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Perry Kessaris, Amanda. *Law in the pursuit of  
development: principles into practice?*

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# Introduction

*Amanda Perry-Kessaris\**

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In the fifties, sixties and seventies it was called the Law and Development Movement; in the eighties it continued without a name; in the nineties and through the turn of the century it morphed from ‘good governance programs’ to ‘the rule of law and development.’

(Tamanaha 2009:1)

### **The present volume**

This volume explores relationships between contemporary principles and practice in law and development. It is organised around three liberal principles which underlie many current efforts to direct law towards the pursuit of development: first, that the private sector has an important role to play in promoting the public interest; second, that widespread participation and accountability are essential to any large-scale enterprise; and third, that the rule of law is a fundamental building block of development. Contributors were selected not only because of their ability to address the key themes at the centre of the volume, but also with a view to creating a lively and balanced mix of practitioners, early-career and established academics, and geographical specialisations.<sup>1</sup> They critique both the principles underpinning contemporary law and development programming and efforts to implement them in practice.

In editing this collection I have sought to ensure that specialist subjects are accessible to law and development generalists. I have also tried to include as many online resources as possible, in order to open up the field to those who may not have easy access to materials. Unless otherwise stated, all weblinks have been checked in June 2009.

### ***Private sector, public interest***

The first part of the volume presents a series of pieces that consider the increasingly muddied, sometimes artificial, yet eternally significant, interactions between ‘public’ and ‘private’ interests. We begin with the idea that economic liberalisation has in many ways decentralised decisions as to where the proper

balance between public and private interests lies. Sally Wheeler (Chapter 2) asks under what circumstances the private decisions of individual consumers can be regarded as ‘political consumption’, capable of contributing to the public objective of achieving social justice. Ann Stewart (Chapter 3) continues the theme using, among other tools, global value chain analysis to explore one sphere in which consumer decisions may impact on social justice: agribusiness in Kenya. Valentina Vadi (Chapter 4) then shifts our attention to how public international law relating to investment and intellectual property rights leaves regulatory gaps through which the private interests of pharmaceutical companies are able to control public access to medicines. Fiona Macmillan (Chapter 5) continues the interrogation of privately held intellectual property rights, asking if they act as further barriers to public well-being that may threaten nascent rights to cultural self-determination. Finally, Kanchi Kohli and Manju Menon (Chapter 6) use the example of environmental legislation in India to demonstrate how liberalisation programmes may cause public interests to become subservient to private interests.

### ***Participation and accountability***

In the second part of the volume, contributors consider the principles of participation and accountability, and their implementation in practice. Suresh Nannani (Chapter 7) initiates the debate by critically assessing the internal accountability mechanisms of multilateral development banks which, in an effort to improve participation, are open to project-affected persons. Remaining at the international level, Andreas Kotsakis (Chapter 8) traces the aggrandisement of local participation in a more specific field: the protection of biodiversity under international conventions. He asks how, in practice, can local communities participate in a system of such top-down origins and orientation? Finally, June McLaughlin (Chapter 9) reminds us that participation is important to private as well as public enterprises. She explains that the systems of dispute resolution currently developing in many African stock exchanges are in danger of becoming just as exclusive, and potentially partial to certain users, as the Western systems upon which they are based.

### ***Instituting the rule of law***

In this final part, contributions focus on efforts to institute the rule of law as both a means to, and an objective of, development. Veronica Taylor (Chapter 10) opens the debate with a reminder and several questions. Asian nations, in particular Japan, are increasingly active practitioners of law and development. To what extent are their approaches distinctive? Is there such a thing as *the* rule of law? Next Julio Faundez (Chapter 11) relates how those involved in legal and judicial reform at the World Bank first warmly greeted, and then quietly dropped, the broader vision of development espoused in the Comprehensive Development Framework and its soul mate, Nobel laureate Amartya Sen. Linn

Hammergren (Chapter 12) follows, casting a critical eye over the efforts of the World Bank to promote the rule of law in Latin America, concluding that they have not infrequently been ineffective and unpopular. Nor does she expect this tendency to change. However, she also cautions us to stop erroneously crediting – or saddling – the World Bank with the tag of market leader in the law and development sphere. Klaus Decker (Chapter 13) pursues the topic of World Bank efforts on the rule of law, specifically its successes and failures in post-conflict situations. The arena of post-conflict situations is further illuminated by Dzenan Sahovic (Chapter 14). Echoing the cultural keys played by Taylor and MacMillan, he uses Grid-Group Cultural Theory to demonstrate how rule-of-law programmes differ and why they may fail. Finally, Patrick McAuslan (Chapter 15) draws our attention to what he regards as one of the most important front lines in all conflicts: access to land. Using the example of Afghanistan, he shows how struggles for land arise before, during and after the headline hostilities are completed; and suggests that official responses are sometimes too divorced from reality to offer practical solutions.

