
FROM LEGAL MISSIONARY TO CRITICAL SCHOLAR: MY LAW AND MODERNIZATION JOURNEY

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INTRODUCTION: I MEET THE GOD OF MODERNIZATION THEORY

In 1966, like a god descending from Mount Olympus, National Security Advisor Walt Whitman Rostow arrived in the US Embassy in Rio to review the USAID program. Brazil was considered to be strategically important to the US fight against communism in Latin America and the US aid program there was one of the largest in the world.

The author of the leading treatise on modernization and now a high-ranking foreign policy official, Rostow symbolized the marriage of knowledge and power. Having developed the ideas about modernization that animated US development policy in the 1960s, Rostow was in Brazil to see how the theory was working in practice.

Here was the *beau ideal* of the Cold Warrior, armed not with guns and mortars, but with social science theory. Here was someone who could write the “non-communist manifesto” with one hand and oversee a massive foreign affairs bureaucracy with the other.

60 years on, this moment remains fixed in my memory. As a junior member of the USAID Mission staff, I attended the meetings in which Rostow, in a professorial tone, told seasoned foreign aid specialists how they should be doing their jobs.

I was hooked. Here was the marriage of science and policy, of modernization theory and foreign affairs. Here was a vision for a career that married success in the academic realm with success in the policy world. It inspired my move from the Department of State to academia a few years later. And it led directly to the Yale Program in Law and Modernization.

The Program was set up to use the modernization theory Rostow had helped create to illuminate and guide legal development in the Third World. We started on this project with enthusiasm. But before long, many who participated in the Program began to question the modernization story. Ironically, instead of being the headquarters for the application of modernization theory to law, the Yale Program became a center for critique of the theory and the source of alternative ideas. In this essay, I trace the evolution of the Program from the beginning to the emergence of a critical stance by recounting my experience as one of its architects.

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1) HOW DID I GET THERE?

But first, we have to go back in time to the period before Yale when I was in the USAID Mission to Brazil and ask: what was I doing in Rio listening to Rostow pontificate? This was not what recent Yale Law School grads and former Federal Circuit Court clerks like me were supposed to do. I had turned down offers from two leading corporate law firms to get there. How did I get on this track?

When I was a law student, I dreamed of working as a lawyer on development projects in the Third World. How I developed this goal, I have no idea. There was no such career, very few jobs of this kind, no courses to take to prepare. Yet when I went on the job market in 1962, I searched for such opportunities and found one at USAID. Ramping up the Cold War, the Kennedy Administration had reorganized and massively expanded US foreign aid. Because of Cuba, special attention was being paid to Latin America. Under the rubric of the Alliance for Progress, the US launched a major initiative for the region: there were jobs for lawyers in DC and overseas helping manage this burgeoning program to modernize Latin America along US lines.

In 1962, I joined the USAID Office of the General Counsel for Latin America and in 1963 was slotted to take over the following year as Legal Advisor in Brazil where at the time we had a program of modest proportions. In late 1963, I started preparations for the move to Brazil. Things changed in March 1964 when the Brazilian Military ousted the left-leaning government. The US encouraged the coup and provided massive economic assistance to the new regime. To calm any worries about conflict with the Alliance for Progress ideas of democracy and liberty, the generals painted the prior regime as one that was moving towards totalitarianism and promised a quick restoration of democracy. US Ambassador Lincoln Gordon endorsed that promise which became the official US position. Having just started to learn about Brazil, I was in no position to challenge that assessment.

While such hopes for restoring civilian rule were projected into the future, the immediate need was to shore up the military regime. An emergency loan of \$50,000,000 was authorized. I had the dubious distinction of drafting the agreement.² Within a short time, the annual USAID budget had grown to over \$300,000,000 per year. I found myself doing more and more work on Brazil while still in DC. And, by the time I arrived in Rio in September 1964 to take over the Legal Advisor post, the Mission had grown substantially and projects needing legal advice abounded. Immediately on arrival I found myself very busy with loan negotiations and the legal and policy aspects of project administration.

I confess I was too busy and too caught up in the excitement of mounting such a massive aid program to worry too about the political situation as the military tightened its grip on the country. If I thought about it at all, I tended to accept the

² Breaking all precedent, instead of preparing the agreement in Washington and taking it to Rio for signature, I was told to send it to the Embassy by cable.

assurances from Ambassador Gordon that the generals would restore democracy swiftly.

2) LOOKING FOR LAW IN DEVELOPMENT

As Legal Advisor, I attended all the senior staff meetings and major policy discussions. USAID had developed a comprehensive program aimed at “modernizing” many aspects of Brazilian life. In the staff meetings, we went around the room with each department reporting on recent progress. There were reports from the offices of business development, education development, housing and urban development, agricultural development, and the like.

