LAW AND DEVELOPMENT: PROBLEMS, PERSPECTIVES, AND PROSPECTS

The panel was convened at 9:00 a.m., Saturday, April 1, by its chair, John Ohnesorge of the University of Wisconsin, who introduced the panelists: Hiram Chodosh of Case Western Reserve University Law School; Mohan Gopal of the National Judicial Academy, India; Matjaz Nathtigal of the government of Slovenia; and Kerry Rittich of the University of Toronto Faculty of Law.

Introductory Remarks by John Ohnesorge*

The promise of globalization for poor countries has been that economic development would follow naturally if they would just open their borders to flows of goods and capital, keep their national finances in order, and reform their legal systems under the tutelage of ''rule of law'' exporters such as the international financial institutions, the United States, and the European Union. Within this paradigm the task of poor-country governments is essentially procedural rather than substantive, facilitative rather than proactive. Open their borders and put their faith in international market forces to establish the flows of goods and capital that will be optimal for their nations' development, and trust in the practitioners of ''legal technical assistance'' to tell them how to remake their legal systems to best facilitate development. Substantive ends will be achieved as a kind of byproduct, as by an ''invisible hand,'' of establishing the structural framework that theory promises will bring about their attainment. Reduced to its essence, this is a very simple, formalist story, underpinned by a deep faith in markets, and an even deeper distrust of activist government. Each member of this panel challenges aspects of the story, suggesting in different ways that the complexities of the real world may not merely complicate globalization's simple story, but may so undermine its underlying assumptions that the story should reshelved in the fiction section.

Matjaz Nahtigal addresses the confusion of means with ends in globalization rhetoric when he reminds us that ''[t]rade is not a goal in itself—its purpose is to facilitate domestic development and social prosperity.'' In addition, he demonstrates that the world trading system is failing to deliver to many poor countries even the increased trade that participation was supposed to bring. Moreover, major flaws in the international trading system, such as the unwillingness of rich countries to open fully their agricultural markets, were so utterly predictable as to suggest willful ignorance, if not bad faith, on the part of free-trade's evangelists. Furthermore, at the same time that the policy demands placed by the international economic order on developing countries are becoming more and more detailed and specific, evidence has been mounting that the orthodoxy underlying those demands cannot account for the economic development success stories that we can all observe in the world around us, whether in China and India today, or in the East Asian ''miracle'' economies before them. The challenge for the international order, then, is to develop an international legal framework that will facilitate economic development in a world in which globalization's simple story no longer convinces, in which it is recognized that development is not simply the mechanistic result of the proper framework being put in place, but will require instead that developing countries be given significant space for pragmatic policy experimentation.

Kerry Rittich expresses similar concerns with respect to the legal reform agenda of the international financial institutions. That agenda has expanded since the late 1990s, when

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criticism of the Washington Consensus for its rigid neoliberalism led to the adoption of ''comprehensive development'' as the new touchstone. With respect to law reform activities, ''comprehensive development'' suggested that the previous focus on property rights, contract enforcement, and other aspects of a market economy, would be expanded to incorporate what Rittich terms the ''social.'' The ''social'' includes not only specific legal add-ons, such as labor and human rights, or access to justice, but also elevates the rule of law to the status of being an end in itself, not merely a means to an end. Rittich expresses serious reservations about this turn of events, which mirror those of Dr. Nahtigal in interesting ways. Like Nahtigal, she is concerned that the turn to the ''social'' has been more rhetorical than substantive, so that it masks the pursuit of market-centered policies that are not that dissimilar to those of the Washington Consensus. In addition, she shares Nahtigal's concern that turning to ''comprehensive development'' has been a way for the international financial institutions to expand into new areas of operation, rule of law promotion, for example, without a clear sense of how their actions will affect people's lives. Elevating the rule of law to being an end, or attribute, of development only exacerbates this problem, as it focuses attention away from empirical inquiry into the social functioning of law in the development process at the precise time that that inquiry is most necessary.

Hiram Chodosh and Mohan Gopal turn the critique to the specifics of legal technical assistance as it is carried out in the developing world, echoing concerns about top-down, one-size-fits-all, legal chauvinism, unwarranted assumptions, lack of theory, etc., that have accompanied these efforts for decades. Coming as they do from experienced practitioners of legal technical assistance, these charges cannot be as easily ignored as the more common outsider's critique. What appears really new about their critiques, and what ties them to Nahtigal and Rittich, is their focus on the means-end problem in legal technical assistance. In different ways, they both point out that legal technical assistance efforts are still too often undertaken without any clear idea of whether—or even how—they are going to achieve desirable social ends. The pressure is for all development assistance projects to produce quantifiable ''deliverables,'' but evaluating a law reform project by counting how many new words were enacted into law as a result, or how many prosecutors sat for how many hours listing to the lectures of the foreign expert, is clearly absurd. As Rittich points out, legal institutions or the rule of law can be treated as ends in themselves, but a danger of doing so is that legal reform projects then become self-referential, as Chodosh and Gopal argue they often do.

