



Legal reforms and development

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ABSTRACT *This paper canvasses the theoretical and empirical literature concerning the role that legal institutions play in development. The first part outlines six influential theoretical perspectives on development and their implications for the relationship between law and development. The second part surveys the relevant empirical literature. There is surprisingly little conclusive evidence that reforms in particular substantive areas of law such as property law, contract law and human rights law have been effective in furthering development, however conceived. There is, however, evidence that enhancing the quality of institutions that enact, administer and enforce laws can have positive and significant effects. This suggests that the current wave of legal reforms must be situated in a broader agenda of public sector reform if they are to avoid the problems that led to the demise of the ‘law and development’ movement of the 1960s.*

Through much of the 1980s and early 1990s academics and policy makers interested in development focused on policies that had little or nothing to do with the legal system. The overriding goals of development policy were macroeconomic stabilisation, privatisation and ‘getting prices right’. Recently, however, the focus of attention has shifted to institutions, which Douglas North (1995) defines as ‘the rules of the game of a society’. Those rules of the game include formal legal rules, and consequently the new reform agenda—the Second-Generation Reforms—is typically understood to include legal reforms.

To the extent that the new agenda includes legal reforms it is premised on the notion that legal institutions play an independent and significant role in development. Ironically, just over 25 years ago this notion was discredited and renounced by scholars who had once been its most ardent proponents (Trubek & Galanter, 1974). In the light of this historical record we believe that it is essential to analyse critically the theoretical and empirical bases for current assertions that legal institutions play an important role in development.

We should mention at the outset that in our opinion this question—what role do legal institutions play in development?—is merely the first of three critical questions that ought to be explored by scholars interested in law and development. The second question is: to the extent that law does play a role in development, why is it that some countries have developed the types of legal institutions that are conducive to development while others have not? The third and final question is: what steps if any can be taken to encourage the emergence

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of the legal institutions that facilitate development in countries where those institutions have not evolved? This paper confines itself to the initial question on the premise that, unless there is reason to believe that legal institutions matter, the other two questions need not be answered.

Our analysis proceeds in two stages. First, we survey some of the theoretical literature concerning the relationship between law and development. Since the definition of development is highly contested, our strategy is to canvass a wide variety of perspectives on development with a view to identifying claims about which legal institutions play a role in development and what sort of role they play. In the second stage of our analysis we examine the extent to which those theoretical claims are validated by the relevant empirical literature.

Theoretical perspectives on law and development

The following sections outline six theoretical perspectives on development and the insights that each purports to yield about the relationship between law and development. In our view each of these perspectives has been particularly influential in that each has not only shaped thinking about development in general but has also been adopted—either explicitly or implicitly—by scholars who have made theoretical claims about the relationship between law and development.

Modernisation theory

Modernisation theory defines development as a process of convergence on the institutions of developed Western societies. On this view underdevelopment is both caused by and reflected in traditional as opposed to modern institutions. The definitive modern institutions are free markets, a bureaucratic welfare state, a multiparty electoral system and civil and political rights. This understanding of development, whose antecedents lie in the writings of Max Weber, implicates a wide range of legal institutions, including property law, commercial law, human rights law and administrative law. It also suggests that it is important to have a competent and independent judiciary to uphold the rule of law. More generally, this perspective implies that the process of development can be hastened by transplanting legal institutions from developed Western countries to less developed countries (Trubek, 1972; Trubek & Galanter, 1974).

