Law and Society as Law and Development

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Lynn Mather's major theme is the need for the Law and Society Association (LSA) to become more open to non-U.S. scholars and their theoretical approaches. Befitting a presidential address, she tapped into sentiments that are shared by many in the Association. We in the LSA are pleased with our growing international membership and wish to recognize and welcome contributions from abroad. Her call is also consistent with the new LSA award for research by a non-U.S. scholar and with the effort to build connections through the Association's international activities committee. At the same time, however, she recognizes that our efforts to welcome non-U.S. scholars face certain obstacles. In particular, there is a natural desire to try to export our own ideas as if they are universal, when in fact they are specific products of our own scholarly worlds—embedded in our own state and economy. The message is that we must overcome this parochialism and be more open to approaches and ideas that come from abroad.

We should all support this message, and my brief comment is meant to do just that. Thee good will and open-minded spirit characteristic of Mather and her presidential address should characterize the LSA even more than it does today. Nevertheless, I would like to add a few factors that complicate this welcoming image. I hope that these factors will help us see why we have some difficulties in the LSA deciding what it means to be welcoming. It is difficult, for example, to determine whom we should honor from abroad and by what criteria. More generally, the issues Mather raises relate closely to those inherent in policies promoting law and development. A close look at ourselves may help us see why the presumed lessons of the law and development movement in the 1960s and 1970s, condemned later as U.S. "legal imperialism" in the guise of legal reform (Gardner 1980), seem so poorly reflected

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in the much larger efforts today. As was the case a generation ago, law and society scholars today are squarely behind the law and development consensus.

To be sure, the situations today and a generation ago in law and development are not quite the same. A little background can place the current law and development efforts and the potential roles of the LSA in perspective. The law and development effort in the 1960s and 1970s, concentrating on Africa, Asia, and Latin America, focused on finding a role for lawyers in programs of economic development led by strong states and designed by economists. Seeking to gain a place with the economists, legal scholars, and activists joined the idealistic effort to "modernize" developing countries. The legal programs from the United States sought to retrain, technically upgrade, and reorient a new generation of lawyers 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 thought to come from the case method—and on expertise in business law. As we have all heard often, the programs were not generally considered very successful, according to their own criteria.

Today, however, 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 acting as a major branch of the government. Lawyers do not have to fight for their role this time. They were invited. Economists by the 1990s came to see the importance of legal institutions to the markets that they now promote. The key development institutions, including the World Bank and the International Monetary Fund, both dominated by economists oriented toward the United States, actively promote legal and judicial reform, which also includes substantive law expertise and educational reform. The difference now from the earlier period is that economists no longer deem state leadership in the economy to be central to economic development. Economic orthodoxy has changed. In common with the earlier movement, however, a central idea is that law, lawyers, and legal institutions should be far more important in the economy and in political governance than they are in most countries of the world. Again, this is a strongly U.S.-oriented approach.

The approach suggests that as a matter of course, contracts should be enforced according to law, and disadvantaged groups should seek to advance by vindicating their rights. In terms provided on the World Bank Web site, "Through a comprehensive approach that emphasizes strengthening the rule of law to reduce poverty, the Legal and Judicial Reform Practice Group is working with governments, judges, lawyers, scholars, civil society repre-

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sentatives and other organizations to build better legal institutions and judicial systems that address the needs of the poor and the most vulnerable'' (World Bank 2002). According to this approach, we address poverty largely through economic policies that are supposed to promote growth and by the development of legal institutions focused on property rights and their protection.

An emerging LSA literature on this new law and development agenda provides some skepticism about its accomplishments and approaches (e.g., Rose 1998; Thome 2000). Efforts to build a new role for courts have not succeeded very much so far. But the mainstream of the LSA, I will argue, has again adopted the agenda of global reform through law. Consistent with the research that Yves Dezalay and I have undertaken for some time, I want to explore this consensus and ask why it has again been reached. The presidential address, as stated above, helps us understand why it is so easy to fall in line with this new orthodoxy. Indeed, it is so taken for granted that it hardly seems like a new orthodoxy at all.

