‘Law As Accelerator With No Brakes’: The Approach To Corruption In The First and Second Moments of Law and Development Discourse*

Abstract

The paper argues that law and development scholarship ran into crisis for its failure to take local contextual considerations into account in formulation and implementation of legal transplantation agenda. It examines the historical development of the law and development scholarship with particular attention to the subject of corruption; what research was done on the place of corruption in development discourse through the various generations of the movement and what impact this may have had on the viability of past, present and possibly future anti-corruption programmes at the international level and nationally with general reference to countries in Sub-Saharan Africa, where corruption is regarded as one of the biggest challenges. It argues that the market-centre emphasis of the movement has largely benefited the few corrupt and privileged elites to the detriment of the citizens. It therefore calls for a reformulation of transplant institutions that are culture contextualised to drive necessary development in transiting and developing economies.

Introduction

Over the years, the study of law and development has been inundated in disenchantment on a wide range of issues that have developed simultaneously with the history of the field itself. On the one hand, there has been a general scepticism over the value of the study of the relationship between law and development. This scepticism is based on the notion

*Matthew Ayibakuro, Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Bayelsa State.

that the initiative had failed to develop any veritable theory relating to the impact of law on development over sixty years after its initiation.[1] Similarly, wrong because they failed to achieve the intended objective of promoting sustainable socio-economic development in the various developing countries in Africa, Asia and Latin America, for a wide variety of reasons.[2] Whereas general reservations of this nature can be found running through the literature on law and development from its inception in the 1950s till the present day discourse on the field,[3] there have been, on the other hand, more particular critiques of law and development that provide analytical assessment of the initiative over the past sixty years with a view to identifying specific areas of concern with regard to the overall objective of fostering development. The main question being asked in this regard is how law and development has been defined, promoted and implemented over the course of its history.[4]

In line with the latter focus of critical practice, this study will examine the historical development of the law and development field with particular attention to the subject of corruption; what research was done on the place of corruption in development discourse through the various generations of the law and development discourse and what impact this may have had on the viability of past, present and possibly future anti-corruption programmes at the international level and nationally with general reference to countries in Sub-Saharan Africa, where corruption is regarded as one of the biggest challenges.[5] To do this, the work will look at the predominant

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[1] D.M. Trubek and M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' [1974] Wisconsin Law Review, 1062.

[2] J. M. A. Anekwe, 'Law and Development in Africa: Towards a New Approach' (2011) 1 (1) NIALS Journal of Law and Development 1

[3] See for instance, similar questions still being raised in David M. Trubek and A. Santos, 'Introduction: The Third Movement in Law and Development Theory and the Emergence of a New Critical Practice' in D. M. Trubek and A. Santos (eds) The New Law and Economic Development: A Critical Appraisal (CUP 2006) 1

[4] K. Gadio, 'The Role of Law in the Development of the African Continent from a Development Agency Perspective' (Harvard African Law and Development Conference, 16-18 April, 2010)

[5] See Transparency International's Report on Corruption in Sub-saharan Africa, <http://archive.transparency.org/regional_pages/africa_middle_east/sub_saharan_africa> accessed 6 December 2013

themes of the various ‘moments in law and development’,[6] considering the analyses of law and policies regarding corruption in the legal reforms that heralded the first two forms of law and development doctrine since World War II when the discipline crystallized.

Corruption in the Moment of ‘Law and The Developmental State’

It has been noted that although the informal narrative of the history of law and development can be linked to Adam Smith’s discussion of ‘the economic effect of mercantile legislation’ in his landmark work, An Inquiry into the Nature and Causes of the Wealth of Nations, first published in 1776, the formal origins of the discipline can be loosely traced to the initiatives of US academics and development experts in the late 1950s and early 1960s whose work was aimed at the promotion of legal and institutional reforms in the newly independent countries of the Third World based on American models that would facilitate economic development.[7] Their work therefore signalled the commencement of the first moment of law and development which was basically state-centric based on development economic theories that emphasized the role of the State as the driver of economic growth. Law in this setting was regarded as an instrument of intervention by the State in the economy to foster development.[8] To achieve this, a number of law reform projects were initiated in a few States along the lines of ‘professionalization of the legal profession through legal training and transplant of supporting legal institutions and modern laws.

Davis and Trebilcock rightly point out that the moment of law and the developmental state was characterized by the theoretical foundation of the concept of modernisation which advances a relationship of qualified cooperation between the developed and developing nations of the world

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[6] The word moment is used here to refer to a period in which law and development doctrine has crystallized into an orthodoxy that is relatively comprehensive and widely accepted.’ See David Trubek & Alvaro Santos, (n 3) 2. Other terms used synonymously with moment include movement, orthodoxy, period, era, etc

[7] K. Gadio, ‘The Role of Law in the Development of the African Continent from a Development Agency Perspective’ (Harvard African Law and Development Conference, 16-18 April, 2010)

[8] F. C. Sherman, ‘Law and Development Today: The New Developmentalism’ (2009) 10 (9) German Law Journal 1258

to achieve the development of the latter. This concept was premised on the fact that modernisation is a prerequisite to development and that developing nations must evolve from their traditional state to modernised societies in order to grow economically.[9] In essence, the foundational conception of law and development at this point was that 'a more developed legal system leads to a more highly developed economy and polity.'[10] The expectation was therefore that law would provide the requisite legal infrastructure on which development would thrive. Sherman summarized the role of law during this period:

> The classic developmental state required laws and legal institutions that would allow it to direct and mould economic behaviour. Legislation served as a tool for effecting national economic planning and law more generally served to create the framework for bureaucratization and governance of state industry. Lawyers working in development agencies, universities and other organizations in the United States and Europe took up the agenda of law reform in this context. Thus, they held a functionalist conception of law as an instrument with which to facilitate state-led development.[11]

On the strength of this theory, law and development-based programs were focused on the replication of American-style legal values and institutions from the developed world to developing nations in the hopes that this will produce the same results in terms of economic development as it had done in the early stages of the development of the Western countries themselves. The preoccupation of this moment was essentially to modernize the legal culture of the various developing countries through educational reform. This was because legal education was regarded as the source of legal formalism, which designers of law and development programmes at the time considered as a central impediment to a functional legal culture in the developing world. They considered legal formalism to be a notion of law as autonomous and abstract principles that can be deduced and applied without regard to socio-economic and policy objectives. Thus, a significant step taken towards modifying this notion was the reforming of law schools with the object of effecting a functionalist legal culture that will be conducive to stimulating economic development.[12] The second major

[9] K. E. Davis and M. Trebilcock: 'The Relationship between Law and Development: Optimists Versus Skeptics' (2008) 56 American Journal of Comparative Law 895

[10] Lawrence M. Friedman, 'On Legal Development' (1969) 24 Rutgers Law Review 11 at 52-53

[11] Sherman (n 8) 1262

[12] ibid

fixation of this moment was legal transplants of modern laws and institutions which, according to scholars and practitioners, was lacking in the developing countries for the purpose of achieving the desired state-led development. It was of utmost importance ‘to strengthen the legal capacity of state agencies and state corporations and modernize the legal profession by encouraging pragmatic, policy-oriented lawyering.’[13] The focus of the transplants was, of course, on economic laws on the pretext that the resulting development would have a spill over effect and create a liberal-democratic order. It was the assumption that if the ideas taught in law schools in developing countries could be changed, the attitude of lawyers would change also, and if the right laws were created, they would be enforced. Furthermore, it was expected that the ‘westernized rule of law’ would be embraced and implemented if its positive benefits could be demonstrated.[14] Whether or not such benefits accrued to developing countries in tandem with this line of thought continue to be a subject of debate.

The justification for considering the transplant of modern legislation as the best means to solve the many development problems in Sub-Saharan Africa was based on the ground that such problems were so pressing, and ‘so contracted [was] the time span for development that direct and manageable solutions were considered necessary.’[15] Supporting this outlook, Rene David, author of the Ethiopian Civil Code of 1960 declared, ‘Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself. The development and modernisation of Ethiopia necessitate the adoption of a “readymade” system.’[16] Others have claimed that this was necessary due to the fact that although the customary law of the peoples of Sub-Saharan was sufficient in handling certain subsistence purposes consistent with the lifestyle of the people at the time, it was ill-adapted to the demands of the required

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[13] Trubek and Santos (n 3) 5

[14] D. M. Trubek, ‘Law and Development’ International Encyclopedia of Social & Behavioral Sciences (2001) 8443

[15] Elliot M. Burg, ‘Law and Development: A Review of the Literature and Critique of “Scholars in Self-Estrangement”’ (1977) 25 American Journal of Comparative Law 506

[16] Rene David, ‘A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries’ (1963) 37 Tul. Law Review 187, 188 (the words ‘readymade’ without an hyphen between them is as used in the original work)

economic development. This was especially the case in the areas of commercial law and modern public law like finance, banking, labour law, state enterprises, import controls, exchange controls, limitations on the repatriation of profits, income taxation, trade unions and a host of others.[17] However, the reality on the ground and the limited success of most of such transplanted legislations in fostering development in regions like Sub-Saharan Africa has subjected this approach to a good deal of criticism both within and outside the field of law and development.[18] A lot of the criticism on the adoption of a modernisation framework at the beginning of law and development literature and resultant programmes has centred upon the fact that the massive transplantation of a different system of laws to developing countries occurred without necessary adaptation to suit the socio-political situations in the respective developing countries, with scholars like Tamanaha driving this point home by adopting terms such as 'context matters',[19] and 'circumstances on the ground shape how things work.'[19] Another reason which may best be considered as corollary to this was the ill-considered focus on formal legal systems alone, excluding customary laws and other informal legal orders that regulated the lives of people in developing countries.[20] However, as rightly observed by Davis and Trebilcock, a lot of the critique was not about whether or not legal reform is feasible or whether law has the potential to promote development, but rather about the appropriate types of legal reform to be pursued to engender development.[21]

Owing to the instrumentality role ascribed to law essentially towards economic ends, the scholarship and policies nurtured by the law and development field during this moment did not consider social and

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[17] Robert Seidman, 'Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa' [1966] Wisconsin L. Rev. 999, 1027. See also Robert Seidman, 'Law and Development: A General Model' (1972) 6 Law & Society Rev. 311

