

---

Volume 52

Issue 2 Winter 2002: *Symposium - Export/Import:  
American Civil Justice in a Global Context*

Article 7

---

# Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results

Bryant G. Garth

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

## Recommended Citation

Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DePaul L. Rev. 383 (2002)  
Available at: <https://via.library.depaul.edu/law-review/vol52/iss2/7>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [wsulliv6@depaul.edu](mailto:wsulliv6@depaul.edu), [c.mcclure@depaul.edu](mailto:c.mcclure@depaul.edu).

# **BUILDING STRONG AND INDEPENDENT JUDICIARIES THROUGH THE NEW LAW AND DEVELOPMENT: BEHIND THE PARADOX OF CONSENSUS PROGRAMS AND PERPETUALLY DISAPPOINTING RESULTS**

*Bryant G. Garth*

## INTRODUCTION

The law and development movement of the 1990s has gone well beyond its immediate predecessor of the 1960s and 1970s.<sup>1</sup> There is a much greater consensus in support of the programs today than in the earlier period. The ideal of a strong and independent judiciary is accepted almost unanimously in development circles. Resources and institutional support have multiplied tremendously. This reflects the fact that law and development programs are now at the forefront of the agendas of development agencies in the United States and Europe, the World Bank, the International Monetary Fund (IMF), the State Department, the American Bar Association, and even the U.S. Supreme Court.<sup>2</sup> There is now a rather large rule-of-law industry ready to compete for the ever-expanding grant money to promote “best practices” into the various “hot spots” of the world. Judicial reform is at the heart of today’s foreign aid programs.<sup>3</sup>

---

1. This article draws extensively on our recent book, YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (Univ. of Chi. Press 2002), and *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (Yves Dezalay & Bryant G. Garth eds., Univ. of Mich. Press 2002) [hereinafter *GLOBAL PRESCRIPTIONS*].

2. Useful recent analyses of the new law and development include Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829 (2000); Carol V. Rose, *The ‘New’ Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC’Y REV. 93 (1998); Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691. For the activities of the World Bank, see WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (Oxford University Press 1997); WORLD BANK, *BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER* (1998); WORLD BANK, *COMPREHENSIVE LEGAL & JUDICIAL DEVELOPMENT* (Rudolph V. Puymbroeck ed., 2001).

3. The CEELI (Central and East European Law Initiative) Program of the American Bar Association has recently developed a Judicial Reform Index to measure what the ABA deems to

All this activity, however, comes with a strong current of disappointment.<sup>4</sup> We are trying hard, but the results are not what we had hoped. So far this disappointment is attributed mainly to the relative immaturity of the field, implying that we need more practice and more learning. The lack of success is also attributed frequently to a lack of political will, requiring more “stakeholders” in the judiciary or government, more monitoring and pressure from “civil society,” or it may be that training programs need strengthening. Despite all these suggestions for improvement, however, we continue to face the paradox of an apparently strong consensus in the north and in the south in favor of reform, on the one hand, and disappointment with the relative lack of success so far, on the other. The task in this Article is to get behind the paradox to examine the local and transnational processes that help produce and explain it. Drawing on research that Yves Dezalay and I have recently published in book form,<sup>5</sup> I shall begin by revisiting the first law and development movement to see what we can learn from it.

## II. CONTRASTING THE OLD AND THE NEW LAW AND DEVELOPMENT MOVEMENTS

The earlier effort, chronicled best for Latin America but strongly evident in Africa and Asia, sought to align lawyers with the program of economic development led by strong states and designed by econo-

---

be the key indicators of judicial reform. CEELI, JUDICIAL REFORM INDEX FOR ALBANIA (ABA/CEELI Dec. 2001).

4. On both the activity and the general disappointment found in all these citations, see THOMAS CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA (Carnegie Endowment for Int'l Peace 1996); THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (Carnegie Endowment for Int'l Peace 1999); LYNN HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE (Westview 1998); LYNN HAMMERGREN, DO JUDICIAL COUNCILS FURTHER JUDICIAL REFORM? LESSONS FROM LATIN AMERICA (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Working Paper No. 28, 2002); JOHN HEWKO, FOREIGN DIRECT INVESTMENT: DOES THE RULE OF LAW MATTER? (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Working Paper No. 6, 2002); LAWYERS COMMITTEE FOR HUMAN RIGHTS/VENEZUELA PROGRAM FOR HUMAN RIGHTS EDUCATION AND ACTION, HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM (Lawyers Committee for Human Rights 1996) [hereinafter HALFWAY TO REFORM]; LAWYERS COMMITTEE FOR HUMAN RIGHTS, BUILDING ON QUICKSAND: THE COLLAPSE OF THE WORLD BANK'S JUDICIAL REFORM PROJECT IN PERU (Lawyers Committee for Human Rights 2000) [hereinafter BUILDING ON QUICKSAND]; Mathew Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64 (2000). The World Bank has over three hundred rule-of-law projects. *Id.*

