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LAW IN THE PURSUIT OF DEVELOPMENT

Principles into Practice?

EDITED BY AMANDA
PERRY-KESSARIS

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Amanda Perry-Kessaris



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Law in the Pursuit of Development

Law in the Pursuit of Development critically explores the relationships between contemporary principles and practice in law and development. Including papers by internationally renowned, as well as emerging, scholars and practitioners, the book is organised around the three liberal principles which underlie current efforts to direct law towards the pursuit of development. First, that the private sector has an important role to play in promoting the public interest; second, that widespread participation and accountability are essential to any large-scale enterprise; and third, that the rule of law is a fundamental building block of development.

This insightful and provocative collection, in which contributors critique both the principles and efforts to implement them in practice, will be of considerable interest to students, academics and practitioners with an interest in the fields of law and development, international economic law, and law and globalisation.

Amanda Perry-Kessaris is Reader in Law and Director of the International Economic Law Justice and Development Programme at Birkbeck College.

Law, development and globalization

Series Editor: Julio Faundez

University of Warwick

During the past decades, a substantial transformation of law and legal institutions in developing countries has taken place. Whether prompted by market-based policies or the international human rights movement, by the relentless advance of the process of globalization or the successive waves of democratization, no area of law has been left untouched. The aim of this series is to promote cross-disciplinary dialogue and cooperation among scholars and development practitioners interested in understanding the theoretical and practical implications of the momentous legal changes taking place in developing countries.

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For Belinda and Chris Perry, my editors for life.

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List of abbreviations

ABS	Access and Benefit Sharing
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AFA	Arbitration Fairness Act
AfDB	African Development Bank
AIDS	Acquired Immune Deficiency Syndrome
AOA	Agreement on Agriculture
ARTF	Afghanistan Reconstruction Trust Fund
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works (1869)
BMC	Biodiversity Management Committees
BTC	Baku-Tbilisi-Ceyhan
BVRM	The Bourse Régionale des Valeurs Mobilières
CAFTA-DR	Central America-Dominican Republic United States Free Trade Agreement
CALE	Center for Asian Legal Exchange (Japan)
CAO	Compliance Advisor/Ombudsman Office
CAS	Country Assistance Strategy
CBD	Convention on Biodiversity
CDF	Comprehensive Development Framework
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEPEJ	European Commission for the Efficiency of Justice
CERDP	Community Empowerment for Rural Development Project
CLEP	UN Commission on Legal Empowerment of the Poor
CMAC	Capital Market Advisory Council (Rwanda)
CMAU	Capital Markets Authority of Uganda
CPIA	Country Policy and Institutional Assessment
CRP	Compliance Review Panel
CRZ	Coastal Regulation Zone
DFID	Department for International Development
DLP	Draft Land Policy

DSE	Dar es Salaam Stock Exchange
EAC	East African Community
EASEA	East African Securities Exchange Association
EBRD	European Bank for Reconstruction and Development
EIA	Environmental Impact Assessment
EMG	Emerging Markets Group
EPA	Economic Partnership Agreements
EPA	Environmental Protection Agency
ESRC	Economic and Science Research Council
ETI	Ethical Trading Initiative
EU	European Union
FFV	Flowers and fresh fruit and vegetables
FOS	Financial Ombudsman Service (UK)
G8	Group of Eight (Canada, France, Germany, Italy, Japan, Russia, UK, USA)
GAC	Governance and Anti-Corruption
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GNI	Gross National Income
GSP	Generalized System of Preferences
HABITAT	United Nations Human Settlement Programme
IBRD	International Bank for Reconstruction and Development
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICCLC	International Civil and Commercial Law Centre (Japan)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICRs	Implementation Completion Reports
ICRG	International Country Risk Guide
ICT	Information and Communication Technologies
ICZMP	Integrated Coastal Zone Management Plan
IDA	International Development Association
IDB	Inter-American Development Bank
IDF	Institutional Development Fund
IDLO	International Development Law Organization
IFC	International Finance Corporation
IFI	International Financial Institutions
ILO	International Labour Organization
IMF	International Monetary Fund
IP	Intellectual Property
IPRs	Intellectual Property Rights
J4P	Justice for the Poor programme
JBIC	Japan Bank for International Cooperation

JETRO	Japan External Trade Organization
JICA	Japan International Cooperation Agency
JSDF	Japanese Social Development Fund
LICUS	Low-income countries under stress
LMI	Legal Modernization Initiative
LSE	London Stock Exchange
MCC	Millennium Challenge Corporation
MDB	Multilateral Development Banks
MDTFs	Multi-Donor Trust Funds
METI	Ministry of Economy, Technology and Industry (Japan)
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MoEF	Ministry of Environment and Forests (India)
MOFA	Ministry of Foreign Affairs
MSRDC	Maharashtra State Road Development Corporation
NAFTA	North American Free Trade Agreement
NBA	National Biodiversity Authority
NGO	Non-Governmental Organization
NHPC	National Hydro Power Corporation
NIE	New Institutional Economics
NSE	Nairobi Stock Exchange
NYSE	New York Stock Exchange
ODA	Official Development Assistance (Japan)
OECD	Organisation for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation (USA)
PBA	Performance-Based Allocation
PCF	Post-Conflict Fund
PDR	People's Democratic Republic
ROL	Rule of law
ROTCM	Rwanda Over-The-Counter Market
SEC	Securities and Exchange Commission (USA)
SEZs	Special Economic Zones
SIFMA	Securities Industry and Financial Markets Association
SPF	State and Peace-Building Fund
SPF	Special Project Facilitator (Asian Development Bank)
SPLM	Sudan Peoples' Liberation Movement
SSCP	Sethusamudram Ship Channel Project
StAR	Stolen Asset Recovery
STDTP	Southern Transport Development Project (Sri Lanka)
TRIPs	Agreement on Trade-Related Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMA	United Nations Assistance Mission to Afghanistan