[18] See for instance, the classic work of D. M. Trubek and M. Galanter: 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' [1974] Wisconsin Law Review 1062

[19] Brian Z. Tamanaha: 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell Int'l L.J. 209

[20] See 'Law and Development Movement' on the World Bank Group resources site at: <http://siteresources.worldbank.org/INTLAWJUSTINST/... LawandDevelopmentMovement.pdf> citing Trubek and Galanter (n 1)

[21] Davis and Trebilcock (n 9) 28

democratic legal institutions and other critical issues that may have a negative effect on the goal to achieve comprehensive development in the various developing countries. One of the most significant of such issues is corruption. A survey of the relevant literature reveals that, in spite of the fact that the prevailing situation created by the institutional framework of the moment granted a lot of discretion and power to public officials in terms of regulating the political economy of the countries in question, very little or no regard was given to the challenge of corruption which had the singular potential of derailing the objectives of law and development programs. For reasons which shall be examined later in this work, there was no research, policy framework or practical work done with regard to corruption in the law and development field in the course of the period comprised in the first moment in law and development thought. This was so despite the fact that, at the same time, there were various studies on the effect of corruption on development being carried out by economists and other social scientists.[22] As aptly observed by Trubek and Galanter, ‘lawyers were late comers to the development research game, responding more slowly than [economists and] social scientists to the demand for theoretical insights into the process of development’.[23] This was indeed a most apposite observation especially on the approach of the law and development enterprise towards corruption. It further exemplifies the lopsided nature of development advanced at the time with all the focus being on promoting economic development through the instrumentality of the law. An evaluation of this particular moment in law and development evolution has revealed that while concentration on economic growth without corresponding human and social development may enhance formal economic development, it will not, for example, stem challenges like corruption which was and continues to be an impediment to the ability of the average people of various countries to live meaningful lives. It was therefore this, and other factors, especially the shift in the global political economy away from the predominant theme of classic state-led growth which underlined its theoretical basis, to a more market-friendly orientation

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[22] See for instance H. N. Leff, ‘Economic Development through Bureaucratic Corruption’ (1964) 8(3) American Behavioral Scientist 8; A. O. Krueger, ‘The Political Economy of the Rent-Seeking Society’ (1974) 64 (3) American Economic Review 29; Susan Rose-Ackerman, ‘The Economics of Corruption’ (1975) 4 Journal of Public Economics 187

[23] Trubek and Galanter (n 1) 1065 (emphasis added)

that eventually led to the collapse of the first moment in law and development.

Corruption in the Moment of 'Law and The Neoliberal Market'

The second moment of law and development is recognised for being essentially market-centric and driven by neo-liberal ideas about development, when law was used to limit the intervention of the State in the economy in favour of promoting the market instead. This was nevertheless geared towards achieving the same aim of economic development pursued in the previous moment.[24] In line with the concept of free markets, the policies pursued during this period which can be regarded as loosely commencing from the late 1970s to the early 1990s included privatization, deregulation and liberalization. Trubek, in establishing the specific role of law in economic development in this era, noted that:

> This perspective assumes that market institutions are necessary for economic growth, and sees modern law as essential to the creation and maintenance of markets. The emphasis here is on modern law's predictability as a set of universal rules uniformly applied. As a result of such predictability, modern law encourages men to engage in new forms of economic activity and guarantees that the fruits of this activity will be protected. Law thus . . . assures the individual that his decisions will be enforced by state authority, [and] his acquisitions protected from the depredations of others. Through institutions such as contract and private property rights, modern law promotes development and hence economic development.[25]

This shift to neoliberalism involved a set of development policy prescriptions, often referred to as the "Washington Consensus" which originated from the Washington-based International Financial Institutions, namely the International Monetary Fund (IMF) and World Bank.[26] Furthermore, the emphasis on security, predictability and certainty as being essential to economic development during this moment can be attributed to the influence of the New Institutional Economics (NIE), which was set

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[24] Baderin (n 2) 12

[25] D.M. Trubek: 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 (1) The Yale Law Journal 1

[26] See generally J. Stiglitz, Globalization and Its Discontents (New York: W.W. Norton, 2002)

out by Douglass North, the Nobel Prize winning economist and others, who argue that the development of legal institutions in areas like protection of property and contractual rights is essential to economic development.[27] This model of law and development discourse practically reversed the hitherto established classic development model by radically altering the role of the State in the promotion of economic development. Here, a market-oriented variant of rule of law was rather accentuated with private law becoming the principal tool for limiting state interference in the economy through largely classical capitalism-supporting legal concerns like property and contract rights.[28] The role of law here was therefore that of providing a framework within which private actors would make economic decisions.[29] Even though the central object of the rule of law was markedly different from that of the first moment, the central challenge of legal transplantation and of law reform regarding the difficulty of creating legal institutions and laws that are able to achieve desired ends by synthesizing foreign laws with domestic social, political, economic, cultural and legal circumstances endured through the era of neoliberalism.[30]

According to Sherman, with this new direction arose also the need for entirely new legal frameworks to allow the market to function freely, and especially to protect participants in the market in areas like finance and banking, corporate/commercial law, intellectual property, insurance, privatization, trade and foreign investment, among others.[31] The rule of law scholars and practitioners during this moment of law and development, still applying modernisation mechanisms of legal transplantation and legal education, were deeply concerned about effective adjudication and judicial independence.[32] This was especially the case considering that the effective enforcement of these new rule-based systems was a major component for the achievement of economic development through neoliberalism.

