The New Law and Economic Development

A Critical Appraisal

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3 THE "RULE OF LAW" IN DEVELOPMENT ASSISTANCE: PAST, PRESENT, AND FUTURE

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The issue of the relationship between legal institutions and "development," whether development is defined narrowly in economic terms, or more broadly, was originally mooted by Max Weber 100 years ago and has continued to fascinate scholars.[1] In recent years, it also has come to interest policymakers as development institutions have placed increasing emphasis on the "rule of law" as a necessary ingredient in any development strategy. The result has been a proliferation of law reform projects and programs supported by development assistance institutions.[2]

In the 1990s, there was a massive surge in development assistance for law reform projects in developing and transition countries. These projects involve investments of many billions of dollars. The World Bank alone reports it has supported 330 "rule of law" projects and spent $2.9 billion dollars on this sector since 1990. At the beginning of this new surge of interest in law within the development community, there appeared to be a broad consensus on the reasons to create the "rule of law" in these transitional and developing economies, on what the "rule of law" meant, and on the best strategies to implement those objectives. But as more was learned about the challenges, and a burgeoning literature emerged, it has become apparent that the initial enthusiasm for the rule of law masked different, and potentially contradictory, visions and approaches. This chapter seeks to trace the origins of the current wave of interest in the rule of law, identify the contradictions that have emerged, and specify issues now on the agenda.

THE LAW AND DEVELOPMENT MOVEMENT OF THE 1960s

To understand the present fully, it is useful to go back to the first wave of interest in law in the international development assistance community. This

[1] David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720–753 (1972).

[2] For an overview, see David M. Trubek, *Law and Development*, International Encyclopedia of the Social & Behavioral Sciences (N.J. Smelser and Paul B. Bates, eds., 2001).

was the law and development (L&D) movement that started in the 1960s and continued into the 1970s. This movement was led by a small band of liberal lawyers working in development agencies, foundations, and universities in the United States and Europe. They sought to interest development agencies in the importance of legal reform. Although the L&D movement was relatively small and short lived, and had little impact on the development policies of its time, it did put the issue of how law related to "development" on the intellectual agenda.

The L&D movement was built around the dominant Western development paradigm of the time that gave priority to the role of the state in the economy and the development of internal markets. This was the era of import-substitution industrialization, in which developing countries sought to build their own industrial capacity by limiting manufactured imports from advanced economies and providing subsidies for national firms. The basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.

Although the rhetoric of development stressed that the ultimate goals were freedom and democracy, not just growth, the projects focused on growth. Development policy stressed economic matters not because planners were uninterested in political democracy or social development, but because those who cared about such matters thought they would follow from economic growth. This meant that within this vision it was possible to accept – if not favor – various forms of bureaucratic authoritarian rule while professing allegiance to ideas of democracy and promotion of individual freedom. Authoritarianism could be portrayed as a temporary stage that would foster growth but automatically wither away once growth was achieved.

In this context, it is no surprise that the small band of liberal lawyers who focused on law reform as a development strategy placed great emphasis on the economic role of law and highlighted the importance of law as an instrument through which state actors could shape the economy. This meant more effective operation of state-owned economic enterprises and "modern" approaches to regulation of the private sector. The L&D movement cherished a vision of lawyers as pragmatic, instrumental problemsolvers who would facilitate state-led economic development. Depending on their role, such "modern" lawyers would help policymakers shape and enforce effective regulations, advise the managers of state enterprises how best to realize their goals, and counsel private clients in ways that would allow them to grow and profit while acting consistently with the policy objectives of the planners and law givers.[3]

[3] David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Reflections on the Crisis of Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062–1101 (1974).

According to the L&D planners, legal systems in Latin America and other developing nations were not producing the kind of modern law and lawyers that were needed. The planners saw many obstacles to legal modernity. Foremost among them was that the legal cultures of these nations were highly "formalist." By this, the L&D planners meant rules were developed, interpreted, and applied without careful attention to policy goals. They alleged that *formalist law teachers* taught that law was an abstract system to be applied by rigid internal rules without concern for policy relevance and impact; *formalist legislatures* copied foreign models or followed abstract principles instead of studying social context and shaping rules for instrumental ends; *formalist judges* applied rules in a rigid and mechanical fashion rather than first accepting the inevitable discretion adjudication entails and then looking to the policy goals behind the rules to guide them in the application of this discretion; and *formalist practitioners* stood aloof from both the goals of the law and the objectives of their clients, issuing interpretations based on some abstract logical system or rote application of formulae thus impeding rather than fostering progress.

Formalism, in this sense, engendered other weaknesses. These included weak enforcement, inappropriate rules, and low legitimacy. Enforcement was ineffective in part because the rules adopted were inappropriate to specific national contexts and thus were easily ignored, and in part because of administrative deficiencies and corruption. The rules passed were inapposite: this was because they either had been copied from more advanced systems without real concern for national need and attention to specific national context, or because they were elaborated by some system of abstract logic equally insensitive to real policy concerns. The legitimacy of the legal system was low because the rules had little to do with the needs of the country and for that reason (among others) laws were frequently ignored.

