

# **THE OWL AND THE PUSSY-CAT: IS THERE A FUTURE FOR “LAW AND DEVELOPMENT”?**

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When philosophy paints its gray on gray, then has a form of life  
grown old, and with gray on gray it cannot be rejuvenated, but only  
known; the Owl of Minerva first takes flight with twilight closing in.

-G.W.F. Hegel

The Owl and the Pussy-cat went to sea  
In a beautiful pea-green boat. . . .

-Edward Lear

“Law and development” is an idea that defines a practice and shapes action. The practice is the self-conscious effort to change law and legal institutions to achieve some goal. The ends sought may be societal: law and development efforts may be designed to foster economic growth, preserve individual freedom, protect private property, guarantee human rights, or foster group emancipation. But the ends might also include such legal values as ensuring due process and equal protection.

Law and development as practice is relatively new but has ancient antecedents. It emerged after World War II but built both on intellectual speculation about the uniqueness of the West and its laws that goes back several centuries, as well as on the experience of colonialism.

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## I. THE VARIETIES OF LAW AND DEVELOPMENT

There have been several versions of “law and development” in the last fifty years. The first version was related to a vision of state-led capitalist development and import substitution. It stressed the role of law as a tool to make the state more effective but keep it within a framework of democratic constitutionalism. The second was connected to the socialist agenda. The socialist version also saw law as an instrument and had an idea of democratic legitimacy. But in the socialist vision of law and development, law was the instrument of a vanguard and legitimacy came from faith in the vanguard and from popular participation rather than constitutional fidelity. A third version of “law and development” was inspired by a neo-liberal belief in markets as engines of growth, a deep distrust of the state, and a vision of law as a tool to enable private ordering and constrain the state. This is the most recent version to be fully and crisply articulated. It drew legitimacy from the idea that markets are a form of freedom and to some degree from parallel commitments to democratization.<sup>1</sup>

Each of these law and development ideas pointed to distinct practices. The law of the capitalist developmental state would strengthen state institutions, making them more effective agents of economic growth. This meant changing legal culture to make it more pragmatic and modernizing regulatory law to compensate for market failure. The law of the socialist state was similarly concerned with instrumental effectiveness but also with wider participation in justice: it was suspicious of an independent legal professional class and supportive of popular courts with lay judges. The neo-liberal vision used law to facilitate markets, protect property, and restrain state intervention in the economy. It thought a professionalized and “independent” judiciary was best suited to carry out these tasks. It promoted “the rule of law” which was equated principally with legal restraint on state action.

Law and development was never just a technical concept or a recipe for reform; it also was an emancipatory ideal. Whether they were derived from ideas about socialism or democratic capitalism, the three law and development visions and practices were all linked to broader

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<sup>1</sup> There is some evidence that a fourth version is emerging but some question whether it is a real change from the third, neo-liberal model. For discussions of this issue and detailed accounts of the history of law and development, *see generally* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

notions of how to achieve emancipation from poverty, oppression, and marginality.

But these versions of law and development are at war with one another. The visions of emancipation they rest upon are warring creeds. The socialist ideal was based on wholesale rejection of capitalism and its legal institutions while the program of state-led capitalist growth emerged during the Cold War as an alternative to socialism. Western powers, including the United States, tolerated and even encouraged a major role for the state in the economy of developing nations in the hope that they would outpace countries in the Soviet Bloc, thus forestalling radical and anti-capitalist movements. As the Cold War waned and both Soviet command style and state-controlled or “dirigist” capitalist economies encountered serious difficulties, neo-liberalism and its ideas about law and development emerged and were offered as an antidote to all the problems of command and dirigist economies.

## **II. THE WAXING AND WANING OF THE SEVERAL “LAW AND DEVELOPMENTS”**

There have been several times when the law and development idea was crisp and coherent and its implications for action seemed relatively clear. The moments of greatest apparent clarity occurred at times when the idea was derived from, and embedded in, some broader social vision that defined both the goal of “development” and the means to achieve it. As long as the overall vision made sense, the idea of law and development it inspired radiated hope for a better world and provided guidance for reformers.

