

# Law, Regulation, and Development

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## Abstract

What is the relationship between law and development in the post-colonial era? Are particular types of legal institutions associated with particular modes of economic organization or trajectories of economic development? Is the relationship between law and development causal, in the sense that specific legal reforms cause specific development outcomes? These questions are not of merely academic interest. The answers have major implications for policy-makers. In this essay we trace major currents in the history of ideas about these topics, ranging from Max Weber and his successors to proponents of the “right to development.” We then identify key limitations in the intellectual frameworks that have been dominant through the turn of the twenty-first century. Those limitations include: failure to draw upon the experience of countries in the global South; misplaced reliance upon problematic conceptual dichotomies such as

legal/non-legal, public/private, common law/civil law, and domestic/international; and failure to acknowledge the complexity and mutability of legal institutions. We conclude by examining emerging approaches that promise to overcome some of these limitations.

**Keywords:** Law and development, global administrative law, varieties of capitalism, Max Weber, new institutional economics, legal origins, rule of law

## **Introduction**

Ideas about the relationship between law and development play prominent roles in contemporary thinking about development, both among scholars and policy-makers. Social scientists regularly try to unpack the mechanisms through which various aspects of law influence individual behavior and promote desirable forms of social change. Meanwhile, development practitioners have invested massively in legal reforms—sometimes known as “rule of law reforms”—designed to promote development (Carothers 1998).

In this chapter we will only sketch the field in the broadest of strokes, restricting our attention to ideas that pertain to the post-colonial era. In most cases it seems safe to presume that the end of colonialism marked a significant shift in the nature of the legal system and its role in society.

We begin by offering a working definition of the concept of law. We then survey efforts to understand the relationship between law and post-colonial development in the twentieth century. This vast intellectual terrain encompasses many theoretical approaches, but we focus only on: the enduring influence of the work of Max Weber; the law and development movement that flourished in the United States in the 1960s; the voluminous scholarship inspired by the new

institutional economics (NIE); the varieties of capitalism project; the human rights movement; and Third World Approaches to International Law (TWAIL). We show that these approaches originated in very different intellectual communities and employ different conceptions of development and of law.

In the following section we describe conceptual limitations associated with these divergent ways of thinking about the relationship between law and development. We focus on four dichotomies: legal versus non-legal, domestic versus international law, common law versus civil law, and public versus private law. We then outline three sets of twenty-first century ideas that point toward ways of overcoming some of these conceptual limitations. We conclude by indicating possible directions for future research.

## **The concept of law**

Studies of relationships between law and development use varying definitions of the term law.<sup>1</sup>

In this chapter, we define a legal system (i.e., a system of laws) as a system of norms—propositions that purport to guide action—administered, or at least endorsed, by state officials in

a particular society. A legal system will include norms that guide the behavior of both state officials and other actors. For example, property law will include both the norms that regulate the use of parcels of land and the norms that regulate the selection of people to adjudicate property disputes.<sup>2</sup> Within a legal system, we use the term “legal institution” to refer both to legal norms and to the organizations—which are themselves constituted by legal and non-legal norms—that administer them. Functioning legal institutions are products of the interaction of official legal norms (the law on the books), the legal officials who administer them, and the environment in which they operate (Kornhauser 2004). For example, understanding Peruvian property law as part of a functioning legal system requires explaining that in some parts of the country the law on the books indicates that land is owned by the State, yet some state officials refrain from evicting squatters if they appear in sufficient numbers (De Soto 1989).

## **Important intellectual currents**

Claims about relationships between law and development can differ significantly in terms of their conceptions of development, the types of law that are most relevant to development, and the causal connections between these two types of variables. In this section we survey sets of ideas

that have been especially influential since the beginning of the twenty-first century, outlining how they vary along these dimensions. Most of the ideas presented in this section were initially developed in the global North, based on experiences of Northern countries.

### ***Max Weber***

The shadow of Max Weber looms large in most contemporary thinking about the relationship between law and development. Weber was not concerned with explaining the relationship between law and development per se. Instead he was preoccupied with *capitalist* economic development.

Weber's view was that capitalism required a "formal" and "rational" legal system that allowed disputes to be resolved based on systematized, previously established rules. Such a legal system allows private actors to engage in trade and investment free from constraints imposed by traditional rulers and with predictable consequences. Weber also asserted that a hierarchical bureaucracy guided by instrumental values was the only realistic way of administering such a legal system in a large, complex society. Based primarily on the history of Western European

legal systems, he supported several key points by reference to Chinese, Indian, Islamic, Jewish, Persian, and canon law.

In Weber's theory, political, cultural, and economic factors can all interact to determine whether any given society develops a formal rational legal system. For instance, he suggested that forms of political rule that depend on tradition or charisma for legitimacy are incompatible with formal rationality.

There are several difficulties with interpreting Weber's work as a theory of law and development (Thomas 2008). First, it is not clear whether he made any claims about the necessary conditions for capitalist development; he appears to have been more interested in explaining historical outcomes than in deriving universal social laws. Citing the differences between English and continental legal systems, he openly acknowledged that capitalism could flourish under a diverse set of legal systems. Second, law plays a limited role in Weber's theory. In fact, his most famous contribution to social thought is the claim that adherence to a set of religion-derived values, the Protestant ethic, was a critical factor in the initial rise of capitalism. Third, Weber might object to equating capitalism with "development." He would likely see the emergence of capitalism and bureaucracy as causes for despair than celebration. Regardless of Weber's own views on the

subject, however, many subsequent thinkers have identified a formal rational legal system as a universally necessary condition for development.

