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The Developing World in the New Millennium: International Finance, Development, and Beyond

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ESSAY

The Developing World in the New Millennium: International Finance, Development, and Beyond

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Former Treasury Secretary Lawrence Summers once commented that the end of the Cold War was the second most interesting story of the past two decades. According to him, the most compelling story during that time was the emergence of global capital markets.[1] This viewpoint heralds a subtle sea change that signals the beginning of a newly formed international consensus. Making a successful transition from being a "developing nation" to being an "emerging capital market" is now the most serious challenge facing the developing world today.

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* This essay summarizes the remarks made by the author at Georgetown University Law Center (GULC) on November 9, 1999, as part of the James Brown Scott Society of International Law's Distinguished Lecturer Series.

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1. Nicholas D. Kristof & Edward Wyatt, *Who Went Under in the World's Sea of Cash*, N.Y. TIMES, Feb. 15, 1999, at A1.

Trade relations and capital investments are now being rationalized in a new international economic order where the post-colonial imprint of the past is gradually becoming irrelevant. Whether we consider trade in goods, technology, or capital, the marketplace has become truly global. Over the course of the past decade, the playing field has been leveled to such an extent that virtually any commodity, product, service, or information may now be obtained from anywhere by anyone using the vehicle of e-commerce.[2]

The rise of a new global economy over the past two decades has meant that the increased cultural diversification within this newly created international marketplace now poses complex, new ethical challenges and dilemmas. This is particularly the case where a plurality of cultural values, norms, and beliefs is fundamentally changing the nature of international business transactions.

In this dynamic context of change, the need for ethical decision-making in support of the economic development of emerging economies has become more critical, and the process by which such decisions are made by policymakers in emerging markets has become more complicated and difficult to manage. This, in turn, has profound implications for the course of the development of emerging and transitional economies. This Essay defines the new legal architecture of development law and underscores the importance of ethical decision-making—a new and critical tool in exercising principled choices in the development law process.

I. THE GENESIS OF DEVELOPMENT LAW: THEORETICAL UNDERPINNINGS

The exponential expansion of international law into the private domain has been a function of the new and rapid globalization of the economy, and the need to express international business, commercial, and financial relations in a coherent legal form. Thus, the fairly narrow paradigm established by the parameters of public international law—heretofore both defined by and confined to the relations between states—has been forced to change radically over the past decade. Indeed, even the dynamic world of international business transactions, the mainstay of most international law practitioners, has been forced to contend with current trends in

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2. RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE 4 (1999). The impact of globalization can be felt in a much more immediate sense in the use of the Internet. Professor John Jackson described the Internet as the "new portal of commerce, which has revolutionized the way in which we communicate, educate ourselves, and transact business." Professor John H. Jackson, Address on the Occasion of His Inaugural to the Position of University Professor of Georgetown University (Nov. 5, 1998).

globalization and often has been instrumental in imposing new legal requirements in order to protect foreign capital investments.

More generally, international law practitioners are also engaged in an effort to rationalize legal relations between individual actors, such as lenders, borrowers, project sponsors, and investors. Accordingly, it is now appropriate, if not imperative, to address the relations of nations, peoples, and other development actors within the changing global context of economic development. Two interrelated causes giving rise to the current matrix of development law and international finance are critical to this examination: (1) the failure of ideology and (2) the failure of the state.

A. *The Failure of Ideology*

The failure of ideology in the twentieth century is embodied in the demise of fascism, communism, Stalinism, and Soviet-backed socialism in Africa and Asia. The dramatic fall of the Berlin Wall in 1989 heralded a new post-Cold War era where old policies of containment, proxy wars, and non-alignment have now become defunct. But if these ideologies have failed, what remains in its place?

