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THE ANGLO-AMERICAN MODEL

The private law institutions of the United States have had a profound influence upon the development of many Latin American countries. As a result of U.S. trade and investment with this area, Latin Americans have attempted to model their private law institutions after those of the U.S., a system which best achieves desirable economic transactions. As an example, U.S. private law institutions were directly or indirectly models for secured and stock exchange transactions law in Costa Rica, a response to widespread demand for accessible consumer credit and readily marketable securities.

I hasten to add that the fact that Anglo-American legal institutions have served as models does not mean that Latin American and Caribbean institutions are supposed to be or work like exact replicas. For one thing, there is the purely technical problem of squaring a concept such as judicial review of statutory or administrative action within a preexisting set of appellate rules based on jurisdictional, pleading and proof assumptions foreign to the imported model. Hence, a Mexican *"amparo"* is, in many respects closer to the French or Spanish *"casación"* procedure than to the United States appeals based on an alleged unconstitutionality.

In addition to the problem of conceptual symmetry there is the more fundamental question of whether the Latin Americans' and Caribbeans' attitude towards their legal system and component institutions is consistent with the nature of the selected institutions, at least as conceived by those who shaped the models. For example, can certain legal institutions which inevitably require for their successful operation that a considerable amount of discretion be given to the principal obligor — whether he be a public law administrator or a private law trustee or fiduciary agent — succeed in societies where there is considerable distrust for "strangers" or nonmembers of the family or friendship circles?[1]

This distrust is in large measure responsible for an unwillingness to engage in transactions such as investments in securities of widely-held companies. It is also responsible for the breakdown of legislative,

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1. *See* Kozolchyk, *Commercial Law Recodification and Economic Development in Latin America*, 4 LAW. AM. 189, 197 (1972).

administrative and judicial decisionmaking whenever the standard of adjudication is predicated on that which is deemed "reasonable."[2] The fact remains, however, that despite the sharp differences in legal technique, attitude and institutional performance, the common choice of institutional models is but a function of the commonality of goals.

It is fair to conclude then that following the initial stages of Latin American and Caribbean nations' independence from colonial rule, the United States has had considerably less power to dictate which ruler, caudillo or dictator stayed in office than is assumed by many U.S. Latin Americanists. Conversely, the United States has had a much more significant influence in the design of public and private law institutions in Latin America and the Caribbean than is generally perceived.

EFFECTS ON UNITED STATES POLICY

Following Fidel Castro's self-proclaimed "olive green" (as opposed to red) revolution, President Kennedy announced the undertaking of an Alliance for Progress with Latin America. The Alliance's policy was predicated on two main premises. One was attitudinal — the United States cared for Latin America and the Caribbean. It cared enough, in fact, to engage in what was perceived by U.S. policymakers as an effort to engineer the transformation of Latin America. Consistent with the optimism of those days it was firmly believed among Alliance policymakers that the United States could and should spearhead Latin America's significant socioeconomic development within a decade or two.

The second premise was epistemological. Most of the United States policymakers at root agreed with the Marxist view that economic factors play the predominant role in bringing about socioeconomic development. It was assumed that Alliance goals could be reached if the United States provided the economic stimulus for the fast, or, as the Congressional appropriations dwindled, the more gradual takeoff. Accordingly, the United States attempted, *inter alia,* to sprinkle the hemisphere with strategically located economic infrastructure projects, including Schumpeterian entrepreneurs. At the same time, and as one of the stated goals, the United States committed itself to help bring about a more equitable distribution of Latin American and Caribbean wealth. It is important to note that while the latter was a stated goal, very few of the Alliance policymakers realized that the more equitable distribution of wealth was also a means, and perhaps one of the fundamental means, of bringing about sustained economic growth.

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2. *Id.* at 198-99.

In due course, as President Johnson's hopes for guns and butter proved unrealistic, the Alliance's congressional appropriations were reduced to insignificance. Thereafter the "New Dialogue" policy, which intended to replace the Alliance, became merely a poor man's or butterless Alliance. Necessity was turned into virtue, and United States policymakers with some Latin American support advocated to the United States Congress the virtues of "trade, not aid." Congress, in turn, made it possible through a system of generalized preferences for Latin American and Caribbean products, especially for commodities and raw materials, to enter the United States market under preferential conditions.

