〈Informal Address〉

Research on Law and Development

by Jerome A. Cohen*

I am glad to be here.

At this time in the afternoon, however, some of you here may feel that yet one more talk is a violation of the provision of the United States Constitution against cruel and unusual punishment. But this is an important conference. We hope that there will be many more, not only in Korea but also in the United States involving both Americans and Koreans. I apologize for my inability to understand Korean and therefore appreciate the discussion. But I have read the summary of the papers and found them rather fascinating, to say the least, and I hope that they will be translated or summarized in the near future. I also have the opportunity tonight after dinner to have a summary of the discussions from some of my former students and now colleagues. I was particularly interested, for example, in Professor Park, Byoung Ho’s paper, which seems to address itself specifically to the kinds of questions many of us in academic life elsewhere would like to know the answers to: What is really distinctive about Korea’s legal tradition? What is the impact of the past upon the present? Is it fair to say that Korea was really a smaller carbon copy of the traditional Chinese legal system? Obviously not. And yet we are very short of information in the United States and elsewhere in the western world about this problem.

So we hope that scholarly efforts in this country will help to enlighten us about contemporary Korea and about Korea’s past heritage in law just as you Korean scholars and the Korean National Museum here enlightens us about Korea’s artistic heritage and contemporary accomplishments.

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Research on Law and Development

Today I will talk to you about, first, the International Legal Center's Committee report which many of you have seen but have not yet had an opportunity to read. It is very long. Perhaps for many of you it is best simply to have a summary and then to glance at the report selectively; others will want to study it in some detail.

This report deals with the future of law and development research. It is the product of a committee of 17 people and 6 consultants, 23 in all, from various countries around the world. It describes the types of law and development research. It describes the problems that have been encountered in undertaking this kind of research, and it makes some recommendations and in an effort to solve some of these problems. It struggles with the question of what is development because if one is going to talk about law and development, one has to define development. One also has to define law; the committee report does not even attempt to handle that old question, but rather deals with the newer question of what is development. It tries to define development in a broad comprehensive way that is not confined to material progress, although it recognizes that material progress is part of the universal desire shared by peoples all over the world. It tries to define development to mean cultural progress as well, and not cultural progress in exclusively western, or so-called modern terms, but enhanced cultural appreciation of the rich heritage that many of the countries of the world possess. I might say parenthetically I have just been in Taipei in Taiwan, and there is a controversy there over the new hotel wing that has been built in Grand Hotel. It is a rather striking landmark in Chinese temple tradition. Many of my Chinese friends in the law dislike it, because it looks like a temple. The Americans like it because it looks like exotic China, in a somewhat modernized form. But many of my friends think that it would have been better to build a tall faceless modern apartment house such as one sees all over the world. It seems to me that this embodies part of the question here that each country faces about what is to be preserved, and what is to be appreciated in its heritage.

Well, we define development to mean the efforts of less developed countries (the L.D.C.) to achieve a better of life in both material and in cultural terms. Obviously we know very little about the relation between law and development. We know that law has multiple meanings with relation to development. We know that law is for all governments, communist and noncommunist, socialist and capitalist, an instrument of development, even though we know very little about its actual utility and impact.
We know law in many countries is more important as a kind of process, a set of values about the ways in which it is legitimate to carry out the conduct of government in society. We also know, certainly from the perspective of social scientists, that law is a prism; it is a means for viewing society in a distinctive way that reveals the society in new light different from the way in which an economist, an anthropologist, or even a political scientist views it. But we recognize that law is also often an obstacle to development. Sometime it is a means of development, but often it is a block because law is often the embodiment of tradition, is the embodiment of the past. Lawyers are often extremely conservative people, although they have been notable radicals among us. The report is quite critical of those social scientists who study development but ignore law as one facet of development. It is also quite critical of legal scholars who confine their studies to questions of doctrine, of theory, of extrapolating from codes, of confining themselves to books alone, without considering what is the actual function of the law, what effect it actually has.

It is obvious I suppose to this audience that we need social scientists and lawyers who really study the social origins and the functions of law, who are interested in the relation between institutions and legal rules and specific developmental efforts. For example, what is the impact on society of a given rule, or a given law. Who has access to the legal system? How are decisions made in the legal process in every country? What is the relation between the informal system that every society has for processing grievances, channeling economic behavior, handling tensions, and the formal system. On the other hand, we also need to know what is the impact on the legal system of many changes in social, economic and political dimensions of society. I was interested in the summary here of the statement of purposes in your program which certainly shows a proper awareness of this question. Now obviously lawyers and social scientists, as has been demonstrated I think by the papers today, often have very different perspectives. The ideal of course is to have people with very substantial training in both disciplines. Just as we train people as legal historians who have substantial training in both law and history. But most of us have to settle for the real world and cannot afford this kind of dual training, but have to cooperate with people in the related discipline. Now of course there are many problems; the basic one is what we should work on basic research or applied research, such as policy questions of the immediate use especially to developing countries. As we will see both of these are
necessary but different people give different priorities to this kind of work. Our report has a survey of selected areas of the world with respect to what has been done in research on law and development in Africa, in Latin America and in Asia.