Dr. Gopal goes the furthest in proposing a way forward, suggesting that providers of legal technical assistance should first identify desired social outcomes that will likely be sensitive to legal reforms, then evaluate legal reform measures according to the extent to which they actually further such outcomes. Gopal proposes further that the task of identifying the desired social outcomes that would be the ends of legal technical assistance would be collaborative, involving local as well as international actors, which would enhance the legitimacy of the reforms, as well as their effectiveness. In essence, Gopal is calling for a rethinking of legal technical assistance that parallels the rethinking of national regulatory systems called for by the ''new governance'' literature. Like the theorists of ''new governance'' in domestic law, Dr. Gopal is calling for legal technical assistance in a new mode, one which eschews top-down, command-and-control techniques in favor of negotiation, flexibility, continuous learning, and the pragmatic redefinition of goals during, and as a part of, the process of implementation. This call is overdue; whether it will be heard remains the question.

International Institutions, International Legal Norms and the Millennium Development Goals

By Matjaz Nahtigal[*]

Introduction

In this article I analyze the causal link between international institutions, international legal norms, and the Millennium Development Goals. While the link may appear tenuous, even precarious, it does nevertheless exist. International institutions and international legal norms help to shape the international environment in which developing countries try to attain proclaimed goals. In considering the Millennium Agenda we should bear in mind two important observations: that the goals set in the Agenda are rather modest in scope, and as the UN Millennium Development Goals 2005 acknowledged, many of the important interim goals are not on track. Moreover, certain of the goals are farther off track today than they were at the time of the adoption of the Millennium Declaration.

I will also discuss the formal and practical possibilities for improving the position of developing countries at the bargaining table within multilateral institutions. Improved representation in favor of the developing countries, and transparent procedures and decision-making processes, are among these possibilities. Better arguments and stronger cooperation could also help in completing the Doha Development Round. What seems more important than the debate on improving market access to the developed countries as an end in itself, however, is to secure an international legal environment conducive to strengthening domestic public institutions and the development policies of developing countries. The sequence of steps toward liberalization must be carefully balanced and work toward improving domestic capabilities for development.[1]

Globalization and Development

Since 1980, we have seen examples of countries in the developing world that have managed to embark on a path of rapid economic and social development. On balance, however, the performance of the developing world in this last quarter of a century remains rather slow, and contrary to initial hopes and expectations. In fact, two of the countries with the highest growth rates in the past two decades, China and India, remain among the most protected markets. Their gradual, partial, and piecemeal approach to various forms of liberalization run counter to the propositions of the international financial institutions on how to improve and develop economies in the era of globalization. It is paradoxical, therefore, to claim that the present context of globalization is conducive to development and the alleviation of poverty by pointing to the countries that are among the least convincing examples of orthodox economic, social, political, and legal reform.[2]

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[1] On the historical shift toward the human dimension of international law, see John King Gamble, Charlotte Ku & Chris Strayer, *Human-Centric International Law: A Model and a Search for Empirical Indicators*, 9 Tul. J. Int'l & Comp. L. 61 (2005). On the relationship between international law and the developing world, see *Symposium Panel Reports, International Law and the Developing World: A Millenial Analysis*, 41 Harv. Int'l L.J. 595 (2000).

[2] Branko Milanovic, *Two Faces of Globalization: Against Globalization As We Know It*, World Development, Apr. 2003.

On the other hand, many of the countries that rank among the most committed examples of orthodox policy and a truly globalized approach have constantly run into economic and social problems and crises. Countries in this category include Argentina, Russia, many African countries, and many East European countries. Empirical studies for the period 1980–1998 show that contrary to expectations and widespread belief, this was a period of stagnation for these developing countries. Even though these countries carried out many economic and social reforms during this time, this period was also marked by stagnation and a return to the historical pattern of divergence between rich and poor countries. This finding is even more disappointing when one remembers that the previous period of 1960–1979 was one of growth convergence.[3] In theory, the latter period is usually termed the Bretton-Woods period, and the former is known as the period of ''Washington consensus.''

Drawing any sort of conclusion from the current trends of globalization is a highly complex problem. There are theoretical, methodological, and empirical obstacles standing in the way of solid realizations. Some of the data are encouraging, for example, that the proportion of the world's population living in extreme poverty has fallen. However, the actual number of people living in extreme poverty has in all likelihood been significantly underestimated. What is more, there is little doubt that the overall income gap has significantly widened in the last two decades.[4] These findings are consistent with the UN 2005 report on the Millennium Agenda. It ought to reinforce the point that the debate on global legal justice should take into account global realities, inequities, and disparities alongside the possibilities and opportunities for more redistributive international legal mechanisms.[5]

The Doha Development Round

One of the central debates on development issues has occurred within the Doha Development Round. In order to open up real possibilities for developing countries, a legal framework that facilitates their development without forcing them into more extensive and stringent concessions must be established. At present, the Doha Development Round appears to be far removed from such a genuine agenda. Trade is not a goal in itself—its purpose is to facilitate domestic development and social prosperity. It is necessary to stress that foreign exports do not constitute the key engine of economic development; this role belongs to domestic consumption, which should lead to a more articulated and advanced domestic economy. As such, a more differential and individual treatment is needed to facilitate the conditions necessary for economic and social advancement.[6]

In contrast, the current debate on agriculture reflects the sentiments of the developed part of the world. In the United States the amended Farm Bill of 2002 led to a rise in agricultural subsidies. In the European Union the current value of the Common Agricultural Policy is EUR 90 billion annually (EUR 45 billion in the direct subsidies, and 45 billion in the ''market price support''). Agricultural reform in recent years in the European Union has only marginally reduced average net import tariffs.[7]

[3] William Easterley, *The Lost Decades: Developing Countries' Stagnation in Spite of Policy Reform 1980–1998*, World Bank Working Paper, Feb. 2001.

