Review Essay – Exploring the New Frontiers of Law & Development. Reflections on Trubek/Santos eds., *The New Law and Economic Development* (2006)

By Bridget Hauserman[*]

[David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A critical appraisal*, Cambridge University Press, New York 2006, ISBN 0-521-67757-2, pp.300, $30.00]

A. Introduction

During the mid to late 1990s the developing world was hit by a series of economic crises that seemed to shake the very foundation of assumptions about international development. Neoliberal conceptions of rapid market liberalization, privatization and deregulation, which were espoused by the Washington Consensus, began to be widely questioned. Notable economists and academics drew attention to the failures of the prevailing economic development theories and criticized the approaches taken by international financial institutions ("IFI") such as the International Monetary Fund ("IMF") and the World Bank ("WB").[1] By the beginning of this century it was clear that a change was taking place—a fundamental shift in the global approach to international economic development theory.

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[1] *See* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

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One of the major criticisms to arise out of these series of events was the lack of focus on the implementation of the "rule of law" ("ROL") by development experts. It was thought that the failures of the IFI development policies hinged in part on the absence of legal institutions, regulations and supervision in order to produce a solid systemic framework needed to protect against the volatilities that market liberalization produced. This realization led to a renewed interest in the interplay between law and development and now, over 10 years later, it can be observed that "law is at the center of development discourse and practice."[2]

Yet the relationship between law and economic development is by no means a newly forged area of legal scholarship. As early as the 1970s, academics were pioneering 'law and development studies' in American universities by seeking to situate the law and legal discourse in the development paradigm. Indeed, Trubek and Galanter's pivotal 1974 article *Scholars in Self-Estrangement* served to critically examine the law and development movement as it existed at that time.[3] Over 20 years later, Trubek—along with co-editor Alvaro Santos—has once again significantly contributed to an understanding of the 'law and development movement,' this time by bringing together a small group of discerning academics to analyze the emerging paradigm shift in the thought surrounding the relationship between law and economic development in the edited volume *The New Law and Economic Development: A Critical Appraisal*.[4]

Though the book calls itself 'A Critical Appraisal' it is clearly not a critical analysis of the need for law and development in and of itself. Nor does it claim to be. At no point do the authors question the legitimacy and/or need for international development efforts. On the contrary, the authors are clear in their approach that they believe in the necessity of international development and importance of market reforms in achieving that end. What the book does is critically analyze the

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[2] Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253 (David M. Trubek and Alvaro Santos, eds., 2006).

[3] David M. Trubek and 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 (1974).

[4] THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek and Alvaro Santos, eds., 2006).

history and the future role of the law in that equation, with a particular focus on the third and current 'moment' in the law and development doctrine including the incorporation of a social agenda (e.g. context specific social concerns and human rights) and the ROL. There is a recognition that law is needed to create the necessary infrastructure for markets to function properly, to regulate them when they fail and to create social reforms which the market can not provide. At the same time, the authors leave open the possibility that development be conceptualized not only in terms of economic growth but also in terms of human freedom. As Trubek and Santos state in their introduction, the "contributors to [the] volume believe that more equitable and fairer approaches to development are possible. They think that legal rules, practice, culture, and consciousness are all arenas in which false universalism and appeal to professional expertise can be contested and alternatives proposed."[5]

Law and economic development, as an academic field, finds its existence in the overlap of economic theory, legal ideas, and the policies and practices of the development institutions. In the introduction, Trubek and Santos state that each of the authors agrees that there have been three distinct moments in the law and development theory.[6] The first moment occurred during the 1950s and 1960s and was characterized by a concentration on the role of the law as a state tool to effectively implement economic reforms. This was done predominately through import substitution, state reallocation of investments in key sectors and controls on foreign capital. During the 1980s, the second moment began to take shape through the emergence of the neoliberal development agenda. Since the state was perceived to be a hindrance to efficient markets and economic development, law's role in development was to place restrictions on state intervention in the market. At the same time, in order to facilitate market transactions, there was a focus on private laws such as the protection of private property and the enforcement of contracts. Little attention was paid to the role of the law in protecting civil rights as unfettered market capitalism was the anthem of economic development. The transition to the third and current moment of economic development was marked by the economic crises in Russia, Latin America and Asia. The 'one-size-fits-all' model of development, which assumed that markets everywhere exist in essentially the same

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[5] David M. Trubek and Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1 (David M. Trubek and Alvaro Santos, eds., 2006) at 18.

