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Theoretical Foundations in Development Law: A Reconciliation of Opposites

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CRITICAL ESSAY:
THEORETICAL FOUNDATIONS IN DEVELOPMENT LAW:
A RECONCILIATION OF OPPOSITES?

RUMU SARKAR*

INTRODUCTION

This Critical Essay will examine certain philosophic implications of modernization theory and dependency theory, and their impact on development law. The essay will also identify certain similarities and key differences between the two theories and explore past histories and future trends of both theories. Finally, this Essay will propose a means of reconciling the two, thereby ending the decades-long stalemate between the two theoretical perspectives. If accepted, this reconciliation may provide common ground for development law practitioners and specialists to work more harmoniously together into the future. However, before embarking on a discussion of the theoretical foundations of development law, let us take a step back and examine why this inquiry should be made.

Development law, as I have defined it, is a subject that establishes a new legal architecture between developing and advanced nations.¹ Moreover, development law, by its nature, is a multidisciplinary study that incorporates aspects of economics, political theory, philosophy, history, sociology, and even legal anthropology as well as other subjects. While philosophy may not be as important in other subjects of law, it is particularly relevant to an understanding of development law. The theoretical foundation of development law is its cornerstone, and any change in its philosophic underpinnings has profound implications with respect to the subject generally.

Indeed, it may be argued that development itself is essentially a political process. It may be further argued that as a consequence, the political theories, ideologies, and philosophies that motivate and guide the political process are vitally important regardless of whether individual political actors acknowledge it, or are even aware of it. Philosophic orientations and approaches, whether overtly

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1. RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE*, CHAPTER 2 (2d ed. 2002, Kluwer Law International); see also Rumu Sarkar, *The Developing World in the New Millennium: International Finance, Development, and Beyond*, 34 VAND. J. TRANSNAT'L. L. 469 (2001).

acknowledged or not, tend to describe, define, and differentiate developing nations from their more advanced counterparts. The post-WW II era has seen a clash of ideals that has been the genesis of the political thinking and action on both sides of the "development" equation, between the so-called "haves" and "have nots." Therefore, a clearer understanding of the philosophic dimensions of this divide both deepens and broadens the debate.

The second preliminary question that needs to be addressed is why modernization theory and dependency theory are considered to be rivals. Modernization theory, discussed below, rose into prominence after the end of WW II, primarily as a result of the efforts of U.S. economists, political scientists, and sociologists.² In contrast, dependency theory achieved its prominence after the decline of modernization theory in the mid-1970's.³ It became a discipline that both stemmed from Marxist political theory, and was adopted by Marxist-influenced political regimes. This, in my view, led to the unhappy juxtaposition of the two approaches within the context of the Cold War during the decades that followed.

A potential reconciliation of opposite views and approaches as discussed in this Critical Essay is important not simply from the perspective of intellectual history, but more importantly, in terms of developing a more coherent, consolidated approach to development theory. If this reconciliation occurs in fact, this will have far-reaching consequences, and a potentially beneficial impact, on development law as a whole. In my view, there may be a significant shift underway in that direction for the reasons discussed below.

I. THE THEORETICAL UNDERPINNINGS OF DEVELOPMENT LAW: MODERNIZATION THEORY

Modernization theory is based on the assumption that development is the inevitable, evolutionary result of a gradual progression led by the nation-state that results in the creation (and ascendancy)⁴ of Western-styled economic, political, and cultural institutions. These institutions rest on three pillars: a free market capitalist system, liberal democratic institutions, and the Rule of Law.

In this context, modernization theory is anchored by two principal thinkers: first, Adam Smith's elevation of the drive to acquire material wealth to a classical economic ideal, and second, John Locke's demand that the State protect private property and individual liberties, thus setting the stage for liberal political theory.⁵ In other words, the pursuit of one's own personal happiness through the material acquisition of personal wealth as well as the state's protection of individual

2. Brian Z. Tamanaha, Book Review, 89 AM. J. INT'L L. 470, 471 (1995) (reviewing LAW AND DEVELOPMENT (Anthony Carty, ed., 1992)).