[4] Robert H. Wade, *Is Globalization Reducing Poverty and Inequality?*, World Development, Apr. 2004.

[5] Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. Int'l L. & Pol. 243 (2000).

[6] Robert H. Wade, *What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of ''Development Space*,'' Crisis States Programme, Working Paper No. 31, Working Papers Series No. 1, *available at* <http://www.eldis.org/static/DOC11821.htm>.

[7] Mark Schucksmith et al., The CAP and the Regions (2005).

Why is the talk about agriculture so important? It is important for both symbolic and practical reasons. On the symbolic level, it is important because it reflects the present mood of the most developed countries within the Doha Development Round, while on the practical level, it is important for the developing countries because it represents ''almost 40% of their GDP, 35% of exports and 70% of employment.''[8] On the other hand, it represents on average only a tiny, highly competitive sector in the most advanced countries, that would for the most part remain competitive even without subsidies and even after removing trade and non-trade barriers to the richest markets in the world.

The developing countries are not a homogeneous trading block; among them are highly productive agricultural countries such as India and Argentina. Nevertheless, many of the developing countries are net importers of food. Therefore, careful calibration must be made in liberalizing agricultural commodities to achieve ''the largest positive effects on producers and the smallest adverse consumption effects.''[9] Among the key barriers that preclude development prospects are tariff escalation (which makes it difficult for these countries to export higher value-added goods and narrows the range of possibilities for their economic advancement), various non-tariff barriers, lack of access to new technologies, and lack of access to finance development.

Conclusion

The potential for real development around the world is immense, but it requires international institutions to expand rather than shrink domestic prospects for development. It requires careful calibration of international rules conducive to development, more representation at the international level, and more open and transparent procedures and decision-making processes in various international institutions.[10] Various other important debates, such as the extent of odious debt and debt cancellation, should be tackled. It is paradoxical that, in the last two decades of debt cancellation talks, indebtedness has in fact risen, not fallen. Official development assistance could also be improved, but the key here is to secure genuine domestic prospects for accountable democratic governments in the developing countries. More room for financing Millennium Development Goals, including rural infrastructure, schooling, and health, should be allocated to the developing countries. A broader development agenda within the Doha Round should be put on the table as well.

The Millennium Agenda is only one of the ways in which the situation manifests itself. There is ample opportunity significantly to ameliorate the above-mentioned negative trends, and international lawyers have many of the necessary instruments in their hands.[11]

The State of Law and Development: Challenges After the Second Generation Reforms

By Kerry Rittich[*]

At least since the appearance of the Comprehensive Development Framework (CDF) in 1999, international financial institutions have incorporated a range of social and democratic

[8] Joseph Stiglitz & Andrew Carlton, Fair Trade for All 120 (2005).

[9] *Id.* at 121.

[10] Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AJIL 619 (2005).

[11] Bearing in mind, however, important caveats provided in 2004 by David Kennedy in *The Dark Sides of Virtue*.

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objectives into their development projects and elevated the rule of law and legal institutions to the status of independently valuable ends. The incorporation of social concerns was a response to criticism concerning the singular focus on rates of economic growth; inadequate local or national consultation and input into the design of development policies; constraints upon sovereign and democratic political priorities; and profound problems or perverse collateral effects from development initiatives, ranging from the displacement of large numbers of people and the destruction of livelihoods to increasing economic and social costs for particular groups such as workers, small businesses, and women.

Yet while social issues now register on the list of concerns, the longstanding problem with legal rules and state ''interventions'' that do not address market failures remains intact, and the institutional infrastructure oriented to facilitating efficient transactions remains unmodified. In practice, second-generation reforms are proving to be a means to disseminate further the basic market-building project while transforming the concept of social progress and channeling the means to achieve it. And if international law and institutions are built through a process of resistance and response, then the CDF is a classic example: expanding the objectives and instruments of development to human rights, gender equality, and participation by civil society has been a way for the IFIs to expand their zone of operation and exercise surveillance over new areas.

The new model is replete with new socially rooted explanations of old objectives and market-centered routes to solving social justice deficits. For example, property rights and land reforms, originally defended for their role in attracting foreign investment are now, following de Soto, described in the language of social justice too; indeed, they are sometimes described as the most important anti-poverty device. Intensifying women's participation in markets and exerting market forces on entrenched cultural norms is now touted as the route to gender equality. And progress for workers, as well, is promised by labor markets increasingly unfettered by constraints on employer action.