5. DEZALAY & GARTH, *supra* note 1.

mists.<sup>6</sup> The leaders of development programs in government, the United Nations and the major foundations, saw lawyers as obstacles to development, too tied to a generalist expertise and conservative ideology to play an active role. Wanting, nevertheless, to keep alive the traditional role of lawyers in state leadership, the new programs from the United States sought to retrain, technically upgrade, and reorient a new generation toward the high profile and instrumentally pragmatic approaches of U.S. corporate lawyers. The focus was therefore on legal education—seeking to promote the critical thinking believed to come from the case method—and on expertise in business law.

The death of this first law and development movement was hastened and chronicled in the mid-1970s by scholars who used their insights to produce a more critical examination of the assumptions and methods of legal reformers.<sup>7</sup> Both critical legal studies and “law in context” owe something to these critical insights.<sup>8</sup> The critics showed that the approaches were rooted in a particularly U.S. approach to law, which David Trubek and Marc Galanter labeled as “liberal legalism,”<sup>9</sup> that the effort to export the model was therefore “imperial,” that the reform of legal education at the heart of the program essentially failed, and that the improved technical training of a small cohort of lawyers was not enough to effect positive change. Indeed, the technical skills and instrumental approaches could be used to serve authoritarian governments and not the rule of law. More generally, the critical scholars suggested that legal programs had to be understood in the broader context of state power and the maintenance of the hierarchies associated with that power.

The setting for today’s law and development is quite different. As suggested above, the consensus is far stronger in favor of reform and the legal approaches identified with the United States, including the core idea of a strong and independent judiciary. Lawyers do not have to fight for their role this time. Economists have come to see the importance of legal institutions to the markets that they now promote.<sup>10</sup>

---

6. See JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (Univ. of Wis. Press 1980) [hereinafter *LEGAL IMPERIALISM*]; JENNIFER WIDNER, *BUILDING THE RULE OF LAW* (W.W. Norton & Co. 2001).

7. The most famous account was in David Trubek & Marc Galanter, *Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wis. L. Rev.* 1062.

8. See Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *Am. J. Int’l L.* 470 (1995); WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* (Oxford Univ. Press 1997).

9. See Trubek & Galanter, *supra* note 7.

10. DANIEL KAUFMANN, *MISRULE OF LAW: DOES THE EVIDENCE CHALLENGE CONVENTIONS IN JUDICIARY AND LEGAL REFORMS* (World Bank First Discussion Draft 2001); KATHARINA

Political scientists see the rule of law and independent judiciaries as key components of “transitions to democracy” and even to the production of “norms” central to international relations.<sup>11</sup> These expertises are embedded in the key development institutions including, most importantly, the World Bank and the IMF. It is instructive that both Robert Rubin and Jeffrey Sachs emphasized that the Asian crisis of 1998 should be interpreted as a call for a new emphasis on the rule of law versus “crony capitalism.” Perhaps more importantly, there are other economic and social pressures behind the new push for legal institutional reform.

We can divide these pressures into two parts. The first draws on economic or business imperatives.<sup>12</sup> The series of events that began in the 1970s with the oil crisis, which includes the subsequent recycling of petro and then euro dollars into third world debt and financial deregulation; the debt crisis of the 1980s; the subsequent wave of neo-liberal reforms through structural adjustment and otherwise; privatizations; and the multiplication of “emerging markets” linked to the capital markets in London and especially New York, all came with a proliferation of professional service providers with increasingly global claims. Corporate law firms, investment banks, management consulting companies, and the “Big Five” accounting firms have all gone increasingly global, advising businesses and the states that govern them how to conform to the new rules of the game. All are part of a U.S. model of legal-financial dealing and U.S.-style contracts, documentation of deals, requirements for listing on U.S. stock exchanges, and intellectual property. Moreover, they are reinforced by the high prestige of U.S. MBAs and law degrees that instill the new rules in new generations of business and government leaders. These powerful producers of ideas and approaches create a remarkable pressure for legal convergence.

---

PISTOR, LAW AND FINANCE IN TRANSITION ECONOMIES (Ctr. for Int'l Dev. at Harvard Univ., L. & Dev. Paper No. 4, 2000); FREDERICK SCHAUER, THE POLITICS AND INCENTIVES OF LEGAL TRANSPLANTATION (Ctr. for Int'l Dev. at Harvard Univ., L. & Dev. Paper No. 2, 2000) (addressing the economic literature but prepared by a lawyer).

