

January 1997

Good Government and Law: Legal and Institutional Reform in Developing Countries

Celia R. Taylor

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Celia R. Taylor, Good Government and Law: Legal and Institutional Reform in Developing Countries, 26 Denv. J. Int'l L. & Pol'y 137 (1997)(book review).

This Book Review is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Good Government and Law: Legal and Institutional Reform in Developing Countries

Keywords

Public Law, Developing Countries, Rule of Law, Government

Book Review

Good Government and Law: Legal and Institutional Reform in Developing Countries

REVIEWED BY CELIA TAYLOR*

GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES; St. Martin's Press, Inc., New York, NY (1997) (Julio Faundez, ed.); (\$65.00); ISBN 0-3120-16473-4; 285pp. (hardcover).

Good Government and Law: Legal and Institutional Reform in Developing Countries is a compilation of papers presented by academics and practitioners at a conference organized by the British Council. The papers attempt to address the role of legal technical assistance in the process of development. In that attempt, they meet with varying levels of success. While several of the papers are interesting and thoughtful in their own right, the volume fails to come together as a unified piece. Part of the difficulty is a failure to define with precision what is meant by "good government" or by "legal technical assistance." The absence of these definitions permit inclusion of papers ranging from theoretical considerations, such as *Bureaucracy and Law and Order* by Reginald Herbold Green,¹ to empirical studies such as *Competition Policy in Latin America: Legal and Institutional Issues* by Malcolm D. Rowat,² but prevent the collection from being a comprehensive treatment of an increasingly important area of law and development concern. This problem is freely acknowledged by the editor, who states that the goal, rather, is to "offer a variety of critical perspectives for the evaluation of legal technical assistance projects and . . . concrete proposals for action and research."³ That goal is achieved with some success, although (as is

* Assistant Professor of Law, University of Denver College of Law; LL.M. Columbia University; J.D. New York University School of Law; B.A. George Washington University.

1. Reginald Herbold Green, *Bureaucracy and Law and Order*, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES, 1, 51 (Julio Faundez ed., St. Martin's Press 1997) [hereinafter GOOD GOVERNMENT AND LAW].

2. Malcolm D. Rowat, *Competition policy in Latin America: Legal and Institutional Issues*, in GOOD GOVERNMENT AND LAW *supra* note 1, at 165.

3. Julio Faundez, *Introduction* to GOOD GOVERNMENT AND LAW *supra* note 1, at 1, 2.

common in writings in the development field) most of the pieces are strong in identifying the problems endemic to an area, they are less successful in articulating new approaches.

That "good government" or "good governance"⁴ is the new mantra of the development arena is well established. International financial institutions and bilateral aid agencies are increasingly basing their funding decisions on considerations about governance. Leading the charge in this arena is the World Bank, which in 1992 published a report entitled "Governance and Development" (Washington: 1992). This report is the culmination of a shift in the approach to development which has taken place both at the Bank and the IMF and in the policies of individual donors. Starting in the 1970s, donors began to shift from addressing underdevelopment as the result of structural problems to be remedied by extensive state intervention to an approach that favored reliance on the free market. "Good government" came to mean non-intrusive government—one that supported the growth of a market. The prime focus of aid to developing countries is now the imposition of policy and institutional changes designed to advance the imperatives of the market in the hope that this in the long run would lead to greater equality and empowerment for all. With the free market now seen as the solution for under-development ills, donors are increasingly concerned with the institutional framework of recipient countries. An essential part of that framework is the governance structure.

This strong focus on governance necessarily demands increased attention to the role of law and the legal system. Policy makers and donors must determine how law could facilitate the creation of a state in which market development can flourish. It is not the first time that law has been a focus of development concern. Laws and legal institutions have been shared, willingly or not, throughout history. In the development arena, law was an explicit component of aid during the 1960s when the "Law and Development" movement placed great emphasis on legal education as a major focus of aid. Adherents believed that legal education would train lawyers to use law as a tool for social change and thus advance development. This approach ultimately failed and donors eliminated, to a large degree, their inclusion of law and legal education from aid decisions. With law once again being added as a central consideration of the aid equation, an important preliminary issue to consider is whether these new efforts will meet with the same fate as did the Law and Development movement.