Whatever their promise, all of these strategies have distinct risks and downsides. They are at best only selectively responsive to the problems which gave rise to the revised approach to development in the first place; in particular, they avoid rather than join the debate about the extent to which bad social outcomes might be at least partly attributable to enduring elements of the development model itself. For example, indigenous peoples or those engaged in subsistence agriculture may become landless and impoverished as property rights are altered to create new markets in land and land is sold, leased or pledged as security for ''higher-value uses.'' Those whose livelihoods are eliminated by such reforms, or as trade barriers are dismantled, may face formidable roadblocks to engagement in new productive activity that matches in security or compensation what is displaced. In addition, responses to social deficits that were speculative to begin with are becoming increasingly difficult to sustain, even in states with advanced economies. For example, despite the current propensity to address labor market problems by focusing on worker flexibility and training, it is becoming clear that supply doesn't produce its own demand, and that workers face sustained pressure on the terms and conditions of work notwithstanding their efforts to adapt to the new economy.

Markets may transmit and reinforce as well as undermine gender norms; without sustained attention to the mechanisms underlying such universal phenomena as gender stratification in job opportunities and compensation, they can be expected to do so. In short, without institutional and regulatory responses which are absent in most places, many people face increasingly commodified engagement in the labor markets, the normalization of economic insecurity, and the individualization of risk in an increasingly unstable world.

Hence, despite recent reforms, the problem of massive divergence between development priorities and benefit for so many people remains. Rather than ''finding a better model,'' the task is unsettling the soft consensus that has developed around the institutional determinants of growth, and making visible the accumulating evidence that social and distributive goals may be impeded as much as they are advanced by the current reform priorities. Here we can raise three issues: the accumulating evidence about the outcomes of orthodox policies; the unavoidable limitations of theoretical assumptions at the level of policy and regulation; and the potential conflict among development commitments and objectives themselves.

While development trends on the ground range from the encouraging to the deeply worrying, neither type provides clear support for the orthodox approach. Many nations continue to do badly, even where they have implemented legal reforms and made considerable shifts in economic policy in accordance with mainstream prescriptions. As Milanovic reports, many states are on a path of downward mobility in the global economy; that is, they have receded farther and farther from the winners since the widespread introduction of the current development orthodoxy circa 1978–1980. By contrast, states that are doing well or better have almost invariably followed paths that are deviant in some important respects, although defenders of the mainstream approaches often ignore these vastly different institutional policy and paths and/or work hard to assimilate them to the mainstream model. Yet, in the wake of these outcomes, there remains surprisingly little analysis within the IFIs of either development successes or failures that does not start from a set of assumptions about the institutional determinants that seriously considers alternative arguments and analyses.

The paradox of second-generation reforms, which reflect a broader view of the means and ends of development, is that they have not led to an expanded optic on the purposes and effects of legal and economic institutions. For example, mainstream development institutions have so far failed to consider how and why institutional features that appear problematic, or even pathological, from one standpoint might be functional for quite conventional economic goals, in the sense that they are a reasonable response to social or economic circumstances. Nor have they considered how they might serve other purposes, including distributive objectives that can be plausibly linked to a broadened array of development objectives. Nor has the new recognition that there are multiple legal and non-legal norms operating in different locales had the sobering effect that we might expect on the approach to legal reform and transplantation: the presence of competing norms both vastly complicates the exercise of determining what effect legal reforms actually have on development and subverts the effort to generate development outcomes through the replication of model regulatory regimes. Finally, there is little evidence that the ideal of ''country-ownership'' of reforms has led to the acceptance of a more diverse set of regulatory goals and concerns.

Second, the whole effort to derive law and development projects from theories and models is problematic; it becomes more so to the extent that it remains impervious to countervailing evidence about the effects of reforms, or their absence, on the ground. It is entirely possible to admit the utility and insights of models and paradigms without insisting upon a direct line from normative and theoretical commitments to the details of policy and legal reform; this remains true whether those commitments concern the advantages of trade liberalization; the benefits of securing property rights; the importance of the rule of law and access to justice through courts; or the need for greater gender equality. Efforts to ''apply'' theory to law and policy reforms in this way are subject to a range of abuses and distortions that include massive simplifications, unjustified projections, and unsustainable or untestable claims, for example, that states that ''regulate less do better.'' Competing theories and explanations are

ignored more often than they are engaged, and entire fields of analysis may be absent from the discussion, no matter how illuminating and pertinent they might be to the issue at hand. Even debates and nuances within the theories that *do* drive reforms are selectively recognized and arbitrarily engaged; those that confirm regulatory ''common sense'' or current policy commitments may be cited, for example, while those that challenge or complicate them are ignored. For example, there are detailed accounts by institutional economists about the ways in which labor market institutions might be useful or even necessary in an economy in which the accumulation and maintenance of skill is necessary to better productive outcomes; however, so far they have not penetrated the bedrock assumption that labor market institutions are likely to be an impediment to the efficient operation of labor markets.

Third, with the expansion of the development agenda it seems clear that reform objectives may themselves point in conflicting directions; there may also be conflicts between national or regional development demands and decisions and internationally imagined optimal market rules. This suggests that the regulatory options and policy priorities for developing countries should be evaluated independently of the extent to which they serve the interests of foreign investors or how consistent they are with the current view of optimal regulation in a global economy. If this seems faintly heretical, it is only because law and development orthodoxy continues to insist that all good things are coterminous. While this insistence may simply reflect the power and pervasiveness of the soft consensus around the institutional determinants of growth, it does raises the question: what actually *is* the main law and development project?