I wondered: what about “legal development”? Surely law must play a role in retarding or accelerating development: why is there no office of *law and development*? No projects to develop law in Brazil? I had some idea of the role of law in US economic, social and political history but no idea how to go from there to policies appropriate for Brazil. Despite USAID’s vast planning apparatus, there was nothing I could find linking law and development. Nor was there official support for projects in this area. While USAID boasted many outstanding lawyers, we were all fully engaged in the legal aspects of other kinds of projects and no one thought about projects to modernize Third World legal systems.

3) THE CAPITAL MARKETS LAW

The closest thing to a law and development project I experienced was our effort to create a domestic capital market in Brazil: that project included efforts to transplant US securities law. I played a minor part on this project but it helped convince me of the need for systematic law and development programming.

After the military takeover, the US worked closely with technicians in the Ministries of Economy and Planning to shift Brazil fully back into the US-led capitalist camp and restart the economy. The Brazilian Capital Market Law of 1965³ was just a small part of that effort. Its goal was to create a domestic capital market that could be a source of funds for the kind of new and expanding private firms which the regime and the US sought to foster.

At the time the military took over, the state controlled 60% of the Brazilian economy and large foreign or family-run firms controlled much of the rest. State companies dominated banking, steel, and other major industries. The capital market was weak and focused largely on government securities and short-term paper. There was no real market for the sale of corporate shares. The government wanted to create the conditions for the creation of new private firms. It also wanted family run firms to open up their capital because it was thought that as listed companies, they would be under shareholder pressure to become more efficient.⁴

³ See Law 4728 of July 14, 1965. For a full discussion of the capital market law, see Poser (1966, 1283).

⁴ I called this policy “agrarian reform in the corporation”. See Trubek (1971, 32).

Since the Brazilian technicians looked to the US for a model of a functioning capital market, it is no surprise that they looked to US securities laws for guidance as they constructed a new legal regime for the markets. And given the US interest in shaping Brazilian institutions, USAID was happy to help. Funding from USAID brought a senior SEC official to Brazil to help design the new securities laws.

While I was in Brazil, I had followed the Capital Markets project closely. It never was part of my job and it did not lead to a law and development project. But as my nascent views of law and development were taking shape, I decided on my own to follow the Capital Markets project and the effort to transplant US securities law.

At the time, I knew nothing about modernization theory as such but, as it had helped shaped the kind of Alliance for Progress policies I was charged with enforcing, I had absorbed a lot of these ideas by osmosis. So, I promoted the Capital Markets Law as part of legal modernization. I brought one of Brazil's leading corporate lawyers from Sao Paulo to Rio to lecture on the bill to Embassy and USAID staff.

Although I did not fully understand it at the time, the Capital Market Law support effort encapsulated the core elements of US development policy and nascent law and development thinking circa 1965. Guided by modernization theory, this approach saw "development" as largely internal to each country; a robust domestic private sector was the long-term goal even if SOEs were tolerated for the time being; a modern Capital Market needs a modern legal architecture; the US, as the leading capitalist country, shows the way to legal modernity; and its laws could be transplanted.

4) LAW AND DEVELOPMENT STARTS: CEPED

My involvement in the Capital Market Law was *ad hoc* and informal: it was not part of my job and did not lead to a USAID law and development project as such. To spend time developing such a project, I needed the approval of my boss, the Mission Director. An old USAID hand from the Point Four days, he was skeptical about the importance of law and development programming. But he was eager to keep me in Brazil as his lawyer, so he agreed to let me try. Showing just how much money was sloshing around at the time, he said "Take a million dollars and see what you can do".⁵

Now that I had the Mission Director's blessing and more money than I could possibly spend, I had to figure out how to go from casual interest and vague ideas to a fundable project. But what to do? What was "underdevelopment" in law and what would a project *develop*? To answer that question, I drew on my own perception of lawyering in Brazil. In my legal job for USAID, I had worked with many Brazilian lawyers, mostly in the public sector, as most of our loans went to

⁵ These were local currency funds generated by the sale of surplus agricultural products to Brazil under PL 480.

government agencies and the SOEs which dominated the Brazilian economy at the time.

I was educated in the pragmatic realist tradition at the Yale Law School and further trained by my first USAID boss, the General Counsel for Latin America and consummate pragmatist William D. Rogers, *ex* Arnold and Porter. As a result, I approached lawyering as problem solving not just rule interpretation. But I found, much to my frustration, that many Brazilian lawyers did not share the problem-solving approach and were often deaf to my efforts to find ways to get around legal roadblocks to USAID-supported projects.

Here, I thought, was a barrier to development: these lawyers were barriers to progress. Maybe I reasoned, the fault lay in their legal education which was highly formalist. Maybe, I thought, if we could change ideas of lawyering, we might make the legal management of development projects more pragmatic and effective. That led to my (and maybe USAID's) first law and development project: CEPED.