### ***Law and development***

Weber's work had a particularly significant impact on the law and development movement of the 1960s (Trubek 1972). This U.S.-based movement combined legal reform initiatives and research projects sponsored by U.S. universities, foundations, and government agencies. The movement assumed that legal reform plays an instrumental role in promoting development; its initiatives focused on educating developing countries' legal professionals as well as reforming formal legal rules.

The law and development movement did not endure, and shortly after its inauguration it was declared dead by two of its key figures, David Trubek and Marc Galanter. In a widely cited paper (Trubek and Galanter 1974), they argued that the movement failed in part because of its ethnocentric assumption that law played the same role in other countries that it was imagined to play in the U.S. In fact, their experience showed that in many developing societies, legal institutions—especially the kinds of elite institutions that received the most attention from the



law and development movement—were not the most important forms of social control. Instead of using contract law, for instance, members of an ethnic group or kinship network can effectively guarantee the credibility of agreements by using social pressures to resolve disputes (Greif 2006). They also argued that when legal institutions were effective means of social control, they were prone to capture by powerful political interests. This meant that there was no guarantee that legal institutions could help promote the interests of less-advantaged groups. For example, the movement's emphasis on a modernized legal profession risked increasing the price of legal services and making legal decision-making more formalistic, thus reducing the ability of the less-well off to access justice. Trubek and Galanter's despairing analysis continues to resonate among skeptics of legal reform initiatives sponsored by Western actors.

### ***New institutional economics (NIE)***

The recent revival of interest in law and development can be largely traced to developments in economics. In 1993 Douglass North won the Nobel Prize for a body of work suggesting that a great deal of the variation in economic performance, across space and time, can be explained by variations in institutions (see generally, North 1990). Although North's best-known work focused on the history of the U.S. and Western Europe, the influence of the "new institutional

economics” in development economics has been profound. Rather than attributing poor economic performance to factors such as climate, endowments of minerals or arable land, or the genetic makeup of the population, it is now standard to search for institutional causes and solutions. Economists’ definitions of the term “institution” typically encompass legal institutions. As a consequence, a great deal of research on the relationship between law and development is now being conducted by economists rather than legal scholars.

Most new institutional economists adopt a neo-Weberian framework. Their hypothesis is that legal systems composed primarily of previously established norms enforced impartially and predictably by specialized officials—attributes often referred to compendiously as “the rule of law”—are universally conducive to economic growth (or other desirable outcomes, such as literacy rates and life expectancy). Property rights and contracts are regarded as especially important. Protection of property rights, for instance, is argued to be necessary to increase incentives for investment and decrease incentives for inefficient competition over scarce resources. Enforcement of contracts—especially contracts that transfer interests in property—is seen as necessary to create markets that allow goods, services, and credit to be allocated to people who value them most highly. So for instance, Hernando De Soto (1989) advocates giving

squatters in Peru and elsewhere formal title to land to allow them to share in the benefits of land markets.

Although the NIE may have been inspired initially by case studies of the North, its empirical studies now often include countries in the South. Cross-country studies generally find that “institutions matter,” consistent with the theoretical predictions. There are, however, important caveats. China is a particularly enigmatic case, a large country with weak indicators of institutional quality and high rates of economic growth. Such studies also provide limited support for claims that legal institutions generally, much less any particular legal institutions, are significant. This is because they rarely attempt to isolate the influence of specific institutions. Finally, cross-country studies shed little light on within-country variations in the role of institutions, such as how institutions affect people from different classes or ethnic groups, or in urban as opposed to rural areas. Within-country studies that incorporate these factors often reveal that the roles of institutions are rather context-specific. In Ghana, for example, where property rights in rural areas are governed by customary law, country-level indicators of the “strength of property rights” over-simplify a complex reality in which the strength of rights varies between urban and rural areas, from village to village, with the political power of the competing claimants

to land, and depending on whether one is considering the right to use or to alienate land (Pande and Udry 2005).

When it considers why legal institutions vary over time or across societies, NIE overlaps with the discipline of political economy. This body of literature considers a wide range of determinants of legal development. Some scholars focus on the lingering effects of colonization, linking the quality of contemporary institutions to the extent to which the country was either exploited (Acemoglu, Johnson, and Robinson 2001; Acemoglu and Robinson 2012) or permitted to develop indigenous legislative bodies and jurisprudence (Daniels, Trebilcock, and Carson 2011) while colonized. Other scholars focus on the effects of resource endowments, arguing that resources that lend themselves to concentrated ownership are likely to generate economic and political inequality, along with a set of institutions designed to perpetuate it (Sokoloff and Engerman 2000). Still others have examined the effects of ethnic divisions (Chua 2000; Easterly and Levine 1997). One particularly notable set of papers focuses on “legal origins,” meaning whether the legal system in question traces its origins back to English common law or to a variant of Roman civil law (La Porta, Lopez-de-Silanes, and Shleifer 2008). Societies with origins in English common law have been found to be superior to those with French civil law

origins along a number of dimensions, including protection of property rights and enforcement of contracts.