We might begin by considering another organization that, like the LSA, is preeminent in a particular international field (Dezalay & Garth 1996). The International Council for Commercial Arbitration (ICCA), centered in Europe, is the most important group of international commercial arbitrators. Its members play a key role in setting the tone and policy for the general field. The ICCA constantly seeks to gain more members from outside the leading Western countries, and as part of that process brings its annual meetings to places such as Korea and India. New members from developing countries, not surprisingly, seek often to bring a ''Third World perspective'' to international commercial arbitration, and the insiders seem genuinely to welcome that perspective. Nevertheless, as a practical matter, a Third World perspective succeeds in this field only if it is directed to improving the legitimacy of the existing private justice system dominated by Western lawyers. There are strong incentives to tame any radical Third World perspective and to welcome relatively minor challenges to the core of the ICCA. Recognition by the core of international commercial arbitration gives stature and credibility to local lawyers from outside the core, and the participation by those from outside enhances the legitimacy and geographical spread of the approaches and norms of the mainstream of international commercial arbitration. The mix ensures that the ICCA will hear and be able to respond to potential criticisms without threatening the basic system.

It should not be surprising if something similar is happening with the LSA. The investment by outsiders in the LSA helps give credibility to the LSA and to those whose scholarship is recognized within the LSA. A potential difficulty with the LSA prize for non-

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U.S. scholars, therefore, is that the scholarship has to be judged by standards from within the LSA and its predominant approaches. It would be difficult, for example, to give the prize to someone who rejects empirical research or has no particular interest in law. We are quite naturally looking for our counterparts—"law and society" scholars—from outside the United States or, even better, scholars whose work helps the LSA take into account other perspectives that will enhance the basic approaches of the LSA core. Since the approaches of the LSA are the product of unique U.S. conditions, efforts to find law and society research abroad tend to lead to scholars who have been trained in the United States or through one or another form of law and development. This is perfectly understandable. It is almost impossible to decide how to include or exclude someone from the internationalizing field of law and society without thinking of the LSA and those who constitute its mainstream. Our desire to welcome and to be open, in short, is embedded in international processes and hierarchies that complicate our task.[1] Mather warns us "how the construction of categories reflects and reinforces broader patterns of political and social power," (Mather 2003:262), and her point is an important one. At the same time, it is difficult to avoid using the categories that "make sense" to people in the LSA.

It may be unfair to compare the LSA and international commercial arbitration. The LSA mandate, which focuses on empirical research and critical issues such as the relationship between law and social change, differs greatly from that of the ICCA. The ICCA and the field of international commercial arbitration emerged largely in order to protect the contractual rights of powerful multinational corporations. Our cause in the LSA is different, and it may not be helpful to that cause to point to unpleasant hierarchies that are perhaps just part of life and that we are in any event trying to avoid. It is also obvious that the non-U.S. members of the LSA are not making these kinds of critical points. They are asking mainly for places of respect in the LSA and recognition for work and activities that they believe contribute to the scholarly mission of the LSA. Maybe we should let well enough alone. However, in the spirit of the presidential address, I will discuss what we might learn by looking more closely at the LSA and its relationship to the United States.

[1] The hegemonic processes I describe do not mean that the traffic in ideas and approaches is one-way—from U.S. scholars to other scholars. Non-U.S. scholars seeking recognition from the scholarly hierarchy in the LSA may face some discrimination on the basis of nationality, but a more likely problem is that the scholarship will not be taken seriously unless it matches with interests and research trajectories recognized or consistent with the LSA and its scholarly agenda setters.

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Mather's presidential address is well-placed in the mainstream of the LSA. Examining some of the themes tells us something about the approaches and values embedded in our organization. Much of the address, as noted before, is about openness to new approaches and a reluctance to impose paradigms, but a picture of the LSA and its research nevertheless emerges. The introduction, for example, makes the basic point that "international developments offer tremendous resources and potentials . . . for achieving greater equality and justice" (Mather 2003:260). With respect to future programs of research, similarly, the address emphasizes that "[T]he language of law provides a key resource for those seeking change in law. By expanding legal categories beyond their conventionally accepted meanings, petitioners may succeed in creating new law" (2003:269). And "legal language has provided new vehicles for political change" (2003:269). The address thus sees law as a way for those who "lack significant social or political power" to "trump politics" (2003:269). The address mentions the importance of institutional structure in addition to legal discourse, highlighting the LSA's own genesis, but it does not explore how that genesis may have imprinted the LSA with an orientation we tend to take for granted—namely, that the road to social change goes through legal advocacy. Consistent with this emphasis, Mather highlights "new institutional structures" that expand the "reach of law" and allow "human rights advocates, environmental activists, and women's groups" to further their causes (2003:269). Citing scholars from inside and outside the United States, she notes that international law has become for many a privileged space for political activity on behalf of disadvantaged groups, and that "international legal strategies" are keys to reshaping fields of state power (2003:270).

