

# Nordic Law and Development – See No Evil, Hear no Evil?

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<b>1</b>	<b>Outset</b> .....	16
<b>2</b>	<b>Nordic Optimism about Law and Development?</b> .....	17
<b>3</b>	<b>Law and Development – Story of Three Failed Generations</b> .....	20
	3.1 First Generation .....	21
	3.2 Second Generation .....	22
	3.3 Third Generation .....	23
<b>4</b>	<b>Comparative Law Point of View</b> .....	24
	4.1 Chinese Rule of Law? .....	24
	4.2 Overblown Notion of the Rule of Law? .....	28
<b>5</b>	<b>Discussion</b> .....	29

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One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles.<sup>1</sup>

*Thomas Carothers*

## 1 Outset

Lawyers choose to think that law is important for the development of a society and that it has an important role in the process of development. The implicit belief or even conviction seems to be that there is an inherent connection between the nature of a society's legal system and society's prospects for development. Today, especially *the rule of law* is firmly established as the core element of a multitude of reform programmes targeting developing countries and championed by Western governments, various intergovernmental organisations, international financial institutions, NGOs and academics. The common nominator seems to be a great reliance on the capability of law and the normative ideal of the rule of law especially.

The belief in law is, however, cherished not only by lawyers or legal actors. For example, the managing director (though lawyer by training) of the International Monetary Fund said in June 2013 that according to her belief there is “the fundamental importance of strong laws and institutions for a robust and well-governed global economy”. She continued and argued that “there need to be laws underpinned by an unwavering respect for the rule of law”.<sup>2</sup> So, the rule of law and the “well-governed global economy” are argued to be interdependent.

Academics support a similar kind of thinking in which the rule of law and economic efficiency are linked together. This is known as the path dependency which is heralded by the so-called legal origins theory.<sup>3</sup> According to economists *Cervellati, Fortunato, and Sunde* “[t]he maximum efficiency in terms of rule of law depends on structural features of the economy...and is higher in democracies.”<sup>4</sup> These academics basically defend the importance of rule of law and the protection of property rights as a path towards more efficient economy and, simultaneously, democracy. The underlying idea is not so much a good society and democracy as such but law as a tool for *good*

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1 Thomas Carothers, *The Rule of Law Revival in Promoting the Rule of Law Abroad: In Search of Knowledge* (ed.) Thomas Carothers, Carnegie for International Endowment for Peace, Washington DC, 2006, p. 12-13, at 3.

2 Christine Lagarde, Managing Director, International Monetary Fund, *Strong Laws and Institutions for a Strong Global Economy*, Washington June 4, 2013.

3 Of legal origins theory and its problems *see*, e.g. Jaakko Husa, *Legal Comparativism and Economic Approach – Tale of Wilful Misunderstandings?*, 1 *Journal of Comparative Legal History* 2013, p. 103-122.

4 Matteo Cervellati, Piergiuseppe Fortunato, and Uwe Sunde, *Democratization and the Rule of Law*. Available on the Internet at “[www.wto.org/english/res\\_e/reser\\_e/gtdw\\_e/wkshop10\\_e/fortunato\\_e.pdf](http://www.wto.org/english/res_e/reser_e/gtdw_e/wkshop10_e/fortunato_e.pdf)”.

*governance* which is conceived as the key to economic success. According to the International Monetary Fund, “Governance is a broad concept covering all aspects of the way a country is governed, including its economic policies and regulatory framework, as well as adherence to the rule of law.”<sup>5</sup> In other words, the rule of law seems to be part and parcel of an efficient economy and possibly also part and parcel of a democracy.

The above said applies also to Nordic development policies. Now, the purpose of this article is not to criticize Nordic law and development efforts as such but, rather, to look into the discussions and debates over the field of *law and development*.<sup>6</sup> The main argument of this article is that we should apply a more informed and critical view with regard to the law and development efforts and not only to copy the models provided by such global actors as the International Monetary Fund or the World Bank. It is the belief of this author that also in the Nordic sphere we should be more distinctly aware of the failures and deeply embedded problems of the law and development approach. In short, Nordic approaches seem overly optimistic about the possibilities of law to enhance development, but as *Kroncke* stingily asks, “At what point does optimism descend into self-delusion?”<sup>7</sup>

This first chapter presents the problem, and the second chapter shows its Nordic relevance. The third chapter describes the difficulties and problems of law and development approaches and projects in general. The fourth part of this article shows what the comparative law point of view may teach about methodological and theoretical issues and questions in law and development especially in the light of the Chinese version of the rule of law. The fifth chapter concludes with a discussion.

## 2 Nordic Optimism about Law and Development?

The point in this article is not so much to claim that we should not attempt to use law as a tool in development policy but rather that we should be more clearly aware of the great number of deep problems attributed to law and development. In short, we should be able to hold on to the idea of development policy morally and ethically but we should also be able to critically evaluate the approaches and methods used in the development policy. A well governed global economy with the rule of law appears to be a very Nordic assumption too.

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5 International Monetary Fund – *Factsheet* (Current as of September 2013). Available at Internet: “[www.imf.org/external/np/exr/facts/pdf/gov.pdf](http://www.imf.org/external/np/exr/facts/pdf/gov.pdf)”.