The NIE had considerable influence upon certain development agencies. A case in point is the World Bank's "Doing Business" project, which champions, among other things, the elimination of regulatory obstacles to enforcing various sorts of contracts and securing property rights (World Bank 2004). More generally, the World Bank as a whole tends to view the quality of a country's institutions as a determinant of how effectively the country will use development assistance, and devotes considerable efforts to compiling indicators of institutional quality (see, for example, World Bank 2010).

### ***Varieties of capitalism***

The "varieties of capitalism" approach was developed by scholars of comparative political economy, focused primarily on developed economies (Hall and Soskice 2001). Proponents classify countries as either "liberal market economies" (e.g., the U.S.) or "coordinated market economies" (e.g., Germany). Although the framework has been applied primarily to OECD

countries, Hall and Soskice (and others) argue that it can be applied to developing countries as well.

The varieties of capitalism literature offers a sophisticated theory of institutional change, showing how institutions co-evolve with patterns of economic activity. Hall and Soskice (2001) argue that the two ideal types of economies represent alternative ways of coordinating interactions among firms, employees, investors, consumers, shareholders, etc. Those interactions are shaped by local institutions and end up influencing, if not determining, macroeconomic policies and the overall structure of the economy. The relevant “institutions” include both rules enshrined in the formal legal system and informal rules such as shared expectations of appropriate behavior shaped by common experiences. A key claim is that nations will tend to develop complementary institutions, meaning institutions that increase the returns from one another. For instance, Hall and Soskice posit that capital markets that are relatively insensitive to current profitability complement long-term employment, whereas more profit-sensitive capital markets complement fluid labor markets. Accordingly, liberal market economies have tended to combine higher levels of stock market capitalization with lower levels of employment protection, whereas coordinated market economies have tended toward the opposite equilibrium.

Proponents of the varieties of capitalism approach claim that both ideal types of economies can lead to satisfactory long-run economic performance, as evidenced by the roughly comparable performance of the U.S. and Germany. They do, however, suggest that differences in institutional structures lead to systematic differences in distribution of income and employment. Institutions also determine firms' capacity for engaging in specific types of activities, including radical (as opposed to incremental) innovation.

This approach shares with the NIE the assumption that institutions determine economic outcomes. A distinctive feature is the emphasis on institutional interdependencies, i.e., the idea that both the structure and performance of any set of legal institutions might be shaped by the broader institutional context in which they operate. This implies that it is impossible to foresee the consequences of adopting particular institutions, or whether those institutions are optimal in any sense, without accounting for institutional interdependencies.

### ***Human rights and the rule of law***

While the NIE and varieties of capitalism approaches are primarily concerned with laws governing the conduct of private (i.e., non-state) actors, other approaches focus on laws that

regulate state action. The most prominent of these approaches connect development with respect for human rights and the rule of law, either directly or indirectly, and focus on legal mechanisms for achieving those objectives. In some cases, legal systems that manifest respect for human rights or the rule of law are viewed not just as means to promote economic or political development but also as ends in themselves. This non-instrumental understanding of the role of law represents a significant departure from other approaches to law and development.

The human rights movement originated in the work of activists seeking to rectify injustices perpetrated or condoned by states or state-sponsored international organizations, in both developed and developing countries. Activists have used human rights discourse to challenge state actors on issues ranging from provision of anti-HIV drugs in South Africa, to displacement of indigenous peoples in the course of constructing the Sardar Sarovar dam in India (Hurwitz and Satterthwaite 2009), to detention, torture, and murder of dissidents in Argentina (Sikkink 2011). Since the 1990s the idea that development includes respect for human rights has become increasingly accepted among mainstream development agencies (Uvin 2007). This idea is succinctly captured in Amartya Sen's (1999) influential concept of "development as freedom."



The human rights approach argues that states have an obligation to “protect, respect, and promote” a set of universal and inalienable rights, for both instrumental and symbolic reasons. There is, however, significant disagreement about how to define the rights that qualify as human rights, especially when it comes to social and economic rights. For instance, some instruments refer to the concept of a “right to development,” defined as a right to a process of development that will result in the realization of all human rights and freedoms. While some proponents of the right to development interpret this as a collective right of a state, some scholars have argued that such collective rights depend on the existence of individual rights to development (Abi-Saab 1975). At stake in this debate is whether states can defend projects that promote national economic development at the expense of certain individuals or communities—a dam might be a case in point—in the name of the human right to development.

Under rights-based approaches, more than in any other theoretical framework, legal institutions play a key role in defining desired development outcomes. Human rights are typically set out in treaties or constitutions and defined by courts, both domestic and international, in the course of litigation. The resulting concentration of power in lawyers and courts may be in tension with democratic principles (Waldron 2006), although, as Sen (1999) points out, this is less of a concern if the rights that merit legal protection are determined through democratic processes.

There are also reasons to doubt whether courts or other human rights bodies are competent to resolve effectively the broad range of public policy issues that implicate social and economic rights. Take, for instance, the right to health: in Brazil and Colombia much of the health care budget is consumed by judicially-mandated expenditures resulting from a massive volume of individual claims. This has undermined the ability of policy-makers and health care professionals to plan how to best use available resources (Yamin and Gloppen 2011).