This diagnosis led to the L&D programs that evolved in the 1960s. The primary goal of these programs was to transform legal culture and institutions through educational reform and selected transplant of "modern" institutions. If formalism was the source of bad laws, weak enforcement, and ineffective or counterproductive lawyering, then the most important thing to do was to create a new, more instrumental *legal culture*. This culturalist approach led to a heavy emphasis on reform of legal education. Legal education was seen as the source of the evils of formalism, and change of legal education as the way to transform a formalist culture into an instrumental one. Instrumentally oriented law schools would not only turn out lawyers who would approach their tasks in a pragmatic, can-do fashion, they would also be venues from which a critique of formalism in law making and application could be mounted, as well as think tanks that could produce the modern law that was so badly needed.

This culturalist approach meant that the L&D movement found itself working to a significant degree with law schools and with the legal elites that exercised substantial influence over major law schools in the developing world. Less attention was paid to the legislature, judiciary, or practicing bar. This was not because they were thought to be less important, but because it was assumed that change in the education system was the most effective way to bring about change in all other legal institutions.

Looking back, it is not wholly clear why the idea took hold that legal education was the fulcrum on which all forms of change would occur. It seems as if the planners assumed – paradoxically – that legal education was both highly autonomous and yet very influential. That is, they assumed that it would be relatively easy to bring about change in the law schools because they were freer from the forces of "formalism" than the bench or bar while at the same time they thought that once change occurred in the schools it would immediately influence modes of adjudication and methods of lawyering. The focus on legal education also may have been influenced by the importance of law schools from advanced countries in the development effort. The pioneers of the law and development movement were drawn from elite law schools in the United States and Europe and, early on, called on the schools to assist in the effort. And in the United States at least the law schools were actively involved in development assistance projects while the organized bar, bench, or attorneys general usually were not.

Legal education reform may have been an area of prime concern but it was not the sole focus of reform energies. It was also recognized that there was a need to create modern rules and legal institutions. This meant to some degree transplanting legal institutions from more advanced countries. But in accordance with the culturalist critique, this had to be done with careful attention to local needs and conditions to avoid the mimicry that seemed to have played such a major role in legal borrowing in the past.

Both in the reform of legal education and the development of modern law, the emphasis was on economic law and the training of business lawyers not just in the private sector but also in the public sector, which played such a major role in many third world economies. This emphasis on economic law was not because all L&D planners were indifferent to issues of democracy, social justice, and human rights; rather, it was because many thought that such values were best served by first getting growth going. Moreover, they believed that a more effective legal system would – by its very nature – insure protection of individual rights. Just as the development thinkers hoped (or pretended to hope) for spillover from economic growth to democracy, so the L&D movement believed there would be spillover from an effective and instrumental orientation in economic law to "democracy values" like access to justice and protection for civil rights.

What was the theory that lay behind the law and development movement of the 1960s? In a sense, there was none. Academics played a role, along with lawyers and others in development agencies, in creating the movement. But they really had no well-developed theories to explain their choice of programs and projects. Beyond a general belief in the importance of law, the relevance of western models, and the importance of a modern legal culture, it was all ad hoc and pragmatic. This was a time everyone thought it urgent to get on with the job, not theorize. Theory could – and did – come later.

The L&D movement had a brief and intense life. Of course, by today's standards it was never a major enterprise. It was focused on a few countries in Latin America and Africa. Projects were small and short lived, and funds were limited. The bulk of the funding came from foundations, not bilateral or multilateral aid agencies. USAID did support some projects, but neither the World Bank nor regional banks like the Inter-American Bank for Development directly supported the reform of legal institutions. For a brief period there was a surge of energy and activity, engaging a small but dedicated group of reformers. However, by the middle of the 1970s there was disillusion in the academy, foundation interest declined, and the official aid agencies showed no interest in moving into legal reform. So, for the moment, the L&D movement seemed to have run out of steam.[4]

CRUMBLING PILLARS: THE COLLAPSE OF THE L&D PARADIGM

The movement rested on four pillars; a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spillovers from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. In the course of the 1970s all four of these pillars crumbled.

As L&D actors gained more experience with Western-inspired reform projects, they began to see serious flaws in the approach initially taken. Questions arose about both the culturalist approach and its educational strategy, and the general effort to transplant Western legal institutions. The educational reform program failed to yield the results hoped for. The law schools proved more resistant to change than the reformers had imagined. And even if small gains were made in the educational sphere, and instrumental ideas were accepted by some third world lawyers and legal scholars, the projects failed to have the systemwide impact hoped for. It seemed as if the structures of law making, law applying, and practice were quite capable of resisting foreign-inspired cultural change. At the same time, many efforts at legal transplantation proved similarly disappointing. In some cases, the transplants did not "take" at all: some of the new laws promoted by the

[4] *Id.*

reformers remained on the books but were ignored in action. In others laws were captured by local elites and put to uses different from those the reformers intended.