6 In this article law and development is regarded both as an academic field (close to comparative law) and as a practical field of law (close to development policy). See for a more detailed view on the conceptions and histories of law and development William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge University Press, Cambridge, 2009, p. 324-329.

7 Jedidah Kroncke, *Law and Development as Anti-Comparative Law*, *Vanderbilt Journal of Transnational Law* 45, 2012, p. 477-555, at 492.

When it comes to Nordic countries it seems that the same types of ideas and legal-theoretical assumptions are implicitly held as fruitful although there seems to be room for softer and more human rights oriented approaches. There is, perhaps, less talk about efficiency and free trade and more talk about human rights and democracy.<sup>8</sup> Yet, if we look under the surface it seems that the very same rule of law ideas and ideals are held in high esteem. Clearly, Nordic countries have an interest in human rights and the rule of law and they have been willing to expand these normative ideals also to cover their foreign policies. According to the Human Rights Strategy of the Foreign Service of Finland “foreign policy strives to strengthen respect for international law, to strengthen security, stability, peace, justice and sustainable development, and to promote human rights, democracy and the rule of law”.<sup>9</sup> Finland holds a position according to which, “Human rights, democracy and the rule of law are also promoted through development policy.”<sup>10</sup> Norway, also, says that it

“attaches particular importance to its human rights dialogues with China, Indonesia and Vietnam. Special priority areas include the abolition of capital punishment, torture and discrimination on the basis of gender, ethnicity or sexual orientation, and the promotion of freedom of expression, freedom of religion or belief, the rule of law and economic, social and cultural rights.”<sup>11</sup>

By and large, in the same tone, “Sweden is driving for a common European foreign and security policy that safeguards respect for human rights, democracy and the principles of the rule of law.” The Swedish position holds also that, “The universal values of human rights, democracy and the rule of law must guide the global debate on norms for cyberspace.” Moreover, it is deemed as “an important responsibility for Sweden and the European Union to uphold human rights, international law and the principles of the rule of law”.<sup>12</sup> Like Finland, also Sweden sees a role for the rule of law in its *development policy* when seeking to “boost trade and investment in developing countries, including at regional level which is deemed to contribute to equitable and sustainable development”. According to Sweden’s Policy for Global Development, the rule of law is a basic condition for “a favourable investment and business climate, including a stable, democratic political environment. Other key elements are measures to strengthen the rule of law and curb corruption. The same applies to

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8 For example, according to the Norwegian view “Assistance in developing independent courts and prosecuting authorities and in the use of international human rights instruments at all levels of the legal system is an important contribution to the development of the rule of law and democracy.” *Report to the Storting on Policy Coherence for Development 2011 Chapter 12 from the 2012 budget proposal from the Ministry of Foreign Affairs, 2012, at 53.*

9 *Human Rights Strategy of the Foreign Service of Finland*, Ministry for Foreign Affairs of Finland, 2103, at 11.

10 *Ibid* at 16.

11 *Report to the Storting*, 2012, at 67.

12 *Statement of Government Policy* (by Minister for Foreign Affairs Mr. Carl Bildt) in the Parliamentary Debate on Foreign Affairs, Wednesday, 15 February 2012.

measures aimed at strengthening the protection of property rights”.<sup>13</sup> Altogether, the Norwegian position neatly carves out the underlying basic Nordic assumption of this approach:

“Assistance in developing independent courts and prosecuting authorities and in the use of international human rights instruments at all levels of the legal system is an important contribution to the development of the rule of law and democracy.”<sup>14</sup>

The focal point is to assist developing countries towards the rule of law which seems to equate, to an extent, with meaningful democratic development altogether. In Denmark, similar types of ideas are openly based on the idea of a certain superiority of what we can call the Nordic rule of law approach. According to the Strategy for Denmark's Development Cooperation:

“The development of our welfare model has provided us with distinctive experience in regard to democracy and rule of law, transparency, gender equality, and a vibrant cultural and associational life, all of which we need to bring into play in our development cooperation.”<sup>15</sup>

Even while this is modestly put, it does not differ much from the US approach or the approach of the International Monetary Fund. The implicit message reads out something like as follows: ‘our system works wonderfully and we want to export our legal models and institutions to your (underdeveloped) system too in order to boost trade and democracy’.

It would appear that the belief is that the rule of law can be *transplanted* to another system and that it has a role in enhancing both democracy and economic efficiency. The Nordic approach adds to this its own flavour by highlighting democracy and gender equality but, nevertheless, the theoretical basic tenets of the Nordic approach co-inside very well with the general Western law and development approach. Law's crucial role for societal development has been the core-assumption of law and development from the early 1960s. What is striking in the Nordic rule of law oriented law and development thinking is a certain naivety concerning the very attempt of using law as an instrument for development. The critical and well know failures, the problems and the innate deficiencies of the whole law and development thinking as a practice and as an academic field are conspicuously absent.<sup>16</sup> As will be explained later, it need not be like this.