In Asia two countries were selected, Indonesia and India. And in addition to this summary, in the report, there will be appendices of the individual studies in the various countries selected. All of these countries were so-called less developed countries.

We also have a summary of a report on law and development in the United States as an example of a more developed country and we hope to include some material on the European and West-European experience. Our conclusions about the state of the art are, to say the least, mildly discouraging. There are some bright spots but the situation is not outstandingly good. First of all, traditional studies, such as doctrinal studies, predominate. I remember years ago we had in the United States some very controversial Supreme Court decisions about whether one could require students in school to say certain prayers. And the Supreme Court held that this was unconstitutional, at least to a certain extent. I asked my colleagues who teach constitutional law what the consequences of these decisions were. Had they made any changes in the public schools in our own city of Cambridge, Massachusetts, or anywhere else? Not one of them knew. They simply did not know what impact these decisions had on our daily life, even though some of them had children in school. That seemed to me this was a typical example of the ability of law professors in the United States as well as elsewhere to ignore the relation between law and social reality. One of them quoted to me a well-known phrase of a former professor, Thomas Reid Powell, who said, "I don't know the facts, I only know their significance." That sounds good, but I think it is quite inadequate for the contemporary Era. The second problem is that we have very few trained people in this field. The third is that the law schools in the United States certainly are too conservative in recognizing the importance of this kind of research. They give too little weight to teaching about this field. They give too little support to research. And they frequently are reluctant to make faculty appointments of a permanent nature to people who choose this field as their vocation. There are very few law and development research institutes in our country, and elsewhere.

There are few social scientists who include law and development within the scope of their own interest. And of course there is too little money to finance the kind of research that we need. Perhaps most important, there is no clear sense of direction of where we
ought to be going. There is a good deal of ferment, but we are groping, and as you recognize here, you too are groping, as indeed we ought to be groping at this stage, for the proper direction, if indeed there is a proper direction.

Yet some promising starts have been made. In the United States, for example, at Stanford University there is a very interesting program done with scholars from many parts of the Mediterranean world, the area of Latin influence. Mediterranean countries and Latin American countries are being compared in their law and development. At Yale Law School there is a program in Law and Modernization, which has emphasized the training of younger scholars who will go out as teachers in this field. It has also sponsored a good deal of research. At University of California at Berkeley, there is a center for the study of law and society. They also have an anthropology project that studies the role of law in village life throughout the world. The University of Wisconsin has made a theoretical progress. They also run summer institutes for training, and they had cooperation with Latin American legal institutions, and published interesting papers. At Harvard we have had a effort to establish East Asian Legal Studies Program that has produced eight books on China, and is beginning to produce articles on Japan, and Indonesia. We hope as a result of the beginning of our talks here, to soon have some significant work emerging on Korea and eventually perhaps on Vietnam. At the State University of New York at Buffalo they have assembled a very interesting cast of academic social science and law people who are now doing some very good work. These are among the major centers that have been established in our country. The social scientists led the way: Daniel Webb of the University of Washington, working on Indonesia, Lora Nader of the University of California, an anthropologist who has worked on several cultures, and Marc Galanter at Buffalo who works primarily on India. This is why our report features India and Indonesia, not because we thought Korea was less important, but because we had personnel who were able to tell us something about India and Indonesia. We hope in the future we will have more ability to do work on Korea. Of course the conditions vary from country to country. In some of the less developed countries some interesting progress has been made, in founding institutions and in publishing research, but thus far we do not have any international community of scholars. We don't have any commonly understood framework. We don't have any commonly shared concepts. Hopefully meetings such as this will take us one step further down the road.
The question of priority has been very difficult. Some people in our Committee argued that we must concentrate on applied research, very practical, short-run, specific projects, because the needs of the less developed countries are very great, and they can't afford to wait for long-range, very academic and highly-expensive proposals. We don't have much in the way of either intellectual resources or financial resources at this time. Therefore, some people argued the best way to use the limited resources is through very specific, applied projects.

Other people argued that often basic research is more practical than applied research, that basic research can tell us more intellectually, and that basic research avoids the danger of academics becoming instruments of the government. On the other hand, we recognize that basic research is much more difficult to support and that it takes a much longer time and at this point we know very little to justify the formulation of grand research designs.