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[27] See Douglass C. North, Institutions, Institutional Change and Economic Performance (CUP 1990)
[28] John Ohnesorge, Developing Development Theory: Law and Development Orthodoxy and the Northeast Asian Experience (2007) 28 U. Pa. J. Int’l Econ Law 219 at 247
[29] M. A. Baderin (n 2) 5
[30] Sherman (n 8) 1265
[31] ibid
[32] ibid

Skeptics of neo-liberalism have however pointed out that the 'rule of law' theorisation upon which it is built is difficult to reconcile with the fact that most countries during this period, especially in Asia achieved a lot of economic development even though they had legal systems that did not meet the prerequisites advanced by neo-liberal theorists. The most significant example of this being China, which achieved considerable economic growth even though much of the productive property in the country has been collectively owned with informal networks of relations among business people treated as more important to transactions than strict contract law.[33] Owing to facts of this nature, there have been claims that 'Asian style neo-mercantilism and economic nationalism' with emphasis of on state control of natural resources, state run investment funds, and export-oriented production pursued together with import barriers and protection of national industries, may prove to be more suited for rapid economic development at the earlier stages of a country's development than promoting market capitalism through law.[34]

Even though the construction of a neoliberal rule of law at this moment was viewed by international development actors as an essential step towards creating the conditions for market-growth because systems of state regulation and intervention which were prevalent in the previous era of law and development were viewed as inefficient, stagnating and corrupt,[35] very little research, theoretical framework, or policy guidelines with regard to corruption appeared in law and development literature. Such anti-corruption initiatives that existed were limited to the judicial arm of government in furtherance of the need to establish formalism in the legal system. The goal of formalism, as pointed out earlier, was essentially being pursued to provide a foundation for the much needed predictability in the legal system which was considered a prerequisite for the security of actors in the economy. The neoliberal law and development doctrine,

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[33] See Tom Ginsburg, 'Does Law Matter for Economic Development? Evidence from East Asia' (2000) 34 Law and Society Rev. 829.

[34] Sherman (n 12) 1264 citing John K. M. Ohnesorge, 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience' (2007) 28 University of Pennsylvania J. Intl. L. 219

[35] ibid.

with a primary focus on the market, showed little concern for the role of law as a guarantor for political and civil rights or as a protector of the weak and the disadvantaged in society.[36] This was regrettably the case when the role of law in that regard would have had the effect of addressing social concerns like corruption.

By the late 1990s, the Washington Consensus was extended to incorporate a wider range of development goals with greater emphasis on a more comprehensive approach to development incorporating concepts such as equitable growth, human rights and good governance. This was attributable to a number of concerns about neoliberalism that began to erode confidence in the foundations of the doctrine. The factors responsible for this turn of events, according to certain authors, included the serious economic emergency experienced by certain Latin American countries and the Asian financial crisis which made it clear that unrestricted markets were often not efficient and that state intervention was necessary to correct market failures.[37] Other critiques were concerned with the sole focus on economic growth, noting that growth did not necessarily lead to poverty alleviation.[38] This new orthodoxy in law and development also heralded the first set of systematic research, international conventions and policy frameworks on the impact of corruption on development within the law and development field almost fifty years after the crystallization of law and development thought.

Whilst an examination of current efforts on corruption in the field of law and development is beyond the ambit of this work, it appears expedient to investigate the factors that might have influenced the lack of research or indeed interest on the relationship between corruption and development from the perspective of law and development scholars during the first and second moments in the evolution of the field, and the effect this may have had on legal anti-corruption measures at the global level and within developing countries in Sub-Saharan Africa.

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[36] Trubek and Santos (n 3) 2
[37] ibid
[38] Kerry Rittich, ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social’ in D. M Trubek and A. Santos, The New Law and Economic Development: A Critical Appraisal (CUP 2006), 203

'Law As Accelerator With No Brakes' - Possible Explanations For The Approach To Corruption In The First And Second Moments Of Law And Development

In his classical work, Law in Aid of Development, the late Justice of the Supreme Court of Ghana, Justice T. M. Ocran, whilst describing the intellectual discipline of Law and Development as 'a study of the conscious use of the normative system called law to bring about economic development' went further to point out that in pursuing this goal, law can be seen as serving a dual purpose. Referring to the development process metaphorically as a vehicle in motion, he noted that:

> Law could serve both as 'accelerator' to keep the process moving and as 'brake' to save the process from derailment. As accelerator, law must be consciously evoked as a tool for social engineering towards development with both legislation and enforcement of law serving as crucial instruments in this regard. As brake, law must also be consciously evoked as an instrument for stemming pathologies such as 'corruption' and other impediments in the development process.[39]