3. *Id.* at 477.

4. See e.g., FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (Penguin 1992) (purportedly describing man's "universal history" by arguing that liberal democracy is the "end point of man's ideological evolution" and thus, the final form of human government. This, in essence, constitutes the "end of history" beyond which no further evolutionary development should be expected). See also SARKAR, *supra* note 1, at 11-12.

5. See generally SARKAR, *supra* note 1, at 21.

liberties has become a Western classical ideal. Indeed, the terrifying force of this ideal may be its universality.

While Western societies developed legal structures over the centuries to protect private property—such as contract enforcement, mortgages, secured loans, liens, and bankruptcy proceedings—and to ensure the protection of individual liberties—for example, passage of a Bill of Rights, due process of law, and jury trials, non-Western societies did not, for the most part, develop similar institutions. What revolutionized our world at the end of the last millennium was not the adoption of a Western classical ideal by the non-Western world, but the adoption of the Western methodology of achieving this ideal through private property, democratic governance, and the Rule of Law.

Under modernization theory, there is a clear and pronounced emphasis on constitutional, legal and regulatory reform.⁶ In fact, modernization theorists created the so-called “Law-and-Development” movement in the 1960’s,⁷ espousing the idea that emulating Western legal principles and institutions lays the foundation for legal development, and therefore, supports the development process in general. A modernist approach creates a solid foundation for creating a positivist, normative style of law-making with which most common law practitioners are familiar.

However, the fundamental character of modernization theory seems to be, for the most part, overlooked. The theory describes an ahistorical, linear *process* based on the experience and cultural values of Western nations. While the value of this process and the end product that it desires to achieve may be debated, the inherent, and somewhat negative, drawback to the modernization approach is, in fact, its ahistorical perspective. The model has been criticized (albeit primarily by dependency thinkers, but also by modernization scholars themselves) as “ethnocentric”⁸ by steadfastly failing to recognize and acknowledge that it

6. Modernization theory supports the view that, “law is essential to economic development because it provides the elements necessary to the functioning of a market system. These elements include a universal rule uniformly applied, which generates predictability and allows planning; a regime of contract law that secures future expectations; and property law to protect the fruits of labor. In theory, law assists political development by serving as the backbone for the liberal-democratic state. Law is the means through which the government achieves its purposes, and it serves to restrain arbitrary or oppressive government action.” Tamanaha, *supra* note 2, at 473.

7. See generally Francis Botchway, “Good Governance: The Old, The New, The Principle, and The Elements,” 13 FLA. J. INT’L L. 159, 177-180 (2001).

8. See e.g., Ilana Shapiro, *Strengthening Transitional Democracies Through Conflict Resolution*, 552 ANNALS OF AM. ACAD. POL. & SOC. SCI. 14, 20 (1997):

The traditional critiques about Modernization theory’s ethnocentric bias are still relevant. The assumption that Western forms of political, economic, and social organization can provide universal models requiring only minor adaptations to the cultural and historical contexts of CEE [Central and Eastern European] countries reflects Western cultural biases. At the same time, this view dismisses the anthropological conceptions of culture and postmodern understandings of context where systemized ways of organizing the world are embedded within specific cultural and social systems. . . .

Modernization models are derived from Western cultural and historical legacies. The specific conditions from which free markets and liberal democracies in the West emerged are not comparable to those in CEE countries, even those CEE countries that had some prior democratic and free market

engenders and supports Western forms of economic production, democratic governance, and laws. As a result, the approach fails to take into account the differences in cultural values and the legal histories of developing nations.⁹ This "one style fits all" approach, in turn, may be perceived as being somewhat autocratic in its overtones.