### **Mapping law and development**

This is the second time in recent years that I have found myself introducing a collection of pieces that address the intersections between law and development.<sup>2</sup> Once again, I have enjoyed the rich variety of topics, locations and perspectives. But once again I have been struck by the absence of a shared analytical framework, a set of reference points, for this field of ours. As Brian Tamanaha recently put it, ours:

... is a poorly constructed category that lacks internal coherence. Every legal system ... undergoes development (or regression) so there is nothing special about this; meanwhile, the multitude of countries that have been targeted for law and development projects differ radically from one another. Hence there is no uniquely unifying basis upon which to construct a 'field.' Law and development work is better seen, instead, as an agglomeration of projects perpetuated by motivated actors supported by funding. This is not meant as a cynical characterization but an accurate description that puts law and development activities in a more adequate frame.

(Tamanaha 2009: 6)

This is all true. But what to do? One possible way forward may lie in a story I heard recently. An economist was chatting with a surgeon. 'In an emergency, how do you know where to begin?' asked the economist. 'We always have our checklist: Airways, Breathing, Circulation, Disability, Exposure and environment' replied the surgeon. The economist pondered his more than three decades in water resources management in developing countries, and wondered 'What is my ABC?' Soon he had set out a framework encapsulating all the elements of

water management systems: Assessment, Bargaining, Codification, Delegation, Engineering and Feedback (Perry 2008, Perry forthcoming).<sup>3</sup> The framework was adopted by the Middle East and North Africa Region of the World Bank as a basis for categorising, and thereby better understanding, its activities in the field of water management (Jagannathan et al. 2009).

Members of the world's second oldest profession we may be, but do we – practitioners and academics at the intersection of law and development – have an ABC, an index or a map for our field? If we do, it has not yet, to my knowledge, been articulated.

We address the same well-trodden paths, circling around issues such as the rule of law, poverty, inequality, conflict, sustainable development, intellectual property rights, access to justice; and actors such as multinational enterprises, children, multilateral development banks, judges, civil society, women, bureaucrats and indigenous peoples. But we do not have a systematic way of classifying our discussions.<sup>4</sup> As a result, we do not always notice how our work fits together; we do not allow ourselves to build upon each others' work as effectively as we might; we unconsciously block those who concentrate their efforts in other fields from drawing on and contributing to our work, and we spend not insignificant amounts of time reinventing various wheels.<sup>5</sup> The nature of the concerns at the heart of our field – poverty, drought, humiliation, desolation, violence, injustice, death – demand that we do the best we can. Might we not be more effective if we were better organised?

Before I go on to outline my proposed map, a note of caution. I have been inspired by the ABCs of medicine and water management but these are not functionally equivalent to my proposed map for law and development. The medical ABC arose from, and is intended to be of use in, situations of acute emergency<sup>6</sup>. It identifies a strict hierarchy of priorities to be followed in order to diagnose and treat any patient in crisis anywhere. Cover the ABCs and you will not miss anything. If conditions change, you start the ABC again. By contrast, the water ABC is intended to categorise past, present and future responses to chronic water crisis. It is essentially positive, not normative. It does not offer a strict hierarchy of action: although engineering should definitely wait for assessment, it is not essential that engineering wait for codification. Similarly, my proposed law and development map is intended for circumstances generally less dramatic than the medical:<sup>7</sup> to ensure that when theorists and practitioners act – in speech, writing or otherwise – at the intersections between law and development, they know, and can explain, where those acts fit into the bigger picture.

In the remainder of this section I will map five aspects or categories of law and development work that may be handily, or reductively, summarised as ABCDE. It is important to note that a given act of law and development might fall into a number of categories. Also, let me emphasise that this is no recipe for law and development, no hierarchical, chronological or otherwise normative template. It is simply a map.