There seem to be something of a conflict between the representatives of our committee from less developed countries and those from the more developed countries. Those from the less developed countries seemed to favor applied research. Those from more developed countries seem to be more academic-minded. We are further removed from the problems, and can be more dispassionate about development, perhaps, but this is only a tendency I think. Even once you grant that there must be basic research, we recognize that there are questions about how to do basic research. Should studies undertaken be related to a specific body of theories? Is it possible at this time to recognize a general body of theories? Is there sufficient knowledge to formulate theories regarding law and development? The second question concerns methodology. Should we in the law field try to emulate to use the methods of economics, anthropology, and comparative sociology? Should we try to formulate hypothesis and then seek empirical vindication of them? Again our committee was divided. Some people thought that we had to really proceed on a comparative social science model. Others said that Law is different, that it is very specific to a given culture, that it is the product of history in a unique way, and that it involves normative premises that are highly distinct. They argued that to make hypothesis at this stage is premature because we simply don't know enough. So concretely how we proceed is the question. One way to proceed is to plunge ahead and start with some project without any theory at all, without formulating any ideas but simply going after the facts. But we recognized
that this is very wasteful, and often very sloppy, so we have come out trying to choose an in-between ground that says for most of us that we are not yet ready for a rigid social science model. But we all agreed there must be cooperation of social scientists. However, we are aware of the fact that under the label of science may be political, ideological assumptions that have to be examined. And we all agreed on the importance of clarifying in advance the theoretical premises of whatever proposal is submitted. What we agreed on also is to try to construct some concepts, some typologies, some issues, and some problems that would be common to various societies, in order to have some sort of dialogue. We need a dialogue not only between scholars in different countries, but we also need a dialogue between scholars in different disciplines, and we therefore must have some common way of discussing these things.

What are the goals we finally set for ourselves? First we must expand the community of people who are working on law and development.

Second, we must in the larger world gain an appreciation of importance of the work that are engaged in. Third, we would like law and development studies to be useful to policy makers. Even basic research can often be useful. In trying to reach these goals in the general principle, we are very cautious. We realize we don’t know very much. One has to be modest also because of the very limited financial resources. So we favor experimental, rather small scale projects even with respect to basic research, and we especially favor trying to strengthen institutions in the less developed countries such as Korea (that have been so encouragingly developed) to do more work in these areas of concern. The recommendations are as follows: The most obvious concerns funds. Of course we need more money for everything. We have urged that people in the more developed countries try to find funds from other sources that would not be available to the less developed countries. But we need of course to have both types of research done, basic research, and policy research. We recognize that you have to work on two legs, and that there is interaction between basic research and policy research and that it is often hard to draw the line to find where applied research stops and basic research begins. We have to train more people and establish better institutions. We have to circulate to a wider audience, existing research, because too few people have read the studies that we have. One suggestion was that we publish a book, a kind of reader that would have selections from the best law and development research that has been done in various places in the
world. The I.L.C. has had a number of fellows who have published very interesting studies. One thinks of the work that has been done in Indonesia, in Ceylon, and here. Certainly the work that has been done in the United States has been useful but it’s not collected in any convenient way. It is hard for people unacquainted with the field to have access to it. We need more conferences; international conferences to bring people from different cultures together, and domestic conferences to have some continuing discussions that will stimulate papers and eventually publications. The I.L.C. puts out a newsletter that could be used to report throughout the world on work in progress. The scholars thereby may find links between themselves that they have not previously perceived.

Probably we should publish a working paper series in order to improve communication. We are particularly happy on the committee when the less developed countries increase their publications. Hopefully some of this information will be in languages that the rest of us can appreciate. Obviously we need greater training. We need to train people who are not now in law and development both social scientists and law professors, in this field, to them in the literature. One way to do it would be in workshops of 8 weeks or 10 weeks of duration as a preliminary introduction. We also need to have briefer introductions for administrators and people who operate in related fields.

We have recommended that there will be special training fellowships, so that scholars who want to devote themselves as major parts of their career will have the chance to acquire tools that they need to do so.

Obviously one has integrate training and research. We hope that the I.L.C. will play a greater role in facilitating all these; in raising money, in providing selected grants, and in holding conferences.

Conferences have of course many values; not only the one of publishing papers and exchanging ideas formally, but if they are internation they give us a chance to visit other countries to meet people, and in the beginning stages of the field they tend to be, I think, rather useful, although one has to weigh the expense involved against better use of the funds in supporting actual scholarship. I might say my own presence here is lucky in that I was in Asia for other purposes so I simply had to drop in Korea on my way home. It would be useful if in each country we had a better catalogue of which scholars are traveling where. For example, I’d like to know in the future, as many people in the
U.S. would, about the travel plans of many of you. Often modesty prevents you from letting people know. If we knew in advance we could set up a program that would enable you to talk to people of mutual interest. Then it might be a more useful visit. The I.L.C. can coordinate all of this and as a final recommendation we suggest that it establish a permanent multinational advisory committee on research and legal education, in order to see these recommendations are carried out.

A lot of this is obvious to this audience. In a way it is like a minister preaching trying to convert the people who are already converted.

Of course, the purpose of this report is not for ourselves; the purpose of this report is to be distributed widely in order to provide some education to other people to acquaint them with the field, and hopefully to obtain sponsorship or greater work in the field. One of our greatest American justices, Oliver Wendell Holmes, Jr. said “We need education on the obvious more than investigation of the obscure.” In this case, I think, that remark is especially applicable.