# Legitimacy, Legal Development and Change

*Law and Modernization Reconsidered*


Edited by David K. Linnan

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## Law and Modernization Reconsidered

*Edited by*

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Angelika Nussberger's chapter entitled "Rebuilding the Tower of Babel—The European Court of Human Rights and the Diversity of Legal Cultures" is based on a paper presented at the Constitutional Forum in Moscow in 2006 which was dedicated to the subject "European Convention on Human Rights and Fundamental Freedoms in the XXI Century: Problems and Prospects of Implementation." A slightly different version of the text was published in Russian in *Sravnitel'noe Konstitucionnoe Pravo* 2007, No. 2, pp. 71–9.

Veronica Taylor's chapter entitled "Japan's Legal Technical Assistance Efforts: A Different Modernization Narrative?" is adapted from "Rule of Law Assistance Discourse and Practice: Japanese Inflections," in *Law in Pursuit of Development: Principles into Practice?*, edited by Amanda Perry-Kessaris (Abingdon: Routledge-Cavendish, 2009), pp. 161–79.

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# Chapter 1
# Introduction to Legal Development and Change

David K. Linnan

This book explores overlapping themes, asking how legal development and change actually work. We approach the questions in comparative, empirical terms, searching for answers in specific legal system examples, rather than pursuing theory in the abstract. Thus we ask questions about traditional schools like "modernization theory" or "Law and Development," but we do so within a framework of 23 country chapters. There are now non-Western legal development alternatives, so we need a better way to ask comparable questions of different approaches.

At a practical level, we tackle the problem of "law in the books" versus "law in action." Legal change is embedded in modernization, but presents an underlying "chicken or egg" question. Can law be employed to shape behavior as a form of social engineering, or must social behavior change first, relegating legal change to follow as a form of ratification or reinforcement of changed behavior? The problem is that most legal development efforts simply assume an instrumental effect. Yet that may be only the first in a series of issues. The hidden concern may be the relationship between legitimacy and instrumentalist approaches to legal development. But we also speak as though contemplating an ahistorical, homogenous society as subject, yet matters are rarely so simple. Meanwhile, if legitimacy is the bridge to social change through legal development, how do we conceptualize and examine social change when its motivating values may not be our own?

Legitimacy itself requires unpacking too, since it traditionally presumes in Western views of legal development certain relationships between government, civil society, citizens and growth. In a nutshell, how to understand the overlap in the context of legal development between the legal and economic fields, more or less in parallel with the overlap between the legal and political (democratization) fields? There are indeed values seemingly embedded in Western rule of law (ROL) work, particularly when examined at the level of ideas concerning the proper relationship between human rights, democracy and economic growth. But how shall we validly measure and evaluate ROL beyond comfortable Western boundaries?

Is a growing emphasis on non-Western alternatives the natural counterweight to the modernization concept's implicit assumption of secular, national law as part of economic and social development? How then shall we deal with legal pluralism as feature of many developing countries? Modernization theory as the social science-based development concept of the 1960s addressed to traditional society in lower income countries was one thing, yet "modernization" is an ongoing process also in middle income countries in most of the globalized, developing world. But *whose* version of modernization will predominate absent a Western monopoly on change? And what is legal development's source of legitimacy, if not modernization?

The acute focus from an American perspective is currently on the "failed state" phenomenon and, separately, the Islamic world. Meanwhile, among developing countries, Asia is broadly recognized as representing successful economic development worthy of emulation. The implicit disconnect is that the developing world may look to Asia as an economic success story, but American views of legal development currently look backwards to the transitional economies of culturally Western,

formerly Socialist Europe in the 1990s. The practical question becomes how to bridge the gap to understand legal development and change in the non-Western setting.

Thematically, we first examine different approaches to the general problem of understanding legal development in empirical rather than ideological terms. We then shift to a more pointed inquiry targeting the overlap between customary, religious and secular law in legal development, including weighing the implicit question whether mostly conservative social views present in *shari'ah* law in particular are a product of religious views or social conservatism (tribalism). Finally, we look at several different countries and international law to address special aspects.

## Changing the Rule of Law Narrative

Part I (of seven) of our book commences with five chapters addressing general aspects of legal development, legitimacy and modernization. Under differing points of view, donor-driven legal transplantation may encompass anything from traditional development assistance focused on economic growth, democratization and governance assistance, through trade facilitation technical assistance, to pre-/post-conflict and security sector, as well as generic rule of law assistance focused on law enforcement. Our own interest is directed more narrowly at legal development as part of traditional development, while still recognizing that law's role in development changed when development itself began to target private foreign investment. The US government's high profile working ROL concept in conflict and post-conflict countries (3C, or courts, cops and corrections) is somewhat misleading as pursued, but that same usage is paralleled in UN peacemaking/keeping/building activities. Such activity may serve foreign policy purposes, but is hardly legal development in any ordinary sense. Meanwhile, non-Western competition now exists in ordinary legal development, looking in particular to Asian examples.