Sadly, judging from the Nordic policies it would appear that there is no place for critical thinking at all. This absence is almost shocking because the

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13 Government Communication Skr. 2007/08:89, *Sweden's Policy for Global Development*, 2008, at 24.

14 *Report to the Storting*, 2012, at 53.

15 “*The Right to a Better Life*” – *Strategy for Denmark's Development Cooperation*, 2012, at 7.

16 See an almost devastating critique concerning the efforts to export the rule of law edited by Thomas Carothers *Promoting the Rule of Law Abroad*, 2006.

literature and research concerning the problems of this kind of a development policy approach are common knowledge within academic circles of law and development and comparative law. Notwithstanding, there are virtually no references to the voluminous literature of the field and the massive failures of the law and development thinking. One might be tempted to ask, is this the way to proceed with this and is this approach working? The question which unavoidably emerges is: Are the Nordic policies uncritically repeating what international actors hold to be the truth? If this is the case, then, there is something to worry about as this article will show later. Experienced law and development scholars *Davies* and *Trebilcock* write as follows:

“over the past two decades or so western nations and private donors have poured billions of dollars into rule of law reform in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia. In other words, in the poorest countries of the world, billions of dollars that could be devoted to projects such as vaccination programs, primary school education and water and sanitation facilities are instead being put into the pockets of lawyers.”<sup>17</sup>

One may, indeed, wonder why these well spread critical views do not seem to find their way into the Nordic policies. As we will see in the following chapter, the failures of the law and development approach are only too well acknowledged in the field.

### 3 Law and Development – Story of Three Failed Generations

To be sure, what we call a “law and development” is not a coherent whole. As a specific approach to development policy it seems to contain various ingredients and layers. *Tamanaha* points out that the efforts of this approach have spanned over more than half a century. Notwithstanding, the labels have not remained the same. In the 1950s and 1960s we were talking about “the law and development movement” which transformed later in the 1980s and 1990s into “good governance” programmes. Today, the present version of law and development seems to be “rule of law and development”.<sup>18</sup> So, we can speak of different moments or generations of law and development.<sup>19</sup>

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17 Kevin E. Davis and Michael J. Trebilcock, ‘*The Relationship between Law and Development: Optimists versus Skeptics*’, 56 *American Journal of Comparative Law*, 2008, p. 895-946, at 896.

18 Brian Z. Tamanaha, ‘*The Primacy of Society and the Failures of Law and Development*’, 44 *Cornell International Law Journal*, 2011, p. 209-247, 216-217.

19 David M. Trubek and Alvaro Santos speak of moments, see Trubek and Santos *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *The New Law and Economic Development: A Critical Appraisal* (eds.) Trubek and Santos, New York, Cambridge University Press, 2006, p. 1-18.

### 3.1 *First Generation*

During the early decades of the 1960s and 1970s law and development was rooted in the ideology of *modernisation*. In practice this meant that development was seen as something that should take place as State led. The problem that early law and development confronted was underdevelopment which was understood as the product of local institutions, cultures and societies. Western laws and legal institutions were needed in order to direct and shape economic behaviour in underdeveloped States. Typically, law and legal institutions were seen to serve the creation of modern frameworks for the governance of State industries. The State was seen as the driver of economic growth. Legal-theoretical thinking leaned heavily on the instrumental view of law which was literally an instrument enhancing State-led development. Besides instrumentalism, there were also certain legal realistic ideas which opposed legal formalism. Formal legal thinking was seen to work without due regard to the socio-economic contexts or policy objectives. But, in practice, the first generation of law and development was also marked by various legal transplants i.e. Western legal institutions were exported to developing countries.<sup>20</sup>

What is clear today is that the first generation of law development failed and it did so quite spectacularly. The failure of the first generation of law and development was made clear and analysed critically in a pivotal article called 'Scholars in Self-Estrangement' by *Trubek* and *Galanter* in 1974.<sup>21</sup> According to them the whole idea according to which Western (they spoke specifically about American) legal ideas and institutions could be exported to developing countries was simply ethnocentric and naïve because Western liberal legal institutions had very little to do with the actual reality of developing countries. In short, the article was kind of a rude wake-up call for the first generation.

The pestering problem of the first generation of law and development was the inability to recognise that the realities of developed Western countries and those of developing countries were too far removed from each other for the legal reforms to actually work. The liberal legalism of the West was too insensitive toward local customary laws and other legal institutions which were informal and part of the subtle web of local legal tradition. This original criticism by *Trubek* and *Galanter* is, however, not a thing of the past but continues to be relevant even for the contemporary generation of law and development.<sup>22</sup> Their critique also, importantly, shaped the later transformation of law and development efforts.

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20 See F. Charles Sherman, *Law and Development Today: The New Developmentalism* 10 German Law Journal, 2009, p. 1257-1273, 1261-1263.

