

**Law and Development
Legal Studies 158**

Spring 2011

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4 units
[Time]
[Location]

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COURSE REQUIREMENTS AND GRADING

You are responsible for all material covered in assigned readings, lectures, and discussion sessions. Your grade for the course will be determined by the weighted average of your grades for participation in discussion sessions, three short written assignments, the in-class midterm exam, and the final exam. The weights will be:

Participation in discussion sessions	10%
Short written assignments	24% (8% per assignment)
Midterm exam	26%
Final exam	<u>40%</u>
	100%

Discussion section

You must attend all discussion section meetings and participate actively. If you must miss a class meeting, please notify your GSI as soon as you know that and indicate the cause of your absence.

Short written assignments

You will be required to turn in a short, several-page essay at the end of the third, sixth, and twelfth weeks of the semester. A specific topic will be assigned for each essay, involving a combination of synthesis and analysis related to particular facts, arguments, or problems addressed in the readings and/or lectures.

Midterm and final examinations

The midterm and final examinations will assess your knowledge of and analyze facts, dilemmas, arguments, and interpretations covered in the course. Both will employ a combination of

multiple-choice, fill-in-the-blank, short essay, and similar formats. The final examination will also include one longer essay. The midterm exam will take place in the first class of the ninth week of the semester. The final exam will cover material from throughout the term, although it will test material from the weeks after the midterm more heavily.

READINGS

There is one required book for the course, which will be available at the ASUC Bookstore and on reserve at Moffitt Library:

Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006)

Many of the other readings are available to the public or through the UC Berkeley libraries in electronic form. These will be posted on or linked to the course website to minimize their cost to you (i.e., saving copying charges and royalty fees). Other readings will be in a course packet available from Copy Central.

SYLLABUS

Week	Topics and reading assignments
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I. Introduction

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| 1. Course overview, fundamental concepts, and basic vocabulary | <p>Topics: Introduction to course. Overview of concepts of development and strategies for promoting development. Basic background on of types of law (formal, informal, customary/traditional) and basic elements of formal legal systems.</p> <p>H.W. ARNDT, ECONOMIC DEVELOPMENT: THE HISTORY OF AN IDEA 1-7 (1987).
United Nations Development Program, "The Human Development concept," at http://hdr.undp.org/en/humandev/.</p> <p>United Nations Development Program, "Origins of the Human Development Approach," at http://hdr.undp.org/en/humandev/origins/.</p> <p>AMARTYA SEN, DEVELOPMENT AS FREEDOM 3-11 (1999).</p> <p>ARJAN DE HAAN, HOW THE AID INDUSTRY WORKS: AN INTRODUCTION TO INTERNATIONAL DEVELOPMENT 63, 69-88 (2009).</p> <p>INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW 101-12 (2009).</p> <p>PENAL REFORM INTERNATIONAL, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 9-16 (2000).</p> |
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2. Law and the rise of the centralized state

Topics: Introduction to functions of law and to legal change, including resistance. Law as a tool of power and means to (try to) control social, political, and economic life. Colonial uses of law.

JAMES SCOTT, *SEEING LIKE A STATE* 33-52 (1998).

Jörg Fisch, *Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion*, in *EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH-CENTURY AFRICA AND ASIA* 20-38 (W.J. Mommsen & J.A. De Moor eds., 1992).

Martin Chanock, *The Law Market: The Legal Encounter in British East and Central Africa*, in *EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH-CENTURY AFRICA AND ASIA* 279-305 (W.J. Mommsen & J.A. De Moor eds., 1992).

David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 *RES. L. & SOC.* 138-45 (1980).

II. Top-Down Models of Law and Development

3. Becoming “modern”

First short written assignment due.

Topics: “Modernization” of legal codes and institutions by local leaders based on unidirectional ideas of progress in law, government, economic activity, and social life. Transplantation and adaptation of foreign models. Case study of transformation of Japanese legal system during Meiji Restoration.

Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 *AM. J. COMP. L.* 902-11 (2008).

René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 *TUL. L. REV.* 187-90, 193-201 (1962-63).

JAMES GARDNER, *LEGAL IMPERIALISM* 29-34 (1986) (“Legal Transfer” section from Ch. 2: “The Development Decade and Legal Transfer”).

JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 3-18, 67-82, 121-38 (1991).