David Linnan notes a surprising lack of attention to the empirical question whether and how legal development actually works. He raises the chicken or egg question addressing instrumentalist assumptions underlying Law and Development approaches, or, more recently, American ROL work generally. The question is whether today's ROL efforts are simply a continuation of early 1960s modernization theory and the Law and Development approach in "old wine, new bottles" terms, harking back to questions about "liberal legalism," argued links between democracy and economic development, and an intellectual partnership between American foreign policy and academic social science. A new form of modernization theory can rescue some of its earlier insights, but it should be equally applicable to non-Western legal development concepts also, focusing on demographic trends and the degree of urbanization present, and a renewed focus on social psychology (because of legitimacy concerns), in a change from the pure new institutional economics IFI focus since the 1990s. It also requires closer attention to individual behavior in adapting to ROL changes, since instrumental behavior is visible there. The problem with simple conclusions, however, is that the developing world itself is beginning to push the arguable bounds of ROL work from domestic to international law, pushing back in many ways independent of traditional formulations such as an assumed relationship between democracy and economic growth (e.g., in connection with climate change).

Joseph Isanga notes that, from the African perspective, ROL is understood as Westernization and a continuation of the Washington Consensus. Further, ROL approaches have not led to much economic improvement in Africa's circumstances. They do not address well the reality that an overwhelming majority of Africans still live in rural (traditional) society, while even in urban areas traditional attitudes to authoritarian leadership have been carried forward. Some African

leaders manipulate ROL and democracy claims to buttress their own political positions with the donor community (and anti-corruption laws being employed opportunistically to attack political opponents is not solely an African phenomenon). From an African perspective, more attention should be paid to issues like education as a precondition to real development, since democratic choice and governance are hollow concepts if exercised by poorly educated majority rural populations on the basis of ill-suited Western categories. Exemplary African leaders pursuing an African vision do exist, but they tend to be underappreciated in the West.

Andrew Harding and Peter Leyland examine the contradictions now visible in acutely polarized Thai law and society, particularly in Thailand's juxtaposition of political stalemate and repeated governmental flip-flops between the (pro-Shinawatra, traditional rural-based) "Red Shirts" versus (nominally monarchist, modern Bangkok-based) "Yellow Shirts" in the Thai parliament and on Bangkok's streets. The ultimate problem may be whether Thailand's true constitution is an unwritten one based upon concepts of the Thai people like *chat* (nation), *satsana* (religion) and *mahakesat* (monarchy) as civic religion, versus Western categories of constitution-making incorporating the received formal categories like separation of powers and the judiciary. The current level of discourse challenging even principles like "one man, one vote" raises the question whether legal reforms were ever adopted on a principled basis, as opposed merely to serve the political interests of their proponents. So, in chicken or egg terms, what is the message about constitutionalism as applied within Thai society? Can legal and constitutional institutions overcome deep social divisions and divergent political outlooks (and a political culture focused more on individuals than policies)? Judging by Thailand's example, social consensus must precede law.

Darminto Hartono addresses the empirical question of whether and how individuals learn to operate in a new, ROL-inspired legal environment. On the example of Indonesian corporate reorganizations following significant changes in insolvency law, the answer is that individuals are observed to learn, but behave instrumentally in pursuing new legal forms to their own ends. Here the object lesson is that legal development may change observed behavior, but that does not necessarily mean that it shapes underlying beliefs. Instead, compared to implicit ROL views verging on law as self-implementing norm, actors in the (changed) legal system navigate the changes to serve their own self-interest. This behavior is not unlike that of sophisticated parties in Western countries pursuing litigation among a portfolio of business strategies. At the empirical level, current instrumentalist views generally may overlook the idea that legal development in creating modern "commercial rules" may simply represent one more theater of action for commercial parties. And on the evidence of Isanga's discussion of African leaders manipulating ROL efforts, Hartono's perception of self-interested actors within a changing legal environment may not be limited to the commercial sphere.

Liu Dongjin describes changes in Chinese economic law dating back to the 1949 founding of the People's Republic of China. Rather than following ROL lines, his presentation is a road map of practical experimentation in the service of China's economic development in moving since the 1980s toward a market-based economy. To that extent, it is probably best viewed in the tradition of Japan's nineteenth-century embrace of (Western) law as a means of modernization and development. Borrowings have come from many different external sources, while internal experimentation is chronicled over time. On a doctrinal level, China appears to share the Korean and Japanese experience of borrowing more in a technical sense from Civil Law rather than Common Law legal systems. Meanwhile, Liu notes that the Chinese distinguish between differing economic approaches within the West, finding the European (social democratic) approach to a market-based economy more congenial. China's economic success calls into question the common assertion of an automatic link between democratization, modernization and rule of law raised also in David