21 David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisconsin Law Review, 1974, p. 1062-1101.

22 Cf. Davies and Trebilcock, 2008, p. 916-917.

### 3.2 *Second Generation*

If the first generation used the State as a means to create development by means of law and legal institutions, the second generation started to limit State intervention and sought to mend the failures of the first generation. This was an age of prominent Western political figures such as *Margaret Thatcher* and *Ronald Reagan*. Basically, the idea was to take social realities better into account. Law and development moved from the State towards market oriented policy-thinking in the early 1980s. The shift in focus brought about the so-called ‘Washington Consensus’ which is a group of policy prescriptions which were heavily influenced by the IMF and the World Bank. Law reforms were to take place by means of large-scale legal transplants; the approach was also known as the ‘Big Bang’ approach.<sup>23</sup> Instead of trying to reform underdeveloped systems as a whole the focus was centred on more manageable things like distinct legal institutions or laws.

Second generation law and development reforms brought about a new focus and new concepts. The shift moved to concepts of good *governance* or *best practice* in law and legal institutions. In this, various aspects were woven together in order to reach good governance legal reform was needed and, thus, the rule of law projects were needed also. According to the second generation approaches development was conceived mainly as a question of governance. This meant that legal and judicial reforms started to regularly appear at the top of the list of deep reaching structural and institutional reforms in the policies by various international financial institutions. The idea seemed and seems to be that reforms ought to work in such a manner that economic development becomes possible when, and only when, certain legal requirements are fulfilled: the rule of law, property rights and lately also human rights. Instead of singular large-scale projects the stress moved to more comprehensive thinking which underlined and underlines the importance of specific structural legal reforms. Albeit, the ultimate justification behind structural reforms still seemed to be economic as to its nature. *Rittich* describes the underlying law and development ideology behind the second generation thinking as follows: “The argument for structural reforms is that the adoption of these rules, norms and best practices are the precondition to participation in the global economic order, without which no State can now hope to achieve growth and escape from poverty.”<sup>24</sup>

Arguments concerning economics are especially relevant for the second generation. Economy and law are linked together. Accordingly, also judicial reforms which are undertaken in order to promote the rule of law are taken because they “secure a stable investment climate”.<sup>25</sup> The formula was rather banal: first comes good governance with the help of law, then follows

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23 Sherman, 2009, p. 1263-1264.

24 Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, 26 Michigan Journal of International Law, 2004, p. 199-243, at 208.

25 Rittich, 2004 at 217.



economic prosperity and finally comes democracy. The third generation follows pretty much a similar type of thinking pattern, yet there are some modifications too.

### 3.3 *Third Generation*

In the 1990s law and development started a new more active phase with the backing of such actors as the World Bank. As a result there was a huge growth of various legal reform projects in developing and transitioning post-socialist countries. Moneywise, the new phase was impressive because billions of dollars had been spent on different kinds of rule of law projects since the beginning of the decade. This surge of interest seemed to assume that there was a broad consensus according to which it was necessary to create rule of law based governments in the developing and transitional economies. The rule of law was taken as the basis of development policies and the key-interest was placed on trying to find the best strategies to implement rule of law development objectives. However, as time passed the amount and significance of challenges became distinct and the early enthusiasm of the 1990s concerning the rule of law fell into decline. It became obvious that the seemingly coherent and unified concept of the rule of law was actually masking a plurality of visions and approaches which were not necessarily even compatible with each other.

The problem, well known in comparative law, was that the rule of law is not really a universal value nor is it easy to achieve because this concept has many meanings.<sup>26</sup> So, it is hardly a surprise that, “The results of such projects have been disappointing”.<sup>27</sup> There have been noteworthy implementation problems and it has been noted that one crucial factor behind the failures has been the inability of Western legal experts to recognise the role of local knowledge and the need to adapt to local conditions while promoting rule of law reforms.<sup>28</sup>

These difficulties have had their effect on the present state of law and development which is now much more conscious, perhaps even disillusioned, of the challenges and obstacles in using law and legal institutions in the development policy. The atmosphere, in research, has shifted from the happy and optimistic feeling of the 1960s into the rather unhappy and pessimistic feeling of the 2000s. The present, almost depressing, state of law and development is made clear if one reads the important book edited by *Trubek* and *Santos* called *The New Law and Economic Development*, which was published in 2006. The academic view of law and law’s role in societies is even fundamentally different from that of the first generation. Now, one of the

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26 See for more detailed analysis David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *The New Law and Economic Development*, 2006, p. 74-94.

27 Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 *Chinese Journal of Comparative Law*, 2013, 4-20.

28 Davis and Trebilcock, 2008, 918.

reasons for the past failures and present scepticism is that law and development has been too distant from its sister field of comparative law or, if you prefer, comparative legal studies.

#### 4 Comparative Law Point of View

It is somewhat puzzling to see how little the seemingly close fields of law and development and comparative law have had to do with each other. Both deal with foreign law and both face rather similar types of questions. However, whereas law and development tries to do something to foreign law, in turn, comparative law struggles in order to understand foreign law and foreign legal cultures. However, in fact, law and development and comparative law seem to be very far apart from each other.

In an important and provoking article *Kroncke* presents an argument according to which law and development ought to be conceived as *anti-comparative law*. Even though *Kroncke's* argument is specifically American it seems to capture and describe some of the general methodological and theoretical problems of law and development and its blindness to comparative law. According to him, Americans ought to categorically abandon law and development and reorient themselves to foreign law the same way as does comparative law.<sup>29</sup> Now, there is much strength and critical drive in *Kroncke's* argument but here we will not follow his lead nor will we try to explain what modern comparative law is because today there is a vast amount of literature on this subject.<sup>30</sup> Instead, we will look into a concrete example which depicts comparative law's message clear and loud.