The message of these passages is that law and lawyers are or ought to be at the center of struggles for social change, and that researchers in the law and society tradition should look for institutional and rhetorical legal spaces that can provide opportunities for rights-based strategies that can trump politics in favor of social reform on behalf of disadvantaged groups. Legal discourse and legal actors are naturally key to these strategies. From an international perspective, this approach leads us to look for cause lawyers who can further this strategy abroad on behalf of dominated social groups. What Mexico needs, from this perspective, is better legal enforcement of labor and environmental rights on the books, and an active "civil society" and a reformed judiciary can temper Asian corruption. This law-centered model of social reform seems natural to us, since it fits the United States reasonably well.

Even in the United States, to be sure, the leading role for lawyers in social change has been challenged. Lawyers and activists,

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we now see, are not necessarily the slaves to legal formalism that critics once seemed to suggest. Their legal strategies can be very sophisticated politically and connected effectively to other strategies. Whether lawyers lead or join in and tame other political movements is never easy to say. What appears in retrospect to be a law-dominated or -oriented social change might also have been portrayed as a move by a few legal entrepreneurs to get lawyers and the law behind a movement that was already on the way to success (Shamir 1995; Tomlins 2000; Garth 1999; Garth & Sterling 1998). Put in simple terms, the social position of lawyers and law schools in the United States, combined with an intensely competitive law school world, has meant that lawyers and social movements have over time been anxious to find each other. The union is sustained in part by the strong institutional support for legal idealism within the legal profession and the law schools.

The LSA's orientation is consistent with this legal idealism. In terms of research, the tremendous attention within the LSA community to the possibilities of rights strategies, their limits, political complementarities, the role of legal discourse, debates about mediation versus class actions, and analyses of the conditions that will lead to public interest careers or pro bono activity are all consistent with our legally idealistic view of ourselves and the world.

This is not the place to explore how these approaches have emerged in the United States. What should be clear is that we have developed a remarkable institutional arrangement that helps attract idealistic talent to the profession, celebrates the commitment of certain lawyers to the public interest and access to justice, and ensures that the vast majority of legal talent will gain prestige and economic riches by working to promote large businesses and rules that will make the world safe for them. By contrast, in most of the world—especially in countries with the civil law tradition and those with the barrister tradition in the common law—lawyers have gained their legitimacy in part through different political activities, which have often involved speaking for the poor and disadvantaged in politics rather than through legal advocacy, and in part through a litigation system that they have protected and supported as "independent professionals" while also defending the property rights of the landed aristocracy. Lawyers in most countries have further protected their reputations by penalizing those who got their hands dirty by becoming too closely identified with business and business clients. It is not that the many variations on this model are better or more just than what has emerged in the United States, but we should see that our brand of cause lawyering—creating public interest law firms on the model of corporate firms—may not take root and may not work in any event

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in the same way it purports to in the United States. Given the disappointments that we can expect to find, we may be following the same trajectory as the previous law and development movement—from idealism about legal reform to skepticism and disillusionment.

Despite the admonitions of the presidential address, its themes are consistent with this idealism and support of our U.S. model. The enthusiasm is not just on the side of the exporters. Eager importers are on the other side. The theories based on the U.S. experience can be used by importers to gain status and the legitimacy that comes through connection to "cutting-edge" theories from the United States. The debates and theories associated with the model are therefore quite relevant outside the United States. That relevance does not necessarily mean, however, that they are the best theories and approaches for either understanding the role of law or advocating social change. The theories have power because of the prestige and position of the United States. In short, it is quite natural for us to export our model, and others have strong reasons to import it (Dezalay & Garth 2002a, 2002b).

It is also true that the record is not entirely disappointing to the advocates of the law-oriented model. There have been some extraordinary successes in importation consistent with the model, including the development of human rights organizations in Latin America and South Africa funded by the Ford Foundation and others. Once the authoritarian and repressive regimes changed, however, the nongovernmental organizations outside the state tended to shrink or be absorbed into the state. One result today is that the public interest side of law is not well-developed outside the United States (Dezalay & Garth 2002a, 2002b).