Julio Faundez examines this concern in his introductory piece, *Le-*

4. Although the volume is titled "Good Government and Law," good governance is a preferred term for many given that the World Bank is not permitted to make decisions based on political concerns. "Governance" enables the Bank to couch its decisions in economic language and thereby stay within its mandate.

gal Technical Assistance.⁵ He posits that while the Law and Development movement and the current push towards exporting legal technical assistance have many commonalities, important differences exist. Significantly, he points out that the two approaches differ in their view of the role of the state in the process of development. Law and development advocates maintained a vision of the state as the central actor in economic development. Lawyers would head up efforts conceived of and orchestrated by purposeful state action. In contrast, the market-driven approach of the governance trend favors state-intervention only to "[f]urther rather than undermine the market process."⁶ Law's (and lawyers') role is passive rather than instrumentalist. It is to help create and support institutions that foster market development. Is this difference one which will save the good governance approach? Faundez is skeptical, although he recognizes that the effort is too new to judge definitively. He suggests that "shifting the focus of attention from legal institutions to economic analysis"⁷ will not help the new approach avoid the many problems which plagued the Law and Development movement, including what role law should play, and what "law" is appropriate for developing countries and others.

Patrick McAuslan echoes this concern in *Government and the Market*⁸ arguing that "[a]n agenda which concentrates on the development of a market economy and uses that perspective to advance the cause of good government is misguided."⁹ McAuslan's criticism of a purely market driven approach towards legal reform in developing countries focuses on the difficulty of exporting legal models from countries that are in very different developmental stages than those to which they are imported. What may serve US markets well may not answer the unique concerns of Africa or the former Soviet Union where "the appropriate cultural endowments"¹⁰ do not exist. McAuslan suggests that what is needed is more attention being paid towards "differently structured, empowered and accountable government" and calls generally for a more comparative approach which relies on indigenous participation.¹¹ He notes, also, that law reform is a slow process and quick fixes are likely to do more harm than good.

The concern with the exportation of "Western" legal institutions and processes is also reflected in Leila Frischtak's work, *Political Mandate, Institutional Change and Economic Reform*.¹² Frischtak recog-

5. Faundez, *supra* note 3.

6. *Id.* at 13.

7. *Id.* at 14.

8. Patrick McAuslan, *Law, Governance and the development of the market: practical problems and possible solutions*, in GOOD GOVERNMENT AND LAW *supra* note 1, at 25.

9. *Id.* at 34.

10. *Id.* at 33.

11. *Id.* at 34.

12. Leila Frischtak, *Political mandate, institutional change and economic reform*, in

nizes that ignoring the history of the development of established markets means ignoring the unique circumstances each country must confront and threatens the efficacy of the "good governance" model. Frischtak concludes that reform should focus on "[a]chieving stabilization and reversal of governance crisis"¹³ rather than on "[t]he longer, more complex and demanding processes of institutional change."¹⁴ In this way, institutions could grow from within as a response to particular societal needs and circumstances and would thus be better suited to each developing country.

While there is validity in this point and in those raised by the other contributors, it is clear that large donors, including the international financial institutions, are not taking that approach and are unlikely to be convinced to do so in the near future. Underlying each of the main theoretical pieces (including those referred to specifically and others addressing governance and bureaucracy (Reginald Herbold Green) and governance and civil society (Nancy Bermeo) is the recognition that the current push towards "good governance" is lacking careful consideration of regional differences, including social realities and culture. The solution for each of the authors is a familiar one — solicit the participation of those at whom the legal reforms are aimed. What is not clearly defined is how to achieve this ambitious goal. It is no answer to suggest slowing the process. Developing countries are eager for development funds and understand that access to monies they view as necessary to their well-being turns upon conforming (at least in appearance) to the models most donors favor. The system provides little incentive for change, although perhaps if legal reform projects fail, under the current approach, those failures will encourage alternative approaches.¹⁵