Independent of litigation, human rights discourse is believed to be an effective way of mobilizing groups to press for social change. For example, resistance to the Sardar Sarovar dam involved not only litigation before the Indian courts but also protest marches and sit-ins, letters sent to the World Bank, and testimony before the U.S. Congress (Narula 2008). In this context, unmoored from the relative precision provided by legal documents and the adjudication of specific cases, the definitions of human rights risk becoming unhelpfully vague, capable of being reconciled with almost any outcomes (Uvin 2007).

Rights-based approaches to development are closely related to approaches that emphasize the rule of law. The definition of rule of law is highly disputed (Tamanaha 2004; Daniels and Trebilcock 2008). Some adopt a thick conception that includes not only fundamental human

rights, but also all the guarantees that need to be in place for such human rights to be protected. Thus, rule of law would include independent judiciaries, non-corrupt bureaucracies, and functional legislatures. In contrast, others have resisted the thick conception as it equates rule of law with a particular (as opposed to universal) concept of justice. Instead, they propose a thin conception of the rule of law based on procedural rights that guarantee due process, but nothing beyond that. Regardless of how it is defined, promotion of the rule of law can be justified as either an end in itself or, as we have already seen with NIE scholars, as a means to achieve other development objectives (Trubek and Santos 2008).

Many development interventions are explicitly designed to promote either human rights or the rule of law. Unfortunately, the results to date have been disappointing (Carothers 2006; Jensen and Heller 2003).

### ***Third World Approaches to International Law (TWAIL)***

TWAIL is a movement that seeks a more equitable international legal regime. The first generation of TWAIL scholars claimed that the post-colonial international economic order was characterized by systemic exploitation of Third World countries by Western nations and that

international law implicitly condoned this exploitative relationship under the guise of neutrality. The movement proposed institutional reforms to better attune international organizations to the interests of developing countries and to reflect their numerical superiority, such as majority rule in votes of international organizations (Bedjaoui 1979).

Since the 1990s, a second generation of TWAIL scholars has analyzed not only formal governance structures in international law but also the relationships of power that determine how such structures operate. In addition to being more interdisciplinary than the first generation, the second generation is more skeptical about the liberating potential for international law.

TWAIL supporters have acknowledged the limitations of the movement, lamenting that: it has made no impression on international law scholarship; it is mostly produced by scholars located in the First World; and the second TWAIL generation has failed to present more detailed proposals for reforms (Chimni 2011). Nevertheless, TWAIL's focus on international power dynamics offers a useful perspective on contemporary features of the international legal order. One example is the argument that the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed in the Uruguay Round of multilateral

negotiations (from 1986 to 1993), has benefited developed countries—which tend to produce patentable products such as pharmaceuticals—at the expense of the developing countries.

## **Concepts versus reality**

Many of the approaches described above are based upon conceptual distinctions that are in tension with reality. Most of them are premised upon at least four dichotomies: law versus not law, public versus private law, common law versus civil law, and domestic versus international law. These distinctions demarcate fields of scholarly inquiry and professional competence, and may thereby perform important organizational functions for legal scholars and practitioners. However, for reasons we discuss below, they are of limited value in social-scientific efforts to assess causal connections between law and development.

### ***Legal and non-legal***

According to Trubek and Galanter (1974), the first law and development movement was premised on the assumption that it was possible to reform the legal features of a society without

taking significant account of or changing its non-legal attributes. However, in many developing societies state and non-state norms interact in a variety of complex ways. For example, in post-colonial societies the colonial legal system may co-exist with customary pre-colonial norms and institutional structures. Those customary norms can attract varying degrees of enforcement by the state. Similarly, in virtually all societies certain industries tend to create their own systems of norms and dispute resolution mechanisms, only some of which are backed by the possibility of state enforcement (Moore 1973; Merry 1988).

This suggests that lawyers and legal scholars must take into account interactions between legal and non-legal norms. For example, guaranteeing women's property rights is regarded as a strategy to increase economic efficiency, improve the family's well-being, and empower women. However, reforms designed to guarantee the benefits of private property to women may generate tensions with reality if customary systems and land management structures are not compatible with gender equality (Agarwal 1994).

The complex and sometimes unpredictable ways in which legal and non-legal norms interact limits the potential for legal reforms to achieve development goals, leading some scholars to question the entire law and development enterprise. In the context of gender equality, for

instance, recent empirical research shows that positive rule of law indices do not correlate with the status of women in society. The correlation does exist in high-income countries, but disappears in poor countries (Pistor, Haldar, and Amirapu 2009). This suggests that the status of women in society is determined primarily by social norms, which are only weakly affected by formal institutions in developing countries. Alternatively, one may argue that state and non-state norms interact in such complex ways that it is impossible to isolate the influence of either set of norms upon human behavior. In either case, there is no value in analyzing state law in isolation from other normative orders<sup>3</sup> or promoting legal reforms independently of broader social change.

### ***Public and private law***

The distinction between public and private law is at the heart of many debates on law and development. Public law is focused on regulation of state action, while private law is concerned with the conduct of private (i.e., non-state) actors. Public law comes to the forefront when development is defined as a set of fundamental human rights that need to be guaranteed through constitutional provisions (Nussbaum 2011). In contrast, when new institutional economists emphasize the importance of contracts and property rights to promote economic development, they are focusing on private law as an engine of development.