**Assessment**

The first aspect or category of law and development to be mapped is the assessment of existing rights and duties (substantive and procedural) both in principle ('on the books') and in practice ('in action'). For example, in this volume Ann Stewart outlines the complex political, economic and legal context in which Kenyan women engage in the agribusiness activities; and Linn Hammergren assesses the World Bank's influence on the donor community and concludes that it has been overstated. Some forms of assessment, such as the increasing use by multilateral and national actors of legal 'indicators' to assess legal systems, may be more contentious than others.<sup>8</sup> But law and development acts, whether theoretical or practical, usually begin with some form of assessment. Separately, and on a normative note, they surely ought to.

**Building**

Second, the work of law and development involves building capacity in the forms of new infrastructure, rules and personnel – for example, creating secure courts; computer systems; well-qualified lawyers, bureaucrats and judges; judicial benchbooks; well-drafted laws; well-maintained law reports and so on. Such components are a common feature of law and development activity in many multilateral development banks and aid agencies. For example, a key task of a World Bank Legal and Judicial Reform project in Sri Lanka, mentioned by Klaus Decker in this volume, was to improve insecure, hot, decaying courthouses (see Perry 2001).<sup>9</sup> Also in this volume, June McLaughlin highlights the importance of physical and information technology infrastructure in the operation of stock exchanges in East Africa. Other would include legislative drafting, legal transplants, and judicial acts, such as the introduction by an activist judiciary of public interest litigation to India (see, for example, Perry-Kessararis 2008: 110–12 and 133–38).

**Contestation**

The third, most complex, overtly and covertly controversial, law and development act is the contestation of existing and future rights and duties (substantive and procedural). Here actors are making a normative bid, explicit or implicit, to privilege or to render subservient certain values or interests. Law and development acts tend to revolve around the need for change, from which new winners and losers are likely to result, so acts of contestation are prevalent in law and development work. For example, in this volume the terms of consumer trade (Wheeler; Stewart), culture (Macmillan; Sahovic; Taylor), property (Vadi; McAuslan) and environment (Kotsakis; Kohli and Menon) are each contested. Contestation may occur both within an individual law and development act, such as a chapter in this book, and between multiple law and development acts.

For example, Fiona Macmillan's contribution to this volume can be read as documenting the actual and potential international contests between, on the one hand, international intellectual property rights, and on the other hand, cultural rights; and as concluding that intellectual property rights have retained the upper hand. In addition, her contribution can be read as itself engaging in a second level of contestation between multiple concepts of 'development'.

### **Delegation**

The fourth category of law and development acts is the delegation to individuals and institutions of responsibilities and arrangements for implementation. Some examples of this category are the posting by donors of practitioners to client states to offer technical legal assistance; and the establishment by a state of an anti-corruption task force. Also included in this category would be creation and implementation of the rules of operation under which the delegated activities took place such as, for example, the guidance developed by the United Nations in relation to its 'rule of law' activities (McInerney 2009), or the operating procedures of the Asian Development Bank Accountability Mechanism (Nanwani, in this volume). Major questions surrounding such acts include the suitability of those personnel and rules. For example, preliminary findings from a survey by Cynthia Alkon (2009) of technical legal assistance providers working in Afghanistan suggest that many respondents were entirely unprepared for, and unenthusiastic about the impact of, their activities; while in this volume Dzenan Sahovic warns of the likely existence, and consequences, of cultural mismatch between peacekeepers and their host states. Also in this volume, Veronica Taylor identifies the limited supply of eligible Japanese lawyers as a determinant of the nature of future Japanese engagement in technical legal assistance.

### **Evaluation**

Finally, there is the evaluation of activities that fall into each category of the framework and the feeding back of lessons learned. For example, in this volume Julio Faundez feeds back qualified applause to the World Bank for its decision, albeit temporary, to place Amartya Sen's work at the centre of its legal reform agenda. Elsewhere in this volume, Patrick McAuslan delivers a devastating evaluation of international technical assistance on land law and policy in Afghanistan. 'Evaluation' includes evaluation of evaluation – for example, efforts to improve the evaluation processes used by various actors. In this sense Nanwani's contribution to this volume can be read as an evaluation of key evaluative mechanisms of two multilateral development banks: the Asian Development Bank Accountability Mechanism and the World Bank Inspection Panel.

## Conclusion

An enormous amount of practice and scholarship resides at the intersections of law and development, and there is every reason to expect that body of work to grow. If the benefits of that work are to be maximised (and the detriments minimised), we need a map by which to navigate the field.