##### 4.1 Chinese Rule of Law?

It is not argued here that the rule of law would be the most important part of the package of "Western legal goods". Yet, it seems to occupy a crucial place as one of the key "goods" that is being promoted: the rule of law, fundamental human rights, markets, economic development, and democracy. And if there is one highly cherished and almost superior legal value today it is most likely the rule of law. It seems to be the standard answer to a multitude of problems; almost the Holy Grail of law and society. According to the view of the World Bank, "[T]he rule of law is a principle of fundamental importance to the World

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29 See *Kroncke* (2012). Notwithstanding, it was not only law and development which rejected comparative law because comparatists themselves also conceptualised their field narrowly and, as a result, many close fields were not recognised as comparative law. Law and development was one of these fields, see William Twining, *Globalisation and Legal Scholarship*, Wolf Legal Publishers, Nijmegen, 2011, p. 48.

30 A few fresh examples citing useful literature: *Methods of Comparative Law* (ed.) Pier Giuseppe Monateri, Edward Elgar, Cheltenham, 2012 and *Practice and Theory in Comparative Law* (eds.) Maurice Adams and Jacco Bomhoff, Cambridge, Cambridge University Press, 2012.

Bank. It lies at the heart of what the Bank is, what it does, and what it aspires to accomplish.”<sup>31</sup>

As we saw in the introduction of this article, the rule of law is also a crucial element of the Nordic law and development approach. However, it is a very complicated concept and its meaning is all but clear and there are conflicting ways to understand what it actually means. To the surprise of Western lawyers today also contemporary authoritarian regimes are referring to the rule of law ideals. Here is the thing: authoritarian regimes rely on their versions of the rule of law and use legal means to “self-reform through internal reallocations of power”.<sup>32</sup> For example, the Chinese Communist Party has learned to use legal methods for its advantage in order to “simultaneously bolster its regime while repressing dissent”.<sup>33</sup>

The above said has not led to new kinds of critical law and development approaches in respect of such Western ideals like the rule of law. The latter still holds a central position in law and development. Basically, if one looks at the mainstream, the rule of law has been treated like a mega-size legal transplant which it, of course, has been.<sup>34</sup> Accordingly, Chinese law expert *Peerenboom* has suggested a specific methodology for successful transplanting.<sup>35</sup> However, here we will not deal with the problems of transplants as such but instead we will look into Chinese law and legal culture.

Even within the Western legal culture and political liberalism, broadly understood, the concept of the rule of law is all but clear.<sup>36</sup> Simply, there is no one-size-fits-all type of definition. One example from Europe will make this evident: the English common law rule of law differs clearly from the German *Rechtstaat* or the French *l'état de droit*. These three basic ways to understand the rule of law have significant differences in how they actually conceive this

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31 Source: “[www.worldbank.org/](http://www.worldbank.org/)” Now, it is not claimed here that international actors would not be aware of the difficulties with the concept of the rule of law. For example, one can find from the web-pages of the World Bank the following: “the multitude of rule of law concepts is likely to breed confusion and misunderstanding between donors and recipients, or even within different members of the same community.” Yet, it is claimed here that this awareness is rather poorly reflected in the practical programmes and actual policies of these international financial institutions.

32 Kroncke, 2012, at 525.

33 Kroncke, 2012, at 527.

34 There is in-depth critical comparative law debate over the concept of legal transplant. For a seminal critique of it, see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *Modern Law Review*, 1998 p. 11-32. The same point is also made by Tamanaha, 2011, in the context of law and development, who says that legal reforms “will unavoidably impinge upon, and be effected by, the enveloping fabric of society, frequently in unanticipated ways”, at 214.

35 See Peerenboom, 2013. Tamanaha, 2011, p. 242-243 points out that China has developed also legally but “none of which can be directly attributed to law and development projects”.

36 As John Bell says “Although the term ‘rule of law’ is frequently used to express a fundamental value of any liberal political system, there are different understandings of this idea among different legal systems”, Bell, *Comparative Administrative Law*, in *The Oxford Handbook of Comparative Law* (eds.) Mathias Reimann & Reinhard Zimmermann, Oxford University Press, Oxford, 2006, p.1260-1286, at 1271-1272.

much used but highly elusive concept.<sup>37</sup> No surprise, then, that the difficulties are very hard to avoid in law and development when it comes to using the rule of law. For instance, *Merkel* studied trends and developments in the rule of law in the five largely known indices: those provided by Freedom House, the World Bank Worldwide Governance Indicators, the Bertelsmann Transformation Index, the Democracy Barometer and the World Justice Project. Now, what *Merkel* noted is that even when these indices are used by people active in research, politics and practice these indices do not meet satisfactorily even the most standard social science requirements. *Merkel's* key finding is that in most cases the fundamental problem lies in the fact that concept formation is weak.<sup>38</sup> To comparative law as a discipline this comes certainly as no surprise.