The literature on law and development in the first and second orthodoxies reveal that the relationship between law and development was essentially driven by the need to utilize law for the basic purpose of accelerating economic development with terms such as 'instrumentality' and 'functionalist' used to describe the primary role of law with regard to development. During the moment of 'law and the classical developmental state', law was used instrumentally by the State to further economic development, whereas in the moment of neoliberalism, law was used to limit the intervention of the State in the economy by promoting private law regimes that emphasized property and contract rights. Far too little attention was paid to the role of law serving as a check on potentially antithetical factors to the development process like corruption. This was the case in circumstances where the facts on the ground and studies in other fields suggested an alternative approach would have been more reasonable. The following discussion might provide an explanation for this approach to corruption in law and development discourse in the first and second moments of its evolution.[40] It is noteworthy that the factors

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[39] M. A. Baderin (n 2) 18, citing T.M. Ocran: Law in Aid of Development, (Ghana Publishing Corporation, 1978) 17. (emphasis added).

[40] It is noteworthy that the factors examined, whilst aimed at providing answers to the approach to corruption, also mirror some of the broader critiques of law and development over the years.

examined, whilst aimed at providing answers to the approach to corruption, also mirror some of the broader critiques of law and development over the years.

The first is the well-discussed disregard for local context in the exporting of legal structures and institutions to the developing world through various ‘development-oriented’ programs. As noted by various scholars, in replicating the structures that were expected to enhance economic development in developing countries, there was a palpable indifference, not just to the practical effects of the programmes being implemented, but to the existing formal and especially informal structures prevailing within the societies. Tamanaha, for instance, points out that the basic approach of modernization in the first moment of law and development continued even though most observers acknowledged its failure and how a lot of money had been lost through capital intensive projects that benefited only a few corrupt and privileged elites with little benefit in terms of development to the citizens of the various countries.[41] Thus, whilst the agenda of transplanting modern legal systems to developing countries was taking place at the formal level, on the ground, elites were actively engaged in co-opting the law for their personal purposes and emasculating legal reforms which threatened to dilute their authority.[42]

Another author with a long history of involvement with law and development scholarship observed, a decade after the crystallization of the law and development programme, that there were serious problems with the strategy of transplanting foreign legal models through an elite-driven approach which did not coincide with the cultural, social and political contexts of the developing countries.[43] The drawback in this is made more apparent at a time when research showed that corruption was considered endemic among legal officials leading to dysfunctional institutions and laws that amounted to nothing more than words on paper.[44] It must be noted that although there was little attention to researching the

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[41] Tamanaha (n 19) 210, citing J. P. Nettl & Karl von Vorys, ‘The Politics of Development’ (1968) 46 Commentary 52, 54
[42] ibid
[43] Trubek (n 14) 8443
[44] Lawrence M. Friedman, ‘Legal Culture and Social Development’, (1969) 4 Law and Soc. Rev. 29

direct and remote corollaries of the transplanted systems in the developing countries such as the prevalence of corruption amongst the political elites in society who misappropriated the large sums of money budgeted for various law and development programmes and engaged in other acts of corruption, there existed more generalized explanations for the incidence of unintended phenomena like corruption during the first and second moments of law and development. One of the most notable of such theories was formulated by Robert B. Seidman who pointed out, amongst other things, the lack of a supporting 'legal culture' in the developing countries in which the legal institutions promoted by modernisation were being set up. This, according to him, led to the attainment of different results from those achieved with the same legal institutions in the developed world.[45] In his words, 'a particular law in two places with different social, political, economic and other circumstances can . . . only by coincidence induce similar behaviour in both places'.[46] This point only reiterates the general sentiment of dependency theorists in law and development who reject models of development that are based on their thriving application in other societies, on the ground that 'even if certain types of legal institutions actually did make positive contributions to the development of some countries, similar institutions will not necessarily make similar contributions to the development of other countries'.[47]

In a subsequent work on the interface between Policy and Implementation in Law and Development, Seidman provides another plausible factor that may have accounted for the attitude towards concerns like corruption in earlier moments of law and development. He noted that the initial inquiry into the relationship between law and development had three basic domains: conflict amelioration, law and society studies and problem solving. A lot attention was however centred upon the second element which allowed academics to study the legal system of the Third World, not with the objective of ameliorating the torment of the less-developed countries (the area of concern for the third domain), but as an exotic laboratory in which

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[45] Robert B. Seidman, The State, Law and Development (Croom Helm 1978).
[46] ibid 35-36. This theory became known as 'the law of the non-transferability of law'
[47] Kevin E. Davis and Michael J. Trebilcock, 'The Relationship between Law and Development: Optimist versus Skeptics' (2008) 56 American Journal of Comparative Law

to test various chosen variables of their chosen academic discipline or the legal systems of the developed countries.[48] Applying more of a problem-solving methodology within the third domain of inquiry identified by Seidman, would require undertaking research to consider the difficulties faced, not by the academics, but by the real people in the developing countries.[49] This would have encouraged more research on the real challenges to development like corruption and the best means of approaching those challenges. The appositeness of theories such as this notwithstanding, the field of law and development continued on its road to modernizing legal systems in the developing world, with contextual problems like corruption going unheeded.

