

No. 5 Theories of Law and Development (2):

Development Beyond Economic Development: Local Context and Access to Justice

Goals:

- Understand the implications of good governance and the rule of law for human development.
- Understand the concept of access to justice.
- Understand the importance of including local institutions in legal reform projects.

1. Introduction

Good governance and the rule of law are essential concepts in the new law and development movement that emerged at the end of the twentieth century¹. This movement was triggered by the transition of former socialist states to market economies. Thus, good governance and the rule of law are not only important for functioning markets, such as through business law reform, but also embody values that go beyond economics. For instance, the Japanese ODA Charter stipulates that:

"Japan will give priority to assisting developing countries that make active efforts to pursue peace, democratization, and the protection of human rights, as well as structural reform in the economic and social spheres²."

¹ To measure the rule of law and good governance, World Bank develops the WGI (World Governance Index) that is the aggregation of perception indices below:

- Voice and Accountability: the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, association, and the press.
- Political Stability and Absence of Violence: the likelihood that the government will be destabilized by unconstitutional or violent means, including terrorism.
- Government Effectiveness: the quality of public services, the capacity of the civil service and its independence from political pressures; the quality of policy formulation
- Regulatory Quality: the ability of the government to provide sound policies and regulations that enable and promote private sector development
- Rule of Law: the extent to which agents have confidence in and abide by the rules of society, including the quality of property rights, the police, and the courts, as well as the risk of crime.
- Control of Corruption: the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as elite "capture" of the state

² Japan's Official Development Assistance Charter, p.2.

<https://www.mofa.go.jp/policy/oda/reform/revision0308.pdf>

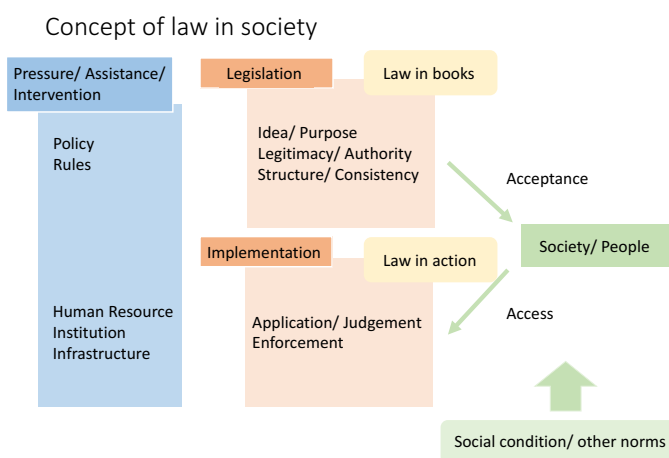
"full attention should be paid to efforts for promoting democratization and the introduction of a market-oriented economy, and the situation regarding the protection of basic human rights and freedoms in the recipient country³."

While economic development aims to achieve national economic growth, human development focuses on expanding the capabilities of individuals. Therefore, in the context of legal reform, attention should be paid to how each person can benefit from the law.

2. Access to Justice

The figure on the right illustrates the relationship between the international community, public institutions, and society regarding legal reform.

A state authority creates legal regulations with the support or pressure of the international community. These regulations should contain ideas and purposes that are consistent with the legal



system as a whole and supported by the legitimacy of the authority. These regulations are called "law in books." Then, "law in books" is enforced through administration or judiciary. The effect of the enforced law is called "law in action." Although the same regulation is enforced, "law in action" depends on the enforcement system, including the quality of enforcers, procedures, and infrastructure. To improve "law in action," the international community supports human resources such as judges, prosecutors, police, and ombudsman, as well as infrastructure such as court buildings and IT systems.

However, ordinary people are often excluded from this process. People's acceptance of laws and access to justice are influenced by social conditions and other social norms. Without acceptance and access, the effectiveness of law is only nominal, and the state can exercise very limited governance capacity⁴.

³ Ibid., p.5.

⁴ The following situations indicate the gap between state law and ordinary people in Southeast

Question:

What language is used in the court in your country?

Do you know the emergency police call number in your country?

The World Bank has acknowledged that, despite providing assistance for legal reform, the results have been mixed at best⁵:

"Where there is commitment to reform, improvements in governance can and do occur.