Dependency theory

By way of reaction to modernisation theorists, dependency theorists reject the notion that different countries should be expected to experience similar forms of development. Instead they argue that development in many less developed countries is inevitably conditioned by the fact that it occurs in the context of complex economic, political and cultural relationships with developed countries (Cardoso & Faletto, 1979; *dos Santos*, 1970, 1973; Frank, 1966, 1969, 1972; Amin, 1974). Consequently, legal scholars influenced by dependency theory tend

to be relatively sceptical of the merits of relying on legal institutions transplanted from developed countries to promote development in less developed countries.¹ Indeed, many scholars influenced by this perspective are sceptical that law reform, in the absence of radical political reform, is likely to have any significant impact on a country's development prospects (Snyder, 1980). However, to the extent that law is seen as an instrument for political and social change, dependency theorists would emphasise its redistributive potential. Specifically, many dependency theorists advocated the replacement of capitalist forms of development with socialist ones. Socialist reform agendas emphasise redistributing real property and reforming oppressive land tenure regimes; promoting worker ownership and governance of private enterprises; and constitutionally enshrining economic and social rights such as rights to education, health services, food, housing, employment and income (see eg Amin, 1990; Pollis, 1981).

Economic growth

One of the most prominent of all contemporary perspectives on development is defined by its focus on policies that promote aggregate economic growth. Within this broad class of theories there is considerable diversity concerning the role of the state and formal legal institutions. Early growth theorists adopted the view that market failures were endemic in developing countries and assigned a large role to the state in transforming the economic structure of these economies. More recently neoclassical or neoliberal theories of economic growth have advocated a dramatic shrinkage in the role of the state and a corresponding increase in the role of markets. An intermediate position is taken by proponents of the so-called 'New Institutional Economics' who view the state and the institutions that comprise it as endogenous to the development process, and view the design and functioning of institutions as critical determinants of countries' development prospects (North, 1995). The current consensus seems to be that certain legal institutions are particularly conducive to economic growth, namely, well defined and alienable private property rights; a formal system of contract law that facilitates impersonal, non-simultaneous contracting; a corporate law regime that facilitates the capital investment function; a bankruptcy regime that induces the exit of inefficient firms and rapid redeployment of their assets to higher valued uses; and a non-punitive, non-distortionary tax regime (Olson, 1999; Posner, 1998, Stiglitz, 1999). An effective criminal justice system is also conducive to economic growth because high crime rates tend to deter investment and deplete both human capital and governmental capacity. For example, a recent study suggests that the high homicide rates that Columbia has experienced since the late 1980s are costing about two percentage points annually in the rate of growth of gross domestic product (Ayres, 1998). These policy prescriptions have implications for the way in which law is applied as well as the content of legal rules because it is widely agreed that, in order to facilitate private investment and exchange, laws must be administered and enforced in a predictable, timely and low-cost manner (Shihata, 1997).

Welfarism

Welfarist perspectives on development challenge the premise of growth-oriented theories of development that conventional measures of economic growth capture all important aspects of human well-being. In particular, welfarist proponents claim that measures of GNP or GDP per capita do not capture inequalities in wealth in general or more specific inequalities such as those relating to women or ethnic minorities. Aggregate measures of income or wealth also fail to capture other instrumental and non-instrumental dimensions of human well-being such as health and educational status and political and economic freedoms (Sen, 1999). The legal implications of this perspective have not yet been explored in any detail. It is reasonably clear, however, that adopting this perspective means giving priority to various substantive areas of law such as a progressive tax policy, redistributive property tax regimes, social welfare policy, and civil and political rights. From a welfarist perspective institutional reforms that serve to reduce levels of violent crime also merit particular attention, since the fear of violence can significantly impair the quality of life in ways that are not fully captured by economic variables.

Feminism

Feminist perspectives on development have evolved over time. Initially the emphasis was on ensuring that women performing their traditional functions in developing societies obtained adequate access to public services such as health care and food subsidies. The next stage in the evolution of feminist thinking about development resulted in an emphasis on policies that facilitate the integration of women into the economic system, for example by combating gender-based discrimination. Variants of this approach place different degrees of emphasis on using economic integration to facilitate poverty reduction, reduction of inequality and economic growth. More recently feminists have paid attention to factors that affect the overall well-being of women, taking into account their experiences in both public and private spheres and the perceived need to challenge established gender roles. Contemporary feminists also tend to emphasise promotion of self-empowerment and bottom-up rather than top-down policies (Moser, 1993).