The new ascendancy of the "Rule of Law" on a global scale is certainly worth considering. In the fracas of dying and defunct ideas, a core ideal of Western thought has endured, namely, Adam Smith's elevation of the drive to acquire material wealth to a classical economic ideal. This, in combination with John Locke's demand that the state protect private property and individual liberties, sets the stage for liberal political theory. In other words, the pursuit of one's own personal happiness through the material acquisition of personal wealth as well as the state's protection of individual liberties, has been elevated to a Western classical ideal. Indeed, the terrifying force of this ideal may be its universality.

While Western societies developed legal structures over the centuries to protect private property—such as contract enforcement, mortgages, secured loans, liens, and bankruptcy proceedings—and to ensure the protection of individual liberties—for example, passage of a Bill of Rights, due process of law, and jury trials, non-Western societies did not, for the most part, develop similar institutions. What began revolutionizing our world at the end of the last millennium was not the adoption of a Western classical ideal by the non-Western world, but the adoption of the Western methodology of achieving this ideal through private property, democratic governance, and the Rule of Law (ROL). The adoption of this Western-based methodology is what is fueling legal reform efforts in the developing world, as discussed below.

B. *The Failure of the State*

The role of the state in the economic development of emerging economies has been critical. In the decades following the independence of most developing world nations, the state was the only institutional actor large enough and sufficiently creditworthy to assume an entrepreneurial function. In other words, the state was the only actor capable of borrowing funds and providing for basic human needs, including power generation, transportation, and telecommunications. In response to the urgent needs of its population in such sectors, the state created state-owned enterprises (SOEs), which borrowed capital to support the capital infrastructure and other nation-building needs of the state. The SOEs, however, engaged in inefficient borrowing practices that burdened numerous developing states with high levels of debt leading to the debt crisis and the continuing debt overhang of many countries. In sum, SOEs failed over time. As a result, the state began divesting itself of ownership interests in its SOEs.

The withdrawal of the state from the productive sectors of the economy led to the massive privatization efforts that we have witnessed over the course of the past decade. This process, along with the rationalization of business and commercial relations through technology, has led to a tidal wave of capital investment flowing into the developing world, the implications of which are truly profound. The development process has gone through a critical reconfiguration. The private entrepreneur—channeling foreign direct investment—and the private investor—fueling foreign portfolio investment—have now become immediate, or removed, actors in the development process. Therefore, it has become clear that the key to development is clear, unimpeded access to world capital markets. This is the true story of the end of the twentieth century, as pointed out by former Secretary Summers.

Thus, we return to our starting point where development success is not measured by being a "developed nation," but by becoming an "emerging capital market." In essence, this means that we are moving away from traditional notions of development through the auspices of foreign assistance and development loans, and toward market economies where the market, rather than the International Monetary Fund (IMF)[3] determines the winners and losers.

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3. In fact, Jeffrey Sachs criticized the IMF's role in requiring sovereign guarantees of loans to the private sector, calling this requirement the "socialization of private loans." Professor Jeffrey Sachs, Next Steps in the East Asian Financial Crisis, Address at the U.S. Agency for International Development's Global Bureau's Economic Growth and Agricultural Development Center (Jan. 7, 1999). Yet, as Professor Sachs points out, Korea's policy of recapitalizing private loans with public funds has kept liquidity in the system. *Id.* This policy, along with writing off non-performing loans

Therefore, unimpeded access to international equity and bond markets is now the clear determinant of global economic success.

In order to be perceived as an emerging capital market, however, the developing country in question must meet the expectations of the Western-based investors. But what is the nature of such expectations? To start, these expectations focus on formulating a clear, cohesive, and enforceable legal framework where private investments will be safe from expropriation by the state and corrupt rent-taking by private entities; a freely convertible currency; and, repatriable profits. These expectations, quite predictably, lead us back to ROL issues in determining whether the country in question has the requisite legal and economic protections in place that will give a certain comfort level to the foreign investor. No doubt, John Locke would be pleased.

