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## There Is No Single Field of Law and Development

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## THERE IS NO SINGLE FIELD OF LAW AND DEVELOPMENT

Katharina Pistor\*

Let me begin—following Ohnesorge<sup>8</sup> following Trubek and Santos<sup>9</sup>—with the notion that the concepts of “law and development” and “rule of law” are closely intermingled with the process of legal reform in developing countries and the role foreign advisers and multilateral institutions play in that undertaking. Describing the “field” in this fashion reveals that the glue that holds together a set of disparate activities by disparate actors (for under what other circumstances do we assume common ground between family and securities lawyers, or professors and world bankers?) is a shared belief in the virtue of law.

The beauty of the “law and development” ideal and the “rule of law” ideal is that hardly anybody can disagree with the goal of building a neutral and universally accessible institutional framework that is meant to benefit all people irrespective of race, gender, social status, or membership in a particular clan or group. This unity of purpose also means that academics and policy advisers across the political spectrum can join forces. When resources are constrained, we do not have to discuss whether political reforms should precede economic reforms, whether land reform supersedes investments in infrastructure, or whether educational or health reforms should take precedence over building stock markets or establishing antitrust agencies. Instead, we can all promote legal development reforms based on the assumption that building a sound legal system will ultimately further all of the above. Studies indicating a strong correlation between the “rule of law” and economic growth appear to buttress that assumption.<sup>10</sup>

Obviously, however, correlations do not prove causation. And it is disconcerting that we lack a sound theoretical basis for explaining why the correlation between legal development and economic growth holds across some countries, but breaks down in others. Nor do we have a good handle on why legal reforms frequently fail to deliver the expected results and, sometimes, correlate to events the opposite of those anticipated.<sup>11</sup> In short,

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<sup>8</sup> John Ohnesorge, “Beijing Consensus” Anyone?, in *Symposium: The Future of Law and Development*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2009).

<sup>9</sup> THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

<sup>10</sup> See, e.g., Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995); Daniel Kaufmann et al., *Governance Matters IV: Governance Indicators for 1996–2004* (World Bank Policy Research Working Paper No. 3630, 2005) (link).

<sup>11</sup> For a general critique of the lack of theory and empirics in the field of Law and Development, see Trubek & Galanter, *supra* note 2. On the failure of wholesale law reform projects to enhance the levels of rule of law in transplant countries, see Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

we continue to know very little about the political economy of legal reforms and their distributional effects. If we believe strongly enough that good law creates a win-win situation whereby today's losers will tomorrow happily join today's winners without dethroning them, we need not bother. But beliefs do not add up to an academic field—and for good reason.

Take, for example, the relation between the “rule of law” and the status of women in society. The status of women in society can serve as a heuristic device. Women represent the systematically disenfranchised: they can be found in all societies, and all societies tend to discriminate against women, or at least share a legacy of discriminating against them.<sup>12</sup> On their face, the ideals that underpin legal reform efforts<sup>13</sup> suggest that women should benefit from the rule of law as an alternative to entrenched social norms. Yet closer inspection reveals that in most parts of the world there is at best a weak correlation between the status of women in society and the “rule of law,” notwithstanding comprehensive law reform efforts to advance their rights.<sup>14</sup>

But this example may not prove much. Indeed, one might argue that, with some patience, law will eventually benefit women in countries around the globe. However, unless we have a sound theory that suggests under what conditions women actually do gain from specific legal reforms and in what ways, this strategy condemns us to an “invisible hand”<sup>15</sup> approach.

Just as advocates of free markets assume that market forces will ultimately achieve the most efficient outcome, so too advocates of rule of law reforms assume that they will ultimately serve the best outcome. Yet neither markets nor legal rules are ends in themselves—ultimately, both serve broader social goals. Only with a clearer understanding of what these ends ought to be can we begin to disentangle the relation between specific legal reform efforts and the social and economic indicators used to assess and measure the legal reform effort. And it is only with better goal identification that we can begin to appreciate alternatives to law that may achieve similar social and economic outcomes, the acknowledgement of which brings us squarely back to the Critical Legal Studies debates of the 1970s.

<sup>12</sup> According to the Gender Gap index, even a country like Sweden discriminates against women. See Katharina Pistor et al., *Social Norms, Rule of Law, and Gender Reality: An Essay on the Limits of the Dominant Rule of Law Paradigm*, in *GLOBAL PERSPECTIVES ON THE RULE OF LAW* 241–278 (James J. Heckmann et al. eds., 2009).

<sup>13</sup> Most central is the ideal of “the rule of law.” For a critical review of this concept as a foundation for data collection efforts, see Melissa Thomas, *What Do the Worldwide Governance Indicators Measure?*, EUR. J. DEV. RES. (2009), <http://www.palgrave-journals.com/ejdr/journal/vaop/ncurrent/full/ejdr200932a.html> (link). Another crucial ideal is “freedom.” See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). However, Nussbaum makes the important point that a general reference to freedom is not enough. See Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECON.* 33, 35 (2003). Instead, Nussbaum advocates a list of substantive freedoms. *Id.* at 40–42.

<sup>14</sup> Pistor, *supra* note 12, Fig. 11.3, at 251.

<sup>15</sup> ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV–V* 32 (Penguin Books 1999) (1776).

Accordingly, perhaps it is time to concede that there is no single field of Law and Development. Instead, there are multiple disciplines that share a common interest in the comparative development of (legal) institutions in societies at different income levels.