Law-Dependent Public Goods: A Proposed Strategic Framework for a Results-Based Approach to Legal and Judicial Reform

By Mohan Gopalan Gopal[*]

Notwithstanding more than a half century of international assistance for legal and judicial reform—which has now grown into a global project covering nearly all donors and some ninety-three recipient countries—legal and judicial systems in developing countries face a mounting crisis. *Justice for the poor is more elusive today than ever before.*

There are a number of well-recognized reasons for the poor effectiveness of international assistance and national programs for legal and judicial reform.

— There is very little clarity or consensus about what constitutes a well-functioning legal system and how to define and measure the success of legal and judicial reform. What are the developmental outcomes of specific legal reform interventions? What is the relative role of legal reform in achieving desired developmental outcomes as against other dimensions such as economic, social and political reform? How should legal reforms be sequenced and prioritized to have the most beneficial impacts on development outcomes? The goals of legal and judicial reform are still vague. Key goals such as ''rule of law'' and ''independence of the judiciary'' are more idealistic political slogans than measurable objectives notwithstanding efforts to quantify them. There has been no adequate explanation of very important questions such as why China has enjoyed such high levels of economic development virtually without a Western-style legal system; or how India has transformed itself from a laggard in economic development to one of the fastest-growing economies in the world without any improvement in its creaky legal system (as

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a matter of fact, while the legal system may have been getting worse). There is very little independent evaluation of the quite massive international assistance for legal and judicial reform.

— Legal and judicial reform traditionally focuses on changes to legislation and on institutional reform and capacity building of judicial, legislative, and executive institutions concerned with the development as well as professional and legal educational institutions. This ''supply side'' approach to reform does not adequately focus on the ''demand side'' of the legal system (users and the public) or on the broader economical, social, and political context in which legal and judicial reform takes place.

— The conceptual dilemmas raised over the last half century are still unresolved. For example, is it necessarily a good thing for the poor to build formal Western-style legal systems and support legal education and the legal profession in poor countries ? What is the risk that these institutions end up favoring the rich and exacerbating existing inequalities and inequities?

— As pointed out by Dave Trubek and Marc Galanter thirty-two years ago, the essential purpose of assistance for law and development continues to be the promotion of Western legal concepts and institutions, an enterprise that plunged scholars into self-estrangement thirty-two years ago and should push them even further into deeper estrangement today.[1] Law and development continues to be ethnocentric and heavily dominated by the Anglo-Saxon, common-law tradition of three countries. Should not law and development itself be democratized?

— ''Law and development'' is too much in bed with the ''development'' business (especially in terms of financial support for academic work). This is now turning to be a distinct liability as the ''development'' project itself is now struggling for relevance and survival, whereas legal reform is accepted as a high-priority, urgent need. This has had at least two consequences. First, the content of law and development has become greatly influenced by the highly political agenda of development, with its shifting goals and priorities, for example, from economic to social and political aspects in sync with the changing agenda of development institutions. Second, law and development focuses only on the problem of the role of law in ''developing'' countries unlike the ''law and society'' movement—from which it originated—which benefited from a broader analytical framework that looks at the role of law in all societies, North and South. Given that many Northern countries are also facing serious legal and justice crises, especially on the issue of justice for the poor, the narrower focus on developing countries is limiting.

— There are very little empirical data about the legal system, and existing systems are analyzed based on theoretical ideas and idealized legal concepts; the research methodologies that have emerged in other disciplines have not yet emerged in law.

— There is still little understanding of the *process* of legal change—of how and why legal reforms do not work—or do—and how they can and should be developed strategically. How should legal reform processes be managed? Are there differences from other types of reform?

[1] David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974).

— There is a vast but significant body of international activity that is today shaping domestic law. These activities are scattered across innumerable international forums, with little or no coordination. How representative and accountable is the international role? How may the international role in this regard be reconciled with the democratic rights of citizens of developing countries to make the laws under which they live?

— Impact of globalization/paradigm shifts in understandings about institutions: The linkages between legal change and development outcomes are further challenged by the paradigm shift that legal/institutional frameworks are undergoing as part of a yet-to-be-well understood transformation from an industrial society to a yet to be well-defined, new, knowledge-based society.

We need new ideas that can address these concerns and move the law and development discipline forward. To this end, a proposed strategic framework to guide international legal assistance for law and development is outlined here for further discussion.

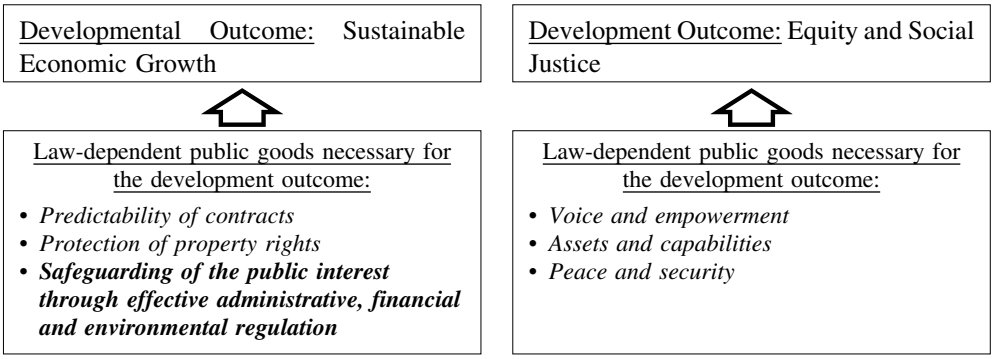
Law-Dependent Public Goods: A Proposed Analytical Framework for Law and Development