11. See, e.g., Guillermo O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, in THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA (Juan Mendez et al. eds., Notre Dame Press 1999); Ellen Lutz & Kathryn Sikkink, *International Human Rights Law in Practice: The Justice Cascade The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001).

12. See, e.g., R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law* (paper prepared for presentation NW. Univ. Dep't of Pol. Sci., Apr. 19, 2001); Edward S. Cohen, *The Governance of Global Economic Activity: The Emerging Role of Private Law and Legal Agents* (paper prepared for meeting of the Research Section on the Structure and Organization of Governance, IPSA, Univ. of Okla., Norman, Mar. 30-31, 2001).

There is some resistance to this strong U.S. push. The recent wave of business scandals in the United States, represented especially by Enron, may undermine some of the credibility of the U.S. model. Denunciations of “crony capitalism,” for example, cannot be made as easily as in the past. The *Wall Street Journal* recently suggested that the impact of the business scandals might be less in the stock market than in the “marketplace of ideas, where the U.S. economic model is coming under attack.”<sup>13</sup> But the power of the business pressures remains very strong. The emphasis on business pressures for the rule of law is not likely to diminish much, if at all, in the coming years.

The second source of pressure is from the sector that Boaventura de Sousa Santos calls the emancipatory pillar.<sup>14</sup> It includes a variety of social actors including Non-Governmental Organizations (NGOs) promoting human rights, environmental protection, nondiscrimination, and measures to counteract violence against women. Such powerful institutions as the Ford Foundation and many others with similar social agendas aid them.<sup>15</sup>

The two sides at times fight with each other and emphasize somewhat different approaches. We can see the fights, for example, in the contests regarding environmental protection and the World Bank, and in the work of NGOs opposed to the neo-liberal policies embedded in the World Trade Organization (WTO).<sup>16</sup> The contests, in fact, promote the construction of a competitive field sharing certain underlying assumptions and approaches—especially the idea that strong and independent courts are essential for either side to succeed. This competitive field allows strong debates, for example, between the World Bank and the Lawyers Committee for Human Rights about how to promote judicial reform in Venezuela. As a result, it has pushed rule-of-law issues into such high places in the policy world as the journal *Foreign Policy* and the Carnegie Endowment for Peace.<sup>17</sup> There are scholars who have made their reputations and gained prestige for their mastery of this field. Both sides are evident in the new focus of the major foundations, the World Bank, the Asian Development

---

13. *U.S. Loses Sparkle as Icon of Marketplace*, WALL ST. J., June 28, 2002, at A10.

14. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN THE NEW PARADIGMATIC TRANSITION (1995).

15. THE FORD FOUNDATION, MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds., 2000).

16. See, e.g., HALFWAY TO REFORM, *supra* note 4; BUILDING ON QUICKSAND, *supra* note 4.

17. Thomas Carothers has become a key figure here through his expertise in the rule of law.

Bank,<sup>18</sup> and other development arenas on the issue of “good governance,” even if the emphases vary enormously in the different places.

The field has even moved into country ratings for investment and assessment of the quality of the bonds that support national debts. Once again, there is no universal agreement on the ratings. The more conservative ones, for example, highlight the efficiency of the Singapore courts, while others might ask more questions about the room to maneuver for NGOs with legal strategies.<sup>19</sup> But there is a field that all tend to support, with debates about how the major institutions should best approach legitimate reform efforts that include a commitment to build strong and independent judiciaries.<sup>20</sup>

At the same time, however, the literature reveals many doubts about the efficacy of the reform efforts to date. As stated above, most reflections on failure either cite a lack of political will or focus on ways that subsequent efforts might learn from the mistakes of the past. The lack of success has neither shaken the field nor diminished the enthusiasm for further efforts. In addition, the academic literature regarding the processes of reform tends to participate in the consensus that makes the movement toward better judiciaries seem both necessary and inevitable. For example, the political science literature on “advocacy networks” highlights the agreement among experts and moral entrepreneurs on norms that lead toward legal strategies for enforcement. Similarly, the literature on the “judicialization of politics” suggests that more prominent judiciaries can be expected as a feature of modern political life. A few naysayers complain about a repeat of legal imperialism, but they have trouble gaining adherents given the degree of enthusiasm for these programs in the south as well as the north and with the idealists as well as the realists.

---

18. Note the interest behind the very large study published as KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960-1995* (Oxford Univ. Press 1999).

19. Compare Ross Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore*, 28 J.L. SOC'Y 490 (2001), with Karen Blochlinger, *Primus Inter Pares: Is the Singapore Judiciary First Among Equals?*, 9 PAC. RIM. L. & POL'Y J. 591 (2000). See generally Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2 U. HAW. ASIAN PAC. L. & POL'Y J. 108 (2001).