How do you put together a project in legal development? Start with influential and knowledgeable insiders. My first contact was Marcilio Marques Moreira, then in charge of international affairs for BNDE, Brazil's National Economic Development Bank. We had worked together on AID loans to BNDE. Trained as a lawyer and diplomat, Marcilio came from the Rio elite. He had worked with Santiago Dantas, former Foreign Minister and author of a widely read article calling for a reform of legal education.⁶ Drawing on his extensive contacts in the legal profession, Marcilio put me in touch with some reform-minded law professors and with Alberto Venancio Filho: in the early 60s, Venancio had worked on legal education reform in the Ministry of Education and at the University of Brasilia.

A group emerged that was interested in working with USAID. Led by Caio Tacito, a senior law professor at the Rio State University and with Venancio serving as coordinator, this group met to discuss reform ideas. All agreed that new methods of teaching and more realistic and policy-oriented courses were needed. But they quickly rejected a major effort within one of the existing law schools. They thought that any such effort would meet resistance both from the existing professoriate who were comfortable with the current system, and from the military regime which was leery of any change whatsoever in law schools which traditionally had been centers of protest.

What emerged was the proposal for a one-year post-grad course for lawyers already in practice that would serve as a laboratory for the introduction of new methods and subjects while creating a cadre of reform minded lawyers in the higher ranges of the profession. The students were drawn from the public and private sectors in equal numbers and were expected to take a year from their jobs to study full time. A new institution called CEPED, Centro de Estudos e Pesquisas no Ensino do Direito (Center for Studies and Research on Legal Education) was created: it was formally part of the Guanabara State Law School but operated

⁶ I translated this paper into English and circulated it widely in USAID.



independently and was housed in the Getulio Vargas Foundation, an interdisciplinary center of policy research and teaching located far from the law school.⁷

CEPED organized the faculty, planned the courses, and recruited the students. USAID provided funds to operate the course, for visits to US law schools, and to hire several US professors who joined the CEPED faculty for one or two year stints. Eventually, jointly with the Ford Foundation, it offered funds for grads of the CEPED course to pursue LL.Ms in the US.

CEPED courses focused on law and policy affecting business and economic activity and included topics and methods familiar to US law professors: pre-assigned readings and class discussion, and problem-oriented exercises with role playing. It even included a course on economics, something still rare in the US⁸. While the CEPED program deployed methods and included topics common in the US, it was radically different from the norm in Brazilian law schools. On its face, therefore, it was the classic modernization era project: a local practice thought to restrict economic development is transformed by transfer of know-how from the United States where “modern” techniques have been developed. Thanks to US funds and US technical assistance, the transformed institution contributes to economic development.

The real story was more complex. We liked to think that the pedagogic ideas had come exclusively from the contacts with US that we had financed: eager to keep the funds flowing, the Brazilians did not discourage that belief. But, in fact, a lot of the pedagogic ideas nurtured by CEPED had already been developed by the Brazilian faculty in trial seminars and in-house courses in law offices, especially the legal office of the Rio Light Company, a major Canadian owned firm reputed to have the best legal staff in the country and from whose staff several CEPED professors were drawn.

While US ideas may not have been as essential to CEPED as we Americans thought, US money was. The program depended on funding from both USAID and the Ford Foundation. By the early 1970s USAID was reducing its Brazil commitments: once I was gone from Rio, this project had less support inside the Mission. Ford still had money set aside for CEPED but was unwilling to keep supporting the Center unless it took on reform of the existing law schools directly. The CEPED team were not willing to make such a direct assault so Ford pulled out. Although CEPED was considered a great success and trained a cadre of lawyers

⁷ In this sense, CEPED was just the kind of institutional bypass described by Prado and Trebilcock (2019). For a discussion of bypasses to conventional legal education in Brazil—and their distributional consequences, see Trubek and Alves (2020).

⁸ The first class was taught by Mario Henrique Simonsen who later became Minister of Finance.

who went on to important careers in law, government, and academia, when the US funding ended, it closed its doors.⁹

5) INTO THE ACADEMY

By 1966, I was having doubts about the US role in Brazil and the promises for swift restoration of democracy. These doubts were confirmed when the military issued Institutional Act II. This quasi constitutional *dictat*, issued in response to opposition victories in several state elections, essentially closed down normal politics. It abolished the existing political parties, provided for the indirect election of the president, restricted the amount of time Congress could consider legislation before it automatically became law, and stipulated that persons accused of crimes against national security were to be subject to military justice.¹⁰

AI II revealed the authoritarian roots of the regime and dashed any hope for early restoration of democracy and human rights. At a luncheon for US Embassy officials to discuss the Act, I was shocked to find a large contingent fully supportive of this move—I later found out this group was largely made up of CIA officials. I did not resign in anger or protest US foreign policy but these developments, along with other factors, affected my decision to leave the government and seek an academic job.¹¹