Over the past decade from 1998-2008, countries in all regions have shown substantial improvements in governance, even if at times starting from a very low level. Examples include Ghana, Niger, and Peru in Voice and Accountability; Algeria, Angola and Sierra Leone in Political Stability and Absence of Violence/Terrorism; China, Colombia, and Rwanda in Government Effectiveness; the Democratic Republic of Congo, Georgia and Libya in Regulatory Quality; Latvia, Liberia and Rwanda in Rule of Law; and Indonesia, Liberia and Serbia in Control of Corruption.

On average the quality of governance around the world has not improved much over the past decade, despite some of the individual country improvements noted above. Coinciding with countries that have done well, a similar number have experienced deteriorations in several governance dimensions, including Zimbabwe, Cote d'Ivoire, Belarus, Eritrea and Venezuela.

Asian countries:

- Most law scholars in Indonesia are interested in dogmatic interpretation of law, such as the civil code, the penal code, and the civil procedure code introduced by the Dutch colonial government, without paying attention to practical social context.
- Legal education in Myanmar still adheres to the "Indian Code" that was transplanted during the British colonial era. (Kaneko)
- In the Philippines, socially-oriented lawyers and law school students established socially-oriented groups, called Alternative Law Groups (ALGs), in prestigious universities. (Golub)

References:

Kaneko, Y. (2019). Contract Law in Myanmar: An Outcome of British Colonial Law. In *Civil Law Reforms in Post-Colonial Asia: Beyond Western Capitalism* (pp. 61-83). Springer.
Golub, S. (2003). Participatory Justice in the Philippines. In M. McClymont & S. Golub (Eds.), *Many Roads to Justice: The Law-related Work for Ford Foundation Grantees around the World* (pp. 67-87). The Ford Foundation.

⁵ <http://info.worldbank.org/governance/wgi/pdf/Pressrelease.pdf>

In many other countries, no significant change in either direction is yet apparent in recent years."

Legal measures can promote individual capabilities that are targets of human development. However, improving the government's capacity for governance and law does not necessarily expand legal rights for ordinary people. In fact, many people are unable to access the formal legal system due to various obstacles, such as political oppression, ethnic discrimination, linguistic barriers, conflicts, gender bias, and informal norms like religious and customary norms.

Therefore, a new approach to legal reform assistance emerged in the 2000s, known as "access to justice."

For instance, the World Bank started showing attention to access to justice in the mid-2000s. The World Bank's World Development Report of 2002, titled "Building Institutions for Markets," emphasizes the importance of a judicial system for a functioning market economy. In contrast, the 2006 report titled "Equity and Development" discusses equal access to medical services, education, jobs, capital, and secure land titles, political freedom and access to political power, elimination of stereotypes and discrimination, and the improvement of poor people's access to the judicial system and infrastructure.

The United Nations Development Programme (UNDP) also focuses on access to justice. To address the problem of poor people's exclusion from justice, the UNDP established the Commission for the Legal Empowerment of the Poor (CLEP) in 2009, chaired by Hernando de Soto and Madeleine K. Albright. In the report's introduction, CLEP explains how exclusion from the law negatively affects the poor.

"As the Report highlights, the sources of legal exclusion are numerous and very often country-specific. However, four common threads stand out. First, legal empowerment is impossible when poor people are denied access to a well-functioning justice system. Second, most of the world's poor lack effective property rights and the intrinsic economic power of their property remains untapped. Third, poor people, in particular women and children, suffer unsafe working conditions because their employers often operate outside the formal legal system. Fourth, poor people are denied economic opportunities as their property and businesses are not legally recognised. They cannot access credit, investment nor global and local markets.⁶"

⁶ Commission on legal empowerment of the poor, *Making the Law Work for Everyone Volume 1: Report of the Commission on Legal Empowerment of the Poor*, 2008.

CLEP asserts that the role of law is significant in addressing the inaccessibility of the poor to four formal legal rights: access to a well-functioning justice system, effective property rights, the right to safe working conditions, and the right to legally recognized business. International cooperation for legal reform is necessary to establish good governance in terms of institutions ensuring "predictable, impartial, and consistently implemented rules" and to address these issues.

3. Local context for access to justice

(1) Recognition of property rights and local context

CLEP pointed out problems of property rights in developing countries⁷:

- i) Lack of sufficient property rights system and appropriate governance in most developing countries.
- ii) Uncertainty over legal ownership of forests, pastures, swamplands, and sources of freshwater.
- iii) Collectively held indigenous lands have often been declared public or unoccupied lands.
- iv) Exclusion of women from legal property rights.