20. The Carnegie Endowment for International Peace website reports, for example, on the first “Rule of Law Roundtable,” held on September 5, 2001, at [www.ceip.org/files/events/events.asp](http://www.ceip.org/files/events/events.asp) (last visited Oct. 29, 2002). According to the summary, Frank Upham of NYU criticized “a new conventional wisdom in development circles, the belief that formalist rule of law, which stresses institutional legal mechanisms and absolute autonomy from politics, is a necessity for economic development.” Thomas Carothers was the moderator and Rick Messick of the World Bank the commentator.

III. FINDING A POSITION FROM WHICH TO ASSESS THE  
NEW MOVEMENT

It is tempting for legal academics, in particular, to take a position in favor of emancipatory judicial reform, to side with the Supreme Court judges abroad who seem to be taking progressive stands on social issues, or to participate in efforts to overcome the problems standing in the way of reform—including the somewhat vague problem of “lack of political will.” The problem then tends to be one of finding the “enlightened” local reformers—those who see the necessity of judicial reform—and using the resources of various northern entities (development organizations, the World Bank, the Ford Foundation, and NGOs) to strengthen the reformist position with institutional leverage, resources, expertise, and legitimacy. For those who need other motivations to support the programs, we can note that legal academics that speak the right language can also count on consulting opportunities that will supplement their incomes, build their own networks, and give them greater expertise about these issues.

It is important, however, to develop a critical perspective on these processes and the consensus they support.<sup>21</sup> Therefore, we have sought in two recent books to develop tools to understand the processes that lead to these reform efforts, to explain why the efforts mostly fail, and to understand why we tend to forget the lessons of the first wave of law and development. One of our books explores the “global prescriptions” that we see as a “new legal orthodoxy” produced in the north, mainly the United States, and exported to the south.<sup>22</sup> The other book seeks to apply two conceptual tools that are at the core of the processes that have produced the new law and development and, more generally, transformations in Latin American states—in our book Argentina, Brazil, Chile, and Mexico—from what scholars labeled “developmental states,” characterized by heavy state involvement in the economy, toward “neo-liberal states” with more open and market-oriented economies.<sup>23</sup> The tools provide a way to trace the actors who produce the pressures for change and invest locally in implementing that change, including judicial reform. Our book, therefore, organized more than three hundred interviews into a loose framework defined by “palace wars” and “international strategies.”

---

21. See also Stephenson, *supra* note 4; Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 *IND. J. GLOBAL LEGAL STUD.* 79 (1999).

22. *GLOBAL PRESCRIPTIONS*, *supra* note 1.

23. The following draws mainly from DEZALAY & GARTH, *supra* note 1.

Before explaining our core concepts, it may be important to say something more about the sociological approach we use and to contrast it with the more common academic approaches. The usual approach, especially in political science or economics, is to ask about individual preferences, or elite preferences for particular social policies. This approach has the virtue of looking at the actors involved in the importation and exportation of ideas and expertise. From this perspective, critics can then celebrate or condemn the remarkable convergence we find in favor of judicial reform. The legal analogue, which places even more emphasis on individual agency, is to look for what we consider the best social policy and then to support legal policies that will best bring them to fruition. Within law schools there is also a strong tendency to align, at least symbolically, with those who will promote the ideals we favor as public interest law. In one form or another, all these approaches emphasize idealism and individual agency.

Our approach, which draws on the sociology of Pierre Bourdieu, tries to move an additional step. It seeks to root that agency in the particular structures and hierarchies that individual actors face. Through the accumulation of numerous individual biographies, we begin to understand the structures that interact with individuals endowed with various kinds of actual and symbolic capital to produce preferences for particular policies for a given time and place (or, for example, to produce idealistic behavior). Bourdieu uses the term "strategy" to characterize the way individuals navigate the "games" whose rules they more or less understand. It is important, however, to recognize that strategies in this sense are not necessarily characterized by plans or even instrumental behavior. Strategies are structured choices to survive and perhaps succeed in particular settings, and they are both cooperative and competitive, depending on the position and disposition of the actor.

#### IV. THE QUEST FOR STRONG AND INDEPENDENT JUDICIARIES IN THE CONTEXT OF INTERNATIONAL STRATEGIES AND LOCAL PALACE WARS

International strategies are characterized by actions to gain power locally through international resources, degrees, connections, and expertise. At times, such strategies are matters of course for an elite that internalizes the notion that their education (and implicitly their claim to social superiority) depends on the foreign degree. For the period we study in Latin America, the more typical story is of an elite individual without a clear path to local power, seeking consciously or

unconsciously to get ahead locally through an international strategy. Until quite recently, perhaps twenty or thirty years ago, a lawyer in Latin America would gain very little realizable local capital from a law degree from the United States. Within a world where “gentlemen lawyers” oriented toward the European continent dominated the state, it made no sense to get a worthless degree (although of course a few did and later reaped dividends when the value of the degree increased).