In the course of my work promoting CEPED and looking for US scholars to help with the project, I had made several visits to law schools around the US and fell in love with the academic environment while assuming that, like Rostow, I could reenter the policy world later. I entered the job market in 1966 and, much to my amazement, got an offer from Yale: I started in January, 1967. At first, I did not do anything about law and development. Rather, I concentrated on urban policies in the US like exclusionary zoning. Yale had recently received a big grant from Ford to create an Urban Law Program and needed faculty members to staff it: I think it was my interest and knowledge in urban issues, not so much my work on Third World law and development, that influenced the Yale decision to hire me.¹²

I worked on a few US urban law issues but, all along, I kept thinking about law and development. How could I turn my law-related experience in Brazil into an academic career? If you had worked in the SEC or the FTC as a lawyer and then went into teaching, it would be easy to use your expertise in teaching: each of these posts gave you real world experience in well-developed academic specialties. But what could I do with four years as a USAID lawyer?

⁹ The law schools at FGV, while founded many years after CEPED closed, acknowledged the influence of the CEPED experience.

¹⁰ See Institutional Act 2 (AI-2) of October 27, 1965.

¹¹ **A FEW YEARS LATER I PUBLISHED A CRITIQUE OF THE REGIME AND US SUPPORT FOR IT. SEE STEINER AND TRUBEK (1971).**

¹² I had some background on urban issues and in the last six months in Brazil, I served as Acting Director of the USAID Office of Housing and Urban Development.

There was no body of law I could teach about –at least none anyone cared about. There were some government attorney skills I had developed but many were unique to the foreign aid context and, anyway, skills training was not on the law school agenda of the time. What I had was a vision of legal “modernization” and some personal experiences I could shape into “case studies”. In the normal course of things, Yale might have let me teach an occasional seminar on this subject. But it would have been hard to get an audience and harder still to do the kind of field research needed to develop these ideas for publication in US journals.

It was at that point that USAID came along and helped me create a course, attract students, conduct research, and mount a full-scale program on law and modernization. USAID had recently created a new initiative to study non-economic aspects of development and was offering large grants to universities to study those issues.¹³ At that time William Felstiner, another former USAID lawyer and program manager, was the Associate Dean of the Law School and Lecturer. Bill and I had an intimate understanding of how USAID worked and realized that Yale could access these funds. Together, with support from Robert Stevens and other senior Yale faculty members, we convinced the Law School to apply for a grant to study law and modernization. We put together a very general description for a five year research and training program and successfully negotiated a \$1,000,000 five year award. The Yale Program in Law and Modernization was launched!

The massive \$1,000,000 USAID grant¹⁴ for the L&M Program changed everything: all of a sudden we could create a new space in which such topics would be thought of as important; we could interact with Yale social scientists like David Apter and Hugh Patrick who were studying modernization; we could bring people to Yale with these interests including law and society pioneers and scholars and students from the Third World; fund Yale students who wanted to study in those regions; and we could get the support needed for our own research in what were, for the law schools of the day, remote and exotic topics that involved costly travel and assistance.

The Program grew quickly. It was easy to find scholars from around the world who wanted to study or teach at Yale. Social scientists saw this as a new terrain to explore and agreed enthusiastically to cooperate. Yale law students were glad to have a space devoted to larger issues than corporate mergers and literatures more expansive and critical than the cases and commentary current in most courses of the time. Because of the scale of our resources, within a year or two we had created a sort of alternative subculture within the Law School with its own references, vocabulary, and debates.

¹³ Foreign Assistance Act of 1961, Pub. L. 87-194 § 211(d), 75 Stat. 427-428, amended by Pub. L. 89-583 § 103, 80 Stat. 797 (1966), repealed by International Development and Food Assistance Act of 1978, Pub. L. 95-424, 92 Stat. 942.

¹⁴ This would be about \$8 million in today’s dollars

Note that from the very beginning, we emphasized “modernization” instead of “development”. By this time, influenced by Rostow’s work, modernization had become a key word both in the academy and at USAID. Modernization theory emerged in the 1950s as an effort to create an overarching non-Marxist theory of world social, economic, and political change. The theory posited an evolutionary process with the US at the top of the evolutionary ladder. It was presented as both objective science and a handy guide to policy making.

Modernization theory had some impact on policy in the 1950s but became a central aspect of US policy in the 1960s as the Kennedy administration weaponized social science to both shape and justify programs like the Alliance for Progress and the Peace Corps.¹⁵ Unlike “development” which seemed to refer primarily to economic issues, modernization had a much broader scope embracing politics, culture and society as well. Further, following Rostow, it brought with it an overarching narrative of historical progression if not inevitability. No wonder we latched onto this rubric!

6) THE LAW AND MODERNIZATION SEMINAR: WEAVING A NARRATIVE

A central part of the Program we presented to USAID was an annual seminar on Law and Modernization which I taught. I must have put together the first seminar in 1968 as we were starting to think about the proposal to USAID and I continued to teach it every year until I left Yale in the summer of 1973.