Modernization theory thus supports, and perhaps even applauds, the demise of the former Soviet Union and the creation of Western-styled democracies in Eastern Europe, the Baltics, the Balkans, and Eurasia along with the profound changes that have most recently taken place in the Ukraine.¹⁰ Further, the modernization of Turkey by sacrificing more traditional Islamic-based values in favor of instituting a modern nation-state, joining NATO, and seeking European Union (EU) membership¹¹ is also a step-by-step path to which a modernist approach would ascribe. However, the same lack of historicity prevents modernization theorists from predicting a case like Iran or Taliban-controlled Afghanistan where modernist principles are eschewed in favor of pre-modern values, practices, and governance.

Modernization theory also creates a nexus between a free market economy and a liberal democracy. Both are seen as co-equal partners working in tandem to bring the wealth and prosperity of Western nations to the underprivileged classes of the developing world. The conceptual framework of both acting in concert is certainly an ideal to aspire to, but it has been clear for quite some time that the nexus may not be an absolute predeterminate of successful development.

traditions. Further, Western political and economic systems have undergone massive changes since their inception so that the current forms barely resemble the early stages. Yet countries in the CEE region are expected to catch up to conditions that have taken decades to develop in the West. Many authors have noted that such expectations are a formula for uneven and unpredictable development. In many ways, the Modernization process in CEE is like trying to rebuild a Skoda into a Mercedes while speeding down the road at seventy miles an hour." *Id.* (citation omitted).

9. Even I have tried to mitigate the one-sidedness of this approach by proposing the Janus Law Principle (JLP) after the Roman God Janus, who looks both forwards and backwards simultaneously. By this, I simply mean to suggest that there are implicit time and space dimensions to sequencing and synchronizing legal reforms. The developing country in question should plot out on a time-space axis for the multi-dimensional legal reforms it is considering. For example, on the time axis, the types of legal reforms a developing country wishes to make in terms of globalization of law efforts (future) along with maintaining its own authentic legal traditions worthy of preservation (past) should be plotted out. On the space axis, the country in question should look to its international national needs (home) and its need to integrate more fully into the global economy (the world.) One of my students also suggested that the JLP axis also be used as the legal coordinates for a fuller analysis that could include economic data and socio-economic criteria. See SARKAR, *supra* note 1, at 38-43.

10. See Steven Lee Mayers, *Ukraine President Sworn In, Promising to Promote Unity*, N.Y. TIMES, Jan. 24, 2005, at A9; Brian Knowlton, *Ukraine President Visits Congress A Hero and Asks for More Help*, N.Y. TIMES, Apr. 7, 2005, at A10.

11. See e.g., Robert Kaplan, *Turkey's Precarious Success*, N.Y. TIMES, Feb. 27, 2001, at A23.

Again, as an example of its lack of historicity, modernization theory was at a loss to explain the relative success of “soft” authoritarian regimes or illiberal democracies that have encouraged capitalist-based economic growth while at the same time repressing true democratization, respect for human rights, and certain social and religious institutions. Examples of such economic success stories include Spain under Franco, Chile under Pinochet, Malaysia, and China.¹²

On the other hand, it is possible to have vibrant democratic institutions without significant economic development as in the case of India until fairly recently, and in the post-Marco era Philippines. While I am not suggesting that free market growth be disaggregated from encouraging the growth of representational democracy and democratic institutions, it is becoming increasingly clear that one can be achieved without the other. Indeed, “the marriage between capitalism and democracy, although prevalent in the West, is not always an easy or happy one.”¹³

In the 1970’s, modernization fell victim to its own “deep pessimism”¹⁴ in light of the failure of developing countries to develop economically, and by the proliferation of authoritarian and military regimes. These events seemed to negate modernization’s own prescriptions for success based on capital market development and democratization. By 1974, less than a decade after it had begun in earnest, the modernization movement was “in crisis”¹⁵ leading to its apparent collapse, despite subsequent attempts to reform it.¹⁶

Modernization theory has certainly enjoyed a broad-based resurgence after the collapse of the Berlin Wall in 1989, and related historical events. The recent rhetoric of globalization is, in fact, grounded in modernization theory. Indeed, the introduction of democratic reforms in the Middle East is breaking new ground for modernists. While elections in Afghanistan, Palestine, Iraq, and forthcoming elections in Lebanon, Egypt and Saudi Arabia signal significant, and even

12. See e.g., Larry Rohter, *Chile’s Retirees Find Shortfall in Private Plan*, N.Y. TIMES, Jan. 27, 2005, at A1; Joseph Kahn, *Democratic Hopes Test China’s Political Limits*, N.Y. TIMES, Mar. 2, 2003, at Final 3.