In contrast, those who invested in economics—often those who did not have the familial connections necessary for success in law—gravitated very early to the United States and used the prestige of mathematical economics to gain status at home, both as economists and as possessors of an expertise that could be used to discredit the generalist lawyers. We cannot tell the larger story here, but after the U.S.-oriented economists gained power and invested their neo-liberal ideas locally, the value of the complementary legal education gradually increased. It gained further momentum through the U.S. orientation of the human rights movement that attacked the authoritarian states that the economists served. Democracy came and the leading actors, economists but also a new generation of law graduates, were labeled as “technopols” to emphasize their technical superiority to the gentlemen lawyers.<sup>24</sup> The lawyers came back to a larger share of power by changing their orientation and upgrading their technical abilities toward U.S.-style legal practice. It is not surprising that these lawyers, educated in the United States and using the claim of expertise and legitimacy to gain power locally, support and invest in the U.S. conception of the role of the judiciary. In interviews about the courts in Argentina or Chile, for example, it was not unusual to hear a diagnosis of problems and solutions according to the authority of a Yale Law Professor.

But the juxtaposition of the “technopols” representing the U.S. team versus the old European-oriented gentlemen is too simple. The single story neglects the fact that the local situations that produced elite actors with the U.S. orientations in law are in many respects quite different, and there are also differences in the local structures as they relate to different expertises and approaches from the north. To simplify a complex story, economic approaches from the north were invested relatively successfully into the countries that we studied. An important reason for this success was that economics was relatively

---

24. See JORGE DOMINGUEZ, *TECHNOPOLS: FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990s* (Penn. State Univ. Press 1997).

new as an academic discipline in the south. New institutions could be created to build economic science and direct it into key institutions with relative autonomy, such as central banks. Since colonial times, in contrast, the law schools and the courts have been built into the fabric of state power. Part-time law professors, including judges and members of the political and economic elite, have managed to occupy the key positions of power in the state, but their power comes from being above the law, not from investing in the autonomy of the law or the courts. Reforms that threaten their positions have understandably faced very serious obstacles. More precisely, those who gain local stature, even as “technopols” oriented toward the United States, tend naturally to invest that stature into the established career patterns of the political elite. Interestingly, however, within the law, the corporate law firm has been relatively more successful than efforts for judicial reform, and public interest firms through the human rights movement enjoyed some success until the authoritarian regimes were toppled. At that point, however, those who had invested in human rights tended to go into party politics.

From the perspectives of the different countries, the position of the courts in Argentina and Mexico has traditionally been weaker than in Chile and Brazil, although this is a question of relative weakness. None of these cases can be seen as great successes, but clearly the structures of power in Mexico and Argentina are not kind to judicial reform. In Argentina, the violence of political struggle has left very little room for investment in the autonomy of the law. Judges are first and foremost members of political parties chosen for their ability to reward their political friends and punish their political enemies. Each new regime transforms the judiciary—and indeed the entire state apparatus including the public law school leadership—in accordance with this political warfare. In Mexico, the pattern established by the long dominance of the Partido Revolucionario Institucional (PRI) party meant that judges were first and foremost beholden to the party. The judiciary was a place for PRI politicians with relatively little talent or prospects for a place in the government. The judiciary thus represented a relatively unimportant, but not neglected, component of the PRI patronage system, designed to bolster PRI power and legitimacy and responsive to each six-year change in administration.

Those who continue to seek to invest in the autonomy of the law as a career strategy in Mexico and Argentina tend therefore to leave the judiciary. The local returns to such an investment, especially in Argentina and Mexico, although for different reasons, remain very low within the judicial branch. In Mexico, interestingly, returns have been

higher in new state institutions within and around the PRI (*i.e.*, electoral commissions and the human rights ombudsman). In Argentina, the returns have been higher in the new private law schools, in think-tanks located around, but not in, the state and in alternative dispute resolution—mandatory mediation—located outside the ordinary courts.

