Discussion of the “Public Domain”

Article: Daniel Drache, “The return of the public domain after the triumph of markets: revisiting the most basic of fundamentals," in D. Drache ed., The Market or the Public Domain, Routledge, 2001.

Jing started with a summary of the major theses of the volume The Market and the Public Domain.

Theme 1: The reconstitution of the public domain in a post-Seattle and post-Washington Consensus world order

Theme 2 : Critique of market fundamentalism and the vision of one-worldism

Theme 3: New public spaces/places/services are required in order to strengthen democracy and to create sanctuaries in society where market fundamentalism cannot reach

The Washington Consensus

- John Williamson coined the term in 1990
- Synonymous with `neo-liberalism’ and `globalization’
- For a bibliography on the debate over “Washington Consensus,” please see http://www.cid.harvard.edu/cidtrade/issues/washingtonlink.html#_2
- refers to “the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989.” These policies were:

1. Fiscal discipline

2. Reordering public expenditure priorities. Switching from things like indiscriminate subsidies to the poor to basic health and education

3. Tax reform (to lower marginal rates and broaden the tax base)

4. Interest rate liberalization

5. A competitive exchange rate

6. Trade liberalization

7. Liberalization of inflows of foreign direct investment

8. Privatization

9. Deregulation (to abolish barriers to entry and exit)

10. Securing property rights: This was primarily about providing the informal sector with the ability to gain property rights at acceptable cost.

Since then, the phrase "Washington Consensus" has become a lightning rod for anti-globalization protestors.

Background

- The rise of anti-globalization discourses in the post-Seattle era: there is a rallying cry among critics from civil society for the need to redraw the lines between the state and the market
- economists such as John Williamson, Paul Krugman, Joseph Stiglitz have started criticizing the pro-market policy prescription
- criticized the policy processes that occur outside the present reach of the nation-state
- a disjunction between the economic side of globalization and its social impact
- disconnect between international institutions that govern the global economy (in Washington, Geneva) and the understanding of the crisis
- The pitfalls of market fundamentalism :
    1. there is no provision at the global level for elementary social justice and the provision of social goods globally
    2. the economic imperative of development is not integrated with the ethical commitment to a socially inclusive global economy
- redefine priorities: the fundamental Q is not what corporations want, but what citicizens demand and expect from the new world order.

Problems

1. the private use of public interest—health, labor standards, and culture are directly/indirectly subject to the WTO's trade codes
2. domestic policy sovereignty is no longer insulated from international disciplines
3. the state is seen as a major facilitator of private interest

Basic premises of the volume

1. Definition of the public domain =\=the public sector

2. the line between the market and the state is moving in sharply contrasting directions so that there is a large public domain to be mapped – a strategic opening
3. The public domain is a large, irregular space having flexible borders, expanding and contracting, driven as much as by need as the price mechanism of the market.
4. The public domain is about resources carved out from the market that empower and transform both the state and non-state actors;
5. the public domain is an area of social life, with its own rules, norms, and practices, cutting across the state and market and other public private agencies
6. the public domain was part of defining 'the mutual obligation of common purpose'; The public domain enables us to grasp what we have overlooked in recent times, namely, the processes and institutions that furnish society with its collective and social goods, public space, and social inclusiveness
7. The public domain was fenced from the pressures of the market place, in which citizenship rights rather than market power governed the allocation of social goods
8. the state was to be the facilitator and partner rather than the engineer of democratic citizenship: the bureaucratic centralization of the welfare state robbed the public domain of its original vitality and democratic impulse
9. The public domain is the 4th element that abuts on civil society, which is itself the legal creation of the state. Civil society emerges from the social relations which are separate from the state. By contrast, the public domain is about the collective goods carved out from the state or from the market and, significantly and increasingly is from both.
10. The public domain, in the final analysis, rests on building sanctuaries, sanctuaries are themselves a product of public finance.

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Several questions and comments were raised during discussion on Drache:

Q: Despite the long discussion by Drache of the various definitions of the "public domain" which seems equivalent to the notion of the "commons," I am still not clear about what he meant by the term.  What is the utility of the concept? Possibly, Drache is talking about a kind of public interest vested indivisibly in certain kinds of (non-negotiable) public goods.

Discussion:  The concept is vague precisely because it is constantly under threat. Drache is arguing that we want the state to protect the area.  But I found the section in his chapter on the list of public places in the city a very helpful guidance for us to conceptualize the "public domain."

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Q: I found the concept of the negotiable, non-negotiable, and mixed common goods an interesting one. In the case of China, what is the absolutely non-negotiable public goods?

Discussion: news of political content and information is non-negotiable and a monopoly of the socialist state.  But news and broadcasting media as a general category is not non-negotiable. Financial news broadcasting is deregulated. Another possible "public goods" is land owned by local states.   Since the 1990s, Beijing has been doing two things

simultaneously: on the one hand, opening up the cultural and media sectors to commercialization, yet continually delimiting the non-negotiable cultural media goods that have to do with "cultural security" on the other hand. How did they do it? They would say "news" can be deregulated, but not political news; they say parts of the publication sector (e.g., infrastructure such as printing and distribution) can be partially deregulated, but not the editorial and content production sub-sectors. Even with "content," they hair-split into entertainment content and political news content – one can be commercialized, the other cannot, etc.

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Q: I found it interesting that Drache distinghished the "public domain" from the civil society (a product of the 18th century Europe). Civil society is vested in the notion of "private interest." If citizens don't have private interest, they won't have the incentive to do public good.

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Kate Hartford led the discussion of Lawrence Lessig, chapter 7 & 10, "What things regulate," "Intellectual Property," in Code and Other Laws of Cyberspace, Basic Books, 1999.

Kate pointed out the concern about the notion of the "commons" between Drache and Lessig – one is about the material things, the other about virtual products. She said her fundamental interest has to do with the regulation of virtual space. The question is: do we need new laws to deal with the challenges presented by the cyber space? What is the boundary of the private when your communications are no longer limited by physical presence?

Right now, the privacy laws of the Internet is based on privacy laws governing material things. There is an argument that with respect to free speech/private speech/IP issues, there is no need for new laws, i.e., we can just draw an analogy from laws (libel, obscenity, etc.) that govern behavior in the real physical world. I go for the opposite argument: that we need new laws. We need to come up with the present-day contingent definition of "fair use".

The question is what the government principle should be for determining how the Constitution provisions are applied when we get into the cyber space.

With respect to intellectual property, the balance between the rights of the creator and the rights of the public to access was written into the Constitution.
The public can automatically access after a certain period of time not clearly specified in the Constitution. The Constitution does NOT guarantee the rights for the public to access, although it implies that public access to ideas and information is important. Why? That's because the Founders did not foresee a situation in which something other than the laws (i.e., technology) could block public access to information (such as the 'code').

Current models of legal production is bounded by corporate interest not by the broader industry interest and professional interest. There is a necessity for "reverse engineering," i.e., to decrypt the cryptic code.

Kate raises the prospect that the current code-practices in the cyberspace will deprive artists and creators the incentive to produce ideas. If public access can be blocked through code and other means of Internet architecture, then what is the incentive for creators of cultural products?