These moments of clarity and hope have come and gone over the past fifty years. When a new social vision emerged, concomitant ideas of law and development seemed robust and able to generate clear guidance for practice. But the practices, which had to deal with the messy reality of legal systems and cultures, often revealed flaws in the ideas. And the larger social visions and their emancipation narratives waxed and waned.

All of the law and development schemes, from state led-growth through neo-liberalism, have been tried, but none remains robust. We can look back on them with a certain disdain but also with nostalgia. Their great appeal—and their greatest weakness—was their universalism and their simplicity. These ideas subordinated law to one big idea about

development and the best way to achieve it, whether through the state or the market, via socialism or capitalism. They told us what was important and what was not; what needed to be changed and what could be left alone. Their message and their guidance was universal: each scheme produced recipes that could be used anywhere so that to practice law and development one did not have to master all the complexity and heterogeneity of dozens of distinct legal systems. There was no shortage of general formulas to apply, best practices to diffuse, prepackaged reforms to transplant.

### **III. THE RULE OF LAW AND ITS DISCONTENTS**

When we look back, it seems that all these prior versions of “law and development” have lost their hold on our imagination. The past looks like a battlefield on which all sides lie defeated. We have lost faith in big ideas and universal solutions. Neither markets nor states seem like the panaceas they once were thought to be. We have confronted the complexity and embeddedness of legal systems, cultures and traditions and learned that one size does not fit all. We have seen that the developmental state can be a tyrant as well as an emancipator, the market a source of oppression as well as of energy and innovation, external assistance a tool of hegemony as well as a gesture of good will.

Moreover, the idea of “development” has changed in ways that affect the idea of “law and development.” Once, development could be equated with economic growth. Later, that idea was amended to stress growth with equity. People might differ on the desirable mix of growth and equity or disagree on which model of political economy was best to promote growth with equity, but they did not have to argue what these concepts meant. Nor, once the basic development vision or scheme was chosen, was it hard to derive ideas about law from it. The vision provided the ends; law would supply the means to that end.

In recent years, however, the idea of development has expanded. Growth and equity remain, but development has also been defined to include such goals as direct poverty alleviation, emancipation of women, protection of minorities, political freedom, access to justice, and legal security. When the ends of development are so broad, and law itself part of the definition, it is hard to say what is the end and what is the means.

At the same time, we have seen the very idea of “law” fragment and become less solid. We have tasted of the fruit of knowledge and

now see law from many perspectives. When people started theorizing about law and development as a self-conscious practice, the world of legal theory was much simpler than it is today. Generations of scholarship about law have produced a richer but more complex idea of what law is or should be. Many different schools of thought have emerged, and each looks at law in a different way.

Today, discourse about law is multi-faceted and the very idea of law is contested. Is law the servant of the market, as we are told by law and economics? And if it isn't, should it be? Is it inherently emancipatory, carrying within itself notions of equality and liberty as some liberal thinkers would assert? Is law a tool of patriarchy, racism and hierarchy as some critics and feminists suggest? Or is it simply a shadow, bearing only a vague relationship to what actually occurs, as many law and society scholars would claim? Is law and development as an organized international practice part of a global hegemonic project designed to maintain exploitation, or is it a genuine expression of an emancipatory ideal?

If it is no longer clear what constitutes "development," our notions of what law does or should do have fragmented, and we have come to question whether internationally-supported reform efforts are driven by altruistic motives, does the idea of "law and development" make any sense any more? Is it time to put this idea on the junk heap of history? And if we do that, will we eliminate any hope for of an emancipatory practice?

Law and development started as a hopeful project. It was a form of enlightenment that promised a better life. It was naive and deeply flawed. But it stood for an important set of truths, beliefs, and hopes. It rested on the idea that law is a vital part of society and fundamental to the operation of the economy and thus can either impede or foster such goals as growth and equity. It saw that law can be a repository of ideas about liberty and a shield for freedom. It expressed the hope that through study and reform, things would get better for many people. The various moments and schemes of law and development reflect different ideas about what causes oppression and poverty, and what law could do to achieve freedom from misery and oppression. But all expressed a commitment to emancipation.

#### IV. IS THE OWL OF MINERVA TAKING FLIGHT?

I think the time has come to abandon all of the simple-minded formulae and models that have been paraded under the name of law and development. Decades of practical experience and critical scholarship have revealed the dangers of master narratives and universal formulae.