None of these observations, therefore, is meant to suggest that the new law and development, including the efforts at judicial reform, has no impact. Sustained investment over time would have a greater impact. The first law and development movement, for example, left a legacy in Brazil of corporate lawyers with an expertise in U.S. corporate law and good connections to U.S. lawyers. The relatively scarce expertise they possessed became more valuable as the economy changed. If we trace the careers of this group, we find remarkable success in corporate law, the state, and the financial sector. These individuals led the movement to rewrite laws to conform to U.S. standards in, among other places, securities and intellectual property. The U.S. investment paid off both locally and for the United States. What did not happen, however, was substantial reform of the judiciary or reform of legal education. The results of the international strategies will depend always on a complex mix of northern prestige and pressure, including the pressure of mentors and former professors, coupled with the opportunities presented in local structures of power to gain returns on those investments.

Despite all the problems and difficulties, one might still conclude that the key is really making a sustained commitment to the good local team, holding them to their promises, and making sure that the investment does not get derailed. Certainly, this strategy requires considerable local expertise and monitoring. It requires a deeper local knowledge than simply a commitment to an independent judiciary pursued through the consultants' general strategy of taking the "best practices" from one client and moving them to another. There are other issues, however, that are brought out by our research.

#### V. MORE GENERAL PROBLEMS WITH THE MOVEMENT TO BUILD STRONG AND INDEPENDENT JUDICIARIES: PALACE WARS IN THE NORTH

One problem is simply that the message from the north changes over time. We have a very strong consensus in the academy today, but it is relatively recent in origin. Most importantly, it is the result of palace wars in the United States. Let us first go back to the earlier law and development movement. The loudly proclaimed failure of

the first law and development movement could be attributed to the lack of success in realizing the ostensible goals. What is missing, however, is the other half of the equation found in the north. James Gardner's *Legal Imperialism* seems to be a kind of *mea culpa* statement by a former Ford Foundation official admitting the flawed and imperial assumptions of the effort to export the U.S.-style rule of law to Latin America.<sup>25</sup> Missing, however, are the debates that took place within the Ford Foundation in the United States about its more general programs in law. As the Ford Foundation moved further into legal strategies consistent with the civil rights movement in the United States, the emphasis shifted to public interest law. Those favoring the new public interest law in the United States found themselves in opposition to programs investing in corporate law in the service of Latin American states. *Legal Imperialism*, while published after the struggle had ended in the Ford Foundation, was part of a struggle within the United States, in particular, within the then-liberal establishment, about what role law should play in the state and state reform.<sup>26</sup> When the approach changed in the United States, it also changed in Latin America. When the Ford Foundation picked up law again in Latin America, it was to invest in the development of a human rights movement consistent with northern strategies against Nixon and others who threatened the liberal reformist establishment at home and abroad.

The revival of law and development came again from a conjunction of northern and southern strategies. As the human rights movement gained power in the 1980s as a tool directed against President Ronald Reagan and Jeanne Kirkpatrick and their policy favoring authoritarian states in a renewed Cold War, the inability to account for the murder of Roman Catholic nuns in El Salvador pulled the administration back into the business of judicial reform. They needed to build institutions in El Salvador that would provide a credible investigation and prosecution. Interestingly, according to Thomas Carothers, before committing to the start of a new era of U.S. investment abroad in judicial and legal reform, the lawyers solemnly read Gardner's *Legal Imperialism* and vowed not to impose U.S. models where they were not appropriate;<sup>27</sup> this time would be different.

The push toward judicial reform also came from another side. After the economists had taken power with Reagan through their attack

---

25. See LEGAL IMPERIALISM, *supra* note 6.

26. See also Tamanaha, *supra* note 8. Stephenson's description of the rule-of-law programs in China also emphasizes the relationship to U.S. domestic politics. See Stephenson, *supra* note 4.

27. THOMAS CAROTHERS, IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS (1993).

on the state, they were far more willing to invest in law and legal institutions to preserve and legitimize their policies and position in the state. When President Bill Clinton came to power, determined to preserve the economic policies of his immediate predecessors, the logic of legal investment in legitimacy gained further. Again, this change in the north came with the realization, or willingness to recognize, that economic reform in the former Communist states was failing without investment in the state and the law. The economics profession shifted the center of gravity from anti-state policies to investment in institutions to support markets and the neo-liberal policies of the 1980s.<sup>28</sup>

Our description of the palace wars in the north is necessarily quite sketchy here and somewhat misleading. It is not just that the policies exported from the north and imported in the south reflect a northern consensus. It is that the palace wars are exported. Outside of state power in the 1950s and 1960s, Chicago's economists invested in training Chileans and getting them to try to demonstrate that monetarism could control inflation. The investment in the south was part of the struggle for power in the north. When the reformist establishment was pushed out of power by the division over Vietnam and the subsequent election of President Richard Nixon, they invested in human rights in Chile and Argentina as a strategy to gain power in the United States. Lawyers, political scientists, and institutional economists used the crisis in the former Communist states to claim a place with the neo-liberal economists in the United States. Civil rights activists out of favor in the United States in the 1980s as "rent seekers" similarly sought to keep their profile and power by reconverting to international human rights activities that might later be reinvested back into the United States.