For these reasons, a ROL framework[4] needs to be put in place in order to ensure that private enterprise and profit-making are not tampered with by non-market forces. In fact, meeting these foreign-based expectations often constitutes the quid pro quo of development. In other words, certain aspects of the indigenous legal culture and the established norms of the developing society may need to be sacrificed in order to attract and keep the foreign capital investment needed to finance economic growth. Accordingly, an emerging market economy needs to make clear, principled choices in the process. Indeed, this is the crucible of the critical decision-making processes currently underway in emerging capital markets. A note of caution, however, is in order because the agenda for ROL reform is deceptively easy and overly simplistic if the underlying ethical and cultural implications are ignored or disregarded.

C. *The Ethical Decision-Making Process*

The dilemma facing emerging capital markets today lies in both attracting and surviving the tidal wave of investment from the developed world, a critical—and in some cases, catalytic—ingredient in transforming developing countries into more fully capitalistic

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from bank portfolios, has kept Korea's economic engines running. *Id.* In the long-run, however, significant debt write-offs, longer repayment terms, and other debt relief strategies need to be implemented in order to solve the debt overhang of the developing world.

4. I argue that the ROL Analytical Framework is composed of the following components: (1) creating a civil society; (2) instituting structural legal reform; and (3) improving the administration of justice. Moreover, a democratic means of governance permitting the individual to express his or her political will involves a fundamental change in the role of the state in facilitating participatory development, empowering individuals, and creating systemic reforms in laws and legal institutions so that this change can be made effectively. *See generally* SARKAR, *supra* note 2, at 28-29.

societies.[5] Institutional and portfolio investors in the developed and developing worlds now have a real choice between investing domestically and abroad. Moreover, modern technology has provided almost unlimited access to international markets by eliminating the traditional barriers to investment, including time, location, language, religion, physical disabilities, age, and gender.[6]

The elimination of these impediments to global investment also signifies the marginalization of national boundaries and, increasingly, local and regional cultures.[7] While some may feel that this trend is an intensely liberating phenomenon, it is important to recognize that the realms of ethics, morality, law and justice, religion, symbols and iconography, language, history, mythology, art, and culture are also being left behind. The aesthetic and cultural dimensions of human life are ill-equipped to deal with the magnitude and the speed of the changes that scientific endeavors and technology are triggering. Once cultural parameters are lost, the loss of respect for the culture and the violation of cultural taboos are the very predictable next steps.

A world without borders profoundly changes our terms of reference. Culture, and the uniqueness and specificity implicit therein, is becoming marginalized and may gradually become irrelevant. Over time, we may be headed in the direction of greater technological complexity coupled with cultural oversimplification. In other words, the depth, passion, particularity, and contradictions of all cultures—especially those of developing countries—may become increasingly unknowable even to the members of that culture, and may soon be lost to us all. Thus, the inherent risk in entering a post-Cold War era of development is one of losing the sacred meaning of culture, religion, language, symbols, and history. In the final equation, the quid pro quo of development may be the loss of culture and that, indeed, is a high price to pay.[8]

II. DEVELOPMENT LAW: A NEW LEGAL ARCHITECTURE

In order to manage the development law process, we need to come to terms with the fact that the old paradigm of international law principles defining the relations between states in the public

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5. *Id.* at 5.

6. *Id.* at 5, 6.

7. *See* Guy Gugliotta, *Saying the Words that Save a Culture: Tribe's Race to Teach Its Mother Tongue Reflects Global Erosion of Languages*, WASH. POST, Aug. 9, 1999, at A1.

8. SARKAR, *supra* note 2, at 6-7. *See also* Georges Enderle, *Ethical Guidelines for the Reform of State-Owned Enterprises in China*, 18 U. PA. J. INT'L. ECON. L. 1177 (1997).

sphere and private international law expressing the needs of global business in the private realm are no longer sufficient to adequately describe, manage, or even understand the new context of globalization and the role that developing nations play in it. Therefore, a fresh, new paradigm of development law must be explored, and I have suggested the following: (1) establishing substantive legal principles; (2) establishing legal norms; and (3) establishing the means to enforce such legal norms.