13. Shapiro, *supra* note 8, at 21.

14. Tamanaha, *supra* note 2, at 472.

15. See David Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974). These commentators proposed an “eclectic critique” that criticized the law and development model based on modernization theory as “ethnocentric and naïve.” *Id.* at 1080. They argued that this modernist view of developing a legal infrastructure did not reflect the realities of developing countries, and was potentially dangerous by attempting to export legal forms and institutions that could too easily be manipulated by and for the purposes of the controlling elites in the countries in question. *Id.* at 1099.

16. “These Modernization revisions included: (1) a greater focus on the role of tradition in processes of social mobilization and change; (2) an expanded methodology of case studies and historical analyses; and (3) a more sophisticated analysis of change that examined the role of multiple institutions, multilinear paths toward development, and the interaction of internal and external factors influencing change.” Shapiro, *supra* note 8, at 16 (citation omitted). Most importantly, modernization thinking has been revised to move away from nation-state directed growth (top-down approach) and towards civil society development (bottom-up approach).

impressive, reforms,¹⁷ the question of whether modernization theory will prevail in these societies is an open-ended one. Clearly, these are all works in progress.

Yet, one possible unexpected, and dismaying, result does come to mind. In the end, the transformative power of democratization, a pillar of modernization thought, may be its ability to give voice to and thus, legitimize minority views and political perspectives. This may mean that “terrorists” will *de facto* become legitimate political actors within the democratic fabric. Intimations of this are already apparent in the express political ambitions of Hamas in Palestine, Hezbollah in Lebanon and Syria, and Al Sadr in Iraq,¹⁸ all of whom are seeking to be political representatives in the legitimate governance of their respective countries. However, it may be wise not to draw any hasty conclusions at this point while this story is still unfolding.

II. A CONTRARIAN VOICE: DEPENDENCY THEORY

While modernists were floundering in the 1970's, dependency theorists dominated the conversation about development. In contrast to modernization theory, dependency theory is not a descriptive process of change leading to broad-based economic development, but a historical analysis and critique of the root causes of underdevelopment—on this level, a comparison of the two theories has always seemed inapt.

In any case, dependency theory considers the historical nature, causes, and implications of colonialism and its aftermath. Perhaps the most important work contributed by dependency thinkers was an analysis of neo-colonialism that argued that newly independent developing countries were entering global markets at their own peril. The legacy of colonialism, they argued, left these countries without the necessary infrastructure of commerce, transportation, trade, and communications as well as supporting social, educational, and political institutions.

Apart from its historical analysis, dependency theorists also argued that developing nations were trapped in self-perpetuating “dependency” relations with advanced nations by continually having a net deficit in capital, technology, and educational opportunities necessary to create an educated workforce. Moreover, international laws and practices of commerce, trade, and investment were all created by and thus, skewed in favor of, industrialized nations leaving developing countries in a declining state of impoverishment and “underdevelopment.”¹⁹

17. See e.g., Mona Al-Naggar, *Egypt: Anti-Mubarak Rallies in 3 Cities*, N.Y. TIMES, Mar. 31, 2005, at A13.

18. Steven Erlanger, *Hamas Will Take Part in Vote for Palestine Legislature*, N.Y. TIMES, Mar. 13, 2005, at Final 1; Michael Young, *Can Hezbollah Go Straight?*, N.Y. TIMES, Mar. 9, 2005, at A25; Hassan Fatah, *Pro-Syria Party in Beirut Holds a Huge Protest*, N.Y. TIMES, Mar. 9, 2005, at A1. See Robert Killebrew, *Al Qaeda: The Next Chapter*, WASH. POST, Aug. 8, 2004, for a theoretical perspective on the assimilation of terrorists into the governance of Middle Eastern countries.