[6] *Id*. at 2.

form, was de-legitimized. More importantly, there was a realization that state intervention was necessary to remove market distortions caused by asymmetrical information and transaction costs.[7] Policy makers began to realize that local institutions and contexts could not be separated from development, that simple transplantation of laws often do not hold and that there is a need for the proper sequencing and pacing of reforms. There also emerged a greater set of critiques which questioned the underlying assumption that economic growth necessarily leads to poverty reduction or that the idea of development should even be viewed in terms of economic growth but instead as a way to enhance human capacities.[8] These realizations have led to the reconceptualization of economic development and are helping to shape the third moment in law and development theory at present.

It is precisely here that the book finds its place in the canon of economic development literature. While there are a myriad of academic works devoted to the critiquing of the policies of the Washington Consensus and the neoliberal model, few aim to deconstruct the critiques themselves. Nor do they seem to critically assess the current discourse, the present reactionary policies of the IFIs or contemplate the possible future direction that law and economic development may take. Where this book shines is in its thoughtful analysis of these issues in the current moment with a particular focus on the incorporation of the ROL and the 'social agenda' into law and economic development theory. Each author touches upon these subjects, attacking them from different angles and through different lenses.

Though an edited volume, several themes link the various chapters. The authors often question the supposed economic neutrality of private law including property and contract law. They challenge the idea that private law is neutral in that it allows actors to arrive at an equilibrium in a free environment as opposed to public or regulatory law which is perceived as being interventionist and market distorting. Instead they argue that private laws such as property and contract laws can be just as interventionist and may be based on decisions made by judges who do not only

[7] *Id*. at 6.

[8] *Id*. at 6, 7.

interpret the law but *make* the law.[9] The authors similarly challenge the idea that private law will a priori lead to efficiency gains as well as the assumption that efficiency gains will necessarily lead to development. They also contend that the idea that private law is distributionally neutral is a myth and that development policies can ever be apolitical.

The following review will endeavour to illustrate some of these issues that are so thoroughly yet concisely analyzed by the authors. It will first discuss the contributions of Scott Newton's analysis of the changing discourse of law and development as well as Duncan Kennedy's enlightening perspective on the globalization of legal thought and legal discourse through three phases of development. It will then turn to an examination of the politics of law and development by discussing David Kennedy's chapter on the inescapable policy agendas that knowingly and unknowingly attach to legal development theory and practice. Turning to the rule of law in development theory, David M. Trubek's chapter illustrating how the ROL came to be a central component of the means as well as the ends of development will be discussed along with Alvaro Santos' examination of the often contradictory uses of the ROL in the theories and practices of the WB. Finally it will turn to an overview of Kerry Rittich's insightful analysis of how ideas of the social have come to the fore in the third and current moment in law and economic development theory in a very problematic way.

B. The History of Law and Development Discourse

Adding to the analytical debate over the new law and development movement, Scott Newton examines the 'zigzagging' discourse of law and development over the past thirty years in his chapter *The Dialects of Law and Development*.[10] This discourse has and continues to be multidisciplinary, drawing ideas from law, economics and sociology, as well as spanning the political spectrum. Beginning from the American doctrine of law as a necessary aspect of modernization, with a focus on public law and legal education (as discussed by Trubek and Santos), law

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[9] *See e.g.*, Duncan Kennedy *The "Rule of Law," in Development Assistance: Past, Present and Future* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David M. Trubek and Alvaro Santos, eds., 2006) at 71.