Given these processes, we certainly should not count on a sustained investment in judicial reform in the south. The struggles for power in the north will lead to more or less investment in law according to factors that have very little to do with what actually happens with that investment. The current war against terrorism, indeed, may bring to the forefront the same Cold Warriors who supported authoritarian states because they were anti-Communist, putting the investment in law and legal institutions again on the defensive. The point, however, is not the specifics, but rather that the process is a hegemonic one that focuses the business of exporting and importing on debates and issues

---

28. The change can be documented by looking at the evolution of the World Bank's annual world development reports. The 1997 report, "The State in a Changing World," signals the change.

that have salience in the north (here the United States) at a particular time and place. We export our own palace wars.

## VI. THE PHENOMENON OF HALF-FAILED OR HALF-SUCCESSFUL REFORMS

The importing side plays into this process of half-failed (or half-successful) reforms. The importers, as we have noted, tend to come from a cosmopolitan elite, capable of taking advantage of study abroad, particularly in the United States. The power and legitimacy of this elite comes in large part from its claim not just to privileged backgrounds and connections but rather their possession of state-of-the-art technologies of governance. At one time, the state-of-the-art technologies came from the European continent, but today they tend to come much more from the United States. The general phenomenon, however, is the same. These leaders are not just purveyors of northern ideas. They are embedded in structures of power with important intermediaries able to keep the social peace that allows the cosmopolitan elite to maintain that elite status. There are accordingly complex local arrangements with political parties, or even systems of patronage and clientelism, that do not fit nicely into the terms of the imported legitimating expertise.

One can hypothesize, therefore, that the importation of ideas and approaches that have grown out of very specific contexts in Europe and the United States will hit local limits. Some investment is necessary to provide legitimacy both locally and internationally, but too much investment might disrupt the social peace and the very local structures and intermediaries that allow the cosmopolitan leaders to maintain their positions.

This hypothesis helps to explain why there is a continuing logic of half-failed transplants. Each generation must bring the latest technologies, now meaning a requirement for a strong and independent judiciary, to fight against their predecessors and parents and at the same time upgrade and relegitimize their governance. Within the north, at the same time, critics and purveyors of new approaches will almost by definition be able to say that the prevailing exported expertise has not succeeded in transforming the local scene in accordance with the hopes of the exporters. They will suggest that the approach and expertise they favor provides just the appropriate remedy for what ails the south.

A. *Complications from the North-South Division of Labor*

We have presented the problem of reform to promote strong and independent judiciaries in largely comparative terms, but we must also take into account a potential division of labor. The pre-eminence of the institutions in the north takes some of the pressure off of the south. Business disputes, for example, can be handled through international commercial arbitration operating according to the state-of-the-art legal standards and involving at least a few representatives from the south.<sup>29</sup> Major business disputes, in addition, can be imported into the courts of the United States, fought through the WTO, or handled through product liability laws enforced in the north.

The same is true for some of the activities that might push for more investment in the autonomy of the courts. Thus, pressures on the major faculties of law to reform are reduced by the fact that increasingly the academic or professional degree that counts is the advanced degree from the United States. Those who seek to invest in human rights, similarly, can move into the major NGOs headquartered in New York or Washington, D.C. In fact, they know that the northern NGOs have the capacity to influence their own countries through the leverage they can bring with the U.S. media, the U.S. government, and crucial lenders such as the World Bank.

B. *Potentially Competing Hegemonies*

Another complicating factor is the potential of competing hegemonies. We have presented our account as if the expertises exported from the United States present the only game in town. Their global reach is indeed very strong at this time not only in the south but also in Asia and even in Europe. We must recognize that the power of our expertises and approaches, consistent with our own state structures, is always contested, and external factors—wars and revolutions, economic crises, and the like—can shift the value of particular approaches rooted in particular national traditions. The United States in 1998 and 1999, aided especially by the IMF, had the authority to blame the Asian crisis on “crony capitalism” and the lack of transparency and the rule of law, but it is at least possible that the situation could reverse.<sup>30</sup> Recall that Japanese power a little more than a decade ago had scholars in the United States calling for an “industrial

---

29. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (Univ. of Chi. Press 1996).

30. See, e.g., Robert Wade & Frank Veneroso, *The Asian Crisis: The High Debt Model Versus the Wall Street-Treasury-IMF Complex*, 228 *NEW LEFT REV.* 3 (1998).

policy.” The long tradition of lawyers and courts in the United States has so far ensured that law and legal approaches have never been too far from the technologies of governance we favor, but even that could change over time in relation to a radical shift in global power. More likely, the ascendancy of other models could act as a local counter and a legitimate alternative to today’s consensus in favor of stronger legal institutions.