19. While the relative merits of this critique lies outside the scope of this Critical Essay, it is important to note that this theory formed the basis of certain economic models used by developing countries, the most prominent being import substitution. In another contrast with modernization, dependency theorists did not describe a single “process of development” but rather several models of development.

For dependency theorists, law was secondary to economics in accordance with Marx's thinking that law constitutes the superstructure to the underlying structure of economics.²⁰ Nevertheless, dependency theory was the genesis of the so-called "international law of development" that underscored U.N. initiatives such as the New International Economic Order (NIEO).²¹ For example, the NIEO agenda advocated giving preferential trade and investment treatment to developing countries, debt relief and grants-based assistance, access to technology transfers, and the recognition to the right to development.²²

Ironically, while the various U.N. resolutions and other actions taken may have lacked legal effect, the NIEO-based agenda has, nonetheless, been partially successful in practical terms. For example, the World Bank and other multilateral and, on a limited scale, bilateral institutions are implementing large-scale debt relief,²³ moving away from loans and towards grants, and facilitating certain environmental technology transfers to developing countries.²⁴ In addition, dependency legal theorists countered the "ethnocentrism" of modernists by espousing the intrinsic worth of preserving the legal values, histories, institutions, and practices of developing nations.

One persistent theme that has emerged from dependency theorists is the legal concept of equity-based relations in international law now referred to as "common but differentiated responsibility (CBDR)." While the term may be fairly new, the concept is not, as it dates as far back as the Treaty of Versailles (1919).²⁵ Non-uniform, differentiated, non-reciprocal treatment can be found in trade²⁶ as well as environmental regimes.

However, the CBDR legal standard has imposed non-uniform legal obligations on contracting parties and has been most prevalent and systemic in

20. Tamanaha, *supra* note 2, at 479.

21. *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), § 4e, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974).

22. See generally SARKAR, *supra* note 1, ch. 7.

23. See e.g., the World Bank's Enhanced Heavily Indebted Poor Countries Initiative (HIPC), at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260411~menuPK:528655~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html>. Widespread debt relief has not always met with approval even from a developing country perspective as there is an implicit "moral hazard" to debt relief insofar as recipient nations may appear uncreditworthy and unattractive to investors. See e.g., Barbara Crossette, *Ex-Premier of Singapore See Pitfalls in Debt Relief*, N.Y. TIMES, Oct. 15, 2000, at Final 4.

24. See e.g., the UN Environmental Programme's website discussing technology transfers, which is available at <http://www.unep.or.jp/Ietc/EST/Index.asp>. See also 15 U.S.C. § 4728(a) (2004) (stating in relevant part: "it is the policy of the United States to foster the export of United States environmental technologies, goods and services. In exercising their powers and functions, all appropriate departments and agencies of the United States Government shall encourage and support sales of such technologies, goods and services.").

25. See Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 278 (2004).

26. The General Agreement on Tariffs and Trade (GATT) added nonreciprocal trade provisions in favor of developing countries in 1979, by permitting "differential and more favorable" tariff treatment. Stone, *supra* note 25, at 278.

international environmental legal agreements stemming from the three "earth summits." The first of these summits was the landmark Stockholm Declaration of the U.N. Conference on the Human Environment (1972) that took "into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need to make available to them, upon their request, additional international technical and financial assistance for this purpose."²⁷

The second summit held in Rio de Janeiro in 1992 also produced detailed international legal agreements such as the Rio Declaration of Principles,²⁸ the Statement of Forest Principles,²⁹ the Convention on Biodiversity,³⁰ and Agenda 21,³¹ that all contained the CBDR principle in some form. These principles were reaffirmed at the third earth summit held in Johannesburg, South Africa in 2002.³²