In LDCs feminists have devoted considerable attention to family law, property law, employment law, criminal law and human rights law. The focus on family law is derived from the concern with improving the quality of women's private as well as their public lives by, for example, increasing their rights to economic support from their spouses in the event of marital breakdown. As far as property law is concerned, feminists are primarily concerned with reversing the effects of both formal and informal legal rules that limit women's rights to own and inherit land. Labour and employment law demands attention to the extent that laws governing discrimination, sexual harassment, the provision of child-care facilities, parental leave, and part-time work affect women's abilities to combine child-rearing with participation in the workforce. The criminal justice system can contribute to reducing various forms of violence against women, including

domestic violence, rape, genital mutilation and trafficking in women. Entrenching rights to gender equality in human rights laws can serve to provide a legal basis for challenging all sorts of public policies that unjustly reduce women's quality of life, including limits on reproductive freedom. Finally and more generally, the overarching goal of empowering women demands that they be given meaningful roles in legislative, administrative and adjudicative processes.

Sustainable development

The prevailing understanding of sustainable development emphasises causal relationships between environmental quality and the well-being of both present and future generations of human beings. Specific relationships between the environment and health status have been identified, as well as relationships between poverty alleviation and enhanced environmental quality (World Bank, 1992). Environmentalists have also drawn attention to the ways in which collective action problems and scientific uncertainty can thwart sustainable development (Hardin, 1968; Gelpe & Tarlock, 1974).

Concern about sustainable development dictates the adoption of legal rules that restrict pollution and promote conservation. Furthermore, in order to mitigate collective action problems this perspective would advocate the adoption of legal institutions that ensure that the widest possible range of interests is considered in the formulation of rules that influence human interactions with the environment. In addition, in appropriate cases special attention should be paid to the views of people whose well-being is closely tied to that of a particular ecosystem. As a result, this perspective has important implications for public international law, constitutional law, administrative law, civil procedure and property law, which in their traditional forms may or may not assign the power to instigate, make and enforce environmentally significant decisions to those who have appropriate interests or expertise.

Empirical analysis of the relationship between law and development

Our brief survey reveals that many of the most influential theoretical approaches to development can be interpreted to include claims about the appropriate design of legal institutions. Moreover, each of these perspectives on development involves many scholars who believe that legal institutions can play an independent instrumental role in achieving development.² This leads us to inquire: what evidence exists to support that belief?

At the beginning of this article we indicated that the recent interest in the relationship between law and development is not without precedent. In the 1960s and early 1970s interest in law and development flourished. By 1975, however, the law and development movement had been declared a failure by some of its leading figures. Their overall conclusion was that reform of formal legal institutions had little or no effect on social or economic conditions in developing countries (Trubek & Galanter, 1974). To a certain extent the movement's decline can be traced to unique historical factors such as the American civil rights movement and the Vietnam War. It is also important to keep in mind that the

original law and development movement drew its theoretical inspiration from modernisation theory. Therefore, we should be cautious about drawing inferences about the validity of the claims about legal institutions that are associated with other perspectives on development. Nonetheless, this relatively recent historical experience suggests that we must seriously confront the possibility that the new law and development movement is destined to meet the same fate as its predecessor.

Recent empirical analyses of the relationship between law and development do not allow us to reject this possibility out of hand. We divide those analyses into two broad categories. The first category comprises cross-country studies that examine the effects on development of several variables, including 'legal' variables that are derived by aggregating the characteristics of a number of legal institutions. The second category comprises smaller-scale studies of the influence of specific legal reforms.

Aggregate studies

The large-scale highly aggregated studies can be further sub-divided into two groups. One group of studies examines the relationship between law, administration and development, essentially by examining the impact of factors such as the quality of the bureaucracy, level of corruption, likelihood of government repudiation of contracts, risk of government expropriation, and overall maintenance of the rule of law on economic development. Most studies find that these factors significantly influence levels of income and rates of growth and investment (Barro, 1997; Berkowitz *et al*, 1999; Clague *et al*, 1997; Kaufman *et al*, 1999, World Bank, 1997), although some believe that studies of this type suffer from a number of methodological problems (Messick, 1999). Another interesting finding is that common law countries have experienced faster economic growth than civil law countries in recent decades (Mahoney, 2000).