As for the first point, CLEP insists:

"Overwhelming evidence, from all over the world, shows that functional property relationships are associated with stable growth and social contracts, whereas dysfunctional property relationships are associated with poor, unequal, and unstable societies. When property rights are out of peoples' reach, or rights are subject to competing claims, their assets are often not secure and their economic potential remains severely inhibited."⁸

In his famous book titled "The Mystery of Capital⁹," Hernando de Soto, co-chair of CLEP, argues that legal recognition of land ownership allows for the capitalization of land assets, which refers

available at <https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/>

⁷ The Commission on Legal Empowerment of the Poor and UNDP, op.cit.,35-36.

⁸ The Commission on Legal Empowerment of the Poor and UNDP, op.cit.,34.

⁹ De Soto, Hernando, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, 2000. (available in GSID library, and, cheap price in fact)

to the multiple uses of the economic value of land. This point will be discussed later using the mortgage system as an example.

Regarding the second and third points, it is necessary to note the difference between traditional land use rights and modern land property rights¹⁰. The recognition of modern land property rights means recognizing a full and exclusive right to control a parcel of land. The owner is free to do everything, including cultivating the land, building houses, renting, selling, restricting entry, and doing nothing with it. On the other hand, traditional land use rights often do not recognize such exclusive control. The land belongs to the community, and occupation of land for dwelling or cultivation does not mean that the land can be freely disposed of. If an occupant does not use the land properly, the land may be returned to the community. In addition, there are other types of rights to use the land, such as the right to feed the grass on the land to livestock, to use wells on the land, to perform rituals on the land, or to pass through the land, and those rights are recognized within the community as separate rights.

However, a simple conversion of traditional land use rights to modern property rights upon independence or legal reform programs often recognizes only the occupant of the land as the sole owner and excludes other traditional rights as inferior rights. Therefore, in regions where traditional communities continue to exist, a gradual transition of the land ownership system is necessary to take such conditions into account¹¹.

Furthermore, if ownership is combined with land registration (official recognition of ownership), the government does not recognize traditional land rights and may deprive the land of residents. For example, in the Narmada valley development project in central India, the government refused to pay compensation for those who were forced to move from construction sites because the government does not recognize the traditional land ownership of indigenous people and assumes them to be illegal occupants on state-owned lands.

The fourth point concerns the marginalization of socially vulnerable groups in the process of legal modernization. Policymakers and lawmakers must be aware that traditional norms often discriminate against social minorities (e.g., women). To address this problem, policymakers and

¹⁰ Various case studies in African countries by Benjaminsen et al. are instructive in this regard.

¹¹ Tanzania is an interesting example, where the government enacted two land laws, namely the land law applied for urban area, and the rural land law applied for rural area.

The YouTube movie below depicts the conflict between state law and customary norm over land in Gambia:

<https://youtu.be/7FSCXzFhZNA>

lawmakers should consider how to introduce human rights values to the traditional community in an acceptable manner¹².

(2) Capitalization of the property through legalization

As discussed so far, property rights are indispensable for the development of large-scale economy. This section discusses the mortgage system as an example how a clearly defined property right supports the capitalization of land asset. Mortgage is one of the most common ways to finance certain businesses. The Black's Law Dictionary defines "mortgage" as:

"1. A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.

2. A lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulate terms."

Thus, by mortgage, one can finance its business while keeping the use of a property in a term that a debt shall be return according to the stipulated terms (time and interest). In sum:

- Creditor (mortgagee) reserves a right on the land as a security for the debt. (The land is used to have capital = capitalization goods)
- Debtor (mortgagor) can use the land for production even the land is mortgaged. (The land is used for production = production goods)

This legal method needs clearly defined property rights on land, an accessible land registration system, and a functioning enforcement mechanism. Because the creditor can know that the debtor is a legitimate owner of the land and the creditor's right as a mortgagee is securely recorded and represented in the cadaster (registration of land rights), the creditor does not have to monitor and occupy the land physically (the costs for monitoring and enforcement are reduced). Without credible registration, the creditor must physically control the land and, even worse, remove the debtor from the land. In that case, the debtor can no longer use the land for production.