A successful example of the use of CBDR is the Montreal Protocol (1987) which took effect on January 1, 1989.³³ The Protocol required a 50 percent reduction in the production and use of ozone-depleting substances. The Protocol led to the adoption of the Helsinki Declaration and the London Amendments of 1990, which led to the virtual elimination of ozone-depleting substances by January 2000. Article 2(9)(c) of the Montreal Protocol required a two-thirds majority vote of the participating nations representing at least 50 percent of the total worldwide consumption, giving veto power, in effect, to both developed and developing nations.³⁴

The Montreal Protocol's common but differentiated responsibility standard created an equity-based legal regime persuading China, India, and Brazil to join the Protocol. The significant features of the Protocol included: (1) a ten year delay in reducing emissions permitting short-term increases in the production of ozone-depleting substances by developing countries; (2) a multilateral fund to facilitate compliance among developing countries; and (3) facilitated transfers of

27. *Stockholm Declaration of the United Nations Conference on the Human Environment, Stockholm Declaration*, U.N. Doc. A/CONF.48/14, princ. 12 (1972), reprinted in 11 I.L.M. 1416, 1419 (1972).

28. *See Report of the U.N. Conf. on Environment and Development: Rio Declaration on Environmental Development*, U.N. GAOR, Annex I. Vol. I at 8, U.N. Doc. A/Conf. 151/26 (1992).

29. *See Report of the U.N. Conf. on Environment and Development: Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. GAOR, 47th Sess., Annex 3, Vol. III at 111, U.N. Doc. A/Conf. 151/26 (1992).

30. *See U.N. Environmental Programme: Resolutions of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity* (May 22, 1992), in 31 I.L.M. 842 (1992).

31. *See Report of the U.N. Conf. on Environmental Development: Agenda 21*, U.N. GAOR, 47th Sess., Annex 2, Vol. 1, at 14, U.N. Doc. A/Conf. 151/26 (1992).

32. *See Report of the World Summit on Sustainable Development*, U.N. Commission on Sustainable Development, U.N. Doc. A/Conf. 199/20 (2002).

33. The Montreal Protocol is available at the U.N. Environmental Programme Ozone Secretariat's website at http://www.unep.org/ozone/Montreal-Protocol/Montreal-Protocol2000.shtml#_Toc483027784 [hereinafter Montreal Protocol].

34. Montreal Protocol, *supra* note 33, art. (2)(9)(c).

environmentally-friendly technologies. The Protocol has led to the virtual elimination of ozone-depleting substances.

Perhaps the most well known legal document containing a CBDR principle is the so-called Kyoto Protocol³⁵ that specifically states in Article 3(1) that: “the Parties should protect the climate system... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”³⁶

The Kyoto Protocol³⁷ requires Annex I countries (i.e., advanced nations belonging to the Organization for Economic Cooperation and Development) to reduce their collective greenhouse emissions by at least 5 percent below 1990 levels by the years 2008 to 2012. However, non-Annex I countries, including India and China, are under no similar obligation—this, in large part, fueled the United States objection to the treaty.³⁸ Further, Art. 3(5) and 3(6) of the Protocol provide that “economies in transition” listed in Annex I may choose their base year, other than 1990, to make their emissions reduction burdens less onerous.

Although the CBDR standard in the Kyoto Protocol mirrors the approach taken by the Montreal Protocol by imposing different legal standards and timelines for compliance on the signatory nations, it has been widely criticized. From one perspective, the differential treatment implicit in the Protocol seems patronizing in character, implying that developing nations lack the financial, scientific, and administrative capability to address global warming. From another perspective, it seems that onerous burdens are being placed on advanced nations while other nations, who do emit greenhouse gases, are not being asked to change their current practices or assume any financial burdens for achieving a worldwide reduction in greenhouse gas emissions.

Yet, the CBDR standard may hold the key to reconciling the two theories, as discussed below.

III. A RECONCILIATION OF OPPOSITES?

It is clear that modernization theory is undergoing a resurgence, especially in the context of the recent and ongoing Global War on Terror initiated by the

35. See *U.N. Framework Convention on Climate Change*, May 9, 1992, in 31 I.L.M. 849 (1992) [hereinafter *Framework Convention*]; *Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, Dec. 10, 1997, U.N. Doc. No. FCCC/CP/1997/L.7/Add.1, in 37 I.L.M. 32 (1998) [hereinafter *Kyoto Protocol*].