The economic determinism present in both the Alliance and the New Dialogue obscured the very significant role played by legal institutions in the development process. During the late sixties, the full significance of the malfunctioning of these institutions became apparent in Empirical studies on the role of legal institutions in Central American developmental activities. To the dismay of Central American and United States development planners it was realized that legal institutions that were supposed to help attain goals such as import-substitution industrialization with high local value-added, significant increases of corporate capital formation, and access by consumers and small businessmen to credit at less than confiscatory rates were doing just the opposite. A very substantial segment of the import-substitution industrialization turned out to be of a low local value-added type.[3] The level of corporate capital formation based upon the public's acquisition of equity participation remained disappointingly low,[4] and the interest rates for consumer and small business loans continued its upward spiral.[5]

The reasons for the institutional failure were uniformly the same. Whether as an administrative concession to set up an import-substitution industry protected against foreign imports by a special import tax, tariff or quota, as a minority interest in a publicly-held corporation or as a consumer or as a small business loan, it inevitably (and unfairly) favored the interests of the economically strongest party. The unequal bargaining power of the weaker participants, or of affected "third parties" such as labor unions with respect to an import substitution concession, generally resulted in a winner-take-all, loser-take-none approach.[6]

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3. Kozolchyk, *Toward a Theory on Law in Economic Development*, 1971 LAW AND THE SOCIAL ORDER 681, 737-40 [hereinafter referred to as Kozolchyk, *Toward a Theory*].

4. *Id.* at 713-14.

5. *Id.* at 733-35.

6. *Id.* at 741-2.

This winner-take-all approach to economic activity and particularly to business transactions may not have been apparent in the text of the statutory rule, administrative regulation or even contractual stipulation. Yet, in actual legal practice it was the "living law," and as such it was responsible for an atmosphere of widespread distrust for lawmakers and legal institutions. Thus a potential purchaser of a minority interest in a local corporation refrained from buying the stock after muttering to the salesman, "Do you think that if this were such a good business, as you say it is, those in control would really want to sell any portion of it? Don't *they* usually keep all the good to themselves?"[7]

A living law predicated upon a widely perceived unfair adjudication or distribution of profits and resources not only bred distrust, circumvention, disregard or disobedience of the law, but with them, it bred anti-economic uncertainty.[8] The costs inflicted by such a malfunctioning of the legal system are enormous. Not only is the legal system unable to instill trust in legal institutions whether in the form of a share of stock in a corporation or an administrative concession (and instilling trust is the key function of the legal system in economic development), it has also become very costly to discourage anti-economic activity. Since widespread circumventions are the living law, a mere prohibition of anti-economic behavior simply will not do. The prohibition usually has to be coupled with costly incentives, such as subsidies or rebates.

Ironically, while the United States and Latin American policymakers purport to comply with the concessional aid precondition of a more equitable distribution of wealth, the disregard of the legal malfunction and particularly of the legal system's inability to instill trust in legal institutions contributes to the perpetration and widening of inequities. For example, the United States helped set up the so-called "financieras" or lending entities designed to act as activators of private capital formation by providing risk venture capital to as wide a variety of local entrepreneurs as possible. Yet, many United States loan officers were surprised to find that by and large the lending was restricted only to a highly limited group of borrowers — entrepreneurs who doubled as close friends and business associates of close friends of the financiera directors. More recently, the adoption of the "trade, not aid" policy is by all appearances having a similar "spill over," filter or "trickle down" effect. In the absence of an equitable mechanism for the distribution of the

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7. *Id.* at 713.

8. *See Id.* at 731–737, for an instance where the uncertainty was particularly evident with respect to the Costa Rican debtor's prison provisions.

profits generated by the preferential access to the United States market, export profits will continue to benefit mostly the very few who wield the economic and political power to control such exports.