Finally, even when change did come about in the economic sphere, leading to more instrumental thinking, effective law making, purposive approaches to adjudication and pragmatic lawyering, the hoped-for spillover to democracy and protection of individual rights did not occur. This was a real shock to Western liberal legalists who had assumed that the legal system was a seamless whole and that reform in one sphere would necessarily lead to progressive change in other areas. These chastened reformers found themselves facing the frightening possibility that legalism, instrumentalism, and authoritarianism might form a stable amalgam so that their efforts to improve economic law and lawyering could strengthen authoritarian rule.[5]

If these lessons from experience started to undermine several of the pillars on which the L&D movement rested, the edifice was further weakened by the effort to develop a theory of law and development. While the early L&D projects were put together in an ad hoc fashion and without any effort to develop a systematic theory, both the academics in the movement and some of the funding agencies sensed the need for such theory. As a result, substantial intellectual energy went into the search for a theory of law and development. Such a theory, it was hoped, would both explain and justify the earlier programmatic efforts and chart the way for future reform efforts. However, the project had effects opposite to those desired. Rather than providing a justification for what had been done, and a map for further reform, the theory-building project revealed serious flaws in the original approach without offering a robust alternative that could orient action and guide project development.

It is important to understand the context in which the theory-building effort was undertaken. The L&D movement was conceived and launched in the early days of the 1960s when liberal internationalism flourished and liberal legalism was a confident creed. The L&D projects were largely conceived by people from Western universities and aid agencies. By the end of the decade, when the project of theory building really got underway, the context had changed dramatically. The failures of the initial reform projects were beginning to become apparent. The anti-Vietnam protests, the events of 1968 in Europe, and other developments had changed the political context and radicalized students in many of the universities in which the theory project was housed. At the same time, the initial reform efforts had brought scholars and activists from the developing world into the effort and they offered perspectives very different than those of the initial U.S. and European reform

[5] *See* David M. Trubek, *Back to the Future: The Short and Happy Life of the Law and Society Movement*, 18 Florida State U. L. Rev. 1–55 (1990).

groups. As chastened reformers met with sophisticated thinkers from the developing world and radicalized students, very different ideas about both law and development began to emerge.[6]

In this new context, it is not surprising that the theory project brought to light some of the simplistic assumptions on which L&D reform projects had been based. Although no explicit and well-developed theories had been put forward in the original surge of L&D interest, further analysis suggested that behind ad hoc decision making lay a set of assumptions that constituted a theory of sorts. It became clear that many project designers had employed a linear model of development. In such a model, it was assumed that all nations went through similar stages to reach a common end, represented in this kind of thought by the legal, economic, and social structures of the United States and Western Europe. This naive and ethnocentric neoevolutionist thinking made it easy for L&D planners to believe that something called modern law, not surprisingly found in their own national legal institutions, was the end toward which all legal systems were moving. Because they could imagine that legal development followed evolutionary stages linked to stages of economic growth, and that "Western law" was the higher evolutionary stage toward which all systems were moving, it was easy to believe that the process of transplanting Western legal culture and institutions would be relatively simple and straightforward. After all, weren't the reform projects, modeled as they were on the legal institutions of more "advanced" societies, just modest efforts to accelerate the forces of history? With the winds of history at their back, how could the reformers fail?

Needless to say, the moment these simplistic ideas were held up to critical scrutiny, they collapsed. These ideas probably would have fallen of their own weight under any circumstance, but it helped that the critique emerged in a period in which, amid growing concerns about neoimperialism, their was a great distrust of all forms of Western intervention in the developing world. Thus, as the 1970s rolled on, the L&D movement had to face the fact that the culturalist strategy was not working as they had hoped; transplantation often went awry; spillover was not happening, and critique had demolished the only theory they had. Things looked bad.

But if that were not enough, at the same time development policy was shifting, thus undermining the fourth pillar. While the L&D movement was going thorough this period of reflection, changes were afoot in the larger world of development policy. People began to question the effectiveness of ISI and of state-led growth. Attention focused on the inefficiencies of protectionism and the distortions of bureaucratic management of the economy. It was clear that a paradigm shift in development thought was on the way.

[6] For examples of alternate visions, see Yash Ghai, Robin Luckham, and Francis Snyder, The Political Economy of Law: A Third World Reader (1987).

The L&D movement, as such, never recovered from these blows. Of course, some academics continued to work on these issues and development aid for law reform did not dry up completely. But the pace slackened. Foundations lost interest in the area and the bilateral aid agencies and international financial institutions did not take up the slack. Some academics became disillusioned. The networks of academics and policymakers that were created in the 1960s started to unravel, and the study of law and development in the academy declined. Some declared that the L&D movement was dead.

THE "RULE OF LAW" REPLACES LAW AND DEVELOPMENT

The rumors of its death were greatly exaggerated. Today, the enterprise of law reform in developing and transition countries is big business, far eclipsing even the wildest dreams of the L&D pioneers. Aid agencies like the World Bank, which once focused primarily on building roads and dams and getting macroeconomic variables right, now proclaim the importance of the "rule of law" (ROL) and spend billions to reform the legal systems of countries as different as Albania and Argentina, Bangladesh and Bolivia. How did we get from L&D to "ROL"? What forces impelled the move of law from the periphery of the development agenda to its very core? And what is the difference – other than sheer scale – between the projects of today and those of the L&D era?

To answer those questions, it is useful to divide the ROL era into two periods: an initial phase in which the new paradigm took shape and massive investments in law reform began, and a more recent period in which subtle changes can be glimpsed.

The global context is transformed

Although the L&D movement took institutional form in the 1960s, it could be seen as a continuation of processes that dated to the end of WWII. The ROL era, in contrast, emerged during the latest wave of globalization and the post-Cold War era. This radical change of context helps account for the great differences between ROL and L&D.