[10] *See e.g.*, Scott Newton *The Dialects of Law and Development* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 174 (David M. Trubek and Alvaro Santos, eds., 2006).

and development became distinctly more political as it spread globally. This global expansion, combined with the emergence of dependency theories and neo-Marxist ideas, saw law and development move further way from economic development and towards a focus on equality. With the shift towards the neoliberal moment and a legal discourse increasingly impregnated and shaped by economic thinking, it was soon obvious that the discourse had once again moved in the other direction, back towards the economy, formalism and private law.[11] Finally, with the demise of the Washington Consensus and the failure of formalism and efficiency theory, Newton suggests that the discourse of law and development has now become "more attuned to differences and apparent contradictions and tensions…between dialectical poles," yet it is unable to argue any specific polar position.[12] This observation is one that finds its way into every chapter of the book. That is, that there seems to be no overall consensus of where the law and economic development model is currently situated. The only consensus is that it seems to be defined by the existence of a constant questioning or "eclectic critique"[13] of all that is law and development.

In his chapter, *Three Globalizations of Law and Legal Thought: 1850--2000*, Duncan Kennedy provides an overview of the history of legal discourse in development leading up to this point. He identifies three phases of the 'globalization of legal thought'. The first phase, which he terms 'classical legal thought' took place between 1850-1914 and was characterized by legal formalism, individual autonomy, protection of private property and free transactions, and liberal ideas of the market. This was governed by the overarching ideological framework of the liberal 'will theory'. That is, that the government should protect the rights of legal persons to realize their wills constrained only as is necessary to allow for an equal autonomy of all.[14] This chapter represents an expanded and much expected continuation of Kennedy's observations published in 2003.[15]

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[11] *See* Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates* 55 U. of Toronto L.J. 853 (2005).

[12] Newton, *Supra* note 10. at 201.

[13] *Id*. at 202.

[14] Kennedy, *Supra* note 9, at 25.

[15] Duncan Kennedy, *Two Globalization of Law & Legal Thought: 1850-1968* 36 Suffolk U. L. Rev. 631 (2002-2003).

From 1900-1968 he suggests that law was seen in terms of the 'the social,' essentially as a means to "facilitate the evolution of social life" and was characterized by legal consequentialism.[16] Since the 'will theory' of classical legal thought was highly individualist it was not able to respond to the social interdependencies that increased with modernization. Hence a turn towards 'the social' was seen to address that problem. Though the welfare state was an integral aspect of this, it was by no means the central component. No universal conception of a specific social regime emerged. Instead, the process of socialization varied in place and over time, leading to a wide variety of conceptual approaches and institutional forms in different countries.[17] The eventual turn away from the social Duncan Kennedy suggests occurred around 1968. Kennedy believes the demise of the social resulted from various factors such as a misassociation of the theory with socialism and communism, the denial of individual rights, and certain socio-political events such as the Vietnam War.[18]

Kennedy continues by summarizing his 'tentative' thoughts on the characterization of the third globalization of legal thought.[19] He suggests that unlike the former two, the third globalization has no overarching connective theory such as the 'will theory' or 'the social'. It is neither ideologically left nor right but is instead a system of neoformalist positive law. "It produces rules that are ad hoc compromises, rather than the social rules dictated by single social purposes in coherent adaptive new legal regimes."[20] In the third globalization the judge has replaced the legislator as the central legal interpreter and human rights plays the same role that "private rights" and "social rights" played in the previous two globalizations.[21]

It is here where Duncan Kennedy's piece finds its resonance within the overarching analysis of the third moment in law and development theory. He suggests that the

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[16] Kennedy, *Supra* note 9, at 22, 37.

[17] *Id*. at 59.

[18] *Id*. at 59-62.

[19] *Id*. at 63.

[20] *Id*. at 63.

[21] *Id*. at 65.

universalism of identity/rights discourse has become a true 'lingua franca' of the current legal movement and it is equally applicable to the law of the market as it is to public and family law.[22] He states that "each national legal system makes its own choices about which identities to recognize and which to stigmatize. But the arguments for and against recognition are close to identical across time and space."[23] While the first globalization was concerned with the relationship between law and morality and the second questioned the relationship between law and society, the third views the relationship between law and politics as the central issue. Kennedy questions the role of the judiciary in this process and posits as to whether judges, through their legal interpretations are simply performing "politics by other means."[24] Indeed he concludes that not only is law politics by other means but that politics is also law by other means in the sense that it is a pursuit for rationality in the world.[25] The importance of this chapter, besides its far-reaching illumination of disparate theoretical trends, lies also in it being the most recent and wonderfully succinct formulation of Kennedy's theoretical approach to the study of law. This comes at a time of fierce debates surrounding the push for law school curricula to include either more vocational training and practice preparation or critical legal theory. Kennedy's chapter strikes an important note in directing our attention to the inevitable confrontation of legal doctrine and thinking with comparative, transnational and global alternatives.[26]

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[22] *Id*. at 66.