PRESENT US-CARIBBEAN DEVELOPMENT POLICY DILEMMAS

The Caribbean Basin provides an excellent illustration of the problems that also beset Latin American development planners. On the one hand, the region can boast of the largest group of democratic countries in the developing world. On the other, as stated by the Fiscal Year 1979 Congressional Budget Presentation of the U.S. AID: "In each [Caribbean country], the balance between growth with equity and economic chaos is fragile."[9] The same presentation identifies some of the key developmental problems as follows: "[A]gricultural production lags far behind needs due to structural constraints such as inadequate infrastructure, restricted access to production inputs, poor marketing facilities and uncertain transportation costs. Improvements are also required in agricultural credit extension and research. . . ."[10] This perception of key problems closely parallels that for Latin America as a whole. In AID's view, some of the major constraints to rapid, balanced, and equitable development are, *inter alia*:

1. Inadequate incentives for private investment;

2. Inadequate family size farm; too many landless peasants;

3. Trade structures too dependent on a few primary commodities; and

4. Development policies aimed at growth alone, inadequately focused on equitable income distribution.[11]

One of AID's key remedial actions for the Caribbean region is "a comprehensive approach to development of productive employment by stimulating expansion of labor intensive enterprises."[12] Yet, from the very data supplied by AID for an individual country aid request, it appears that even such a labor intensive enterprise as sugar growing and

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9. *See* U.S. AID, Caribbean Regional Fiscal Year 1979, Congressional Presentation, CP — 79–13, p. 599.

10. *Id.*

11. *See* U.S. AID, Fiscal Year 1979 Congressional Presentation, CP — 79–13 p. 572 (Latin America).

12. *See* U.S. AID, Fiscal Year 1979 Congressional Presentation, CP — 79–13 p. 600 (Caribbean Regional).

refining in the Dominican Republic falls considerably short of AID's income redistribution expectations. Again, in AID's own words, "Studies conducted in 1975 (in the Dominican Republic) showed that the poorest half of the population receives only 13% of the national income and that a majority of the farmers and farm laborers receive annual per capital incomes of less than $120 (per year)."[13]

The role of equitable income distribution is all the more significant with an administration that has adopted the protection of human rights as the moral cornerstone of its foreign policy. As stated by Anthony Lake, Director of the Policy Planning Staff for the Department of State in a November 1977 speech:

> [W]e accept the diverse models of economic and political development that the LDC's (less developed countries) have chosen to benefit their peoples. But we also believe that certain human rights have universal application. Human rights include not just the basic rights of due process, together with political freedoms, but also the right of each human being to a just share of the fruits of one's country's production.[14]

Thus, while the United States is committed to a policy of bringing about a more equitable income distribution, it is clear, first, that the legal institutions used for bringing about such a change are either not doing their job or are doing it too slowly to effect the desirable degree of development. Secondly, very little if indeed anything is being done to monitor the operation of these institutions both by the United States aid grantors and the Latin American and Caribbean aid recipients. Typically, AID will report to the United States Congress that the host government is committed to a policy "of a more equitable income distribution, and to a wider sharing of economic and social benefits"[15] and this pro forma statement will satisfy the equity precondition. Yet, even if AID would have wanted to report more reliably on progress on the equity front it could hardly have done so without resorting to indicators which in large measure still remain to be designed and tested. For while we know or can reasonably predict, for instance, the increased volume of

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13. *See* U.S. AID, Fiscal Year 1979 Congressional Presentation, CP — 79-13 p. 659 (Dominican Republic).

14. *See* Address by Anthony Lake, Annual Meeting of African Studies Association and Latin American Studies Association, (Houston, Nov. 5, 1977) (Dep't. of St. Bull., undated, p. 3).

15. *See, e.g.*, U.S. AID Fiscal Year 1979 Congressional Presentation, CP — 79-13 p. 759 (Jamaica).

agricultural products traffic to reach specified markets in Haiti if additional roads are built, we are unaware of the marginal efficiency of secured transaction *"X"* which relies on the Haitian farmer's land title as collateral versus *"Y"* which relies on the creditor's priority claim exclusively on the farm products and their sale proceeds. In the absence of such information which requires not only traditional legal research but also the determination of which of the various arrangements with the requisite degree of legal certainty is the most consistent with the participants' sense of fairness, it would be very difficult to design a viable system of agricultural credit.