A second group of studies examines the relationship between law-making institutions and development, in particular the relationship between democracy and economic growth. These studies yield much more mixed results, with some finding that democracy promotes economic growth, others finding that it reduces economic growth, and yet others finding that it has no statistically significant impact (Przeworski & Limongi, 1993; Barro, 1997).

These cross-country studies go some way towards rebutting the claim that legal institutions are epiphenomenal. It is important to emphasise, however, that most of these studies use economic growth as the dependent variable and neglect other dimensions of human well-being that are highlighted by several of the theoretical perspectives reviewed above (Kaufman *et al*, 1999 is an exception). In addition, the variables that these studies use to represent the characteristics of legal institutions do not shed much light on which types of legal institutions play the most important roles in development, whether measured in terms of economic growth or otherwise. The fact that the quality of bureaucracy and levels of corruption are significant determinants of growth rates suggests that as a general matter the way in which law is administered is important. However, these findings do not shed any light on which if any substantive bodies of law are

important. Also unhelpful in this regard are statements along the lines that overall levels of respect for the rule of law are statistically significant determinants of growth rates.

Studies of reforms in specific areas of substantive law

In order to explore the role that particular legal institutions play in development we must turn to the second category of studies, the relatively fine-grained analyses of reforms to specific legal institutions. In many substantive areas of law these studies have yielded at best mixed results.

One of the best ways to illustrate the inconclusive nature of the empirical literature on law and development is by canvassing the literature on property rights. Property rights play a central role in virtually all theories of development. Modernisation theorists tend to regard the presence of a legal regime that enshrines rights to private property as a characteristic feature of a modern society. Development economists regard well defined and freely alienable property rights as essential methods of ensuring that individuals both have adequate incentives to invest in property and are able to transfer property to those who value it most highly. Meanwhile, for those whose vision of development entails redistribution of wealth and power in society, redistribution of property rights, and in particular rights to real property, seems to offer a natural method of achieving their goals.

A number of empirical studies have been conducted on the economic effects of the formalisation of title to land; individualisation (and formalisation) of title to land held under communal tenure and reforms designed to enhance the alienability of property. With respect to titling projects, the empirical evidence on their impact on incentives to invest in the acquisition or improvement of real property is mixed (see eg Place & Hazell, 1993; cf Alston *et al*, 1996). In the specific context of settlement upgrading projects some studies suggest that the provision of complementary government services to land holders may be at least as important in enhancing these incentives as titling (Varley, 1987; Razzaz, 1993). With respect to reforms designed to facilitate the privatisation of land held under customary tenure and the alienation of land, the evidence concerning the impact on productivity is mixed. These reforms also do not always have a dramatic effect on patterns of land dealings or land holdings; customary patterns of landholding and alienation often prove to be stubbornly persistent (Cornelius & Myhre, 1998; Platteau, 1996).

Taken as a whole these empirical studies fall well short of validating the claims that modernisation theorists and growth-oriented economists tend to make about the merits of formalised, individualised and freely alienable property rights. The evidence also suggests that property regimes of this sort are problematic from a number of other theoretical perspectives. For instance, while titling may reduce risk and transaction costs for some categories of people, it may simultaneously create new uncertainties for other groups that rely on customary or informal practices and rules to establish and safeguard their land claims. That is, certain sections of local populations face a serious risk of being denied legal recognition of their customary rights to land during

the registration process. This is especially true of women, pastoralists, casted people and other groups who have traditionally enjoyed usufructuary rights to land (Platteau, 1996).