Ideas of justice are not static or identical across countries. Justice does not consist merely of the existence of laws, rights, duties, or certain types of legal and judicial institutions. Justice/injustice may be defined in terms of, and *experienced* by, individuals and communities in the form of *outcomes* (''realities'' on the ground, going beyond merely legal entitlements or rights)—for example, gender equality freedom of expression, freedom from arbitrary arrest, freedom from physical violence, ''fair'' legal proceedings, freedom from adverse discrimination, predictability of contract, protection of property rights, and freedom from hunger. These outcomes will vary across societies and across time. The effectiveness of the functioning of legal systems may be measured by the availability of such *outcomes*.

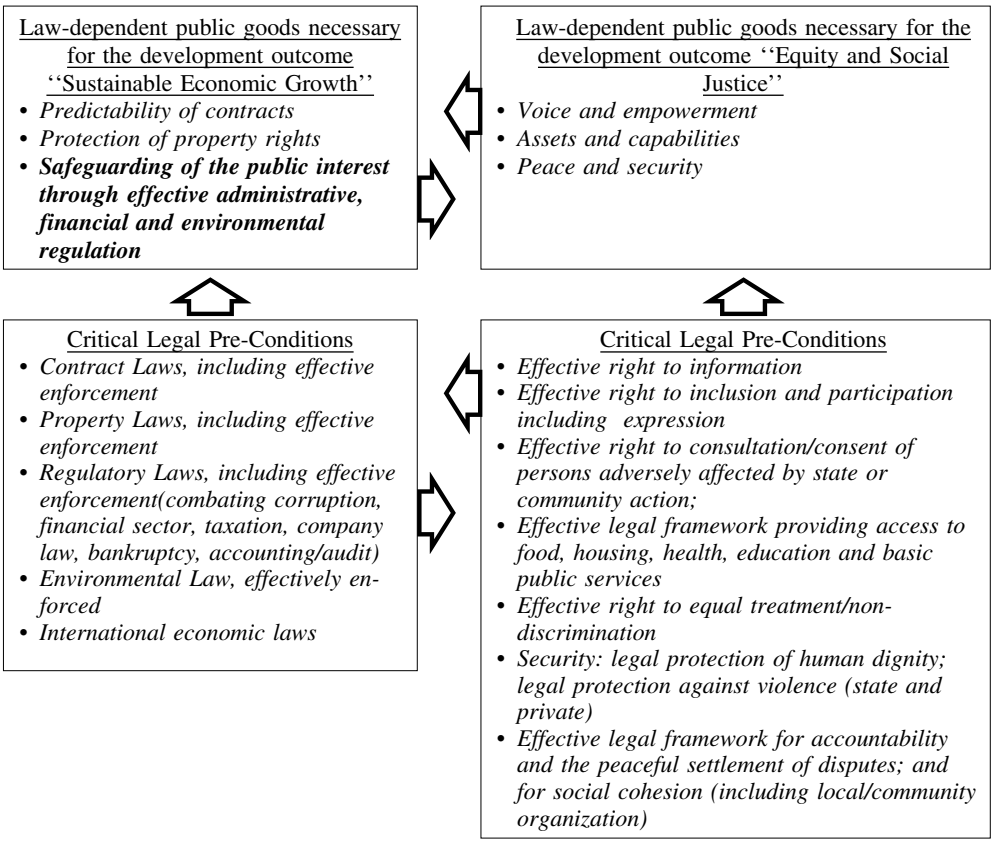
Such outcomes may be referred to as ''public goods'' because they share many of the characteristics of ''public goods'' —they are non-excludable (i.e., those who do not pay for their production cannot be excluded from their enjoyment) and non-rival (i.e., consumption by some does not reduce availability for others). Admittedly, they may not always be ''pure'' public goods and may have elements of ''mixed'' goods and ''private'' goods as well in some circumstances.

As law is a constitutive function providing legitimacy for all activity, law will be an essential factor that determines the degree to which virtually all development outcomes are actually available in society. However, some outcomes are more centrally dependent on laws and legal and judicial institutions (''law'') than others (e.g., freedom of speech, predictability of contract, etc.). These law-dependent outcomes may be called ''*Law-Dependent Public Goods.''* Specific Law-Dependent Public Goods will vary from one country to another, and even from one local area to another, and will need to be determined through an inclusive, consultative process. The availability of law-dependent public goods depends in turn on certain *critical legal pre-conditions.* These legal pre-conditions fall into two broad categories: (a) *specialized laws, effectively implemented, relevant to the concerned public goods;* and (b) an effective underlying *''legal operating system,''* i.e., the systemic foundations of the legal system.