Hegel suggests that we can only fully understand something when it is on the wane: he says that wisdom, symbolized by the Owl of Minerva, comes only at twilight. Through our growing understanding of the complexity and contradiction in law and development ideas and practices, we have been able to glimpse the Owl of Minerva. But does that mean that we are now in the twilight and darkness is soon to come? Does this wisdom, this hard-won enlightenment, mean that law and development is or should be coming to an end?

I think not. Rather, I see this as a time to redouble our commitment to better knowledge and more effective practice. We should not be deterred because there are no simple, universal ideas, no prepackaged reforms ready for immediate and effective transplantation, no clear consensus in the world of scholarship about the nature, history, and impact of law in any society. This condition makes the job of effective reform more daunting but also more exciting.

Remember that law and development carried a promise of emancipation. It was tied to whatever big idea animated the development doctrine of the time: whether it be state, market, class, or vanguard. The practitioners of law and development were, in Isaiah Berlin's terms, hedgehogs who know one big idea, not foxes that know many different and possibly contradictory things and accept the inherent complexity and pluralism of the world.<sup>2</sup> The big ideas proved to be flawed, and one by one we have had to abandon the law and development recipes they generated. But that does not mean we should abandon the commitment to emancipation: quite the contrary, it is a reason to renew that commitment.

What is needed now is a way to live with the knowledge we have gained without abandoning the commitment that led us to the enterprise

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<sup>2</sup> Berlin contrasts the *hedgehogs* who "... relate everything to a single central vision ... a single universal organizing principle" with the *foxes* who "... pursue many ends ... lead lives perform acts and entertain ideas that are centrifugal rather than centripetal ... without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing ... unitary inner vision." Isaiah Berlin, *The Hedgehog and the Fox*, in RUSSIAN THINKERS 22 (Henry Hardy & Aileen Kelly eds., 1994).

in the first place. We must live with the Owl of Minerva but struggle against the waning of the light. Edward Lear was not familiar with the work of Isaiah Berlin but he knew that owls and other species can live together. If we cannot yet be foxes, at least we can be pussy-cats and set sail on these uncharted waters with the Owl at our side.

To do that, we must find new approaches to replace the “one-size-fits-all” formulae that have guided practice in the past. The first step is to look very closely at what has actually happened. That is what my colleague John Ohnesorge does in his study of the role law played in economic development in Northeast Asia during the “Asian miracle.” In this period, Japan, Korea and Taiwan enjoyed the most rapid economic growth any country had experienced while maintaining substantial degrees of equity. Ohnesorge shows how this law and development history has been ignored by many theorists. He demonstrates that the Northeast Asian experience refutes some of the central “hedgehog” orthodoxies with their pre-written scripts and universal formulae. Because he is a good comparative lawyer and thus a careful student of actual legal systems, he bases his account on what really happened, not what should have occurred if history had followed any of the prevailing law and development scripts.<sup>3</sup>

Ohnesorge ends with suggestions for an approach to reform practice that is open to complexity, distrusts holistic schemes and universal formulae, and looks at each country and each area of law in its particularity. Such realism is the necessary first step towards better practices. It requires detailed empirical knowledge of the conditions in any given country and critical assessment of the role of actually existing legal regimes. But it must be complemented by processes that allow clear articulation of values; close participation of stakeholders in the design of reform projects; careful attention to successful reform efforts in similar settings; and careful monitoring of the effects of change.

So this essay is a plea for a new approach. Let’s call it “post-law and development,” not because this term offers a new big idea, but because it suggests we have to build our new practices on the shards of the past. Let’s abandon the hope for one big idea and for universal schemes while searching in the complexity of actually existing legal systems for opportunities for emancipation. Let’s leave pre-packaged reforms at home but not abandon the idea of reform itself. Let’s look

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<sup>3</sup> John K. M. Ohnesorge, *Developing Development Theory: Law & Development Orthodoxies and the Northeast Asian Experience*, U. PA. J. INT’L ECON. L. (forthcoming).

back at what has actually happened and see if there are small lessons that can be learned. Above all, let's continue to be engaged.