Briefly, substantive principles of development law include mutuality, accountability, equitable participation, and the duty of cooperation.[9] While the analysis employed to derive these principles is a story unto itself, it may be summarized by stating that mutuality[10] must be established among all sovereign and institutional actors in the development scene. This principle recognizes that the obligations created by the development process do not rest simply with the nation or society desirous of development, but also imposes an equivalent obligation on industrialized nations and international financial institutions, in particular, to fulfill their duties to cooperate with developing countries in seeking responsible, sustainable, and equitable development solutions.

Accountability is the legal derivative of badly needed transparency-related issues in the development law process; and equitable participation is aimed, in its most ambitious form, at creating a legal nexus between the most impoverished and deprived individual and the loftiest decision-maker in the development process. Not only does this give a voice to the ultimate end-user of the development process but, over time, it may have the effect of creating a new kind of mutual insight, respect, and clarity, thus making the development process more efficient and self-sustaining in the long run. Finally, applying a duty of cooperation to all the development actors permits the objectives of development to be achieved in a more balanced equation benefiting in some way, however tangentially, all of the participants in the process.

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9. SARKAR, *supra* note 2, at 56-57, 68-72.

10. Although I originally based the idea of mutuality on its familiar contractual context, the development process, of course, is not necessarily contract-based. Thus, I was forced to rely on the general definition of the term in *Black's Law Dictionary*, which thankfully lacked overt contractual overtones. BLACK'S LAW DICTIONARY 1041 (7th ed. 1999) (defining mutuality as "[t]he state of sharing or exchanging something; a reciprocation; an interchange"). I have subsequently realized that the concept of mutuality is more narrowly tailored in the arena of international law. For example, the U.S. Supreme Court denied enforcement to a French court-issued judgment on grounds that French courts denied enforcement to U.S. judicial decisions. Hilton v. Guyot, 159 U.S. 113, 210-11 (1895). The Supreme Court held that that the French judgment lacked "mutuality and reciprocity" and, therefore, could not be enforced in the United States. *Id.* at 227-28.

In terms of establishing new substantive legal norms, differential legal norms[11] should not be employed. Rather, a more systemic application of contextual legal norms found in model laws as formulated, for example, by the UN Commission on International Trade Law (UNCITRAL)—such as in the UN Convention on Contracts for the International Sale of Goods (CISG)—and by the World Trade Organization (WTO)—through such means as Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures. Creating a menu of options gives the developing nation in question an opportunity to make structured, thoughtful development choices in creating or remaking a ROL framework better suited to its needs in the new millennium.[12]

Finally, absolute legal norms, particularly in the area of international human rights, also need to be carefully considered. The human person as the central subject of development should remain the active participant and beneficiary of the right to development. Beyond this, much more work needs to be dedicated to reaching an international consensus on what constitutes fundamental human rights—such as freedom from torture—below which standard no nation should fall, and to which no individual should be subjected. In this process, however, we should be wary of establishing a lower tier of expectations for developing countries. In other words, poverty should not deprive an individual of inalienable human rights. It is hardly necessary for me to add, however, that the dialogue on what constitutes fundamental human rights and how such rights should be

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11. SARKAR, *supra* note 2, at 73-74 (citing the Kyoto Protocol on Climate Change as establishing differential legal norms requiring industrialized nations to lower airborne emissions over the course of the next fifteen years but imposing no similar requirement on developing nations). The Kyoto Protocol sparked strong U.S. Congressional resistance to such differential legal treatment:

> None of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol, which was adopted on December 11, 1997, in Kyoto, Japan, at the Third Conference of the Parties to the United States Framework Convention on Climate Change, which has not been submitted to the [U.S.] Senate for advice and consent to ratification pursuant to article II, section 2, clause 2, of the United States Constitution, and which has not entered into force pursuant to article 25 of the Protocol.