While a number of ''law-dependent public goods'' may be identified from development literature, as an illustration, the following may be considered the most critical for the achievement of the overall goal of poverty alleviation through sustainable growth with equity and social justice:



The *critical legal pre-conditions* necessary for generating these six ''law-dependent public goods'' may be categorized into: (a) specialized laws relevant to the respective law-dependent public goods; and (b) the legal operating system. While the specific set of issues falling into each category would need to be confirmed at the country level, the following would normally be considered as critical legal pre-conditions for the generation of law-dependent public goods:



While the composition of the systemic foundations of legal systems (the ''*legal operating system*'') will vary from one type of legal system to another, a well functioning system would normally have the following elements:

(i) an effective law/rule making system;
(ii) an effective system for dispute settlement including an independent and effective judicial system;
(iii) an effective system for the implementation of laws including remedies, compensation and sanction systems;
(iv) an effective system for training and regulating the legal profession; and
(v) a minimum set of core laws (contract law, property law, personal laws, tort law, criminal law, constitutional and administrative law and personal law).

Using the Proposed Analytic Framework to Assess the Health of Legal and Judicial Systems and Evaluate Effectiveness of Bank Assistance

The proposed analytic framework can be used to assess the ''health'' of legal and judicial systems in a manner that addresses ''gaps'' in current approaches to assessment and diagnosis.

Given that legal and judicial system issues vary significantly at the country level (and, in many cases, at sub-national levels), development assistance in this area has tended to lack a coherent common framework across countries and regions. The proposed analytic approach could address this gap.

This ''results-based'' approach to program development and implementation will significantly strengthen the ability of donors as well as governments to plan, allocate resources to, and evaluate effectiveness of, legal and judicial reform efforts. Given the highly interdisciplinary nature of this approach, this approach calls for close interdisciplinary collaboration. Externally, it calls for close coordination and partnership among donors and requires that responsibilities be shared on the basis of comparative advantage and mandate. The implementation of this approach will require considerable programmatic flexibility to ''tweak'' interventions until they are able to produce the desired outcomes/results with respect to the relevant public goods. This will call for continuing adjustments at the policy and operational level by implementing agencies. The proposed approach will therefore require strong national/local ownership as well.

Comparative Dimensions of Law and Development

By Hiram E. Chodosh[*]

Beyond the precise relationship of law and development as distinctive and interdependent social phenomena, an investigation of how best to achieve development through law is profoundly comparative. Reform interventions carry two, often implicit, comparative dimensions. First, reforms are inspired by perceptions of success elsewhere (legal models in more ''developed'' societies). Second, reforms presuppose a comparison of the status quo and

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(with the help of the designed intervention) a different (more ''developed'') future. When examined more closely, the comparisons embedded in reform may not fully grasp the complexity of the social phenomena they describe and seek to alter. Explication of the implicit causalities—key institutional features and legal provisions that create a just society—is more conveniently avoided, but not without consequence. The failure to explicate comparisons in reform serves to discourage, if not entirely prevent, accountability for the consequences of the proposals.

The modest thesis here posits that disappointment with law and development reforms may be in part attributable to frequently implicit and flimsy comparisons across national experience and time. I will illustrate the comparative challenges by confronting the common apples/oranges objection and identifying some key features of helpful comparisons. Second, I will outline the common ways in which weak comparisons limit the success of reform interventions, including poor empirical understanding, inarticulate aims and institutional and behavioral theories, and an under-appreciation of the dilemmas that reformers face at every turn. Finally, I briefly conclude that greater attention to comparative methodology (including anti-dilemma strategies) might help to improve our efforts to understand and improve upon efforts in law and development.

Confronting the Apples/Oranges Objection

In justice reform, law and development and more general reflections on the success or failure of nation-states, skeptics often express resistance to a posited comparison with the retort: ''that is apples and oranges!'' As I have pointed out elsewhere, this response implies, first, that apples and oranges are incomparable, and, second, that the incomparability of apples and oranges is itself comparable to the incomparability of the two objects in the primary comparison. The reasoning carries three weaknesses.

First, the reasoning is paradoxical because the conclusion that two objects are incomparable is itself based on a comparison. This comparison (of comparisons) concludes that the differences so outweigh the similarities that the identification of similarities is not useful. Second, the reasoning is also internally inconsistent. Instead of resting on a comparison of two fruits (or two legal phenomena), the ''apples and oranges'' objection remarkably analogizes two comparisons, and thus implicitly judges the incomparability of two legal phenomena to be comparable to the incomparability of two fruits. The contestable implication here is that the two comparisons are more comparable in their common degree of extreme incomparability than are either two legal phenomena or apples and oranges. Finally, the implied incomparability of the two fruits is false. The putative incomparability of apples and oranges is contradicted by many comparisons of the two phenomena. Possible comparisons of apples and oranges select from a variety of criteria, such as origin; appearance, including size, shape, and color; texture; nutritional content (e.g., sugars, acids); economics (e.g., market price, costs of cultivation, production, distribution); symbolic value (e.g., the expression, ''as American as apple pie''); or convenience of consumption (i.e., edibility or ability to extract peel; or the insulation of pits in the core). Inconsistent comparative content and characterizations may reflect inconsistent comparative motivations. In comparing apples and oranges, for example, the farmer may be interested in the climate conducive to cultivating apples and oranges, the greengrocer may be concerned with shelf life, the botanist with origins, or the baker with water/solid ratios. Comparisons of apples and oranges or any other phenomena carry three basic elements: the purpose for which the comparison is made, the content chosen to compare,

and thresholds of differentiation that help distinguish the two phenomena according to a consistent criterion.