Rummaging through some old, unrelated files, I came across the syllabus for the Law and Modernization Seminar I taught in spring 1969: I think this must have been the second time it was offered and before the Program in Law and Modernization officially launched that fall. My copy is pock-marked with small holes which seem to be the work of mice¹⁶.

1969 LAW AND MODERIZATION SEMINAR. This Seminar will explore current theories about the process of social change variously called “development”, “industrialization” and “modernization”. Our goal first will be to determine what can be said, on the basis of current knowledge, about the relationship between law-government institutions of societies and this process... our second goal will be to formulate meaningful questions that can be asked about this relationship, and to explore methods that might be used to answer such questions.

¹⁵ In his book on “Modernization as Ideology,” Michael Latham argues that the Alliance for Progress was framed by modernization theory. This body of ideas, he argues, offered a justification for encouraging Latin America to emulate the US. See Latham (2000).

¹⁶ It seems to be a copy that was sent to Bill Felstiner and me: on the back is a post-it with a note from Bill that says: “This looks like a nice course.”

One can learn a lot from this syllabus, especially if it is compared with later course descriptions that can be found in Annual Reports to USAID. As the years went on, the concept of law and modernization and the nature of the course changed. There were at least three major changes: In the beginning I drew heavily on contemporary social science of development; by the last seminar I taught at Yale the emphasis had shifted to classical social theory including Marx, Weber and Durkheim as well as critical work on development. In 1969 I spoke of modernization, development, and industrialization as synonymous; by 1973 I referred only to industrialization. In 1969 I looked primarily at Brazil. This continued: throughout the whole time I taught L&M. In that period, I was engaged in research on Brazil and I always used it as the major contemporary case study. But for reasons that will become clear, in 1969 I added more material about 19th Century Burma.

The Brazil materials in the 1969 Seminar were drawn from my personal experience working as a USAID lawyer in Brazil and on research I did once I got to Yale. The seminar looked at two Brazilian Case Studies: the Brazilian Capital Market Law of 1965 and CEPED. Both involved efforts to transplant US institutions and practices to Brazil. I chose the Capital Markets Law because it was an important element of the US-supported initiative to create a modern regulated capitalist economy and an example of transplantation of US law. I included CEPED because it presented a case study of modernization of the legal profession.¹⁷

There was very little material on law and development available in 1969 so using my own experience made sense. But why Burma? And what did I –or anybody–know about law and development in 19th Century Burma? To understand that is to understand the evolution of my thinking between 1969 and 1973. Burma entered the course because of a critique by a student of the ideas underlying the whole L&M program. It stayed in because the Burma “case” was a way to critique the modernization paradigm if not the whole law and development field as it stood in the late 1960s.

The Law and Modernization Seminar was the primary vehicle by which I sought to turn my USAID experience into an academic specialization. It allowed me to link my professional experiences to the academic literature on modernization. It served as an environment in which I could shape a research agenda. If I try to reconstruct my thinking as of 1969 using the mice-eaten Syllabus as a guide, I think I initially offered the students the straight law and modernization story in which the US is the apex of legal modernization and US laws are models to be followed. I was aware of practical issues involved in such transplants but

¹⁷ These materials drew on my personal experience both in the USAID Mission and afterwards. After I left USAID, I started a major empirical study of the Capital Markets Law. See Trubek (1971). I also kept in touch with CEPED. These experiences gave me material for many classes. See Trubek (2011).

these were presented as problems to be solved not as reasons to question the whole enterprise.¹⁸

7) DISRUPTING THE NARRATIVE: DUNCAN KENNEDY AND FURNIVAL

That was until Duncan Kennedy came along! Duncan took the Seminar as a second-year law student in 1968. As he had done earlier in my Property Class,¹⁹ he challenged the very premise of the seminar. He cast doubt on the modernization narrative, mocked the case studies, and completely disrupted my narrative. He did it by introducing J.S. Furnival's critique of the legal strategy of the British colonial regime in Burma. In his rightly famous Colonial Policy and Practice²⁰ Furnival, himself an imperial administrator, showed how the introduction of modern British Law in Burma in the late 19th century favored British capital and Indian money lenders and devastated the Burmese peasantry. Thomas Stanton describes the Burmese experience:

“Colonial status shifted Burma’s economic role from subsistence agriculture to the generation of large-scale exports. By undermining the traditional Burmese legal system and substituting Western international standards of property rights, enforceability of contracts, and an independent judiciary...the legal system amplified and channeled destructive economic and social forces...”

²¹

The Burmese case was one where law did stimulate economic growth by facilitating a prosperous export rice trade but it challenged modernization theory on many counts. It questioned the autonomy of developing economies (Burma was being shaped to be a part of the global economy of the British empire); it did away with the idea of an evolutionary scale of legal development (modern law was a tool of colonial capital, not an evolutionary advance); and it brought to light the distributional effects of legal transplants.