The L&D movement emerged in a period in which international economic policy was supportive of state-led initiatives in partially closed economies. In the advanced countries of Europe and the United States, this was the era of "embedded liberalism." This regime, guaranteed by the Bretton Woods system, maintained a balance between openness, democracy, and economic fairness. Embedded liberalism was an *international regime* that operated to facilitate *domestic* politics and shield *domestic* systems of economic regulation and social protection in advanced capitalist countries from global shocks. It allowed individual nations leeway to regulate the economy, promote

employment, insure against economic risks, and redistribute income. It supported democratic politics at the national level, ensuring that when governments exercised the powers safeguarded to them by the international regime they would act in the best interests of their citizens. This system combined efficiency with legitimacy: its great virtue was that once the international machinery was set in motion, the nation states had effective authority over their economies, major political choices could be made at the national level, and national governments could be held accountable through democratic processes.

Although the developing world was only marginally affected by embedded liberalism, one can see strong affinities between the broad intellectual framework the regime rested on and development policy of the 1950s and 1960s. Embedded liberalism was a compromise between those who wanted a completely open world economy and those who felt that it was important to limit the impact of exogenous economic forces and thus allow the state to play a major role in national economies. For people who accepted such a compromise for the developed world, it was easy to accept the idea of import substitution industrialization and state-led growth for the "Third World."

If the thinking behind embedded liberalism affected the overall architecture of the post-WWII era, the emphasis on state-led growth and relatively closed markets was also a way for the managers of the world economy – or at least of that part of the world economy under Western hegemony – to cope with the pressures of nationalism and demands for decolonialization. National movements seized control of states in former colonies and sought to break ties with their respective metropoles that had been built up under colonialism: this meant placing more emphasis on national development strategies and endogenous growth, a change international development policymakers accepted and supported.

Finally, there was the Cold War, and the ideological struggle with the Soviet Bloc. This required that the West promise to deliver economic growth, but do so while also claiming to promote liberal democracy. Law and development was part of the West's answer to communism, part of the promise, often not fulfilled, that a Western-led economic system could deliver economic growth with freedom.

The contemporary "Rule of Law" enterprise took shape in a very different *conjuncture*. By the 1990s when ROL really became big business, major changes had occurred in the world economy and world politics. International trade had grown substantially. The spread of industry into the "third world" and the success of export-led growth in Asia, plus the globalization strategies of major transnational corporations and rapid deregulation of capital markets, significantly increased the degree of world economic integration. The collapse of the Soviet Union helped legitimate the kinds of neoliberal

economic policies that gained credence in the West under the aegis of the Reagan and Thatcher administrations. The vision of a world of partially closed national economies and state-controlled national markets gave way to a vision of a fully open global economy with minimal state involvement and free flows of goods and capital across national boundaries. This vision affected thinking about development in very profound ways, creating a new development paradigm with important implications for the law reform agenda. It implied a triple shift, from state to market, from internal to export-led growth, and from official capital flows to private foreign investment.

These shifts create multiple pressures for the internationalization of legal fields. They provide opportunities for the more cosmopolitan sectors of the legal profession, valorizing knowledge on foreign legal systems and contacts with foreign firms. They put pressure on governments to make legal changes calculated to attract foreign investors. They created the need to strengthen the legal foundations of market institutions.[7]

One of the more dramatic developments is the emergence of new actors into the legal scene. These include the growth of more internationally oriented corporate law firms in developing countries and the emergence of major multinational law firms as global players. Local law firms with cosmopolitan connections were able to expand in size and influence. And truly global institutions were constructed. Through merger, acquisition, and opening of branch offices, major law firms, led by the U.S. corporate bar and British solicitors, and joined by law subsidiaries of the Big 5 (now 4) accounting firms, created global legal practices with hundreds if not thousands of lawyers operating in many countries. While the global practice of law was not a new phenomenon, the scale of such firms and the geographic range of their activities grew geometrically in the 1980s and 1990s. The global firms often came to occupy important positions in national legal orders, thus deepening the contact between national legal systems and transnational legal ideas and actors and facilitating the spread of a new orthodoxy about law and economic development.[8]

These forces intertwined with the growing interest of the official development agencies in legal reform so that the reform projects both found responsive supporters and helped create additional support elements. Although the remainder of the chapter focuses on the development agencies and their discourse concerning law, it is important to bear in mind that they act in a broader context that is influenced by multiple actors and forces.

[7] *See* Yves Dezalay and Bryant G. Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States (2002).

[8] Ruth Buchanan, John R. Davis, Yves Dezalay, and David M. Trubek, *Global Restructuring and the Law: The Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 Case Western Reserve L. Rev. 407–498 (1994).

Discovering the "rule of law": Human rights, the Washington consensus, and the emergence of law as a development assistance priority

This was the context for the rediscovery of law in the development community. One could see the ROL movement as arising from the confluence of two forces at work in this new era. These forces had different roots, were supported by different actors, and defined "development" in different ways. But they coalesced, at least at the more general level, on the importance of something called "the rule of law."

