



## REVIEWS

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# STATE AND LAW IN THE DEVELOPMENT PROCESS: PROBLEM-SOLVING AND INSTITUTIONAL CHANGE IN THE THIRD WORLD

By Ann and Robert Seidman  
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**P**ROFESSORS Ann and Robert Seidmans' *State and Law in the Development Process* challenges conventional law and development theory. The interface between law and development in third world countries, they contend in part one of their book, demands more than ends-directed policy and elegant legislative drafting. Tinkering with doctrinal detail does little to induce development or resolve socio-economic problems. Law needs to change "the repetitive patterns of

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social behaviour that foster poverty and oppression".<sup>1</sup> This proposition is encapsulated by the maxim, "no policy without a law; no law without effective implementation".<sup>2</sup>

Most lawyers intuitively recognise that cultural difference makes transplanting law from one society to another a dubious exercise. Nevertheless, conventional comparative theory<sup>3</sup> finds unity in diverse legal systems. Neutral, apolitical comparison purports to link ostensibly similar legal ideals, which, like natural rights, await discovery. Much of the current enthusiasm for international legal harmonisation in regional fora like APEC, proceeds on these assumptions.

The Seidmans argue that comparison of this kind avoids questioning the role of law in society. Take, for example, Vietnam's *Law on Business Bankruptcy 1993*. Drafted with Australian legal assistance, it makes provision for secured and unsecured creditors, schemes of arrangement and prohibits officials of bankrupt enterprises assuming similar responsibilities.<sup>4</sup> After enactment, the law lay dormant for twelve months, before an implementing decree<sup>5</sup> was promulgated. To date, only one "experimental bankruptcy"<sup>6</sup> has been attempted.

If the Seidmans are correct in saying that no matter how well drafted, law is not good law unless it is implemented, the *Law on Business Bankruptcy 1993* has been a spectacular failure. There is no shortage of factors that may account for the lack of enforcement. The Law is comparatively sophisticated, too complex for a legal system innocent of public-private property and contract definitions, courts with little commercial experience, a dysfunctional debt enforcement agency and a society that stigmatises bankruptcy. Lack of enforcement is equally likely to arise from institutional competition.

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1 Seidman, *State and Law in the Development Process* (St Martin Press, London 1994) p351.

2 As above.

3 The literature in this area is vast, but see Zweigart & Kotz (Weir (tr)), *Introduction to Comparative Law* 2 vols (Oxford University Press, Oxford, 2nd ed 1987).

4 Interview, Nguyen Thanh Thay, Deputy Director, Department of Management for Civil Sentence Execution, Ministry of Justice, Hanoi, July, October 1995.

5 *Decree No 189/CP of the Government, Providing Guidance on the Implementation of the Law on Enterprise Bankruptcy* 23 December 1994.

6 See Fitzpatrick & Wyville, "Business Bankruptcy Seminars in Vietnam" (1994) 22 *Australian International Law News* 23.

More importantly, the *Law on Business Bankruptcy 1993* imposes rights-based solutions. Although, Vietnam's common economy has been dismantled, both public and private capital is still tightly managed by bureaucrats.<sup>7</sup> At least in the short term, the government is reluctant to allow quasi-independent people's courts to jeopardise state mandated industrial development, by bankrupting economically important state and private enterprises.<sup>8</sup> Narrow doctrinal comparative analysis fails to consider broader social issues and, not surprisingly, transplanted foreign legal principles do not operate as intended.

In the course of thirty-five years of observing transplanted legal models in Africa and Asia, the Seidmans developed the "Law of Non-Transferability of Law". Law, they argue, addresses individuals, who respond by making choices dictated by the constraints, assumptions and resources unique to their environs. It follows that the same rules of law, in different times and places, only coincidentally produce the same results.<sup>9</sup> Examples abound, but few are as instructive as a comparison of road traffic codes. After gaining power in 1975, the Lao People's Democratic Republic abolished most existing laws; the *Road Traffic Code* was an exception. As a technical regulation, law-makers considered it free of suspect colonial ideology and alien cultural values.<sup>10</sup> Although virtually identical to French by-laws, the per capita traffic accident rate is approximately three times higher in Vientiane than in Paris. Transplanted law was ineffective, because it did not take into account differences in road conditions, driver training, car maintenance and the cultural reception of road rules.

If one country cannot copy the laws and institution of another, can law-makers learn from each other? The answer is obviously yes, if one does not follow a post-modernist retreat to extreme cultural relativism. In part two of their book, *Development Theory and Practice*, the Seidmans consider how to develop law. Most legislative policy is framed as normative propositions, for example, insolvency ought to be resolved in an orderly fashion. Confronted with ends-directed proposals, law-makers formulate legislative solutions from logical constructs or theories. Most Australian legal advisers in Vietnam, for example, unquestionably

7 See Gillespie, "Bureaucratic Control of Business Regulation in Vietnam" in Taylor (ed), *Australian Perspectives on Asian Legal Systems* (Law Book Co, Sydney 1996) (forthcoming); Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis" (1994) 30 *Stanford J Int'l* 325 at 346-356.