36. *Kyoto Protocol*, *supra* note 35, art. 3(1).

37. The Kyoto Protocol entered into effect on February 16, 2005 following its ratification by the Russian Parliament on November 5, 2004. Article 25 of the Protocol specifies that ratification by 55 countries representing 55 percent of the total worldwide greenhouse gas emissions is necessary in order for the accord to take legal effect. See *Kyoto Protocol*, *supra* note 35, art. 25. Notably, the United States and Australia have not ratified Kyoto. See Gary Thomas, *Global Warming Accord Takes Effect Minus US, Australia*, VOICE OF AMERICA, Feb. 14, 2005, available at <http://www.voanews.com/english/2005-02-14-voa52.cfm>; see also the official website of the Australian Government, at <http://www.greenhouse.gov.au/international/kyoto/>.

38. While the Kyoto Protocol excludes developing nations from making emissions reductions, Art. 12 of the Protocol establishes a Clean Development Mechanism to provide incentives to industrialized countries to finance emissions reduction projects in developing countries (e.g., emissions trading, carbon sinks). See *Kyoto Protocol*, *supra* note 35, art. 12.

unprovoked attacks launched on September 11, 2001 on the United States. Modernization theory has incorporated a fresh new perspective, and now has a re-energized commitment to stem the flow of fundamentalist Islamic-based terrorism by introducing the elements of representational democracy and economic growth, and benefits that flow therefrom, to societies harboring such terrorists.³⁹

This is a very significant development since modernization theory now is becoming a backdrop to overarching strategic geopolitical considerations, international diplomacy, and even the prosecution of a global war on terror. This may come as a surprise to the U.S. military, intelligence, and national security communities since development issues have simply not been on their agendas heretofore, at least not in any truly significant way.

The reason this development is so interesting is that it links, however tentatively, the root causes of endemic poverty and political disenfranchisement to the downstream effects that may ultimately lead to terrorist activities, political destabilization, and the emergence of asymmetric threats against the West, particularly the United States. Perhaps over time, this linkage will become clearer and better understood, so that the causes and effects of global poverty will be more fully integrated into geopolitical considerations that go into the formulation of national security, defense, and military strategies.

The relative "symmetry" of the Cold War that held two superpowers in a delicate balance has been replaced with an asymmetric world of unpredictable and diffuse threats posed by failed and collapsed states and non-state actors. Threats include, for example, terrorism, the acquisition and use of weapons of mass destruction as well as biological and chemical agents by rogue states and terrorists, and political destabilization posed by insurgencies, military coups, and genocidal acts. Natural disasters, famine, and HIV/AIDS along with other pandemics are also destabilizing factors affecting global security. In fact, the HIV/AIDS pandemic has been described as "not only an unprecedented humanitarian catastrophe, but a political and security threat to both U.S. and global interests."⁴⁰ If the spectrum of geopolitical considerations were widened to include not only HIV/AIDS but also endemic poverty and its causes, that would be impressive indeed.

In contrast, dependency theory is not undergoing a resurgence, but the persistent and recurring theme of the CBDR principle has remained on the international legal scene. In essence:

The principle of common but differentiated responsibilities requires us to recognize that because of historical circumstances, countries at different stages

39. Neil MacFarquhar, *Unexpected Whiff of Freedom Proves Bracing for the Mideast*, N.Y. TIMES, Mar. 6, 2005, at FINAL 1; Todd Purdum, *For Bush, No Boasts, but a Taste of Vindication*, N.Y. TIMES, Mar. 9, 2005, at A10; Thomas Freidman, *Arabs Lift Their Voices*, N.Y. TIMES, Apr. 7, 2005, at A23.