[23] *Id*. at 57.

[24] *Id*. at 71.

[25] *Id*. at 72.

[26] For thoughts on necessary adjustments in law school curricula, *see* e.g., Craig Scott, *A Core Curriculum for the Transnational Legal Education of J.D. and LL.B. Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School*, 23 PENN ST. INT'L L. REV. 757 (2005); Stephan Leibfried/Christoph Möllers/Christoph Schmid/Peer Zumbansen, *Redefining the Pillars of German Legal Studies and Setting the Stage for Contemporary Interdisciplinary Research*, 7 GERMAN L. J. 661 (2006), available at: http://www.germanlawjournal.com/pdf/Vol07No08/PDF_Vol_07_No_08_661-680_Articles_Leibfried.pdf.

C. The Politics of Law and Development

Picking up on the ideas at the end of Duncan Kennedy's chapter, David Kennedy examines the political significance of policy choices in development in his chapter *The Rule of Law, Political Choices, and Development Common Sense*.[27] He suggests that political agendas are often clouded in economic and legal vocabulary, yet development professionals often see themselves as delivering non-political expert advice on development. He argues that this view is contained within a false notion that the development of policy prescriptions intended to increase economic growth through efficiency is an apolitical endeavour since politicians can afterward redistribute wealth generated from such projects as they see fit. In reality, each development policy decision has a political impact, whether a distributional impact among different groups or an effect on the distribution of power among political ideological positions.[28]

While development policies always have a political ideological position, Kennedy argues that they often become solidified as the 'common sense' of development in any given era at which point they cease to be situated on any specific point on the political spectrum. Debates within development then begin to take on the same vocabulary (e.g. the language of the market) and arguments lose their ideological identification.[29] In any given era, this emergence of a dominant development vernacular makes it much more difficult to focus on alternative policy ideas.

David Kennedy suggests that current baseline common sense among development professionals continues to be a neoliberalist conceptulization.[30] Developing country governments are often still seen as inefficient and corrupt, laissez-faire liberalization policies are still the predominate policy prescription and an equality of bargaining power between developed and developing nations has yet to arise.

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[27] David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95 (David M. Trubek and Alvaro Santos, eds., 2006).

[28] *Id*. at 95.

[29] *Id*. at 167.

[30] *Id*. at 150.

"At the same time, the neoliberal baseline supporting this common sense has been chastened."[31] With the shift towards a focus on the social and human rights, he suggests that issues of distribution have come back to the fore. Though contemporary ideas about the ROL may be suited to determining issues of distribution, he argues that because the ROL seems to be becoming a development strategy in and of itself—a sort of cure-all for development policy—that "the politics of allocation is submerged."[32]

David Kennedy discusses the fact that the in the new vernacular of law and development, experts recognize the need to attune policies to specific political, social, and cultural conditions, focusing on institutions, problems of transaction costs, market failures, human rights, cultural and social costs, as well as policy sequencing and planning.[33] Due to this, the law, legal institutions and more broadly, the ROL, is now at the center of development policy.[34] While Kennedy sees this turn towards law as important for development, he recognizes that it is being used as a way to escape economic analysis and political choice—both of which must not be bypassed. Law cannot be a substitute for the decisions of economic distribution and policy choices, nor can they be ignored at the outset to be revisited only when growth requires redistribution. He states that "development strategy requires a detailed examination of the distributional choices effected by various legal rules and regimes to determine…their likely impact on growth and development."[35] We must choose which path to take despite not knowing where it may lead or what consequences it may hold. Such analyses should be made within the ROL rather than using the ROL as a substitute for making difficult political and economic choices.

D. The Rule of Law in Law and Development

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[31] *Id*. at 151.

[32] *Id*. at 168.