And, as if the above problems were little, AID faces the constant problem of having its meager appropriations absorbed or siphoned away by the unavoidable task of keeping substantial segments of the local population from starving or preventing a friendly host government from being toppled by its inability to meet payroll obligations.

The dilemma of the United States' Latin American and Caribbean development policy therefore is that it is palliative and short-run in nature while the solutions should be clearly institutional and long-run. Thus, very little is done about the institutionalization of fairness at the public and private law levels, crucial as this institutionalization is in fueling developmental activities.

RECOMMENDATIONS

Underdevelopment may well be a universal phenomenon but the solutions depend first of all upon a clear identification of the physical and socioeconomic problems peculiar to the geography and culture involved. In this respect those who propose a globalist policy for Latin America and the Caribbean are not only advancing a fallacious argument — as if a species by belonging to a genus was no longer a species — they also make the solution of developmental problems more difficult by diluting and thereby blurring their true identity. Secondly, solutions depend on the determination of not only what institution is the most likely to bring about the desirable result, but also who is in the best position to help attain it. Here is where the influence of the United States, not only as the most economically developed and most active trade and investment partner in the hemisphere but also as a country many of whose legal institutions served as models for those in Latin America and the Caribbean, should play a fundamental role.

The United States role should not be that of a "cultural imperialist," or even that of a propagandist for democracy, capitalism or the free market, but that of a technical advisor. The advice should be confined to the task of helping Latin American and Caribbean development planners

formulate with as much precision as possible what are desirable goals and what legal institutions will be used to bring about such goals. This formulation should also provide for the use of reliable indicators of institutional performance.

The availability of reliable information on the performance of legal institutions will not only help in the solution of purely economic problems but also in the implementation of a truly binding Inter-American human rights policy. For as indicated earlier, with the exception of Marxist-inspired constitutional or public law, the hemisphere's public law, at least as found in its written formulation, espouses many common principles.

The skills required for implementing the above recommendations are available. The law and development euphoria of the Alliance for Progress days did not produce unqualified successes, and may have even fostered a new brand of charlatanism. Significant progress, however, was made in legal education and research.[16] Consequently, there is a well-trained core of Latin American, Caribbean and United States specialists who could act as leaders of interdisciplinary task forces in developing the initial models for defining goals, identifying and whenever necessary designing legal institutions, and testing their responsiveness.

The urgency of the recommendation is underscored not only by the ever-widening gap between the living standards of the peoples north and south of the Rio Grande but also by the cost efficiency constraints likely to weigh quite heavily on congressional aid appropriations for the foreseeable future. Mere palliatives should no longer be perceived as cures, especially if the cost of continued palliation eventually will make the cost of the cure prohibitive. The time is ripe therefore for the United States State Department and Congress to require hard proof on improved internal equity as a precondition of United States aid, and for the Latin American, Caribbean and United States governments, academic and professional communities to sponsor the creation of task forces that will make the aid development efforts meaningful.

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16. For a summary appraisal of progress in Latin American legal education, *see* K. KARST & K. ROSEN, LAW AND DEVELOPMENT IN LATIN AMERICA 66-69, n.9 (1976). For an appraisal of changes at the University of Costa Rica Law School, *see* Skidmore, *Technical Assistance in Building Legal Intrastructure,* J. DEVELOPING AREAS 549 (July 1969). *See also* Dean Gutierrez' preface to Kozolchyk and Torrealba, CURSO DE DERECHO MERCANTIL, (Lehmann, San Jose, Costa Rica, 1974) and Verbit and Weisenfeld, Report to U.S. AID, Visit to the School of Law at the University of Costa Rica, September, 1970 (International Legal Center, N.Y. 1970). For the impact of Costa Rican teaching materials on other Latin American law schools, *see* Furnish, Book Review, 25 AM. J. OF COMP. LAW 160-2 (1977); (*Ed. Note*) Laing, *Revolution in Latin American Legal Education: The Colombian Experience,* 6 LAW. AM. 370-415 (1974).