And, when the Western legal minds move from the boundaries of their own legal culture the problems may grow more significant as to their relevance. This is because the legal cultures of the countries which are deemed by the law and development approach as “developing” may have their own deeply culturally rooted ways of understanding what the rule of law means. They may have their own legal traditions. In these cases we can no longer speak of legal transplants but rather legal replacements but this changes the dynamics of law and development to a considerable degree. As a concrete example we may refer to the Chinese way to define the rule of law which differs from Western models. China makes a nice example as there has been multiple rule of law projects and because China, with regard to law and development, seems to be an almost embarrassing example. Much seems to go against the rule of law objectives: property rights and contract enforcement are weak, courts are not really applying law independently, and there is no Western style separation of powers or constitutionalism. Notwithstanding, China is undoubtedly an economic development success – semi-authoritarian government which hardly fits into any Western definition of the rule of law or democracy.<sup>39</sup>

Tantalisingly, China seems to prove that there can be significant economic and even legal progress without the Western style rule of law.<sup>40</sup> But, what rule of law are we dealing with here then? The answer is all but clear. There are deep epistemological troubles. The basic problem is that “the West has constructed its cultural identity against China in terms of law”.<sup>41</sup> This methodological flaw of law and development causes epistemological

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37 In comparative law these linguistic and cultural translation problems are distinctively clear, see Jaakko Husa, *Understanding Legal Languages – Concerns of the Comparative Lawyer*, in (ed.) Jaap Baaij, *The Role of Legal Translation in Legal Harmonisation*, Kluwer, Hague, 2012, p. 161-181.

38 See Wolfgang Merkel, *Measuring the Quality of Rule of Law*, in *Rule of Law Dynamics in an Era of International and Transnational Governance* (eds). Michael Zurn, Andre Nollkaemper, and Randall Peerenboom, Cambridge University Press, Cambridge 2012, p. 21-47.

39 Cf. Tamanaha, 2011, p. 229-230.

40 Cf. Tamanaha, 2011, p.245. See also Kroncke (2012) 499.

41 Teemu Ruskola, *Legal Orientalism*, 101 Michigan Law Review, 2002, p. 179–234, at 184.

commensurability problems concerning the basic legal conceptions. As *Fu* points out at the beginning of a short encyclopaedia-article about Chinese law:

“The study of Chinese law poses special challenges for those educated in the Western world. In fact, the concept of law as we know it today is difficult to place in the Chinese legal tradition.”<sup>42</sup>

The Anglo-Saxon classical ideal according to which one ought to have “rule of law not of men” seems to be in a clear contradiction with the classical idea of Chinese political and legal philosophy which underlines governance or ruling of men i.e. *rénzhì*.<sup>43</sup> This is basically a utopian idea which stresses the foundational source of society’s power: those who use power ought to have a virtuous nature which will provide a legitimate base for the usage of power. Accordingly, ruling should rely on the virtuous character of the rulers (*yǐ dé zhìguó*, 以德治国). Now, as such this ideal provides a rather wide base for different grounds for being virtuous: one can be virtuous in a Confucian manner or one can be virtuous in the manner which is accepted by the Chinese Communist Party.<sup>44</sup>

But, if you look at the Chinese approach from the point of view of “the rule of law not men”, then, it looks like a rather perverted way to conceive the rule of law. However, it is hard to tell with any true certainty which conception of rule of law is “right” because legal cultural contexts differ and this fact ought to speak for a more sensitive approach than for the normative approach. As, *Ruskola* points out “our conception of the rule of law must not be so closed and rigid as to categorically delegitimize all alternatives to political and social organization”.<sup>45</sup> And, this is very much the lesson which we hear from modern academic comparative law circles; sensitivity towards foreign legal traditions.<sup>46</sup>

In the light of the above, it is hardly a surprise that the expression “the rule of law” does not translate functionally at all if it refers to *Rechtsstaat* i.e. a state which uses law as the base and as a guardian of the use of public power.<sup>47</sup> Yet, the idea of the Western (however vague) conception of the rule of law is possible to express in Chinese too as the expression *fǎzhì* might be a

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42 Junwei Fu, *China*, in Elgar Encyclopedia of Comparative Law 2edn (ed.) Jan Smits, Edward Elgar, Cheltenham, 2012, p. 137-139, at 137.

43 This is a combination of the word man *rén* (人) and the word *zhì* (治) which refers to ruling.

44 See with more details Leigh K. Jenco, “Rule by Man” and “Rule by Law” in *Early Republican China: Contributions to a Theoretical Debate*, 69 *Journal of Asian Studies*, 2010, p. 181–203 (“an alternative path for interrogating the quality of the Chinese (or any) government that need not rely on contemporary Western ideals of liberal democracy as a yardstick”, at 198).