[33] *Id*. at 170.

[34] *Id*. at 170.

[35] *Id*. at 172.

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In his chapter, *The "Rule of Law" in Development Assistance: Past, Present and Future*, David Trubek examines how the ROL emerged as a dominant theme in the current moment and how it is currently being interpreted and employed.[36] Indeed, the ROL plays heavily in the analysis of each author as the book argues that the ROL is now viewed not simply as a tool for development but as an objective of development policy in itself.

Trubek states that the contemporary ROL movement began to take shape after the paradigm shift towards neoliberal market policies led to increased international trade, world economic integration and the spread of legal ideas.[37] At the same time, increases in international corporate law firms in developing countries helped to merge local and international legal ideas and the IFIs began to look to the law as a tool to help in development. Development experts realized that neoliberal market reforms must be accompanied by regulatory changes to ensure the institutional conditions for markets. Since certain rights must be protected, efficiently functioning courts, an independent judiciary and access to justice are also necessary. Trubek states that the first phase of the ROL was characterised by: neoformalism; a focus on administration of justice; emphasis on contract and property as the core of the market economy; a belief in the possibility of legal transplantation; a belief that reforms made from the top would be accepted below; and with a view that there is only one model of the ROL. Soon it was realized that these assumptions were flawed. Experience and analysis showed that: legal transplantation created laws on the books which did not necessarily translate into practice; the protection of rights focused almost exclusively on property rights; restrictions on state intervention conflicted with the promotion of democracy; there was little direct action in poverty alleviation despite the fact that it was a stated goal of the ROL; and because market efficiency was seen to be neutral, issues of distribution were ignored.

These criticisms coincided with other criticisms of the Washington Consensus policies but unlike the greater paradigm shift in law and development theory, the second and current shape of the ROL has yet to undergo as significant a transformation and is similarly in a state of transition. Trubek suggests that ideas

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[36] David M. Trubek, *The "Rule of Law," in Development Assistance: Past, Present, and Future* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74 (David M. Trubek and Alvaro Santos, eds., 2006).

[37] *Id*. at 82.

about the ROL have expanded to include recognition of the failures of transplants and top-down reform, the need for context-specific projects, long time horizons, greater human rights (e.g. labour rights, women's rights) and environmental protection. Though the IFIs have included ROL projects, Trubek questions their approach and wonders whether in this time of reformulation of the ROL, whether "acceptance of pragmatism [can] replace faith in formalism…democratic empowerment take precedence over economic constitutionalism; poverty alleviation be a goal in itself rather than a result of "trickle down" policies or token project additions' distributive concerns be highlights in policy making and the construction of legal rules and institutions; and a better balance struck between economic integration and endogenous growth."[38] He is optimistic that the current moment presents a turning point which will go beyond merely critiquing the dogmatic approach of the neoliberal model towards a phase of reconstruction and that the values of human dignity, equality and fairness are not incompatible with the ROL but in fact are embedded within it. [39]

Continuing with an analysis of the ROL in the present moment in law and economic development theory, Alvaro Santos examines the current development policies of the WB in his chapter, *The World Bank's Use of the "Rule of Law" Promise in Economic Development*.[40] Santos suggests that though many view the WB's programs as a result of a consensus amongst policy makers, in reality there is actually much dissensus as well as inconsistencies in the WB's use of the ROL. He suggests that there are in fact four, sometimes contradictory, conceptions of the ROL that are used by various competing organizations within the WB. The ROL at the WB has been used (1) as an institutional framework for good governance, (2) to promote substantive rights and regulations, (3) to fight corruption and to reduce poverty and (4) to enhance peoples' capabilities.

Santos suggests that overtime the ROL went from an instrumental conception at the WB to an intrinsic one, yet there are contradictions between these various conceptions.[41] Adding to the complexity of the use of the ROL at the WB, ROL

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[38] *Id*. at 93.

[39] *Id*. at 93-94.

[40] Alvaro Santos, *The World Bank's Use of the "Rule of Law" Promise in Economic* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253 (David M. Trubek and Alvaro Santos, eds., 2006).