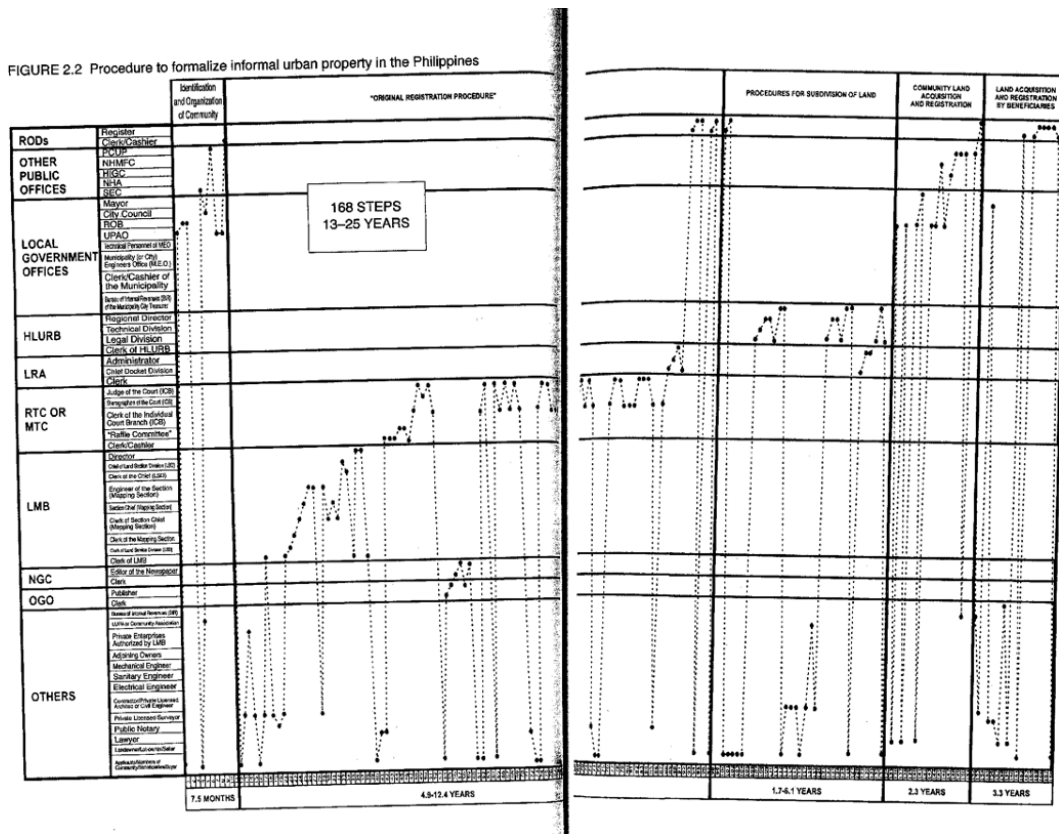
¹² An interesting attempt is to transform customary law that is discriminative against women through Islamic law teachers in Aceh province, Indonesia. Please watch the film (this is a private link, so do not share it with others):

<https://youtu.be/WTtxBEylZQw>

It should be noted that even though establishing accessible registration and functioning enforcement mechanisms need costs (labor cost, computer, or training for legal experts), if more people take advantage of them, the average cost will decrease. Therefore, the development of a formal legal system and economic growth have a synergy effect.

Question:

Please consider the history of the modernization of land ownership in your country and the extent to which the modern land system already works in your country. If it doesn't work as expected, what are the reasons?



Extremely complicated procedure for the formalization of land rights in the Philippines¹³

Next: International cooperation for legal reform

- I will explain some examples of legal reform projects assisted by international society.

¹³ De Soto, *The Mystery of Capital*, pp.22-23.

- Comparing the law and development in the 1960s and the law and development in the 1990s
- A case study of the judicial sector reform in Timor Leste (East Timor)

Readings:

Trubek, David M. "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in David M. Trubek and Alvaro Santos eds., *The New Law and Economic Development: A Critical Appraisal*, Cambridge, 2006, pp.74-94. (Available at the GSID Library)

Taylor, Veronica L. "New Markets, New Commodity: Japanese Legal Technical Assistance." *Wisconsin International Law Journal*, vol. 23, no. 2, 2005, p. 251-282.

<https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2005/05/taylor-new-markets-new-commodity.pdf>

Presentation and term-paper

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