Further explanation for this can be found in the intricate relationship between the field and International Financial Institutions (IFI), chiefly the World Bank. The influence of IFIs on the scope and objectives of research in the field of law and development has been acknowledged variously by scholars in the field. The introduction to the recent work of Trubek and Santos recognized this fact when they noted that at any point in time, the doctrine of law and development can best be understood when seen as the intersection between economic theory, legal ideas and the practices of development institutions.[50] Whereas current discourse in the field tilts towards a more balanced approach to the place of each of these three components at the intersection, which is law and development, the methodology of earlier orthodoxies indicate that economic theory and institutional practice dominated the agenda and objectives of the field. Law only played an instrumental role in the equation in aid of the prevalent economic theories and institutional practices. Until recently, the main stream of law and development has focused on the parameter of economic development with the bulk of funding provided by institutions like the World Bank whose principal objective is advancing economic development.[51] Thus, ‘while law and development projects are uniformly

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[48] Robert B. Seidman, ‘Law and Development: The Interface Between Policy and Implementation’ (1981) 2 Boston College Third World L.J. 47, 49 <http://lawdigitalcommons.bc.edu/twlj/vol2/iss1/6> accessed 10 January 2014

[49] ibid

[50] Trubek and Santos (n 3) 4

[51] See Robert C. Effros, ‘The World Bank in a Changing World: The Role of Legal Construction’ (2001) 35 Int’l Law 1341, 1344.

presented as being for the benefit of recipient countries and their people, they are often not by or of recipient countries and their people'.[52] Lurking at the background of the law and development enterprise is the fact that many of the legal reforms are essentially imposed as conditions that must be fulfilled before recipient developing countries can secure loans and other forms of financing from IFIs.[53] Reform initiatives were therefore more reflective of the agenda and ideological imperatives of such institutions than the pressing challenges and impediments to the development of the receiving populace like corruption. The paramount imperative in this case, it has been suggested, was ensuring that the legal systems of the recipient countries were 'modernized' enough to be streamlined with those of the West to allow for smooth trade and economic relations, which, although were paraded as being aimed at developing the former, essentially benefited corporations of the latter in terms of providing more favourable markets and sources of raw materials and cheap labour.[54] The various law and development programs were therefore adjudged successful provided the parameters for economic advancement such as securing property and contract rights and better trained judges who ensured stability and predictability in the legal system were achieved. With development defined exclusively in economic terms, there was no apparent necessity to give heed to corruption and other obstacles to socio-political development in recipient countries; such questions considered as having the potential of bringing into question the 'burgeoning' law and development enterprise at the time.

It may be the case that, as observed by one author, IFIs needed to hold on to the simple model of transplanting legal reforms for economic development which was easily supported by the traditional tools of foreign assistance. It may have seemed really daunting to accept the fact each country is unique with its challenges and that there is no easy answer to the question of what laws or legal systems were needed in each country, or that Western expertise itself in the area of legal reform was generally of dubious value.[55]

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[52] Tamanaha (n 19) 243
[53] Ibid, citing 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 (OUP 2006) 146
[54] ibid
[55] Trubek (n 14) 8445

It is worth noting that from a positive perspective, the flexible interpretation of the Articles of the Bank – which prohibits the Bank from engaging in political activities and mandates it to finance projects for the purposes of reconstruction or development alone[56] - by its General Counsel Dr. Ibrahim Shihata, allowed the bank to engage in ‘institution building’ activities as an integral part of development, which was hitherto interpreted as political in nature and therefore beyond the mandate of the Bank. This flexible interpretation allowed for the financing of rule of law projects by the Bank and created a lot of momentum for the current comprehensive conception of the rule of law to take hold. However, even now western countries and IFIs are being cautioned to avoid the usual temptation to see the legal institutions of the West as a model for imitation by developing countries, especially considering the fact that doing so happens to promote the interest of the western countries and organisations in ways that are congenial to western capital and firms in particular, when the basic concern should be overcoming the challenges of developing countries.[57]

A third possible explanation for the discouraging approach towards corruption may be the lack of reliable empirical data explaining the effect of the law and development programmes in developing countries: what proved successful and what did not, how much change was being experienced on the ground in terms of palpable development, what factors were aiding success and what factors were inhibiting progress in the various countries. Trubek points to the fact that the first and second moments of law and development were based on a simplistic model of history which presumed causal and linear relationships between the establishment of a ‘modern’ legal system and market democracy. No empirical fact or other evidence was ever produced to support this theory which represented a little more than an ethnocentric and imperialistic projection of the ideals of the legal culture of developed countries.[58] The outcome of this is that billions of dollars have been spent on legal reforms that were essentially guided more by intuition, assumptions and hope, than by any empirical

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[56] International Bank for Reconstruction and Development, Articles of Agreement, Art. III, s 4(vii) and Art. IV, s 10

[57] Trubek (n 14) 8446

[58] Trubek (n 14) 8444

evidence or systematic knowledge that is based on the peculiar circumstances in each of the countries targeted for such reforms.