Duncan was not the only student to challenge the modernization narrative. Yale in the late 60s and early 70s was a hot bed of student radicalism and I was confronted with challenges by other students like Mark Tushnet and Boaventura de Sousa Santos. For example, Boa, animated by Program-supported field work in Rio's favelas, was especially critical of the whole USAID endeavor, seeing it as an

¹⁸ For a discussion of CEPED, see Trubek (2011). I do not know to what extent I mentioned that the Brazil experiments were going on during a military dictatorship but I fear that was not highlighted.

¹⁹ See Trubek (2015).

²⁰ See Furnival (2014).

²¹ Stanton (2014).

imperialist effort driven by doctrinaire anti-communism to support a military regime that suppressed popular forces and free speech.

Duncan's intervention, the reading of Furnival, and other critiques from students like Boa disrupted the modernization narrative I had constructed around my Brazilian case studies and created doubts about the story I was telling. But it did not lead me to put forth a full-blown critique. That came later in *Scholars in Self Estrangement*, the article I wrote with Marc Galanter and published in 1974.²²

8) A COUNTER NARRATIVE EMERGES

Many things had to happen first. These included the emergence of a critique of modernization theory, the rise of dependency theory and its elaboration in the work of Immanuel Wallerstein, the critique of American liberalism, the full-blown campaign against American imperialism, the growing authoritarian trends in Brazil, and recognition of the limits of transplants. All these streams flowed into the making of *Scholars in Self Estrangement* which was my own contribution to the critique of modernization. Written with Marc Galanter who had been a Fellow in the Law and Modernization Program. Although published in 1974 after I left Yale, Marc and I worked on it while we were both in New Haven and *Scholars* came out of debates in the L&M Seminar and other Program events and can be fairly considered one of the major products of the Program.

i) CRITIQUES OF MODERNIZATION THEORY

In the 1960s both American leaders and social scientists embraced modernization theory. This was a time in which the US faced challenges around the world created by decolonization and Soviet expansionism. It was thought that foreign policy had to be reshaped to face these challenges and extend American influence. For the social scientists modernization theory provided a framework by which to understand what was going on in what became known as the "Third World"; for the foreign policy elite it served both as an apparent guide to policy making and a justification for US intervention around the world. Modernization theory suggested that social change led naturally to the "modern"; that the US and Western Europe represented the apex of modernity; and that US intervention in Third World countries was designed to help them reach modernity and thus was unselfish and benign.

By 1969 when the L&M Program officially began, already some were having doubts about both the theory and its uses in foreign affairs and a critical literature had begun to emerge.²³ Some questioned "...the fundamental ethnocentrism of modernization theory in its conception of history as a unilinear process of progressive change toward a model of modernity patterned after a rather utopian

²² See Trubek and Galanter (1974).

²³ See Tipps (1973).

image of Western society.”²⁴ No one provided a better summary of the critical trend than Theda Skocpol in her review of Immanuel Wallerstein’s *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*. She notes that modernization theories reify the nation state as the unit of analysis; assume all countries can follow the same path of evolutionary development from “traditional” to “modernity”; and “disregard the world historical development of transnational structures that constrain or prompt national developments”.²⁵ Critics of modernization theory came to see how it was used to justify American expansionism: some, like Galanter and me, rebelled at their complicity in such an effort.

ii) *DEPENDENCY THEORY*

Dependency theory emerged at about the same time as doubts about modernization theory had begun and served to strengthen the critique. Dependency theory changed the way people thought about development. Rather than seeing it as a process largely internal to each country, dependency theory placed development in the larger context of the capitalist world system and stressed the subordinate position of “developing countries” within that system.

The most famous of the dependency studies was Cardoso and Falleto’s *Dependencia e Desenvolvimento in America Latina*²⁶. Its contribution to development studies was to update the Marxist theory of imperialism to take account of the current wave of foreign investment in developing countries and its impact. Classic Marxist-Leninist theories treated foreign investment as simply impoverishing developing countries. As much of the investment in the 19th and early 20th century had been in raw materials and extractive industries that brought profits to foreign owners and left little for the domestic economy, there was much to be said for the Leninist theory in its time.

But how to account for the contemporary wave of foreign investments which – as was the case in 1960s Brazil – looked to build domestic industrial capacity to produce cars, kitchen appliances and other consumer goods for which a growing domestic middle class was essential? The answer was “associated-dependent development”, the term Cardoso and Falleto used to describe a situation in which a country was part of the capitalist world system and dependent on foreign capital but able to enjoy limited economic growth and improvement in incomes nonetheless.

I cannot pinpoint the exact time that I began to become aware of dependency theory which was not well known in the US academic scene in 1969. The work of Prebisch and others was available but Cardoso and Falleto was only published in 1970 and the English translation did not come until much later. The Furnival story

²⁴ Ibid, 216.

²⁵ Skocpol (1977) (emphasis added).

²⁶ Cardoso and Martins (1969).

Duncan brought to my attention fits with dependency theory but I do not know if Duncan made the connection at the time.