45 Ruskola (2002) at 230.

46 See H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 4 ed, Oxford University Press, Oxford, 2010.

47 See e.g. Martin Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford, 2010, p. 312–341.

satisfactory legal linguistic translation because it combines *fǎ* (法), meaning law, and *zhì* (治), which here might stand for rulership or power over someone or something. *Fǎzhì* might be translated as “governance with law as an instrument of ruling”. Crucially, here law is seen instrumentally as a tool for ruling and not so much as the base and the guardian of the power of the State as is typical in the broad sense of the Western conceptions of the rule of law.<sup>48</sup> There especially seems to be a distinct difference between the continental European *Rechtsstaat* legal ideology which attributes also a certain philosophy to it and the Chinese version.<sup>49</sup> Notwithstanding, the Chinese version may actually fulfil the minimum World Bank –style rule of law which underlines that a legal system ought to provide “predictable, enforceable and efficient rules for a market economy to flourish”.<sup>50</sup>

#### 4.2 *Overblown Notion of the Rule of Law?*

Undoubtedly, there is more to this than merely differing conceptions of the rule of law. Even though we would be able to work out a coherent and unified conception of the rule of law we would still have to evaluate the genuine power of it in the process of development of a society. *Kairys* remarks that “overblown rule-of-law notion inaccurately conveys that freedom, democracy, and equality will be or can be reliably guaranteed by operation of law and irrespective of values or politics”.<sup>51</sup> The argument of *Kairys*’ is that one should not overestimate the role of law in a society and that there is a risk that talk of the rule of law may actually mask societal crisis and legitimacy problems one-sidedly as legal problems. This is also the lesson from comparative law which underlines the fact that law is always law in context and that legal culture has great significance when it comes to the empirical realities of how law actually works in a system.<sup>52</sup>

To summarise, it would be crucial to understand that one can transplant and export legal institutions but there is a risk that one assumes implicitly that

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48 This can be seen consequentially in the Constitution of the People’s Republic of China according to which (Art. 5) the State is governed according to the rule of law: *yǐ fǎ zhì guó* (以法治国). However, this does not mean the same as ‘the rule of law’ in common law English, rather it means something like ‘rule by law’.

49 There are even internal differences in the concept of *Rechtsstaat*, see Kaarlo Tuori, *The ‘Rechtsstaat’ in the Conceptual Field – Adversaries, Allies and Neutrals*, 6 *Associations*, 2002, p. 201-214.

50 Alvaro Santos, *The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development*, in *The New Law and Economic Development*, 2006, p. 253-300, at 253.

51 David Kairys, *Searching for the Rule of Law*, 36 *Suffolk University Law Review*, 2003, p. 307-329, at 328.

52 For example, in his seminal comparative law research *Gifts: A Study in Comparative Law*, Oxford University Press, Oxford, 2009, Richard Hyland says that “if comparison is possible at all, it can only occur by examining the norms of particular social and cultural contexts”, at 73. The methodological point made by Hyland is to regard law as society-specific i.e. contextual knowledge is deemed as essential to the understanding of law.

various supportive conditions of a secondary nature would also be in place in the systems where transplants and exports are transferred to.<sup>53</sup> However, various social, economic, cultural and also political factors differ from those of the exporter's which means that transplants and exports will work differently than what they do in their original legal cultures.<sup>54</sup> To simplify a great deal, a perfectly good legal institution or piece of legislation may work decently in one place but have ill effects elsewhere.<sup>55</sup> Be that as it may, actors like the World Bank assume that the rule of law objectives of development programmes actually fit into one package even though this conclusion "is neither theoretically plausible nor supported by the projects' experience".<sup>56</sup>

## 5 Discussion

To be sure, Nordic systems are doing fine in global comparisons. By all means, there are genuine reasons for Nordic countries to feel pride. However, it would not seem very believable that we are doing fine because of the rule of law. Nordic law has many innate values and factors which have to do with history, mentality, culture, religion and various other factors which came first – only then came the Nordic version of the rule of law which, by the way, does not have any common Nordic definition.<sup>57</sup> Now, to argue that Nordic success has taken place because of our legal systems seems quite an overstatement. Accordingly, to export contemporary Nordic ideas to developing countries does not seem to be an easy task at all. As in all efforts, in the area of development policy, the risk of failure cannot be avoided when trying to stir development by exporting law. Notwithstanding, law and development literature teaches us what the fundamental problems are with this approach. Clearly, problems go deeper than just implementation or political sensibilities.<sup>58</sup> If one takes a look over the Nordic approaches of law and development these lessons have not been heard; quite the contrary. Nordic law and development approaches follow closely the lead of international financial institutions.<sup>59</sup> And therein lies the problem: the approach of the global financial

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53 This is also one of the key-observations in legal pluralism research and discussion. See, e.g., John Griffiths, *What is Legal Pluralism*, 24 *Journal of Legal Pluralism and Unofficial Law*, 1986 and Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism*, 42 *Journal of Legal Pluralism and Unofficial Law*, 2002, p. 37-82.

54 Cf. Tamanaha, 2011, p. 223.

55 See also Tamanaha, 2011, p. 219.

56 Santos, 2006, p. at 300.

57 See Jaakko Husa, Kimmo Nuotio, and Heikki Pihlajamäki, *Nordic Law – Between Tradition and Dynamism*, in *Nordic Law – Between Tradition and Dynamism* (eds.) Husa, Nuotio, and Pihlajamäki, Intersentia/METRO, Antwerp – Oxford, 2007, p. 1-40.