Commenting on the general state of knowledge accumulated in the field of law and development over the years, Thomas Carothers, director of the rule of law project for the Carnegie Foundation tells of how a long-time participant in law and development projects confided in him that ‘we know how to do a lot of things, but deep down, we don’t know what we are doing’.[59] Whereas early researchers such as Burg refer to a general lack of definitive knowledge on the relationship between law and development,[60] Nyhart asserts that such understanding of that relationship that existed, where it did, was at best superficial.[61] The result of this was the formulation of development programmes and policies with challenges of meaningful implementation and a propensity to produce unintended ends. With regard to judicial reform for instance, it has recently been observed that certain reforms in Latin American countries which were aimed at achieving judicial autonomy led to rampant nepotism and further opportunities for corruption to thrive.[62] Whilst admitting the apparent challenges that may be encountered in conducting empirical research to measure the successes, failures and challenges of legal reforms and programs, the lack of such definitive data and knowledge in the field generally and specifically on formal and informal impediments to development programmes may be considered as also being instrumental to the lack of attention to corruption during the earlier stages of the discipline.

The fourth explanation is a point that has been referred to earlier, that the field of law and development had been dictated by economic foundations for a long period of time with economists setting the agenda for development. Law was mainly a responsive device used in the promotion

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[59] Tamanaha (n 19) 218, citing Thomas Carothers (ed), The Problem of Knowledge’ in Promoting the Rule of Law Abroad: In Search of Knowledge (Edward Brothers 2006) 15

[60] Elliot M. Burg, ‘Law and Development: A Review of the Literature and Critique of “Scholars in Self-Estrangement”’ (1977) 25 American Journal of Comparative Law 492

[61] J. D. Nyhart, ‘The Role of Law in Economic Development’ (1962) 1 Sudan L.J & Reports 394

[62] Tamanaha (n 19) 223

[63] F. Charles Sherman, ‘Law and Development Today: The New Developmentalism’ (2011) 10 German L.J. 1258

of those economic objects. Capturing the dominant economic tone of the field at its earlier stages, Sherman observes that since its emergence in the post-war era, theory and policy formulation in law and development has ‘arguably been a function of prevalent economic development models and their conception of the proper relationship between the market and state, which in turn has been reflected in international development assistance.’[63] Trubek and Santos opine that this relationship between economics, legal theory and the practice of development institutions in law and development is fluid and dynamic rather than a one-way, causal relationship.[64] As much as this may represent the situation under the new trend in law and economic development discourse, which was the subject of Trubek and Santos’ work, this does appropriately describe the situation in the earlier moments of law and development. Trubek himself had earlier admitted that lawyers were indeed late comers to the development research, responding slower than economists and other scientists to the need for insight into development theory.[65] Some scholars admit that in many situations, due to the predominance of economics, it was often difficult to disentangle the ‘law’ part of the development programmes.[66]

It is significant that during the period of the first and second moments of law and development, there were conflicting economic studies and research findings on the effect of corruption on economic development. On the one hand, there were studies that pointed to the negative effects of corruption in terms of slowing down development[67], whilst other studies which enjoyed reasonable consideration pointed to the desirability of corruption (bribery in this case) in promoting economic development for reasons which include enabling entrepreneurs to overcome cumbersome regulations and institutional shortcomings, and fostering efficiency by

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[64] D. M. Trubek and A. Santos (n 3) 1, 4

[65] Trubek and Galanter (n 1) 1065

[66] Daniel Sokol, ‘Law and Development – The Way Forward or Just Stuck in the Same Place?’ (2010) 104 Northwestern University Law Review Colloquy 242

[67] Andres Shleifer and Robert W. Vishny, ‘Corruption’ [1993] The Quarterly Journal of Economics 600. See also David J. Gould and Jose A. Amaro-Reyes ‘The Effects of Corruption on Administrative Performance’ [1983] World Bank Staff Working Paper N0. 580; Robert Klitgaard, ‘Gifts and Bribes’ in Richard Zeckhauser (ed) Strategy and Choice (MIT Press 1991).

serving as some form of performance-based direct compensation for public servants to motivate them to perform their duties effectively.[68] With findings such as the latter appearing in economic studies and with law and development playing a largely complementary role to economic policies and programmes at the time, it is understandable how such economic theories of the time could have influenced the substance and stride of legal research resulting in the dawdling approach to corruption in law and development.

A final point which has been made from a variety of viewpoints is the possibility that the very agenda and approaches that define the first and second moments of law and development orthodoxy may have aided the escalation of corruption in developing countries. Being the proponents of the frameworks and institutions may have unsighted scholars of law and development from investigating the subject-matter of corruption and its potentially damaging effect on the reforms and institutions being set up and on the development of the recipient countries generally. For instance, the bureaucratic institutions being promoted by the legal reforms of the first moment which emphasized control of economic activities by the State through Import Substitution Industrialization (ISI) can be regarded as providing favourable conditions for corrupt public officials to thrive. Writing specifically on the model of 'legal liberalism' which was adopted as a model in the 1970s and 1980s, Tamanaha observed that whereas the basic argument of the model was that the rule of law operates under the principle of neutrality, this concealed the fact that law was being used to maintain an unjust social order in the service of the elite in society who exploited the transplanted legal institutions to perpetuate their corrupt activities.[69] He further remarked that:

> Critical legal theorists were especially scathing about legal formalism, which they attacked as a false claim of objective rule application, when the truth is that indeterminate legal rules allow judges substantial room to manoeuvre . . . they are deceptive when they hide behind formalistic rule-bound reasoning to come to preferred ends while pretending that the decision was compelled by law,[70]

[68] Nathaniel Leff, 'Economic Development through Bureaucratic Corruption' [1964] American Behavioural Scientist 8; Samuel P. Huntington, Political Order in Changing Societies (Yale University Press 1968)
[69] Tamanaha (n 19) 240
[70] ibid

Trubek and Galanter raised similar questions when they noted that assumptions of, and emphasis on liberal legalism in the first moment of law and development may have blinded researchers from important questions on the possibility of the model generating a very different set of results, than those intended, that might flow from expanding the role and orientation of the legal profession in a developing country. For instance, might not an enlarged and modernized legal profession increase social inequality by raising the cost of legal services beyond the reach of the ‘have-nots’ in society? Might not a more instrumental approach to law, say, in an authoritarian regime weaken instead of strengthen individual rights? And might not an improvement in the instrumental capacity and skills of lawyers create a more effective resistance to development efforts that have the aptitude to benefit the general populace, thereby diminishing the pride of place of members of the legal profession?[71] The point of emphasis here is that the instrumental application of law for certain goals during this period ‘may not only be irrelevant to development, but may in certain circumstances be downright harmful in terms of enabling corruption, establishing inequality and generally impeding development.[72]

Conclusion

It appears that wheel of law and development has come full circle, leading back to the conclusion that there is no consensus on what works for growth and development.

A common thread of argument which runs through most of the literature on law and development attributes a good percentage of blame for the shortcomings of law and development programs on its failure to take local contextual considerations into account in formulation and implementation. Whilst drawing a distinction between law and development described as a label for a host of projects funded and carried out by development organisations in countries considered insufficiently advanced, and legal development as the enhancement of the legal structures and institutions within a country, Tamanaha points out that the latter can effectively take place without the former. In the light of the limited success achieved by

[71] Trubek and Galanter (n 1) 1076
[72] Burg (n 15) 514

law and development (whose underlying objective appears to be the establishment of capitalist, democratic and liberal legal institutions in tandem with Western standards), he suggests that very little would actually change in terms of legal development if law and development projects around the world were to cease immediately.[73] Expected to be different in form and design, the legal development that will take place, with the ceasing of law and development programs, will produce more effective results as they would be designed, run and implemented by legal personnel, practitioners and organisations within each country – people who understand the local situation, who know what is possible, who understand the compromises that must be made and have long term relationships and socio-political capital to draw on in the course of implementation.[74] With such arrangement, perhaps the role of the development community may be limited to information gathering and sharing which will enable, but ultimately leave the task of formulating the right laws and policies for reform to the developing countries to decide how best to design their own developmental states.[75] It goes without saying that a program of legal development initiated and implemented in this manner can better analyse and tackle challenges such as corruption in regions like Sub-Saharan Africa. It is encouraging that leading researchers on law and development point to the fact that more attention is now been granted to local participation in the design and implementation of reforms in manner that will let the locals' take 'ownership' of reforms and projects.[76]

The need for scholars to investigate how various social interests benefit from law and legal order has also been identified.[77] Specifically, law and development scholars need to understand how interest in the rule of law can be mobilized and built in a manner that ensures that the legal order of the countries in question do not just favour the strong and the rich – the elite in society. There is, of course, the general need to determine the precise laws, policies, institutions and programmes through which more comprehensive objects for law and development can be achieved.

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[73] Tamanaha (n 19) 241
[74] ibid
[75] Sherman (n 8) 1272
[76] Trubek and Santos (n 3) 7
[77] Trubek (n 11) 8445

It must be noted that despite the sceptical tone of the findings in this chapter, it is neither an indictment of the use of law to pursue developmental goals, nor is it a general denigration of law and development research and programmes through the first and second eras. The concerns expressed are with regard to the appropriateness of legal reforms pursued and the types of law and legal institutions which were transplanted to developing countries without the requisite process of adapting such laws and institutions to the existing socio-political and economic factors existing in the various countries, or at least taking cognizance of those factors.

There are a lot of reasons to be optimistic about the prospects of the law and development movement. The evolving third moment of law and development discourse, more than any of its preceding orthodoxies, provides enormous opportunities and leverage to approach law and development from the broadest possible perspectives in terms of the scope of development, as well as the role of law in the development process. It signals a shift from universal formulae for development that existed in the first and second moments and encourages a more contextual consideration of the best approach to development. As aptly summarized by Sherman, ‘[W]here there was orthodoxy, there is now heterodoxy. Where was dichotomy, there is hybridity. Where there was instructing, there is learning. Where there were recipes, there is experimentation. Where there was rigidity, there is flexibility’.[78]

As the pieces of the third moment of law and development begin to fall into place, the expectation is that the lapses in the approach to concerns like corruption in the first and second moments of law and development highlighted above will be rectified, and the underlying potential of the law and development movement may yet be realized.

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[78] Sherman (n 8) 1272