Making Appropriations for Foreign Operations, Export Financing, and Related Programs for the Fiscal Year Ending September 30, 2001, and for Other Purposes, H.R. REP. NO. 106-997, § 577, at 56 (2000).

12. An emerging capital market should also consider applying the "Janus Law Principle" in making its proposed legal reforms. Under this principle, the developing nation, like the Roman god Janus, simultaneously looks inward in terms of its own national fabric and outward in terms of joining the global community—a space axis. In addition, it looks to its own past legal traditions and the future global legal trends—a time axis. SARKAR, *supra* note 2, at 29-32. Thus, the proposed ROL changes can be fit into a continuum of space as well as time to help better sequence legal reforms.

applied to women, children, and disenfranchised minorities is a contentious debate that is no where near formulating absolute legal norms at this time. Yet, the fact that such a vigorous debate has been initiated is, in itself, promising for the future.

Further, the success of the development equation rests on three pillars: the exchange of capital, commodities, and technology. As far as a framework for enforcing legal norms is concerned, the WTO has established a well-defined, substantive body of law on trade and intellectual property rights as well as an enforcement mechanism for both.[13] The WTO has met the institutional needs of two of the three pillars, namely, commodities and technology; therefore, a Capital Transfer Appellate Board (CTAB) should be established as a separate appellate body to review the decisions of the Executive Boards of the World Bank and the IMF.[14] This will help close the accountability gap in the way capital transfer decisions are made by the World Bank and the IMF, the two sister institutions of the WTO. This will provide a new forum for sovereign members to appeal executive board decisions of the World Bank and the IMF on grounds that: (1) the executive boards have failed to follow their own procedures; or (2) that their decision violates another international protocol that the sovereign member is governed by; or, (3) that the decision cannot be carried out because of unforeseen or changed circumstances. Thus, this independent adjudicatory process will be problem-driven to seek out constructive answers and pragmatic solutions to capital transfer-related questions, rather than being an abstract process.

III. ETHICAL ASPECTS OF THE DEVELOPMENT LAW PROCESS

The substantive principles of development law may provide insight on which laws and regulations need to be created, changed, modified, or sacrificed in order to meet the demands of all development actors. This purely legal examination, however, omits the ethical aspects of the decision-making process that are involved in making these choices. What are the ethical implications of the above-enumerated considerations that must be weighed, and why are such ethical considerations important?

In one sense, ethics can be seen as the process through which the substantive norms created by legal codes are viewed and applied. Thus, ethics is the highly individualistic framework containing the substantive, normative principles of law that have been created

13. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Agreement Establishing the World Trade Organization, Annex II, 33 I.L.M. 112 (1994).

14. SARKAR, *supra* note 2, at 79, 84-90, 251-54.

through popular, consensual means. One avenue of approaching the ethical dilemmas posed by development law problems is to initially adopt a sliding-scale, moral-relativist perspective. When the process of decision-making has begun to run its course, certain moral values or ethical principles will begin to reveal themselves through this empirical process.[15] For example, choosing the method of expressing dissent or conflicting opinions—through a public hearing, soliciting public comments, or conducting opinion surveys—are all empirical experiments in the ethical decision-making process. What method is the most effective in the decision-making dilemmas posed by this example? Are public hearings required for changes in zoning ordinances, even though they are not the most expedient means of deciding whether—and how—displaced persons or refugees are to be compensated for their losses? Should hearings be conducted on the issue of environmental degradation or do independent, scientific studies suffice for this purpose? Should such findings of the scientific community be publicly released and debated?