8 See Lay, "The New Bankruptcy Law in Vietnam 1994" 11 *ICCLR* 389.

9 Seidman, Ann & Robert, *State and Law in the Development Process*, p46.

10 Interview, Mr Ket Kietissak, President, Lao Supreme Court, Vientiane, January 1995.

advocate laws based on neo-classical economic assumptions,<sup>11</sup> apparently oblivious to local behaviour that obstinately refuses to fit this paradigm.

Arguing that all grand theories operate at too general a level to propose the detailed measures required to restructure legal systems and institutions, the Seidmans have developed a practical research methodology that focuses abstract models on observed reality.<sup>12</sup> Known by the acronym ROCCIPI (Rule, Opportunity, Capacity, Communication, Interest, Process and Ideology), the methodology brings together a series of research categories to explain how a "role occupant" (individual or corporate body) will behave when faced with a law. The ROCCIPI research agenda ensures that, at an appropriate level of abstraction, law-makers consider the full range of explanations for role occupants' behaviour. This investigation is best informed by participatory research. Those affected by policy, it is plausibly assumed, invariably possess the most profound insights into their own responses.

Research not only shapes legislative policy, it can also diagnose whether laws achieve an acceptable resolution of the social problems they purported to address. Black-letter law is, however, only part of the equation; effective law-making depends on the structure of implementing agencies. Laws often fail, because they treat institutions as single, rational actors, rather than complex, multi-faceted organisations composed of many role occupants. Institutional reform requires laws to address the interaction of role occupants, identifying and rectifying dysfunctional attributes. As Lenin observed, radical transformation calls for "smashing the bourgeois state".<sup>13</sup> For similar reasons, rights-based bankruptcy laws are unlikely to operate as intended without a fundamental structural reform of Vietnam's socialist trained bureaucracy.

The third part of the book, *Restructuring the State*, uses the ROCCIPI agenda to discover how well intended laws and governments in most post-independence third world States allowed officials to capture state resources for their own private advantage. Homilies embedded in conventional development theory, like removing constraints to economic

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11 These views are embedded in the legal development theory of the World Bank and UNDP. See Lichtenstein, *A Survey of Vietnam's Legal Framework in Transition* (Policy Research Working Paper 1291, World Bank Legal Department, East Asia and Pacific Division 1994) pp1-2, 5, 43-44, 60-61; Hoang Phuoc Hiep & Per Bergling, *Introduction to the Vietnamese Legal System* (unpublished report, SIDA 1994) pp37-38, 116.

12 Seidman, *State and Law in the Development Process*, p115.

13 As above at p131.

development and improving education and law enforcement, were not the solution. Although necessary, these reforms simply replace one patronage group with another. Major institutional change of the legislature, administration and judiciary, the Seidmans conclude, requires accountability through a vibrant civil society.

*Transforming the Political Economy*, the fourth part, examines why efforts by most developing countries to engender economic growth were frequently diverted to strengthen bureaucratic powers and privileges. Chapters in this part examine key economic sectors, trade, agriculture, industry, finance and education.

The Seidmans' work considers the instrumental and institutional aspects of law. Indeed, the ROCCIPI mnemonic reminds law-makers that elegant drafting is boutique intellectualism, if divorced from the norms of conduct that guide citizens, companies and bureaucrats. It is, therefore, paradoxical that such faith is placed by the Seidmans in positivist solutions. Readers are assured that legislation changes attitudes, and detailed social science research can bridge the gap between legislative expectations and social behaviour. This reliance on rational solutions diminishes the importance of irrational social behaviour. As Dror<sup>14</sup> observed many years ago, legislation is least likely to induce changes in behaviour where it acts on deeply embedded cultural practices. Where legislation excites social change, rational legislation tends to categorise behaviour into subjective-objective, normative-factual and legal-illegal (frequently traditional) behaviour. This bifurcation ignores the patronage networks, property demarcations, trading patterns and dispute resolution practices that developed in most third world countries without much regard for state instrumentalities.

Although primarily written as a text for third world legislators, the Seidmans' theories are entirely applicable to Australia. Explanations for third world legislative failures convey a message to Australian Governments that believe social change can be induced without public consultation and diagnostic research conducted by law reform commissions. This is an extremely well written and lively account of a most complex area of governance and is highly recommended for law-makers, aid organisations and students of law and development theory.