Many developing countries—Brazil is a leading contemporary example—have a Developmental State (Evans 1995, Trubek 2008), which is actively involved in the economy. The law that regulates the activities of such a state has both public and private aspects. For instance, many developing countries have state-owned enterprises (SOEs) that can operate as private companies in the market. In addition to (or instead of) profit, SOEs may pursue social and political goals defined by their controlling shareholder, the government. While the legally defined governance structures of these SOEs may formally resemble those of purely private companies, they will obviously have different ramifications, and will, or ought to be, constructed accordingly (Ghai 1977). A similar blurring of the line between public and private occurs in national development banks. Banking transactions are generally governed by private law but many of these banks are used to pursue industrial policy through investments in sectors that the government considers strategic.

The public/private distinction is also challenged by proponents of the varieties of capitalism approach (Hall and Soskice 2001). They try to discredit the idea that governments are able to design and implement institutional reforms without input or assistance from the private sector.



***Common law and civil law***

The distinction between common law and civil law jurisdictions has long been central to comparative law scholarship, as has a particular set of sub-distinctions among civilian jurisdictions based on European history. These distinctions have been reified in the development context by the Legal Origins theory (La Porta, Lopez-de-Silanes, and Shleifer 2008), which casts doubt on the merits of legal institutions that come from the benighted French civil law family.

These distinctions assume that most countries can be identified with a unique legal origin and that there are fundamental differences between legal systems with different legal origins. In many instances, however, these claims are demonstrably false. In Latin America, for example, many countries combine European-inspired civil codes, with constitutions based on the U.S. constitution, and corporate and commercial statutes based on a mixture of common law and civil law sources (Dam 2006).

***Domestic and international law***

Most studies of law and development focus on how domestic laws affect local social and economic outcomes. This is often distinguished from the work of international lawyers who examine the effects on developing countries of bodies of public international law, such as the law of the World Trade Organization or the International Monetary Fund, investment treaties, or the international human rights regime.

The reality in many developing countries, however—especially small countries with very open economies—is that social and economic outcomes are influenced by legal norms that cannot be classified straightforwardly as either domestic or international. For instance, domestic laws of large foreign states can exert extra-national influences in these countries. For example, U.S. laws concerning immigration, narcotics control, and firearms have dramatic effects on patterns of migration and criminality throughout Latin America and the Caribbean. Similarly, when the U.S. sanctions firms for paying bribes to foreign public officials, it increases the risk of investing in corrupt countries.

The domestic/international dichotomy also fails to account for norms promulgated by intergovernmental organizations or private standard-setting agencies that do not qualify as binding international law. For example, the World Bank promulgates internal policies setting out social and environmental standards to be met by the projects it supports. Those standards are adopted voluntarily by many private project finance banks under the auspices of the Equator Principles. Given the volume of foreign investment that is bound by the World Bank standards, they effectively serve as an externally imposed code of social and environmental regulation for developing countries.

## **Emerging approaches**

Most of the theoretical approaches we have discussed in the previous section were developed in the global North to explain relationships between law and development in Northern societies.

This is potentially troubling because experience has demonstrated that empirical and normative assumptions that underpin those theories are not necessarily valid in other contexts (and in some cases they are not valid in the North either!). As a consequence, conceptual frameworks based on those assumptions may be less helpful than expected in the global South.

Emerging theoretical frameworks are more mindful of these limitations and have paid more attention to the experiences of developing countries. The most interesting of these theories are open to potential interactions between institutions that span traditional conceptual categories, e.g., legal and non-legal, public and private law, common and civil law, domestic and international law. They also show increasing acceptance of the idea that both legal systems and the societies in which they operate are complex and constantly evolving, and so the relationships between law and development are likely to be variable and context-specific.

### ***Global Administrative Law (GAL)***

The concept of GAL (Kingsbury, Krisch, and Stewart 2005) overcomes many of the conceptual limitations identified above. Its proponents are concerned with exploring a “global administrative space” in which a variety of extra-national actors engage in regulatory activities. Those actors include:

“ . . . transnational private regulators, hybrid bodies such as public-private partnerships involving states or inter-state organizations, national public regulators whose actions

have external effects but may not be controlled by the central executive authority, informal inter-state bodies with no treaty basis (including “coalitions of the willing”), and formal interstate institutions (such as those of the United Nations) affecting third parties. . . .” (Kingsbury 2009a: 25)

This definition of the global administrative space unambiguously rejects sharp distinctions between domestic and international law. Moreover, although GAL purports to focus on “law,” it does not insist on a narrow state-based concept of law.<sup>4</sup> Also significant is that the project includes many case studies of the effects of GAL in developing countries (see, e.g., Kingsbury 2009b). An interesting offshoot of this work is the Regulatory State of the South project (Dubash and Morgan 2012), which seeks to explain variations among independent regulatory agencies in developing countries, and to set the stage for future research on what kinds of agencies are “successful” along various dimensions.

On the other hand, GAL does not and cannot offer an overarching framework for analyzing the relationship between law and development because it is limited to institutions with significant extra-national aspects. In addition, much of the project is focused on the norms that govern global administrative actors, what excludes purely domestic legal institutions and many areas of

private law. For example, global administrative lawyers might be interested in whether and how the World Bank's views on topics ranging from environmental protection to insolvency law effectively regulate activity in developing countries. However, purely domestic efforts to regulate in those fields are beyond the scope of the project. Moreover, GAL is more interested in the institutions that hold the World Bank accountable for its actions than in the effects of those actions on development outcomes.