Doubtless some will be horrified by the very idea of attempting to pin down such a rich and diverse field; shy away from the simple terminology that I have chosen; hear normative undertones in what I am presenting as an essentially positive tool. Of course it is impossible ever to be entirely neutral. In drafting a map we necessarily have to summarise: focus on some things, ignore others, often not even knowing that we have done so until someone else points it out. I look forward to the discussion. In the meantime it is my great pleasure to introduce in more detail the law and development acts that form this volume which touch on each aspect of the ABCDE map.

This volume addresses the principles and practice of law and development. In the terms of the ABCDE map which I am proposing, contributors are engaging in acts of assessment, building, delegation and evaluation. Perhaps most importantly, they are contesting values and interests about which difficult, explicit choices must be made when law is directed towards the pursuit of development.

## Notes

- \* Thanks to Cynthia Alkon, Elin Cohen, Kevin Davis, Julio Faundez, Linn Hammergren, Nicos Kessarlis, Suresh Nanwani, Chris Perry, Veronica Taylor and Valentina Vadi for their very helpful comments.
- 1 Decker, Hammergren, Kohli, Menon and Nanwani are primarily practitioners, while Macmillan, McLaughlin, Kotsakis, Sahovic, Stewart, Vadi, Wheeler and I act predominantly in the realms of principle (although in so doing we may pay a good deal of attention to practice). Faundez, McAuslan and Taylor straddle the principle-practice divide.
- 2 See Hatchard and Perry-Kessarlis (2003).
- 3 The basic ideas are set out in Perry (2003). The elements in detail are: assessment of water availability; bargaining over principles for water sharing; codification of rules governing the day-to-day distribution of water; delegation of responsibilities and arrangements for implementation; engineering of necessary infrastructure; feedback of lessons and best practice. 'Feedback' was added during discussions of the ABCDE framework at a meeting of the Arab Water Council in Abu Dhabi (March 2008).
- 4 For examples of the issues collected under the umbrella term 'law and development' see the websites listed at the end of this chapter.
- 5 Benjamin van Rooij provides a useful example of this last point in his critique of the recent popularity of 'bottom-up' legal development:

The sudden popularity of these new approaches shows how much legal development cooperation is a field of trends, where doubts about effectiveness force legal reformers to regularly shift from one paradigm to the next, enthusiastically applauding the seemingly new, while sacrificing the caricaturized old.

(van Rooij 2009: 1)



- 6 The framework was developed by Dr Jim Styner, who crashed his plane in rural Nebraska in 1976:

[He] sustained serious injuries, three of his children sustained critical injuries, and one child sustained minor injuries. His wife was killed instantly. The care that he and his family received was less than adequate; it was evident that the small rural hospital and its staff had little or no preparation for a situation of this magnitude. There was an obvious lack of training for proper triage and injury treatment. The surgeon, recognizing how inadequate his treatment was stated, 'when I can provide better care in the field with limited resources that what my children and I received at the primary care facility, there is something wrong with the system and the system has to be changed' (ATLS website).

The framework has been formalised as the Advanced Trauma Life Support (ATLS) Program.

- 7 Although those acts may sometimes occur in the context of an emergency, such as war-torn Afghanistan.
- 8 See, for example, Davis and Kruse (2007); Perry-Kessarlis (2003) and (2008); Rodriguez-Garavito (2009).
- 9 See also Nanwani and Ayus (2007) for a recent example of a legal education and judicial training project in the Maldives.

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## Useful websites

- (ATLS) Advanced Trauma Life Support  
<<http://www.facs.org/trauma/atls/about.html>>
- Foundation for International Environmental Law and Development  
<<http://www.field.org>>
- (IDLO) International Development Law Organization  
<<http://www.idlo.org>>
- International Economic Law Justice and Development (Birkbeck)  
<<http://www.bbk.ac.uk/law/prospective/taughtmastersdegrees/ieljd>>
- Law and Development (World Bank)  
<<http://www.worldbank.org/legal>>
- Law and Development Blog  
<<http://lawprofessors.typepad.com/lawdevelopment>>
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<<http://go.worldbank.org/9OTC3P5070>>
- The Law and Development Review (Berkeley Electronic Press)  
<<http://www.bepress.com/ldr>>
- Democracy and Governance (USAID)  
<[http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law)>