UNCESCR	United Nations Committee on Economic Social and Cultural Rights
UNDP	United Nations Development Programme
UNDPKO	United Nations Department for Peacekeeping Operations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNESCO Convention	Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
UNEP	United Nations Environment Programme
UNESCO Declaration	Universal Declaration on Cultural Diversity (2001)
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development
USE	Uganda Securities Exchange
WAEMU	West African Economic and Monetary Union
WCD	World Commission on Dams
WFE	World Federation of Stock Exchanges
WTO	World Trade Organization

Notes on contributors

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I cannot thank Maria Pope enough for the talent and warm spirit that she brings to her work. Like all self-respecting children, mine help and hinder my professional progress in equal measure. Long may they continue on their merry and enchanting way. To Nicos, an exceptionally generous team-mate, I will forever be trying to return your favours.

A. P. K.
London, June 2009.

Foreword

Bronwen Morgan

The relationship between law and development, in the context of an integrated global economy, has moved from a niche area of study to an increasingly central location in scholarly enquiry over the past several decades. This shift is simultaneously reconstructing the core questions and approaches in what might once have been called 'law and development' but is increasingly seen as part of global governance or the transnationalisation of legal orders. Professional socio-legal studies meetings illuminate this. In July 2007, over 2,000 scholars from 72 countries gathered in Berlin for an international meeting of socio-legal scholars. Seventy out of the roughly 600 papers presented were devoted to transnational issues: almost a sixth of the conference proceedings.

Many of these papers appeared in one of two 'collaborative research networks' that organized a series of linked papers and attracted large audiences. One network focused on 'transnational legal orders'; the other titled itself 'rule of law, state-building and transition', explicitly citing the changed nature of the political economy of global law and development as a reason for rejecting the label of 'law and development'. These two research networks often provided complementary perspectives on similar issues of legal change linked to economic and social development. What seemed to be emerging was an increasing interest in cross-border legal norm-creation and implementation from the perspective of the 'developed' world, coinciding with an enduring interest from the perspective of 'developing' countries in the ways in which their domestic trajectories are shaped by such processes. At the same time, the coherence of a distinction between 'developed' and 'developing' countries was increasingly muddled.

The intensified overlap between the concerns of these two strands could be seen as a natural outgrowth of the increasingly juridified nature of interdependence between the 'developed' and 'developing' worlds, coupled with the absence of any structural alternative to the capitalist model for economic development. Whereas prior to the post-colonial era, the legal dimensions of cross-border interdependence were embedded within intra-imperial political relations, since the acquisition of national sovereignty for ex-colonies, such interdependence (or dependency, depending on one's political assessment) has

become much more explicitly premised on legal regimes. Thus the early attention of studies on transnational legal orders was focused on transatlantic economic competition and cooperation, particularly the World Trade Organization and the GATT legal regime. By contrast, 'law and development' scholars focused more on international financial institutions and the effect of conditionally-structured aid on domestic policy trajectories.

As the scope of transnational legal regimes widens well beyond trade, competition and intellectual property, issues such as public health and cultural heritage have become increasingly juridified, and both financial conditionality and legality increasingly encompass these kinds of non-market issues. Just as the original vision of the European Union as a trading compact has expanded well beyond market integration, so too, albeit in uneven and patchy ways, have cross-border relations in other regions and globally. And as legal regimes aimed at establishing market access and integration extend their reach, state-building efforts and transitions from colonialism or communism are drawn inexorably into the same transnational juridified space that first attracted the attention of 'transnational legal orders'. Thus the two strands of scholarship increasingly overlap, and can benefit from mutual dialogue.

With these developments comes a fertile opportunity for a newly configured field that entices both more traditional international lawyers, and those who carry out empirical work, to contribute their perspectives to the relationship between law reform and economic and social development in a globalizing world. Just such an opportunity was the hope of the conference from which many of the chapters in this volume originate, which was held in London in December 2007, sponsored by the Socio-Legal Studies Association (UK).¹ Additional perspectives from people working more directly in the field have expanded the collection of perspectives offered in these pages. We hope that the combination will go some way towards supporting a network of scholars whose efforts can help to craft new solutions linking principles and practice in ways that facilitate law's ongoing pursuit of development.

Note

- 1 The aims of the Socio-Legal Studies Association are to 'advance education and learning and in particular to advance research, teaching and the dissemination of knowledge in the field of socio-legal studies.' For audio recordings and presentations of proceedings of the conference *Justice, Power and Law: In pursuit of development*, organised at Birkbeck College, London by Bronwen Morgan and Amanda Perry-Kessaris on December 10, 2007, see <<http://www.kent.ac.uk/nlsa/content/view/166/139/#justice>>.