By contrast, the other side of the U.S. model has been quite successful. Corporate law firms then attract local talent, place it in the service of large corporate interests, and legitimate it by reference to the U.S. legal approach and that of the leading English solicitors. It is an open question whether the best approach to social reform in such a situation is to push harder for a U.S. model of public interest law—the approach most consistent with the LSA. Maybe, for example, it would be wiser to look at social movements seeking to strengthen and reorient the state. At least, as researchers, we ought to consider how the U.S. approach and different approaches relate to each other and in turn relate to social change.

The LSA focus on legal activism leads us naturally to the efforts to build independent and strong courts, to legal rights, and in general to a search for ways that, we hope, might allow the underprivileged to "trump" politics. We encourage lawyers to use the law strategically and to learn to go well beyond traditional legal

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formalism. The LSA position here, as reflected in the presidential address, fits perfectly with the new law and development movement (Dezalay & Garth 2002a). It helps build a consensus for a new role for lawyers—a role that, not incidentally, can make lawyers more useful to foreign and large domestic businesses. LSA scholars are certainly not the only or the leading participants in the new law and development movement, but they have found a way to participate again.

The question is why we have become such enthusiastic participants. The LSA, after all, provided the institutional home for the first generation of law and development actors and scholars after they turned on their earlier efforts (Trubek & Galanter 1974). We learned from their criticisms that we cannot simply export U.S. models and that it is essential to go beyond legal institutions to understand the law in its social and economic context. Indeed, many critics of law and development went further. They questioned the model of "liberal legalism" as a basis for U.S. social reform efforts. The demise of the activist state in the United States—which for a time made legal strategies look quite good—led to skepticism about "rights" as a basis for social change. Somehow, however, we forgot earlier lessons. Liberal legalism made a comeback both domestically and as a model for export abroad. We also forgot the mandate to consider law in a broader social context and in relation to state structures of power.

I would like to see more research on the subject of liberal legalism at home, asking how it relates to competition between law and other forms of authority, how it plays into the legitimacy of the legal profession, how it reinforces a social hierarchy that privileges lawyers, and how the role of lawyers relates to challenges to the social order legitimated by law. These questions, perhaps because of the relationship and even subordination of the LSA to agendas defined more by lawyers, are not often asked (Dezalay & Garth 2002a). However, the more important question in terms of the presidential address and law and development is why we do not have more questioning of the exports and imports of the same approach.

We can suggest an answer that is consistent with Mather's address. Legal idealists confident of their own good intentions—and fortified with professional ideology that celebrates those intentions—want to fight on the side of justice. They look for their potential counterparts abroad, listen to their explanations about their own idealistic intentions to put law in the service of good causes, and then naturally support and celebrate those counterparts. As I suggested above, they see no reason to muddy the waters by searching for hierarchies and ambiguities in their position. Legal strategies seem to be working to safeguard the environment, protect

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human rights, and combat violence against women, with public interest lawyers leading the way, making it tougher still to look deeper into the hierarchical processes that determine the agendas of these global actors and the way these agendas intersect with local hierarchies and structures of power. More important, from a scholarly point of view, it limits the ability of mainstream LSA scholars to gain a critical perspective on the new law and development movement—other than to call for more support of cause lawyering as a global antidote to neoliberal globalism. We seek to remedy the inequities of U.S.-style globalization by offering more of our favored brand of U.S.-style globalization.

Mather's presidential address invites us to consider openly and honestly how the LSA can welcome and learn from non-U.S. scholars. In that spirit, I want only to push our agendas further to consider what we are promoting from within the LSA, why it finds favor in certain groups abroad, how it relates to the new law and development movement, and what the consequences are in terms of the construction of global norms and the maintenance of particular hierarchies at home and abroad. Without some better understanding of these processes, we are likely to see our growing foreign contingent simply as a recognition and legitimation of the essential goodness of our own commitments and strategies in favor of progressive change. We should not, of course, give up on our idealism or our strategies. They are what make this presidential address appealing. But we might try to look deeper at the circumstances that produce them, how they relate to the particular relationship of the legal profession to economic and political power in the United States, and why LSA approaches at this time are appealing to a growing numbers of scholars abroad.

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