### ***Adaptability theories***

Some contemporary scholars focus on processes through which interdependent institutions adapt to changing circumstances. Drawing on the literature on varieties of capitalism, Milhaupt and Pistor (2008) argue that understanding how legal systems adapt to change is more important than a static analysis of the law. They conclude that the demand for law depends on affected constituencies' ability to participate in lawmaking and law enforcement. Their analysis is based primarily upon case studies of legal responses to corporate governance crises in six developed and middle-income countries, and mainly involves tracing different methods of legal adaptation.

Similarly, in recent work Douglass North and his collaborators argue that institutional change is a path-dependent process. Institutions, like technological development, can be locked in a suboptimal equilibrium that is hard to change. Obstacles to change include institutional interdependences and culture (North 2005). North, Wallis, and Weingast (2009) examine the emergence of regimes that allow open access to political and economic benefits and tend to foster economic and political development. They conclude that the pre-conditions to the emergence of such open access regimes include: (i) rule of law for elites; (ii) the creation of perpetually lived organizations; and (iii) consolidated control over violence and the military. In their absence, attempts to promote rule of law by transplanting legal institutions associated with markets and elections have failed (Weingast 2010). For instance, political leaders ranging from Carlos Menem of Argentina to Indira Gandhi of India have undermined the potentially salutary effects of elections by compromising judicial independence and thereby avoiding the rule of law.

On the one hand, focusing on processes of adaptation represents a promising reorientation of the field of law and development. This approach is sensitive to the complexity of interactions between legal systems and societies and points away from the idea that institutional designs are or should be static. On the other hand, these approaches threaten to dampen dialogue between academics and policy-makers by suggesting that such processes are too complex to permit

intentional manipulation. This would cast a long shadow upon an aspiration that has characterized law and development scholarship since its inception, namely, of providing guidance for action.

### ***Experimentalism***

Most of the approaches discussed so far are based upon firmly held beliefs about causal relationships between legal institutions and development outcomes. In contrast, experimentalists start from the premise that we know very little about such relationships, and they value using experiments to untangle them. Rather than a theory of law and development, experimentalism promises a theory about a process for generating theories of law and development. So far, however, there have been few explicit efforts to experiment with legal institutions in developing countries.

Political theorist Charles Sabel (2007) justifies experimentalism in governance of developing countries by pointing to evidence that the performance of institutions varies according to the context. Even in countries with national-level institutions that are viewed as dysfunctional, there are clusters of industries and some government branches that operate as effectively and



efficiently as their counterparts in the developed West. He argues, therefore, that reformers should focus on what is already working in the specific context and attempt to improve upon it.

For this, Sabel strongly favors a method inspired by the Toyota Production System. This method involves ongoing monitoring of institutional performance, benchmarking against peers, and deliberation about both goals to be achieved and means of achieving them, all in a non-hierarchical fashion with open participation.

In development economics experimentalism is associated with another process: randomized controlled trials (Banerjee and Duflo 2011). In such trials, subjects are randomly assigned to either a group that is subjected to the intervention, the “treatment group,” or a group that has not been subjected to the intervention, the “control group.” Different outcomes between the treatment group and the control group are presumed to be caused by the intervention.

One of the few examples of a randomized controlled trial of a legal intervention involved police reform in the state of Rajasthan, India (Banerjee et al. 2012). The experiment consisted of four different interventions to improve police performance and public perception of the police. While some randomly selected police stations were subjected to one type of intervention, others

remained as the control group. The experiment showed that two mechanisms—training and freezes on transfers of police staff—improved performance and perceptions of the police. In contrast, the other two—placing community observers in police stations and weekly duty rotations—showed no results. Scholars suggested that failed implementation may explain the different result, as the latter depended on sustained cooperation of communities or local authorities, whereas the former did not.

Practical, legal, and ethical problems limit the scope for experimenting with legal norms, especially those that apply directly to individuals. Advocates for randomized controlled trials to evaluate legal reforms in developed countries argue that these problems are not insurmountable (Abramowicz, Ayres, and Listokin 2011). They do not, however, focus on the potential challenges associated with running such experiments in developing countries. Where is a government to find people with the expertise and integrity to design, conduct, and interpret the results of these kinds of experiments in good faith? Do they have legal authority to apply legal norms selectively? Is it ethical to experiment with the welfare of people on the brink of subsistence? Without answers to these questions it is hard to determine the extent to which experimentalism will help the field of law and development move forward.

## **Conclusion: The search for meta-principles**

For most of the post-war era, dominant approaches in law and development have involved claims about how specific legal mechanisms invariably produce desirable development outcomes.

Emerging approaches take better account of the complexity and dynamism of relationships between law and development, especially as they are manifested in the Global South. They acknowledge that legal systems are composed of many interdependent parts that interact in complex ways across artificial divides between public or private, domestic or international, common law or civil law, or legal or non-legal norms, in an endless process of adaptation.

Unfortunately, approaches that acknowledge these complexities struggle to identify empirical regularities in the relationship between specific legal institutions and development outcomes.