The second portion of this volume attempts to suggest some practical approaches towards meaningful implementation of legal reform in developing countries, moving from theoretical discussion of the validity of a market-driven approach to presentation of several case studies of attempted reforms. These case studies support the general conclusion that reforms which pay attention to the particular needs and circumstances of a country have the best chance for success and that those needs may not be for less government (as the good governance movement would support) but for different structures of government. One example is provided in a paper by Robert A. Annibale that examines the development of financial markets in Africa.¹⁶ Annibale argues that less

GOOD GOVERNMENT AND LAW *supra* note 1, at 95.

13. *Id.* at 118.

14. *Id.*

15. This hindsight is twenty-twenty approach is well known to the World Bank, evidenced by its changing attitude on participation in development.

16. Robert A. Annibale, *The need for a regulatory framework in the development and*

regulation is not the solution, but rather, that effective and comprehensive regulation is necessary to insure that structures are in place and individuals are trained to deal in the markets being created. While this may slow the speed of "reform," it would prolong its life. Similar points about the complexity of importing regulatory frameworks are made in John McEldowney's paper on the regulation of public utilities in Britain.

Some further difficulties of the good governance approach are explored in Joseph R. Thome's *Land Rights and Agrarian Reform: Latin American and South African Perspectives*,¹⁷ and Ross Cranston's *Access to Justice in South and South-East Asia*.¹⁸ Taken together, these pieces clearly show that without consideration of the characteristics of the country to which aid is provided, the well intended aid is unlikely to have the desired effect. For example, how should legal reform efforts deal with various views on land ownership? Although couched in terms of pure "technical" legal reform assistance, land titling programs have serious political and social implications. Good governance would push for the conversion of communal property rights into individual holdings while local populations may resist and, thus, ultimately frustrate these efforts.

Cranston examines access to justice and the various approaches South and South-East Asian countries have taken to this problem, concluding that the focus on formal court proceedings or other formal dispute resolution processes, favored by the good governance approach, may not be the most efficacious. Instead, he suggests that many developing countries place far greater faith in informal processes and often have institutional mechanisms in place specifically designed to circumvent the court system.

These, and the other case studies, which include works on competition policy in Latin America, and Women, Representation and Good Government in India and Chile are useful to those interested in the particular field. Like the theoretical pieces, they tend to be more descriptive of difficulties than prescriptive of solutions, but each makes a valuable contribution. In sum it is fair to say that each of the contributors to this volume would agree that legal and institutional reform is necessary in developing countries. Each would also agree that in order for that reform to be effective it must be generated from within. As his-

liberalization of financial markets in Africa, in GOOD GOVERNMENT AND LAW *supra* note 1, at 123.

17. Joseph R. Thome, *Land and rights and agrarian reform: Latin American and South African perspectives*, in GOOD GOVERNMENT AND LAW *supra* note 1, at 201.

18. Ross Cranston, *Access to justice in South and South-east Asia*, in GOOD GOVERNMENT AND LAW *supra* note 1, at 233.

tory demonstrates, the imposition of models from other countries at other stages of development without consideration of unique societal concerns is doomed to failure. On those points, the book does an admirable job in making its case both from a theoretical and practical perspective. The weakness of the work is its attempt to address the entire topic of good governance and legal reform without a centralizing theme. Thus, while the individual pieces included in the volume are relevant and interesting, as a whole the work frustrates. It identifies a serious and vast issue and then illuminates only a small portion of the problem. Of course, no work could possibly provide a solution to the problem of what place law should have in development. If this volume is viewed as a springboard to further consideration of the issue rather than an attempt at comprehensive treatment, it makes a useful contribution.