58 Davies and Trebilcock, 2008, p. 919.

59 The question might also be: What form of 'pursuit to happiness' it is that we are actually trying to export? Nordic, Western, liberal or what? The expression 'pursuit to happiness' comes from William P. Alford's review-article about Carother's book *Aiding Democracy*

institutions equates to looking at other legal traditions through the filter of Western legal-cultural presuppositions.

Even if one supports various forms of Western development policies and even if one sees the point also in trying to develop the legal systems one should not practice law and development without a clear awareness of the troubles and difficulties. Mostly these problems stem from the very fact that people (including Western lawyers) conceive law in too simplistic a manner as a set of rules and institutions which can be exported elsewhere. However, it is partly because of the oversimplified view of law and legal history that the well-meaning development projects fail<sup>60</sup>. The difficulties and problems originate from the Western legal cultural view which causes lawyers to undermine the non-legal factors and actors which affect law.<sup>61</sup> Likely, they fail because law and development has an inborn flaw: it fails to recognise the cultural meaning and significance of law and local legal cultures. One cannot but agree with *Tamanaha* when he concludes while explaining the reasons for these failures:

“the very label suggests that law, or the ‘rule of law’ has a special ability to deliver desired development goals. This faith is bound to disappoint. Law cannot deliver in and of itself because it swims in the social sea with everything else.”<sup>62</sup>

One way forward might be the one taken by *Peerenboom* which means developing a new kind of *methodology* which would “be based on a better theoretical and empirical understanding of the conditions that determine the

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*Abroad* (1999), see Alford, *Exporting “The Pursuit of Happiness”*, 113 *Harvard Law Review*, 2000, p. 1677-1715

60 Notwithstanding, there are examples of concrete approaches which seem to be quite down to earth as for example The World Justice Project (<http://worldjusticeproject.org>) in which the rule of law is understood to mean: 1) local business and foreign investment are not stifled by corruption, 2) governments are held accountable for their actions and citizens are able to express dissent peacefully, 3) children can go to school and are not exploited for cheap labour 4) women and girls are able to protect themselves from violence and discrimination 5) children can be vaccinated without having to pay bribes, 6) buildings and other constructions withstand earthquakes and remain upright (so that lives are not put in danger by compromised regulations). But, here the problem is that this kind of broad conception of rule of law seems to embrace too much in order to have any analytical edge i.e. it can contain almost everything which is deemed as “good and just”.

61 As explained by Stephen Golub: “the powerful tendency to minimize, usually not intentionally, the many other factors and actors that affect legal systems development and that can be brought to bear to improve it. Attorneys and judges are not blind to such considerations, but their perspectives and experience undercut giving nonlawyers and nonlegal tools the full weight they deserve. This contributes to such phenomena as the fixation on courts and other institutions, and working with fellow lawyers and judges”, Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*. Paper October 14, 2003 Carnegie Paper No. 41, at 22. Available in Internet at: “siteresources.worldbank.org/INTLAWJUSTINST/Resources/BeyondRuleOrthodoxy.pdf”.

62 *Tamanaha*, 2011 at 247. He also points to other rather obvious legal historical point: “There is no timetable for building the rule of law. It may take decades or generations or centuries”, at 238.



success or failure of legal transplants”.<sup>63</sup> In any case, it might be a good idea for the Nordic law and development approaches to start thinking more about particular circumstances, specific purposes and differing legal cultural contexts for the rule of law, human rights and democracy.<sup>64</sup> At least we should be able to move the stress from the supply of legal institutions to the demand side. As it happens to be the case, this is also the message that modern academic comparative law conveys i.e. methodological sensitivity toward local conditions and an attempt to abandon the legal view that is one-sidedly embedded in one’s own legal culture.<sup>65</sup> Or as *Twining* says, “[W]e cannot break away very far from our intellectual roots, but we can subject them to critical examination”.<sup>66</sup>

To conclude, according to their general law and development goals Nordic actors are taking part in aiding and shaping basic economic, legal and political institutions in the developing world. It is essential to critically evaluate and re-think these general (rule of law) goals and approaches for two reasons. First, the knowledge base of the rule of law and democracy projects is all but convincing. Secondly, if the knowledge base is flawed or lacking the well-meaning development policies may turn out to be merely a legal version of neo-colonialism or ethnocentrism. And that, frankly, does not appear to be a desirable outcome for the Nordic versions of law and development.

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63 Peerenboom, 2011, at 6.

64 Davis and Trebilcock (2008, 945-946) underline prudently the need for “some degree of modesty” and “a larger role for ‘insiders’ with detailed local knowledge”.

65 There seems to be an underlying methodological idea which underlines the comparability. The key-idea is to place foreign rules, principles or institutions in a comparative framework and then study them as a part of a larger socio-legal context. This kind of comparative method requires placing foreign law in an external comparative framework as an attempt to counterbalance one’s own legal-cultural prejudices. *See* for more detailed discussion Jaakko Husa, ‘*Functional Method in Comparative Law – Much Ado about Nothing?*’, 2 *European Property Law Journal*, 2013, p. 4-21.

66 Twining, 2011 at 38.