The project of democracy and the need for domestic human rights protections. The first of these could be called "the project of democracy," and came out of the human rights movement of the 1970s and 1980s. Remember that the L&D movement thought that growth and cultural transformation would lead to democracy and protection of human rights. It soon became apparent that this "spillover" would not occur automatically: human rights had to be pursued as an independent goal. As a result, "human rights" went from an idea to an organized movement and institutionalized force. The international community made great progress in specifying human rights norms, creating machinery for international action to enforce them, and ensuring that internationally recognized human rights became a part of the discourse of domestic politics in many countries.

For our story, the most important move was the recognition that purely international approaches to human rights protection were insufficient without strong counterparts in domestic law. Events such as the Helsinki process drew attention to the lack of protection for human rights in domestic institutions. The human rights movement began to look at domestic institutions, championing the creation of constitutional guarantees, judicial review, greater judicial independence, and "access to justice." This path naturally led to ideas about the construction of "the rule of law." It was understood that that project would require substantial effort both to dismantle older systems that had buttressed authoritarian rule and to create the new culture and institutions needed to protect democratic freedoms.

The project of markets and the discovery of institutions. The second, and for the understanding of development assistance the more powerful, force might be called "the project of markets." Following the decline of the 1960s statist-ISI paradigm, a new set of development policy prescriptions emerged from the Washington-based international financial institutions. This approach stressed export-led growth, free markets, privatization, and foreign investment as the keys to growth. To pursue these goals, it was necessary to create all the institutions of a market economy in former command economies and remove restrictions on markets in *dirigiste* economies such as those in many Latin American countries.

For many who promoted the project of markets, growth would be best achieved if the state stayed out of the economy except to the extent that – through law – it provided the institutions needed for the functioning of the market. These include guarantees for property rights, enforcement of contract, and protection against arbitrary use of government power and excessive regulation. All this was packaged as "good governance" and deemed important both to stimulate domestic growth and attract foreign investment.

In the very beginning, promoters of markets may have assumed that the main thing that needed to be done was to get the state out of the way, and somehow everything else would take care of itself. But it soon became apparent that markets do not create the conditions for their own operation, so that the move to markets would involve major institutional reform. As a recent World Bank Report notes:

> Subsequent practical experience suggested that reform efforts could not stop with policies designed to shrink the state and liberalize and privatize the economies. . . . It turned out that a lack of attention to institutions generally, especially legal ones, placed substantial limits on the reforms as a means to promote economic development and poverty reduction. [9]

The rule of law as a common goal. Once the economic development agencies realized that the neoliberal turn involved positive intervention to create the institutional conditions for markets, development agencies were committed to investing in legal reform. They found their concerns overlapped with those of the proponents of human rights and democracy. For both, the rule of law was a common goal.

While the project of democracy and the project of markets seem very different, they both identified "the rule of law" as an essential step toward their objectives. Both thought it important to have constitutional guarantees for certain rights, even if they differed on the rights to be given primacy. Both thought that an independent judiciary, preferably armed with powers of judicial review, was desirable, even though they had different ideas about what the judges were to be independent of and what was the purpose of such independence. And they agreed that efficiently functioning courts providing cost-effective access to justice were needed, although they probably had different ideas about who should get such access and for what ends they would use it.

Ironically, both the market builders and the democracy promoters showed a faith in formalism, albeit a modernized neoformalism, which was seen as an inherent part of a "rule of law." For some of the promoters of democracy and freedom, it seemed self-evident that independent judges would possess a method of adjudication that would resolve all questions without resort to

[9] World Bank, Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency 17–18 (2002).

ideology, politics, or even policy-oriented balancing. However, at the same time that ROL proponents were championing formalism, they also were arguing that it was necessary to make legal systems more effective and efficient, and promoting instrumental thought and greater sensitivity to policy concerns.

The reform agenda that came from this curious amalgam of markets and democracy was wide-ranging, covering all aspects of the legal system from education and drafting of new rules to organization of the bar. This was especially true for programs in former command economies where, it was thought, the whole institutional structure of market society had to be built from scratch. Thus, unlike the L&D movement, which focused on education, ROL projects sought to bring about change in all aspects of the legal system. This meant that there were projects to strengthen the bar and bench as well as the academy, and to reform legal rules in almost all areas. Practicing lawyers, prosecutors, judges, and court administrators from Western countries joined legal academics in this new phase of law reform and transplantation. However, special emphasis was placed on the administration of justice. This includes the efficient management of cases, increased access to justice through the construction of alternative dispute resolution mechanisms, enhanced means of enforcing judicial decisions, and the promotion of judicial independence. While there are many reasons why the administration of justice loomed so large in the ROL programs, it is worth noting that because of their shared faith in the role of judges, this is an area in which the project of markets and the project of democracy overlap.

Several distinctive features marked the first phase of the ROL era. In addition to neoformalism and a focus on the administration of justice, there was great emphasis on contract and property, seen as core ingredients of a market economy, a strong belief in the possibility of legal transplantation, a willingness to conduct reforms at once in all parts and levels of the legal order, and a view that there was one model of "the rule of law" that made sense for all countries. Further, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted.