Often the particularities of legal systems in developing countries are fleshed out through careful case studies, which then resist generalizations. In contrast, regularities in processes of institutional change may be generalizable. This may explain why an intellectual quest for general principles of law and development has evolved into a search for meta-principles.

So far no single approach offers a well-developed set of overarching concepts and causal claims that can satisfactorily account for the varying relationships between law and development in the

Global South. And even if such a theoretical framework does emerge, translating its insights into practice is likely to present a challenge. In the absence of overarching theoretical frameworks we expect the practice of law and development to remain focused on analyses of the impact of legal reform in specific contexts. The most important scholarly research is likely to be concerned with the methodologies for conducting such analyses.

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<sup>1</sup> Here we ignore definitions used in studies conducted for other purposes, such as philosophical inquiries into whether people have a duty to obey the law or whether judges have a duty to decide cases in accordance with the law.

<sup>2</sup> This distinction corresponds to the legal philosopher H. L. A. Hart's famous distinction between primary rules and secondary rules (Hart 1994).

<sup>3</sup> Some "legal pluralists" would define the concept of law to include any norms that individuals treat as guides to behavior, regardless of whether those norms are recognized by state officials (Griffiths 1986). They view state law as just one of several kinds of legal orders, which might be embedded simultaneously in any given social setting (Griffiths 1986; Merry 1988). By contrast, others argue that in trying to capture the multitude of normative orders that influence social behavior the concept of "legal pluralism" is deprived of any analytical force. Indeed, one of its early proponents later argued that the concept of "legal pluralism" was a mistake and should be replaced with a concept such as "normative order" or "mode of social control" (Griffiths 2005: 63–4).

<sup>4</sup> Kingsbury (2009a) suggests that norms administered by extra-national actors qualify as global administrative law so long as they generate a sense of obligation among their subjects and there is agreement among the relevant officials that the norms come from a source capable of generating legal rules.

## References

Abi-Saab, George (1975). *The Right to Development at the International Level*. The Hague: The Hague Academy of International Law.

Abramowicz, Michael, Ian Ayres, and Yair Listokin (2011). “Randomizing Law,” *University of Pennsylvania Law Review*, 159: 929–1005.

Acemoglu, Daron, Simon Johnson, and James A. Robinson (2001). “The Colonial Origins of Comparative Development: An Empirical Investigation,” *American Economic Review*, 91: 1369–1401.

Acemoglu, Daron, and James A. Robinson (2012). *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishing.

Agarwal, Bina (1994). *A Field of One’s Own: Gender and Land Rights in South Asia*. Cambridge: Cambridge University Press.

Alston, Philip (2005). “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals,” *Human Rights Quarterly*, 27: 755–829.

Banerjee, Abhijit, and Esther Duflo (2011). *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty*. Philadelphia: Public Affairs.

Banerjee, Abhijit, et al. (2012). “Can Institutions be Reformed from Within? Evidence from a Randomized Experiment with the Rajasthan Police,” NBER Working Paper No. 17912, National Bureau of Economic Research (NBER), Cambridge, MA.

Bedjaoui, Mohammed (1979). *Towards a New International Economic Order*. New York: Holmes & Meier.

Carothers, Thomas (1998). “The Rule of Law Revival,” *Foreign Affairs*, 77(2): 95–106.

——— (2006). *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, DC: Carnegie Endowment for International Peace.

Chimni, Bhupinder S. (2011). “The World of TWAIL: Introduction to the Special Issue,” *Trade Law and Development*, 3(1): 14–25.

Chua, Amy (2000). “The Paradox of Free Market Democracy: Rethinking Development Policy,” *Harvard International Law Journal*, 41: 287–379.

Dam, Kenneth (2006). *The Law–Growth Nexus: The Rule of Law in Economic Development*. Washington, DC: Brookings Institution Press.

Daniels, Ronald J., and Michael J. Trebilcock (2008). *Rule of Law and Development: Charting the Fragile Path of Progress*. Cheltenham and Northampton: Edward Elgar Publishers.

Daniels, Ronald J., Michael J. Trebilcock, and Lindsey D. Carson (2011). “The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies,” *American Journal of Comparative Law*, 54: 111–78.

De Soto, Hernando (1989). *The Other Path: The Economic Answer to Terrorism*. New York: Harper & Row.

Dubash, Navroz K., and Bronwen Morgan (2012). “Understanding the Rise of the Regulatory State of the South,” *Regulation & Governance*, 6(3): 261–81.

Easterly, William, and Ross Levine (1997). “Africa’s Growth Tragedy: Policies and Ethnic Divisions,” *Quarterly Journal of Economics*, 112(4): 1203–50.

Evans, Peter B. (1995). *Embedded Autonomy: States and Industrial Transformation*. Princeton: Princeton University Press.

Ghai, Yash P. (ed.) (1977). *Law in the Political Economy of Public Enterprise: African Perspectives*. Uppsala and New York: Scandinavian Institute of African Studies.

Greif, Avner (2006). “The Birth of Impersonal Exchange: The Community Responsibility System and Impartial Justice,” *Journal of Economic Perspectives*, 20(2): 221–36.



Griffiths, John (1986). “What is Legal Pluralism?”, *Journal of Legal Pluralism & Unofficial Law*, 24: 1–56.

