

# DEVELOPMENT LAW CAPACITY BUILDING: TRAINING LEGAL PROFESSIONALS FOR DEVELOPMENT

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## 1. Introduction

At base, “development law” means using a legal system to achieve sustainable economic development. To reform and administer a country’s laws, regulations and judiciary (and to negotiate international agreements and resolve disputes under that system) requires competent legal professionals, including government and corporate legal advisors and judicial personnel (i.e. judges, magistrates, prosecutors and other court officials). Thus capacity building is a necessary and continuing component of international development law.

Development law capacity building has evolved through successive stages over the past four decades. Initially confined to the academe (university law teaching) as part of the “law and development” movement, it virtually disappeared in the mid 1970, only to reappear and flourish some years later in new garments.

This paper traces the history of legal training, technical assistance and related institution building from their origins in the 1960s to their demise in the mid 1970s. It then examines their revival in the 1980s and 1990s, with the emergence of business globalization. Over the past 20 years, development law capacity building has shifted in emphasis from international commercial transactions to economic law reform to good governance; and most recently to legal and judicial reform. In the process, the subject has acquired increasing recognition and financial support from the development assistance agencies that control its destiny.

Turning to future trends and prospects, it appears that the best opportunities for training and technical assistance in the field of development law lie ahead. This is especially true

when it comes to putting law at the service of poverty reduction, crafting dispute resolution systems for international rule making and implementing conflict resolution for peacekeeping.

From the outset, the author has been both observer and participant in the field of international development law. He served as a law school instructor in Africa under a Ford Foundation-sponsored program in 1963-1965, and years later he was co-founder and Director General of the International Development Law Institute in Rome. Currently he is President and principal consultant in the firm Resolve-Consult International, LLC. The report and observations that follow draw heavily from his personal experiences and observations.

## **2. Beginnings: the Rise and Fall of “Law and Development”**

Post World War II decolonization was a precipitating factor. The science and practice of economic development, which began with the Marshall Plan and the reconstruction of Europe, soon reoriented itself toward newly independent countries in Africa and Asia. In the field of law, this took the form of scholarship (such as Professor A.N. Allott’s learned studies on African customary law) or tutelage (such as the drafting of the Ethiopian Civil Code by Professor Rene David and the Ghana Company Law by Professor L.C.B. Gower).

Meanwhile, the independence movement—especially in Sub-Saharan Africa—captured the imagination of lawyers in the West. With financial support from American foundations, programs sprang up to assist new law faculties and to advise national administrators and judicial officers. As colonial governments retreated, the atmosphere was heady. “Law and development” became a fashionable term, in both academic institutions and development agencies.

During the period from 1960 to 1972, legal development was seen more as an end in itself than as a means of achieving economic growth, although the two were often linked in the rhetoric of grant applications to development donors. Improvement of the courts, the legal profession and the quality of justice were the goals to be served. At the same time, the legal approach to economic development tended to be quite academic and theoretical. Producing studies in the spirit of Max Weber on how law affects social behavior, the “Law and Modernization Program” at Yale Law School was a case in point. Scholars debated the merits of “legal engineering,” but stayed aloof from real world policy making. In those days, economic development was viewed by most as the exclusive province of economists. Legal professionals remained outside the development circle.

One of the very few exceptions was Dr. Ibrahim F.I. Shihata, an Egyptian jurist who had acquired an S.J.D. degree from the Harvard Law School. In 1969, when he was a legal advisor to the Kuwait Fund for Arab Economic Development, he published a seminal paper entitled “Role of Law in Economic Development: The Legal Problems of International Public Ventures.” Among other things, he observed in the article that economic development creates “a great challenge for the legal profession, a challenge which is yet to be fully answered” (Shihata, 1969). Addressing the issue of “why law in

development?” rather than capacity building *per se*, Dr. Shihata concluded that law “is not that negative tool which merely reflects society in a given stage” but rather “a dynamic mechanism that can positively respond to and influence society’s growing needs for organization and development.” His argument made clear that what was required was the education and training of lawyers. For almost two decades, however, Shihata was a voice in the wilderness.

- **Phase 1: Academic Teaching and Research**

Project SAILER (Staffing of African Institutions for Education and Research) funded by the Ford Foundation played a more active role, but confined its activities to research and teaching on the machinery of justice. From its inception in 1962 to April 1972, SAILER sent some 116 law teachers (mostly, but not entirely, from North America) to law faculties in 14 African countries. According to its founder and historian, the late John S. Bainbridge, SAILER’s investments in time and money were “more than warranted” (Bainbridge, 1972). Reflecting on the accomplishments of SAILER, he wrote:

There are an increasing number of African scholars and African institutions that are concerned with the dynamic characteristics of law and legal development. Law is being increasingly viewed as an instrument of social change. There is a growing awareness that law’s service to the community is more of a right than a privilege. There is increasing insistence that the predictive quality of law and its procedures must be strengthened and its application made equal to all peoples in all stations.