I do, however, know that by 1971 I not only had heard about the theory; I had heard it directly from Cardoso. In April, 1971 Yale Professor Al Stepan convened a workshop on contemporary Brazil: thanks to the connections with Yale social scientists we had made through the L&M program, I was invited to attend. Among the speakers was Fernando Henrique Cardoso, then working at CEBRAP after being forced out of the state university by the military. Cardoso gave a paper entitled “Associated-Dependent Development: Theoretical and Practical Implications”.²⁷ In it, explaining the impact of the 1964 Coup in Brazil, he stated:

“The accumulation, expansion, and self realization of local capital requires and depends on a dynamic complement outside itself: it must inset itself into the circuit of international capitalism...It was this limited transformation to a dependent capitalist economy that the 1964 coup made possible....It removed...the ideological and organizational factors that tended to work against the policies of association between the state, local private enterprise, and international trusts.”²⁸

iii) WALLERSTEIN

Another blow to my naïve vision of law and development came when I encountered the work of Immanuel Wallerstein who took the critique of modernization theory further and deployed dependency theory to create an alternative account of world history. Wallerstein explained developments in Brazil and other Third World countries as the result of their embeddness in, and control by, the capitalist world system. With Wallerstein all the pieces for a critique came together.²⁹

It took time for me fully to grasp this vision and its implications. I had started my thinking about ‘development’ as something contained within each country. External forces could help – that is where foreign aid came in – but the structures impeding development were internal and the changes needed came largely from within. The dependency narrative unsettled that view and Wallerstein carried it further. He posited an integrated world system; rejected the idea that the nation-state was the proper focus for analysis; drew attention to transnational structures that constrain development; and questioned the ideal types of ‘tradition’ versus ‘modernity’ and the related assumption that all countries must follow a single path of evolution. These ideas were in the air in the late 60s and early 70s and, while I

²⁷ Cardoso (1973).

²⁸ Ibid, 163-64.

²⁹ The following passage is based on *Living in the Contradiction, Globalization and its Discontents*. See Trubek (2021).

did not directly engage with Wallerstein until the 1980s, I am sure that his story helped me move away from modernization in the 1970s.

iv) POLITICAL DEVELOPMENTS: STUDENT PROTESTS AGAINST IMPERIALISM, DEEPENING AUTHORITARIANISM IN BRAZIL AND THE CRITIQUE OF AMERICAN LIBERALISM

If modernization theory incorporated a “utopian image” of the United States, events in New Haven and around the country in the late 1960s and early 1970s exposed the less admirable features of American society. Student rebels like Duncan and others articulated a critique of American society that was hard to ignore and strengthened doubts already percolating in academic debates. The protesters pointed to racial injustice and inequality, questioned American commitment to its own ideals, and attacked US foreign policy, including the Vietnam War, as imperialism.

As I participated in some of these protests, I also watched developments in Brazil and was anguished that the US continued fully to support the regime even though it had hardened into full blown authoritarianism and had discarded any pretense of a quick return to democracy. All these ideas, experiences, and criticisms seeped into classrooms and academic debates, further casting doubt on my liberal, utopian vision of US law and development ideas and policies.

v) FAILURE OF TRANSPLANTS

A final blow to the original law and development story was growing recognition that many of the legal transplants promoted by law and development projects just did not work—or had unexpected and negative consequences. The naive idea that, as these laws came from countries further up on the modernity scale, they could easily be incorporated into the political economy of Third World countries and their legal systems, proved to be a chimera. I had seen the limits of transplants in the Brazilian case: by the 1990s a whole literature on transplants and their limits started to emerge.³⁰

9) THE FINAL L&M SEMINAR

All these ideas influenced the evolution of the L&M seminar. From using Brazil to show how modern law can be transplanted to the Third World, I used it to highlight the critique and introduced material on Burma to show the negative impact of transplants. Instead of looking at contemporary social science theories of modernization, I introduced classical social theory and recent critiques of law, society and development influenced by it.

10) PUTTING IT ALL TOGETHER: SCHOLARS IN SELF-ESTRANGEMENT

³⁰ For a recent discussion, see Goldbach (2019). See also Donaggio (2014).

I was generally aware of the emerging critique and alternative accounts of development by 1972 when I set out with Marc Galanter to work on the study that became *Scholars*. Marc was a Fellow of the Program in 1971. A highly regarded expert on the role of law in India, Marc had written one of the early articles on law and modernization.³¹ In 1972, we were commissioned by the International Legal Center in New York to survey the condition of law and development studies in the US. We worked on the report while I was still at Yale; after I left to go to Wisconsin we turned it into article that was published in 1974.³² The result was a critique of the field.