——— (2005). “The Idea of Sociology of Law and its Relation to Law and to Sociology,” *Current Legal Issues*, 8: 49–68.

Hall, Peter A., and David W. Soskice (2001). *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. New York: Oxford University Press.

Hart, H. L. A. (1994). *The Concept of Law*. Oxford: Clarendon Press.

Hurwitz, Deena R., Margaret L. Satterthwaite, and Douglas B. Ford (2009). *Human Rights Advocacy Stories*. New York: Foundation Press.

Jensen, Erik G., and Thomas C. Heller (eds.) (2003). *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. Stanford: Stanford University Press.

Kingsbury, Benedict (2009a). “The Concept of ‘Law’ in Global Administrative Law,” *European Journal of International Law*, 20: 23–57.

——— (ed.) (2009b). *El Nuevo Derecho Administrativo Global en America Latina*.

Buenos Aires: Rap.

Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart (2005). “The Emergence of Global Administrative Law,” *Law and Contemporary Problems*, 68: 15–61.

Kornhauser, Lewis A. (2004). “Governance Structures, Legal Systems, and the Concept of Law,” *Chicago-Kent Law Review*, 79: 355–81.

La Porta, Rafael, Florencio Lopez-de-Silanes, and Andrei Shleifer (2008). “The Economic Consequences of Legal Origins,” *Journal of Economic Literature*, 46: 285–332.

Merry, Sally Engle (1988). “Legal Pluralism,” *Law and Society Review*, 22: 869–96.

Milhaupt, Curtis J., and Katharina Pistor (2008). *Law & Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World*. Chicago: The University of Chicago Press.

Moore, Sally Falk (1973). “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” *Law and Society Review*, 7: 719–46.

Narula, Smita (2008). “The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank,” New York University Public Law and Legal Theory Working Papers, Paper 106. ([http://lsr.nellco.org/nyu\\_plltwp/106](http://lsr.nellco.org/nyu_plltwp/106))

North, Douglass C. (1990). *Institutions, Institutional Change and Economic Performance*. New York: Cambridge University Press.

——— (2005). *Understanding the Process of Economic Change*. Princeton: Princeton University Press.

North, Douglass C., John Joseph Wallis, and Barry R. Weingast (2009). *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*. Cambridge and New York: Cambridge University Press.

Nussbaum, Martha (2011). *Creating Capabilities: The Human Development Approach*. Cambridge, MA and London: The Belknap Press of Harvard University Press.

Pande, Rohini, and Christopher Udry (2005). “Institutions and Development: A View from Below,” in Richard Blundell, Whitney Newey, and Torsten Persson (eds.), *Proceedings of the 9th World Congress of the Econometric Society*. Cambridge: Cambridge University Press, 349–403.

Pistor, Katharina, Antara Haldar, and Amrit Amirapu (2009). “Social Norms, Rule of Law, and Gender Reality: An Essay on the Limits of the Dominant Rule of Law Paradigm,” in James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds.), *Global Perspectives on the Rule of Law*. New York and London: Routledge, 241–78.

Sabel, Charles (2007). “Bootstrapping Development: Rethinking the Role of Public Intervention in Promoting Growth,” in Victor Nee and Richard Swedberg (eds.), *On Capitalism*. Stanford: Stanford University Press, 305–41.

Sen, Amartya K. (1999). *Development as Freedom*. New York: Alfred A. Knopf.

Sikkink, Kathryn (2011). *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: W. W. Norton & Co.

Sokoloff, Kenneth L., and Stanley L. Engerman (2000). “History Lessons: Institutions, Factor Endowments, and Paths of Development in the New World,” *Journal of Economic Perspectives*, 14: 217–32.

Tamanaha, Brian Z. (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.

Thomas, Chantal (2008). “Re-Reading Weber in Law and Development: A Critical Intellectual History of ‘Good Governance’ Reform,” Cornell Legal Studies Research Paper No. 08–034, Cornell Law School, Ithaca, NY.

Trubek, David M. (1972). “Max Weber on Law and the Rise of Capitalism,” *Wisconsin Law Review*, 1972(3): 720–53.

——— (2008). “Developmental State and the Legal Order: Towards a New Political Economy of Development and Law,” paper presented at the Conference on Social Science in the Age of Globalization, December 2008, Fudan University, Shanghai.

Trubek, David M., and Marc Galanter (1974). “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,” *Wisconsin Law Review*, 1974(4): 1062–1102.

Trubek, David M., and Alvaro Santos (eds.) (2008). *The New Law and Economic Development: A Critical Appraisal*. Cambridge: Cambridge University Press.

Uvin, Peter S. (2007). “From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development,” *Development in Practice*, 17(4–5): 597–606.

Waldron, Jeremy (2006). “The Core of the Case Against Judicial Review,” *Yale Law Journal*, 115: 1346–1406.

Weingast, Barry R. (2010). “Why Developing Countries Prove So Resistant to the Rule of Law,” in James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds.), *Global Perspectives on the Rule of Law*. Abingdon and New York: Routledge.

World Bank (2004). *Doing Business in 2004: Understanding Regulation*. Washington, DC: World Bank.

——— (2010). *Country Policy and Institutional Assessments: 2010 Assessment Questionnaire*. Washington, DC: World Bank.

Yamin, Alicia Ely, and Siri Gloppen (2011). *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge, MA: Harvard University Press.