Later reviewers of SAILER and other law and development efforts were less kind (Messick, 1999). According to the critics, the movement lacked any theory of the impact of law on development, making it impossible to set priorities or evaluate results. There was too little participation of local lawyers who would need to carry out the reforms. And the movement tended to ignore customary law and other informal legal systems.

SAILER was not alone in the legal teaching and technical assistance field. For example, the Asia Public Services Fellowship Program of the Syracuse University Maxwell Center for the Study of Overseas Operations and the MIT Fellows in Africa Program of the Sloan School of Industrial Management recruited lawyers and other professionals to assume advisory and operational roles in the new administrations in Africa and Asia. Although most of the experts came from the United States, some were European (including Professors L.C.B. Gower and William Twining of the UK and Zacharias Sundstrom of Finland).

Whatever lasting impact these activities had on their intended beneficiaries, they greatly influenced the western lawyers who participated as visiting faculty, advisors, administrators or draftsmen. An Arden House conference of law teachers (“Twenty Years After”) in 1986 revealed that many of them became full-time educators. Others joined development assistance organizations, such as the United States Agency for International Development, voluntary service agencies or non-governmental organizations promoting development. Some of those returning from professorial

assignments in Africa or Asia embellished northern law school curricula with courses in “African Customary Law,” “Foreign Investment in Developing Countries” or simply “Law and Development.” Many research projects on law and development found homes at Yale, the University of California, Berkeley and other prestigious schools. North American interest in the subject declined almost as abruptly as it began. Not surprisingly, a decrease of projects in the mid 1970s was paralleled (or was caused) by an evaporation of funds. The Ford Foundation discontinued its funding of the International Legal Center (ILC), the successor of SAILER. The published *mea culpas* of two scholars marked the end of the era (Trubek and Galanter, 1974).

But the idea refused to die. With more modest funding from new sources, the International Center for Law and Development (ICLD) supplanted ILC. At the same time, it adopted a grass-roots approach to replace advisory assistance at the official level. Law faculties at Glasgow and Warwick continued to offer LL.M. programs in law and development. The International Law Institute (ILI), then attached to Georgetown University, began offering short courses in negotiation and trade law for a developing country audience. Based in Washington, D.C., it drew many of its short-term faculties from the World Bank and local law firms. The Law Faculty of the University of Windsor, which offered courses on law and development for LL.B. students since 1972, hosted at least a dozen symposia on law and development. It was at the 1981 Windsor symposium that plans for the creation of the International Development Law Institute, discussed below, were first presented to an international audience.

Looking back, the law and development “movement,” as it is now termed, had a dynamic of its own. Extraneous factors, such as the availability of funding or the enthusiasm of individual lawyers recruited to serve as teachers or advisors, determined the state of play. As suggested above, what seemed to be lacking were an overriding development vision, clearly defined objectives and a generally acknowledged relevance to the central issues of economic development. Those deficiencies cost the movement its funding and eventually caused its demise.

Indeed, Professors Trubek and Galanter in their famous farewell article (Trubek and Gallanter, 1974) criticized what they characterized as the “liberal legalist” approach—the assumption that legal development “can be equated with exporting U.S. institutions.” The era of the “legal missionary,” they said, was over.

Did the American lawyers serving in Africa in the early 1960s see themselves as “legal missionaries?” Probably not. They (including the author) went to Africa with modest objectives. They simply wanted to lend a hand: to teach some courses in the law schools, assist in the ministries or in the courts and perhaps advise local counterparts. With few exceptions, they were technocrats plying their craft in foreign lands. Their time horizons were limited. Most of them saw their African service as a two or three year prelude to law practice back home. Perhaps some of them (like many U.S. Peace Corps Volunteers at the time) were or became idealists, prone to cynicism when their best-laid plans went awry. Indeed, the American Peace Corps, better known for sending young college graduates to remote villages, inaugurated a lawyers’ program in 1963.

Having failed to define law and development goals in the first place, the planners were

hard pressed to distinguish success from failure a decade later. Added to this were changing circumstances. Institutions that utterly lacked teachers in 1962 could boast of ample numbers by 1974. By the same token, the need changed: from law faculty classroom to government ministry. The transformation of SAILER to ILC mirrored that change. While SAILER provided law teachers and researchers, ILC sent lawyers as advisors to the courts and ministries. It also enlarged the geographic scope from Africa to the rest of the Third World.

Other law and development activities that survived the 1970s were those undertaken by two divisions of the Commonwealth Secretariat based in London. The Legal and Constitutional Affairs Division assisted member countries in the development of their constitutions and legal systems, concentrating in later years on human rights, commercial crime and trade law. At the same time the Secretariat's Economic and Legal Advisory Service Division (formerly Technical Assistance Group) furnished consultancies on economic law and policy.

Despite an expansion in mandate and geography, "law and development," as originally conceived, was by 1974 largely viewed as irrelevant, an historical curiosity. With the small-scale exceptions noted, the "movement" at large was dead in its tracks.

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