*C. Further Local Complexities: The Potentially Precarious Position of Imported Expertises*

The picture we have given is one of local cosmopolitan elites importing the latest and most prestigious technologies for governing the state and the economy into their own local contexts, with more or less limited successes depending on the local situation and the power and resources of those on the exporting side. The investment in a strong and independent judiciary faces numerous obstacles, including the fact that the investors on both sides may change their minds about the priority of this feature of good government or be pushed aside by others with different opinions or new cutting edge approaches. Another problem is simply the stability of the general system we have described. Its legitimacy can be challenged, especially in an economic or political crisis.

There are at least three vulnerabilities in terms of the legitimacy of this imported expertise. The first, which we have not explored in detail here, is that the asymmetrical importation of U.S. legal technology may affect its legitimacy. The U.S. legal profession depends on the idea that, while most of the best talent serves major corporations, some proportion—including from within the corporate bar—will be devoted to public interest law. In the countries we studied, the corporate part has been imported relatively successfully, but the other side has not. If elite lawyers are perceived as only serving big businesses, and of those, mainly foreign businesses, their position may not serve well as a platform for promoting the rule of law—including a stronger and more independent judiciary.

Second, there is the danger that the fact that the expertises are foreign will be used to attack and delegitimize them at particular moments. Furthermore, the recent wave of support for strong and independent judiciaries has been accompanied by a transformation in the role of the development agencies, including the World Bank. At the time of the first law and development and before the conversion of the development institutions to the virtues of “governance,” the World Bank, in particular, was forbidden by law to get involved in

local political issues. The General Counsel was expected to keep the Bank from intruding on the sovereignty of states that were supposed to be able to choose their own political system. Through a combination of realism and idealism symbolized by the alliance of the environmental movement with critics of the Bank such as Jesse Helms, the obstacles to a more intrusive approach for good or evil have largely been overcome.<sup>31</sup>

The World Bank and the IMF, therefore, are far more involved in local politics and political reform than they were in the 1970s and 1980s. Even structural adjustment in the first round did not involve questions of how to best design the state and its institutions. It simply called upon the state to follow certain economic recipes as a condition of foreign aid. The intrusion now is much greater, potentially provoking a reaction. Note in this context that the best way to promote judicial reform from the north is to get involved in the micro-details of the south.

Third, and finally, there is the situation of the cosmopolitan elite linked to this imported legitimacy and expertise. While it has not happened yet, we can certainly imagine the development of radical strategies to blame current economic and political problems on the elite and on its dependency on the north for ideas and legitimacy. That is not to say that strategies to attack these people or ideas will succeed, but it is important to see that the entire edifice remains somewhat fragile.

## VII. CONCLUSION

This contribution is not meant to denigrate the goal of strong and independent judiciaries. It is not difficult to see from our perspective the advantages that we understand to flow from judicial reform corresponding to a U.S. model of state institutions and a corresponding role for lawyers and the law. Indeed, our ability to see these advantages reflects our inclusion in the processes that we seek to study. The echo we find among our friends in Latin America and elsewhere reinforces our comfort in the United States with the value of these approaches. The purpose of this Article is to try to explain both the comfort and the echo and to show why the prospects for the new law and development may be no better than they were for the earlier version.

Hierarchies and structures of power provide incentives in the north and south that have led to the new law and development. The consen-

---

31. See Robert Wade, *Greening the Bank: The Struggle over the Environment, 1970-1995*, in *THE WORLD BANK: ITS FIRST HALF CENTURY: VOLUME 2 PERSPECTIVES* (Devesh Kapur et al. eds., 1997).

sus that sustains it and the impacts of such reform efforts, even if using the same approaches with the same general agreement, will be very different in different local settings. The similarities among the Latin American countries mask substantial differences in the position of the courts and their potential as relatively independent of the executive and legislative parts of the government.

More fundamentally, the same hierarchies, structures, and corresponding sets of incentives that have produced the pressures for reform may just as easily undermine the very same consensus and take away those pressures. Not only can the consensus be challenged from the top, as it was at the time of the first law and development, but it can also be challenged from those who do not participate in the processes behind the current consensus. Current economic crises, exemplified especially by the Argentine crisis, so far have not produced a strong vocabulary of resistance to the general contours of the U.S.-legitimated—"dollarized"—model of development, but we must recognize that such a resistance, which could also question the role of the courts that development agencies now support, could develop and spread. The end of the Cold War has limited the production of alternative development models, but we very much doubt that we are at the end of this particular history in the United States or elsewhere.