically, they suggest that legal actors need to take greater care to understand better and respond to the roles of different stakeholders and systems in defining and participating in development interventions – whether informal actors, subnational groups or the methods of experts in other disciplines. Third, many of these contributions point hopefully to the development of a new and robust, integrated law and development studies curriculum, one in which law has a role both to unify the findings of multiple experiences and different disciplines, and also in which its "rule" will be sensitive to individual circumstances and differing local needs. In this, the articles collected here suggest, the rule of law may help resolve much of the uncertainty and chaos that continues to bedevil the development field.