4. The first Law and Development movement: Vision and methods

Topics: Linear model of economic growth coupled with political and social “modernization.” Law as a tool of state-led development. Legal change driven by outside development agencies and foundations (e.g., US Agency for International Development and Ford Foundation), primarily through rewriting of legal codes, changes in legal education, establishment of legal aid programs.

WALTER ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* 1-16 (1960) (“The Five Stages of Growth: A Summary”).

Dwight D. Eisenhower, *The Role of Lawyers in Promoting the Rule of Law*, 46 A.B.A. J. 1095 (1960).

Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 477-79 (1995).

David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 2-10 (1972).

John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP L. 457-73 (1977)

David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1065-74 (1974).

JAMES GARDNER, *LEGAL IMPERIALISM* 191-210 (1986) (Ch. 8: “The Reform of Legal Education in Democratic Colombia”).

5. The first Law and Development movement: Disenchantment and critique

Topics: Critiques of the vision and execution of the first Law and Development movement, including cooptation by entrenched elites, gaps between law as written and as enforced, and lack of understanding of context.

David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1074-93, 1100-02 (1974).

JAMES GARDNER, *LEGAL IMPERIALISM* 3-26 (1986).

David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 RES. L. & SOC. 129-38, 145-52 (1980).

Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470-76, 483-86 (1995).

6. Neoliberal growth and the second Law and Development movement

Topics: Neoliberal economic model – growth driven by market, with minimal state involvement. Law as a framework for private transactions and restraint on state intervention. Legal change through transplantation, with a focus on private law.

Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 206-19 (2008).

Second short written assignment due.

David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 128-50 (David Trubek and Alvaro Santos, eds., 2006).

T. Waelde & J. Gunderson, *Legislative Reform in Transition Economies: Western Transplants: Short-Cut to Social Market Economy Status?*, in MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION 84-90 (Ann Seidman, Robert B. Seidman & Thomas W. Walde eds., 1999).

Wade Channell, *Lessons Not Learned about Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137-59 (Thomas Carothers ed., 2006).

7. Good governance and the rule of law: Vision and methods

Topics: Major institutions’ turn to “good governance” and the “rule of law” as key influences on economic growth, with many programs aiming to achieve distributional and social development goals as well. The World Bank as a key actor in law and development.

Thomas Carothers, *The Rule of Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3-13 (Thomas Carothers ed., 2006).

David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 150-66 (David Trubek and Alvaro Santos, eds., 2006).

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 253-59, 266-92, 298-300 (David Trubek and Alvaro Santos, eds., 2006).

8. Good governance and the rule of law: Limitations and challenges

Topic of first two classes of week: Limits and criticisms of good governance approach. Failure to adapt to national contexts. Technocratic approach ignores distributional consequences of change, role of power, and resistance from vested interests. Focus on law as written and ideology of legal institutions rather than their functioning in practice. Unclear causal relationship between legal change and economic development.

Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER FORUM WORLD AFFS. 49-61 (2009).

Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 105-30 (Thomas Carothers ed., 2006).

Daniel Kaufmann, *Rule of Law Matters*, 104 NW.U. L. REV. COLLOQUY 244-48 (2010).

D. Daniel Sokol, *Law and Development – The Way Forward or Just Stuck in the Same Place?*, 104 NW.U. L. REV. COLLOQUY 238-43 (2010).

Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 47 AM. J. COMP. L. 766-775 (2009).

Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331-42 (2008).

Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 938-45 (2008).

Review of Unit II

(last class of week)

9. Midterm exam

(first class of week)

III. Bottom-Up Models of Law and Development

9. (second and third classes of week)
Holistic conceptions of development
- Topics: United Nations Development Program Human Development concept. Development as full participation in social and political life. Freedom as end of development versus as means to a narrower version of development.
- UNITED NATIONS DEVELOPMENT PROGRAM, 1990 HUMAN DEVELOPMENT REPORT 9-16 (1990) (Ch. 1: “Defining and Measuring Human Development”).
- United Nations Development Program, “Human Development Indices,” at <http://hdr.undp.org/en/humandev/hdi/>.
- Sabina Alkire and Séverine Deneulin, *The Human Development and Capability Approach*, in AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 22-48 (Séverine Deneulin with Lila Shahani eds., 2009).
- Séverine Deneulin, *Ideas Related to Human Development*, in AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 51-54 (Séverine Deneulin with Lila Shahani eds., 2009) (Section: “Human development and market liberalism: Freedom compared”).
- AMARTYA SEN, DEVELOPMENT AS FREEDOM 35-53 (1999) (Ch. 2: “The Ends and Means of Development”).
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10. **Rights-based development**
- Topics: Using human rights law and human rights approaches to shape development initiatives. Integrating agency and self-determination of beneficiaries (e.g., the poor) into development efforts. Adoption of rights-based approach by large development bureaucracies, including United Nations and large international NGOs. Tensions between rights-based approach and history and culture of development organizations.
- PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT 9-38, 47-50, 122-66 (2004).
- Seyhan Aydinligil, *Gender policy in Turkey*, in AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 304-11 (Séverine Deneulin with Lila Shahani eds., 2009).
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11. Combating poverty by formalizing legal relationships