[41] *Id*. at 276.

projects are carried on by various, often competing, departments within the WB. A lack of coordination and knowledge sharing between these departments has created fragmentation and inconsistencies in WB policies. Since the ROL has become a development goal in its own right, Santos suggests that institutional reforms are transplanted as "proven recipes, not as complex choices with multiple linkages," and that the WB's "apparent conclusion that all ROL objectives fit into one package is neither theoretically possible nor supported by the projects' experience."[42] He examines why, during this time of increased critical analysis of development policies, the ROL is seemingly immune and suggests that like other areas of development, it should be opened up to scrutiny and evaluation.

E. The Incorporation of the Social in Law and Development

The second striking component of the paradigm shift in law and development in addition to the new found focus on the ROL is the incorporation of social concerns, including human rights, into development policies. As with the ROL, many authors suggest that social growth has now become an objective of development that has been incorporated into policies of the IFIs.[43] At the same time, these authors recognize that despite the rhetoric of the World Bank and other IFIs which espouse the virtues of the incorporation of the social, the primary focus remains situated in neoliberal market reform. They analyze whether this rhetoric is merely intended to stave off critics while in the practical implementation of policies, nothing much has changed.

On this point Kerry Rittich suggests that institutions such as the IMF and World Bank have in fact incorporated the social in their projects but that these are in themselves based on economic rationales. For instance, emphasis on the need for *basic* human rights such as freedom of expression and freedom of association also "protect the interests of civil society, serve as a counterweight to state power and form part of the political climate necessary to attract investment and ensure

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[42] *Id*. at 299-300.

[43] *See e.g.* Trubek and Santos *supra* note 5, at 7; Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 203 (David M. Trubek and Alvaro Santos, eds., 2006) at 205.

growth…thus serv[ing] both [a] economic and a social purpose."[44] Similarly, the advancement of women's rights helps bring more human capital to the workforce thereby increasing productivity and economic growth. At the same time, social reforms are now viewed as both a means and an end to development.

Rittich also argues that the current law and development moment is characterized by an emphasis on greater country-ownership and participation in the development process as well as the importance of the ROL and the judicial process in securing the social and civil rights. Additionally, non-state actors and non-legal norms are beginning to have a greater role in norm generation, monitoring and compliance and there is an increased use of soft law over hard law. She suggests that while the reforms of the new moment have brought the ideas of neoliberal market reformers and their critics closer, major conflicts of strategy still remain. Questions such as the hierarchy of rights, equity and distributional issues, and the incorporation of social objectives, all which are seemingly outside of the area of market growth, create issues of how the IFIs should rank and order differing social objectives and which policies should be pursued.[45] Rittich refreshingly recognizes that neutrality on these issues is an impossibility since they are necessarily political issues which require that certain tradeoffs be made and that winners and losers will result.[46] Like all of the authors in the volume, she suggests that what is necessary is a contextual approach utilizing a detailed examination of the rules, norms, actors, policies and consequences in order to determine the best course of action.[47]

F. Conclusion

One of the most interesting elements of *The New Law Economic Development* is that it creates exactly what it aims to analyze—the future discourse of the law and economic development movement. If this book is any indication, it would suggest

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[44] Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 203 (David M. Trubek and Alvaro Santos, eds., 2006).

[45] *Id.* at 247.

[46] *Id.* at 251, 252.

[47] *Id.* at 247.

that the current moment in law and economic development is characterised by a turn towards the inclusion of the social, human rights and the ROL but more importantly, that it is defined by a consistent and deliberate analysis and questioning of law and development discourse, policy prescriptions, their underlying assumptions and foundations, their consequences and effects, their moral and ethical bases and even the definition of development itself. While this departure from blindly following a dogmatic path is certainly a welcome change in the field of development one is left wondering how this academic exercise can be translated into concrete development practice. Unfortunately the authors give no indication of precisely how the law and economic development movement should proceed in its practical implementation. Perhaps that is because, as the book suggests, there is no sure fire formula for development—the best that can be done is to proceed from a contextual and detailed analysis. Then, in a sea of "contending ideas, contending interests, contested theories, and complex unknowables…we must decide…[and perhaps] even experiment."[48]

[48] Kennedy *Supra* note 26, at 173.

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