40. See Council on Foreign Relations and Milbank Memorial Fund, *Addressing the HIV/AIDS Pandemic: A U.S. Global AIDS Strategy for the Long-Term* (May 2004), <http://www.cfr.org/pdf/HIV-AIDS.pdf>.

of development have different capacities, and consequently, different levels of and kinds of responsibility for dealing with international environmental issues. . .

The principle of common but differentiated responsibilities recognizes the importance of taking responsibility for past actions. As well, differential responsibility is consistent with recognition of the varied needs and capacities of individual and states.⁴¹

While the name of the underlying concept, Common But Differentiated Responsibility, implies that a *differential* legal norm (i.e., providing a more advantageous set of legal standards to one group over another) is being applied, it may be argued that the legal norm is actually *contextual* in nature (i.e., providing the same legal treatment but permitting different applications that vary based on certain factors.) A contextual norm has been described as:

A norm which on its face provides identical treatment to all States affected by the norm but the application of which requires (or at least permits) consideration of characteristics that may vary from country to country. The application of a contextual norm thus typically involves balancing multiple interests and characteristics.⁴²

Thus, if the CBDR concept could shift from *common but differentiated* to *common and contextual responsibility* (CACR), perhaps some of the divisive rhetoric can be avoided. This shift is permitted under the historical approach and analysis of dependency theory, but not under the ahistorical approach of modernization theory. However, a shift in analysis permits both the introduction of the legal concept of equity as well as the dimension of historicity missing from modernization theory. The element of equity tends to level an unequal playing field by imposing the same legal obligation to comply with international commitments, but differentiating the means by which such compliance is sought.

Recognizing the past inequities among nations, and imposing different legal obligations as a result, is a difficult transition for traditional modernists to make. It requires an acknowledgment of a non-Western history and creates a result based in equity, rather than strictly in law. However, it may be argued that such a shift has already taken place *de facto* (but not *de jure*) with regard to practices related to debt relief, preferential borrowing practices, and other issues discussed above. Perhaps it is time to take a leap of faith.

Law and equity are certainly interrelated concepts, and equity tends to mitigate the harshness of law by taking notions of fundamental fairness into account. By recasting differential norms as contextual norms, the elements of equity and historicity that are notably absent from modernization theory, are

41. Graham Mayeda, *Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 29, 50 (2004).

42. David Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. & POL'Y, 73, 74 (1990).

introduced to it. Modernists should not fear that this will weaken or dilute their theoretical approach. Indeed, by incorporating a missing dimension, modernization theory will be greatly strengthened. Just as law is truly balanced by equitable principles, so modernization theory can be balanced by dependency theory.

In the end, modernization theory's "autocratic" edges may be softened by making it more inclusive, more representative, and therefore, more effective in the long run. In addition, it would be well to remember that contextual norms for nations are on a sliding scale insofar as the nations themselves are dynamic and constantly changing. The international scene is constantly in flux and as the circumstances of developing nations change, so too will the legal standards that will be applied to them. Indeed, the entire point of the development process is to actually achieve development.

IV. A SUMMATION

So, we return to the first question posed by this Critical Essay, that is to say, why should we revisit and attempt to reconcile two theoretical perspectives on development law? Modernization theory is already taking on new dimensions of analysis, yet the equity-based differential treatment of developing nations has remained as a constant theme over the past three decades. Rather than continuing a stalemate between the two theoretical approaches, a slight shift in the analysis of modernization theory permits the reconciliation of the two. The merit in doing this is to create a coherent theoretical approach that reconciles the differences between the two while acknowledging the strengths and shortcomings in both.

As a concluding note, it should be clear that this reconciliation is one of two Western-based theories. The truly absent voice in development law is from the developing countries themselves. Perhaps the final frontier is an exploration of the contributions that the historical experience, legal histories, and traditions that developing countries have to make in this regard. The role of consensual decision-making, conflict resolution, and truth and reconciliation of differences seem full of possibilities. As the theoretical dimensions underlying development law evolve in the future, it may lead to seeking new avenues that are more process oriented, that establish contextual relationships and legal norms, and that emphasize more cooperative and collaborative relationships.