Looking at some of the ideas and projects of this period, L&D veterans could only sigh as they saw many of the errors of the past being repeated. For them, the emphasis on top-down, one size fits all reform, suggested that little had been learned from prior experiences. What about all the experience with the limits of transplants, the need for adaptation to local contexts, the possibility of multiple paths to growth, the risk that reforms would be captured by elites for their own ends, and the gap between law on the books and law in action? And what could they make of the apparent return to formalism? After a personal encounter with the managers of the new ROL program in USAID in the early 1990s, I felt about that agency as Tallyrand felt about the Bourbons after the Restoration: they had forgotten nothing and learned nothing!

Critiques of the first phase

The first phase of the ROL enterprise had a narrow concept of the rule of law and a simplistic notion of how to bring the rule of law into existence. There were three things that could be said in criticism. The first dealt with the implementation of ideas. The others dealt with the institutional ideas themselves.

Questioning implementation methods. The first criticism has already been suggested. It focused on the method to implant the rule of law. For those who thought that there was a single model good for the whole world, attention had to be drawn to the fact that working legal institutions must be embedded in diverse contexts. Those who relied heavily on legal transplants had to be reminded of the complex and disappointing history of legal transplantation. And those who thought that reform ended with the passage of new laws needed to be lectured on the historic gap between the law on the books and the law in action.

Challenging the model itself. But doubts about the enterprise went beyond questions of timing and strategies for transplantation. There were real questions about the kind of "rule of law" that would result. Critics expressed concern about the results that would come from successful implantation of the initial rule of law model.

These more fundamental criticisms might be divided into two broad types. The first were those who agreed with the basic ideas behind the ROL enterprise, focused on the economy, but accepted a somewhat broader role for law and legal institutions than the strict, neoliberal market vision that took center stage in the first phase. Early ROL ideas rested on a particular view of the role for the state in the economy. They presupposed severe restrictions on economic regulation. Private law was presented as a neutral framework with no distributional effect. The model did include protection for human rights, but these included rights to property as well as political and civil rights, and property was emphasized. The role of the judiciary was to police the boundaries between state and market, and it was thought they would do this through a mechanistic formalism.

Critics could note that such a model was at odds with the actual existing arrangements in all advanced capitalist states. They could point out that these countries used law to intervene in markets in myriad ways to correct market failures and allocate risk. They could also note that actually existing legal systems in established market economies vary in many dimensions, and that there was no single model or set of best practices that could be copied, even if, despite the prior experience with transplants, copying could be done effectively.

While this second criticism fell well within the mainstream of liberal thought about law and development, a more radical strand may also be

discerned. The more radical position would embrace the first two critiques, but go beyond them. For those who took this view, the "rule of law" should promote solidarity as well as efficiency. And they saw the law and its "rule" more as an arena in which the struggles for various values and interests could go on than as a fixed entity rigidly cabined by formal rules and processes or a technocratic machine limited exclusively to correcting market failures.

Revealing contradictions in the amalgam. If we look at the body of thought that arose in the first stage (ROL-1), we can see that it represented an uneasy amalgam of potentially contradictory strands. Emerging from an unstable alliance of the project of markets and the project of democracy, the latent within the amalgam were serious tensions. Initially, these were masked by the vagueness of the idea of the rule of law, a term sufficiently general so that different meanings might be and were read into it by partisans of differing visions.

Of course, there were areas of real overlap between the visions of the two projects: thus both believed in the idea of an independent judiciary that would serve as a shield against arbitrary state action. And it may be that both sides felt a need to play down differences in the interest of interesting policy makers in the part of the vision that they really shared. But as time has gone on, and critics have poured cynical acid on some of the initial ideas of the initial ROL effort, the contradictions always latent in ROL-1 and the neoliberal development model have become clearer. These include contradictions between:

FORMALISM AND PRAGMATISM. ROL-1 stressed the importance of a neutral framework for growth, judicial autonomy, and adherence to the rule of law while simultaneously championing the need for an instrumental approach to law, pragmatic problem solving, and policy science. Thus, it contained an unstable amalgam of legal formalism and a postrealist legal culture that not only rejected formalism, but *denied that formalism is a realizable goal*. According to the legal realist tenets embedded in postrealist pragmatist thinking about law, legal orders, private as well as public, are inherently indeterminate. As a result, any effort to revive formalism and pretend otherwise was mystification. As a result, pragmatists not only rejected the formalist option but claimed it was a myth behind which rules were being manipulated. As time goes on, the contradictions between these two inherently inconsistent strands of legal culture have become clearer.[10]

ECONOMIC CONSTITUTIONALISM AND DEMOCRATIC EMPOWERMENT. The ROL-1 amalgam favored strong constitutional or quasi-constitutional protections for basic economic freedoms including property rights, freedom of

[10] *See* Frank Upham, *Myth-Making in the Rule of Law Orthodoxy*, Working Paper No. 30, Carnegie Endowment for International Peace Rule of Law Series (2002).

contract, and protection against excessive and arbitrary regulation. At the same time, stress was placed on expanding access to justice, popular empowerment, and more democratic forms of governance. At some point, these two approaches were bound to clash if democratically elected governments chose to regulate their economies and intervene in market processes.