The essay was built around a model of what we called “liberal legalism”, a vision of law in society based on an idealized view of the US legal order. Using this vision as a template, we argued that early law and development doctrine was based on the following:

"Law" was seen as both a necessary element in "development," and a useful instrument to achieve it. "Law" was thus "potent," and because legal development would foster social development and improve human welfare it was also "good." Law implied impersonal governance through universal rules, and governance through law would lead to more inclusive and more equal treatment of all citizens. Accordingly, the development of legal institutions was seen as a way of increasing equality and widening participation. Law was seen as a technique for curbing arbitrary government action, and as means of both protecting individual freedom and ensuring greater governmental responsiveness. Legal development would enlarge the sphere of liberty and simultaneously guarantee that governments would act in accordance with the wishes of the citizens. Moreover, law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals. Law was one of the tools that could be used by planners consciously seeking to enhance human welfare. If law became more effective, the planners' powers would grow.³³

Consistent with modernization theory, this model rests on the idea that US law represents the realization of ideals of liberty and equality and was an evolutionary achievement the Third World could and should aspire to. While the nascent law and development field had been built on such liberal legalist assumptions, we asserted these was a “crisis” in the field because:

³¹ See Galanter (1966).

³² See Trubek and Galanter (1974)

³³ Ibid, 1073-74.

“...some scholars have come seriously to doubt the liberal legalist assumptions that "legal development" can be equated with exporting United States institutions or that any improvement of legal institutions in the Third World will be potent and good. They have come to see that legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal "reforms" can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being. These realizations have led to a reappraisal of the liberal legalist model of law in society, a search for a new research agenda, and the emergence of moral doubt about scholarship and assistance.³⁴

Scholars describes the emergence of a critical perspective within the law and development community and traces its origins. It shows that projects like the Yale Program, which emerged out of the effort to rebuild Third World legal systems along US lines, led to the critique of that very idea. By trying to create a field that included social scientists as well as lawyers; scholars from Europe, Asia and the developing world as well as Americans, and US, European, and Third World law students in time of great political controversy on US campuses, we injected a critical perspective into law and development scholarship.

This brought to light flaws in the liberal legalist vision for the Third World and cast doubt on early law and development endeavors. Ironically, an academic project devoted to support the export of liberal legalism ended up undermining the very assumptions on which it had been built. We observed that the crisis had led to “malaise” within the field and noted:

There is a profound irony in the prospect that the malaise will destroy the field rather than moving it to a higher level of awareness and sensitivity. The malaise resulted from the critical perspective on legal development; this itself was the result of the effort to create interdisciplinary and international centers of social research on law. Critical thought was possible only because such centers were able to develop or absorb a set of ideas and a perspective that would have been impossible within the environment of the separate law schools, area study programs, or social science departments from which the members of the law and development movement came. It seems ironic that the first result of those ideas may be to undermine the conditions that are

³⁴ Ibid, 1080.



necessary for maintenance of the very environment that produced them.³⁵

By this time, I had come a long way from the Seminar in 1968!³⁶ *Scholars* questioned the ethnocentric, neo-evolutionary themes in modernization theory and the one-size fits all theory of legal modernization that lay behind the transplantation effort. It urged scholars in the field to distance themselves from government programs based on these premises. As Marc and I had contributed to some of the theory and helped design some of the programs, we admitted errors: hence, *self-estrangement*. While critical of the law and development movement up to that point, we did not put forth a full-blown alternative, simply urging scholars to engage in “eclectic critique”.

11) AFTER SCHOLARS

My struggle with modernization theory and law’s role in it continued after *Scholars*. An important part of the struggle was trying to come fully to grips with the Wallerstein perspective. Sometime in the early 1980s I heard him lecture at the Latin American Studies Association Annual Meeting. He developed his critique of modernization and laid out the elements of the World System theory in a clear and concise fashion. Shortly thereafter I was teaching a course on Law and Development in Recife, Brazil, a city in Brazil that was once part of the Dutch and then the Portuguese empire, had been affected by the English and French, and was now under US influence. By then the full Wallerstein critique was sinking in and I remember sitting by the beach in Recife and thinking: *We have to start all over. The process we want to change, the tools we hope to use, indeed, our very identities, are created by, and caught up in, complex global structures. Unless we understand that, we will understand nothing and change nothing.*³⁷

By the time I had digested Wallerstein and all the rest of the emerging critical ideas, I had come a long way from the simple export of US law and legal education. Was it time, I thought, to chuck the whole thing? If ‘development’ could really be a mode of capitalist exploitation of the periphery, containing, within its very structure, limits on equitable growth in the Third World, what was left of the idea of law and development as an emancipatory enterprise? Were academics like myself no more than representatives of a hegemonic global capitalist class, and our Third World counterparts, mere compradors? Nonetheless, while fully aware of these critiques, I pushed on with my efforts in law and development, seeking ways to ensure that it was an emancipatory process.³⁸ And I still am.

³⁵ Ibid, 1102.

³⁶ For a discussion of the paper and its aftermath, see Trubek (2016).

³⁷ See Trubek (2021).

³⁸ See Trubek (2007).

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