Weak Comparative Foundations for Reform

Reforms directed at creating a more independent judiciary, a less corrupt civil service, or less delay in the civil and criminal justice system presuppose two different types of comparisons. First, reforms are often motivated by foreign examples. The theory supporting them posits that because a particular feature seems to have been critical in the achievement of certain objectives in a developed country, the adoption of a similar feature in a developing country will render similarly successful results. Second, even without cross-national inspiration, reform itself carries a comparative theory that the reform intervention will change the status quo to the desired condition.

Accordingly, many reforms rest on the strength and predictability of the theories embedded in these comparisons. However, reform comparisons tend to be flimsy, and this weakens reform proposals from the point of conception. Weaknesses range from poor empirical understanding to unsubstantiated theories of institutional and behavioral change. Severe resource limitations and practical obstacles to effective, collective action impede responsive reform processes. If these impediments are ignored by comparative theories of institutional change, dismissed as ''mere resistance,'' or accepted as simply unalterable, reform initiatives are likely to fail. Therefore, it may be useful to isolate some common weaknesses.

Weak Empirical Understanding

First, comparisons are often based on a poor empirical understanding of conditions on the ground. Dysfunctionality is often accompanied by entrenched and powerful interests, who will resist change. A registrar who makes his living off of grease payments to advance or delay matters on the docket is unlikely to support anti-delay measures. Second, comparisons may derive from overly harsh assessments. Delay may be a sign that the system is trying to get it right without cutting corners. It may signal evidence that there remains considerable trust in and high demand for the court's service. Corruption may be an understandable response to an excessively bureaucratic, unresponsive, or repressive system. Third, comparisons may reflect myopic views of complex and interrelated problems. Delay and corruption, for example, go hand in hand. Without delay, officials who control the line cannot extort bribes from those who want to pay their way ahead of their turn. Creating an independent judiciary in a corrupt judicial service, for example, may only exacerbate the corruption within the judicial system by insulating it from any accountability whatsoever. Finally, comparisons may not take into account severe resource limitations: We often propose Cadillac solutions for more pedestrian problems, and in so doing underestimate resource limitations.

Weak Theories

Responsive reforms reflect flimsy comparative theories, based on inexplicit aims, poor design choices, and weak theories of institutional or behavioral change. First, initiatives embed a series of inexplicit and often conflicting aims. Supporters of mediation reform in India stress the instrumental goal of docket reduction instead of intrinsic goal of improving the social process of conflict resolution to create more participatory, neutralizing processes leading to win-win, interest-based solutions. Without clear aims, it is harder to bolster sustainable support, get a sense of priority, or measure success over time. Second, every

reform posits a comparative theory that the newly introduced feature (when compared to the status quo) will generate a better result. Many try merely to negate the effect of the status quo system (reform by negation) as a poor way of dealing with underlying problems. Third, most contemporary reforms are informed by reference to positive foreign examples. Many of these approaches attempt to replicate an entire system (reform by recipe), rather than separating and reconfiguring its adaptable parts. New rules or features do not automatically mean a change in behavior. The mere creation of a judicial commission in Indonesia does not mean that the judiciary will become more impartial and effective. The introduction of mediation does not necessarily mean that the country will reduce its backlog.

Under-Appreciation of Common Dilemmas

Many reforms also underestimate the trade-offs at each phase: from choices of process to substance. Such dilemmas fall into a few distinct categories: dilemmas in the design of a reform, the method or process of reform, or the social dilemma of tradeoffs between individual and collective interests. For example, court systems may have to choose between strong independence and accountability mechanisms, or between formal adjudication that stresses public pronouncements of norms or on informal conflict resolution that emphasizes interest based, consensual settlements. Reformers choose between incremental and systemic approaches to reform; gradual and sudden sequences; top-down or bottom-up decision-making; external or domestic sources of expertise; and the balance between research (as the basis for reform) and reform (as the continual basis for research). Most importantly, individual, subcollective, and collective interests may conflict, and this poses one of the most significant impediments. If everyone agrees on a reform in the abstract, it may still be frustrated by individual incentive structures inconsistent with its implementation.

Toward the Improvement of Comparative Reform Methodologies

This assessment should serve as a starting point for strengthening the comparative foundations for law and development reforms. Explication, more rigorous empirical and theoretical work, and the development of strategies to navigate the many dilemmas of reform are each critical in this process. Anti-dilemma strategies range widely. For example, reformers may alter the current incentives and trade-offs with side payments; reject the exclusivity of the choices and propose a combination of seemingly competing solutions; look for a third way; attack the fundamental assumptions of falsely binary polarity; break up the problem into smaller units of decision in order to have a more incisive approach to each aspect of the underlying problems; grasp the relativity of harms and benefits and calculate the discount or multiplier effect of probabilities of alternative scenarios; choose which mistake one would rather make (pick their poison); and organize collectively to have the important conversations about these choices (to allow the paradigmatic prisoners the opportunity to confer.)

Over time, greater attention to these philosophical and practical approaches to making better comparisons in reform might increase our ability to understand and improve interventions to achieve development through law.