Clearly, there is no right or wrong choice here. The methods for making ethical decisions will change with the circumstances, time, the sophistication of the public and interested parties, and the democratic nature of the decision-making process. Some decisions will be popular but bad, whereas other decisions will be unpopular but completely justified. It is important to recognize that the development process does involve ethical and moral questions because it intrinsically involves a balancing of—and a choice between—conflicting legal, cultural, and aesthetic norms. As discussed earlier, the struggle between the developed and the developing worlds is not only one for economic accumulation, but it is also a struggle of ideas around which societies are organized.[16]

The parties involved need to be patient in the process of developing ethical decision-making rules or procedures because there are no strict legal or ethical norms that clearly apply in such situations. In fact, this may be an opportune time to examine ROL programs of the past decade that have absorbed billions in foreign

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15. In fact, it may be wise to draw a distinction between ethical values and the methods of deriving such values. The Josephson Institute, for example, has developed a methodology for deriving corporate or institutional ethical values by asking participants in its sessions to name persons with admirable qualities, identify the underlying characteristics of such people, and apply such qualities to problem-solving situations using hypothetical examples. Over the course of this process, the participants are able to weigh these qualities and decide what are their core ethical values. Applying such core values to ethical problems that cannot be answered by reference to established legal norms helps to integrate the corporate culture with its ethical basis. *See generally* Josephson Institute, Ethics in the Workplace Training Program, *at* http://www.josephsoninstitute.org/etw.htm (last visited Jan. 23, 2001).

16. SARKAR, *supra* note 2, at 8.

aid, foreign government budgets, and consulting fees. Compilation and analysis of the information generated by these programs should be geared toward understanding the trends and successes in ROL reforms, the underlying legal principles, the lessons learned, and a menu of best practices. The empirical approach to ROL-based structural legal reform may, over time, yield ethical norms from this process of critical analysis and review. It is important, however, to not be too hasty in deciding what ethical processes should be followed. Ample room should be given in order to experiment with the possibilities.[17]

IV. CONCLUSION

Access to international markets in a globalized economy is practically limitless, with few impediments based on time, geography, language, age, or gender. Once the national boundaries are eliminated, however, the cultures contained within them may be eliminated over time as well. The delicate balancing act of deciding which aspects of culture, including legal culture, to maintain may be achieved through a principled discourse in the form of ethical decision-making. While not a panacea, it at least offers a means to articulate, discuss, and decide what cultural norms can or cannot be sacrificed.

Although globalization is an intensely liberating phenomenon, it also means that art, culture, morality, ethics, law and justice, language, history, national boundaries, and art may be sacrificed in the stampede. The Author was particularly struck by the force of this idea while on a recent diplomatic mission to Chile to discuss the creation of a new legal center to study both criminal and civil law

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17. Prematurely imposing legal codes and substantive law principles is something that Professor Steven Salbu warns against by stating:

> [T]he codification of values has greater potential within highly cohesive, well-developed communities than within culturally fragmented, developing communities. Codification prior to the development of a traditional community structure becomes totalitarianism at the extremes because moral judgments are imposed absolutely without a source of democratic support . . . . As the Twentieth Century draws to a close, nations must coexist before mutual cultural assimilation can occur. It is likely that efforts to force assimilation by prematurely codifying ethical codes would be ineffective and dangerous. Laws without underlying values are meaningless to those who do not understand that them because their foundations are alien. Further, the application of laws without an understanding of their purpose is a potential source of international and intercultural resentment and hostility.

Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 351-53 (1994).

changes in Latin America. The intensity of their examination of common law systems of due process, jury trials, and the provision of court-appointed defense counsel made me shiver in realizing that this may be the end of Lex Romana. The legal conceptual framework of civil law systems that devolved from Roman conquests in Spain during the second century B.C.E., and which were subsequently transmitted to Spanish colonies in the New World in the fifteenth century A.D., is beginning to erode. The civil law systems prevalent in Latin America are gradually, but unmistakably, succumbing to the unbearable pressure being exerted by the legal hegemony of the common law-based systems of the Anglo-Saxon legal tradition, for reasons that lie outside the scope of this Essay.

In sum, it is becoming increasingly clear that if the ideal of becoming an emerging capital market is not achieved, then the promise of economic development may also be betrayed. Thus, one would do well to remember that the competition to succeed in this new world order is fierce—precisely because the stakes are so high.