MARKET-ORIENTED GROWTH AND DIRECT POVERTY ALLEVIATION. The ROL-1 amalgam arose at a time when the faith in markets to spur growth and lift all boats was at its apogee. ROL accepted poverty alleviation as a goal, but in the robust version of this faith, there was no need for direct action for poverty alleviation as this would result from growth itself – yet another "spillover" idea in a field plagued by such notions. Needless to say, as time went on and the promised growth did not always materialize, or materialized but did not automatically lift all boats, this contradiction also has become more apparent.

EFFICIENCY AND DISTRIBUTION. In the ROL-1 amalgam, stress was placed on law's role in making the economy more efficient, but little was said about distribution. There were two different reasons why distributional issues were down-played. First, according to formalist thinking, the rule of law simply creates a framework for efficient allocation of resources and does not itself have distributional consequences. Second, in robust neoliberal economic thought, distributional issues are generally downplayed. But, as some in the ROL enterprise have brought to light, the inevitable distributional effects of all legal rules and institutions, and also seen the desirability of direct forms of intervention for distributional purposes, issues of distribution have reappeared in the debate.

GLOBALIZATION AND ENDOGENOUS GROWTH. Two cardinal aspects of robust neoliberalism are that everyone will benefit from greater global economic integration, and foreign investment and export-led growth are the best development strategies. In this vision, a primary goal for the rule of law is to make national economies more attractive to foreign investors. To that end, property and other economic rights should be protected and government intervention limited. At the same time, this vision stresses the importance of measures of legal harmonization and elimination of any discrimination against foreigners so that national economies can be more easily linked to larger global or regional economic entities. But as evidence came in to show that liberalization can hurt some sectors of the population, and that some economies had grown successfully while placing limits on foreign investment and stress on internal market development, the tension between globalization and economic fairness has surfaced.

ROL stage II: Cracks in the monolithic view of development and law

As one looks at policy developments and at the burgeoning law and development literature, it looks as if we are entering a new stage in the ROL era. To

be sure, many of the elements of the first stage are still with us. But in recent years, critics have brought to light problems with the neoliberal Washington Consensus approach to growth and raised doubts about some aspects the program of law reform initially associated with that approach. These changes and doubts, when coupled with other developments, show that the project is more complex – and more problematic – than initially thought. As the L&D veterans feared, the project of institution building has proven more difficult than imagined. The idea that market development would by itself spur institutional reform has proven an illusion: it is one more "spillover" idea refuted by experience: we have learned that, markets do not create the conditions for their own success. All the problems of transplantation discovered decades ago have belatedly been recognized. Finally, there is a growing recognition that the original compromise between the projects of markets and the project of democracy papered over contradictions now becoming more apparent.

Changes in development policy. The first big change has come about in the broader sphere of development policy. Doubt has arisen concerning the ease of implementing policies and institutional changes dictated by the Washington Consensus. This has led to much greater attention to issues of reform sequencing, and to a recognition that active planning and implementation are needed to implement even the most neoliberal, free market order. But this questioning has gone beyond issues of timing and implementation: some more or less within the mainstream have also questioned some of the policies themselves. They have criticized the exclusive emphasis on export led growth; the strong bias against regulatory intervention; the idea that there is one and only one road to development that works for all economies; the idea that full and immediate capital market liberalization is highly desirable; the lack of concern for strong social safety nets.

As a result, a chastened neoliberalism may be emerging. In this vision the "big bang" is to be discouraged and privatization and markets phased in gradually; export led growth policies will be tempered with concern for domestic markets; limits allowed on foreign investment; state intervention permitted but only when necessary to correct market failure; and targeted poverty reduction and limited safety nets allowed.

Official ideas about the "rule of law" become complexified. The second change has occurred in official thinking about law. One can see signs that development institutions have begun to question some of the ideas that were taken as holy writ in the first stage of ROL. Mainstream voices are heard questioning formalism; raising doubts about rigid constitutional constraints on state action; recognizing failures of transplants and top-down reform; stressing need for context-specific project development; accepting need for long time horizons; recognizing the need to add labor rights, women's

rights, and environmental protection to contract, property, bankruptcy, and economic regulation; acknowledging need for special efforts to ensure access to justice; and questioning the adequacy of the field's knowledge base.

Thus, the World Bank has recently expressed doubts about the earlier commitment to formalism:

> A new conventional wisdom about the rule of law and development seems to have taken root in development circles. It is asserted that formalist rule of law, which stresses institutionalized legal mechanisms and absolute autonomy from politics, is a necessity for economic development. But attempts to transplant formalist rule of law to developing and/or democratizing countries could actually be counterproductive for economic, institutional, and political development, especially when informal mechanisms would be more effective and efficient.[11]

Similarly, in a recent note posted on the Bank's legal institutions website, we see an emerging recognition of the complexity of the relationship between formalism, judicial autonomy, and development:

> The economic impact of a particular set of institutions often depends on context. For example, certain institutions make it difficult for the government to institute policy changes. In some contexts, this is beneficial for economic development, since it makes government commitments more credible. . . . On the other hand, in times of economic crisis or rapid change, these same institutions can hinder a government's ability to respond effectively. An independent constitutional court may encourage foreign investment by ensuring the executive does not arbitrarily seize property, but if it were to prevent the rapid adoption of policies needed to counteract a financial crisis, it might also discourage investment.[12]

These cracks in the monolithic views of the first stage of ROL parallel changes in thinking about development policy in general. Even those who think that it is possible to create perfect markets now see that such a program involves time-consuming and arduous efforts at institutional reform. But as it becomes apparent that there will always be market failures of various forms, justifying some degree of regulatory intervention, emphasis is shifting toward various forms of regulatory and administrative law. These were far from central to the vision of the first stage of ROL. Finally, the recognition that there are different legitimate paths to growth casts doubt both on the "one size fits all" idea and the sure faith in legal transplants.