Topics: Informal rules and practices as obstacles to economic development and poverty reduction. Formalization of rights and access to formal dispute resolution mechanisms as development strategy. Critiques of strategy. Case study of Organization of American States “right to identity” (universal birth registration) project.

HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 1-13 (2000).

COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, *1 MAKING THE LAW WORK FOR EVERYONE* 13-22, 25-40 (2009).

Edward Robbins, *Formalization of Land and Housing Tenure to Empower the Poor: Simple Nostrum or Complex Challenge?*, in *RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY* 175-99 (Dan Banik ed., 2008).

Stephen Golub, *The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice*, 1 *HAGUE J. RULE L.* 101-16 (2009).

Organization of American States, “PUICA: Civil Identity Program of the Americas: About PUICA,” at http://www.oas.org/sap/english/cpo_modernizacion_puica.asp.

Organization of American States, “PUICA: Civil Identity Program of the Americas: Lines of Action,” at http://www.oas.org/sap/english/cpo_modernizacion_puica_lines_action.asp.

Organization of American States, “PUICA: Civil Identity Program of the Americas: Projects,” at http://www.oas.org/sap/english/cpo_modernizacion_puica_projects.asp

12. Legal empowerment of the disadvantaged

Topics: Creative use of law to expand economic, social, and political opportunities of people disadvantaged by, for example, poverty or gender discrimination. Use of strategies integrating law, politics, education, and other vehicles for change. Maximizing role of the disadvantaged themselves in design and execution of social change initiatives. Case study of Timap for Justice, Sierra Leone.

Third short written assignment due.

Stephen Golub, *The Legal Empowerment Alternative*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 161-87 (Thomas Carothers ed., 2006).

AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 146-59 (1999) (Ch. 6: “The Importance of Democracy”).

Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 *YALE J. INT’L L.* 428-65 (2006).

Jamie O’Connell, *Empowering the Disadvantaged after Dictatorship and Conflict: Legal Empowerment, Transitions and Transitional Justice*, in *LEGAL EMPOWERMENT: PRACTITIONERS’ PERSPECTIVES* (Stephen Golub ed., forthcoming 2010) (excerpt: analysis of Timap for Justice).

Possible guest lecturer: Stephen Golub, Consultant, United Nations Development Program.

13. Challenging customary law

Topics for this week and first two classes of next week: Overview of customary legal systems and processes. Common objections to many customary legal systems (e.g., gender discrimination). Strategies for “reform,” from replacement to engagement. Ethical dilemmas (e.g., cultural imperialism) and difficulties in implementation of change strategies.

Leila Chirayath, Caroline Sage and Michael Woolcock, “Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems,” World Bank: Background Papers for *World Development Report 2006: Equity and Development*, July 2005, 1-7.

PENAL REFORM INTERNATIONAL, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 9-16 (2000).

EWA WOJKOWSKA, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 16-23, 25-29, 47-55 (2006).

Ewa Wojkowska & Johanna Cunningham, *Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor*, in LEGAL EMPOWERMENT: PRACTITIONERS’ PERSPECTIVES (Stephen Golub ed., forthcoming 2010) (excerpt on Acehnese adat system and recommendations for engaging it).

INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW 101-12 (2009) (Ch. 8: “Cultural Diversity, Plural Legal Orders, and Justice – Policy Options and Principles”).

14. Challenging customary law
(continued – first two classes of week)

Topics for first two classes: See previous week.

WORLD BANK, FORGING THE MIDDLE GROUND: ENGAGING NON-STATE JUSTICE IN INDONESIA xvii, 3-10, 41-57, 61-74 (2008).

Concluding lecture (last class of week)

Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 1 WORLD BANK L. REV. 87-111 (2003).

SALLY FALK MOORE, LAW AS PROCESS 1-13 (1978).