Expansion of the reform agenda and refinement of methods. The changes in official views have led to changes in the reform agenda and the nature of projects now being undertaken. A quick survey of recent developments at

[11] World Bank, Legal Institutions of a Global Economy Homepage, http://www1.worldbank.org/publicsector/legal/index.htm.

[12] *Id.*

the World Bank indicates that at least some in this institution have started to rethink the paradigm. There, one can find:

- explicit recognition of the failures of transplants and of top-down methods;
- rejection of a one-size-fits-all approach and stress on the need for context-specific project development based on consultation of all "stakeholders";
- awareness that legal reform requires a long time horizon and cannot be carried out quickly;
- recognition of the importance of the rule of law for poorer segments of the population;
- support for rule of law projects that deal with labor rights, women's rights, and environmental protection; and
- acceptance of the need to make access to justice an explicit dimension of judicial reform projects.

However, as Santos points out, the Bank is not a monolith and it is premature to say that these remarks presage real change.[13]

Questioning the knowledge base. A final aspect of the current scene is that questions have begun to arise about the knowledge base on which the whole enterprise has been built. While the World Bank has acknowledged that it made mistakes in the past, its current publications stress that there is now a strong knowledge base and effective methodology to guide rule of law projects. However, even sympathetic outside observers have questioned this assurance. In a recent paper, Thomas Carothers, head of the Democracy and Rule of Law Project at the Carnegie Endowment for International Peace, challenged official thinking on a range of issues.[14] Where the World Bank is quite confident about its ROL credos, to the point of producing tables that quantify the amount of rule of law and show that the more ROL, the higher national per capital income,[15] Carothers struck a more skeptical note. He questioned the validity of key aspects of conventional ROL wisdom such as whether:

- the rule of law is necessary to attract foreign investment;
- technical improvements in the administration of justice are necessary for democracy; and
- the court system is the core of "the rule of law."

Carothers made clear that, despite the expansion of the reform agenda and the refinement of methods, ROL projects remained tied to a Western model – one might add an *idealized* Western model – in which the core of the rule of

[13] *See* Alvaro Santos' chapter in this volume.

[14] Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Working Paper No. 34, Carnegie Endowment for Int'l Peace Rule of Law Series (2003).

[15] World Bank, *supra* note 9.

law is thought be the an independent judiciary applying neutral rules in an objective manner and to the belief that the creation of such an institution will directly and unproblematically accomplish a wide range of goals from market development to poverty alleviation. Carothers suggested that despite rhetoric to the contrary, the development agencies have learned very little from their experiences and there are substantial obstacles to any systematic learning process in this field.

BEYOND CRITIQUE: WHAT FUTURE FOR THE RULE OF LAW?

Shifts in views about development and the cracks that have emerged in the original rule of law orthodoxy suggest that things are more open and fluid than they once seemed. Critics of the Washington Consensus and the legal orthodoxy it engendered have succeeded in opening up the discourse. The moment seems more open, the discourse more fluid.

But doubts remain. Are we dealing with a situation in which small concessions have been made to other ways of thinking about both law and development, but a hard orthodox core remains? Or is this a time when new ideas and new strategies might have a chance to be taken seriously? The World Bank has expanded its reform agenda and rejected the most blatant errors of implementation. It has added some "social concerns" to the economic rights core of its vision. But the Bank's view of "ROL" is still grounded on strong assumptions about the nature of law, the relationship between law and development, and the relevance of Western models, however contextualized. So the question is: in this period of rethinking and partial doubt, is there a real chance for the recognition of alternative development strategies and of very different legal paths that can be followed on the road to economic growth and political freedom? Is it possible, for example, that acceptance of pragmatism could replace faith in formalism, however "neo" the formalism may be; democratic empowerment take precedence over economic constitutionalism; poverty alleviation be a goal in itself rather than a result of "trickle down" policies or token project additions; distributive concerns be highlighted in policy making and the construction of legal rules and institutions; and a better balance struck between economic integration and endogenous growth?

My view is that there is an opening for the introduction of new ideas. I see the present as a turning point, a moment in which it is possible to go beyond critique of orthodoxy to reconstruction. Thus I think that progressive intellectuals should engage constructively with the ROL enterprise. I support such values as human dignity, equality, and fairness that are embedded in the idea of the rule of law. I recognize that actually existing legal systems do not necessarily embody these values, and to some degree can deny them while professing to uphold them. But we also know that these actually existing

legal institutions are arenas in which the struggle for such values can go on in relatively bloodless ways.

That suggests that the struggle for progressive goals can be compatible with efforts to create something called "the rule of law." And it raises the possibility that ROL development projects could be shaped to serve the whole population, not just the economic elite. There are groups in the developing world who seek to do just that. Intellectuals in the north have an opportunity – and an obligation – to work with them to identify the perils and open up the possibilities of this present.