The empirical literature not only casts doubt on the merits of the kinds of property law reforms advocated by modernisation theorists and theorists of economic growth. The experience of the past three or four decades also casts doubts on the efficacy of the types of land redistribution programmes that might be regarded as the logical extensions of welfarism and dependency theory. Following World War II Japan, Taiwan and South Korea embarked upon ambitious and generally successful land redistribution programmes that both enhanced agricultural productivity and reduced inequalities of wealth. However, in many other developing countries land redistribution programmes have proven much less successful, in large part because of the disproportionate influence of landed and other political elites in the formulation and administration of these redistributive programmes and other aspects of agrarian policy (Prosterman *et al*, 1990). This experience calls into question the feasibility of using property law instrumentally to achieve any goals that run contrary to the interests of dominant groups in a developing society.

The empirical literature on the importance of contract law is not much more conclusive than the literature on property rights. There is strong evidence that predictability on the part of the judiciary is positively associated with growth and investment (Brunetti *et al*, 1998, World Bank, 1997). It is unclear, however, to what extent this means that predictable enforcement of contractual as opposed to other rights is important. A number of studies have documented the extent to which firms in LDCs where judicial enforcement of contracts is unreliable use informal techniques such as relational contracting to avoid being harmed by breach of contract (Fafchamps & Minten, 2000, Bigsten *et al*, 2000; McMillan & Woodruff, 1999). However, there has been little analysis of the economic effects of encouraging firms to abandon these informal techniques by improving the reliability of judicial enforcement. The most useful study we have found comes from a transition economy, Russia, where Hendley *et al* (1999) found that enterprises that invest in legal expertise tend to have more successful transactions. On the other hand, the Japanese experience suggests that it is possible for a country in which commercial actors do not rely extensively upon judicial enforcement of contracts to sustain high levels of economic growth and development (Pistor & Wellons, 1999: 215–248). It is worth noting that even some economists have suggested that the welfare effects of improving judicial enforcement of contracts may not be positive. In principle it is possible for imperfect judicial enforcement to undermine relational contracting without significantly enhancing firms' ability to engage in non-relational forms of contracting (Grief, 1997; McMillan & Woodruff, 1999).

A third area in which empirical analysis calls into question the potential effectiveness of legal reform is human rights law. Modernisation, welfarist and feminist perspectives on development all place considerable emphasis on constitutionally enshrining protection for civil and political rights. However, in many developing nations violations of constitutionally protected human rights are commonplace, in part because courts are unwilling to risk antagonising the

executive and legislative branches of government (Cornell & Roberts, 1990; International Human Rights Law Group, 1990). According to one of the few rigorous empirical studies in this field, countries that provided constitutional protection for one particular right, the right to be free from unreasonable search and seizure, were scarcely more likely to protect this right than were other countries (Cross, 1999). It is possible to point to cases in which judges have been willing to enforce human rights legislation. For instance, the Indian Supreme Court has staunchly defended fundamental human rights from incursions by the executive and legislative branches of the government (Bhagwati, 1985; Cooper, 1993). Similarly, the Namibian Supreme Court has disallowed arbitrary official actions, struck down infringements on freedom of the press and even found the Namibian system of apartheid unconstitutional (Bjornlund, 1990). Overall, however, the real-world significance of constitutional reforms is unclear.

We do not mean to convey the impression that there is no evidence to support the effectiveness of any specific legal reform. There is definitely evidence to suggest that some reforms might have an impact on development. For example, in the area of commercial law, using a cross-country multiple regression analysis Levine has found that countries which give a high priority to secured creditors receiving the full present value of their claims have both better developed financial intermediaries and higher rates of economic growth (Levine, 1999). Interestingly, these findings imply that economic objectives might conflict with redistributive objectives in the design of insolvency laws in LDCs. This is because rules that subordinate the claims of workers and the government to those of secured creditors probably serve to redistribute wealth away from those constituencies and towards secured creditors. This may not be the kind of redistribution of wealth that is required to promote some non-economic forms of development.

Cross-country research in other areas is also beginning to yield potentially useful results. For example, Barth *et al* (1999) have provided preliminary results showing that countries restricting the securities activities of banks have significantly higher probabilities of suffering a banking crisis than countries with less restrictive regulatory practices. Further research in this area is critical because banking crises are horrendously costly—some recent crises have cost countries over 10% of GDP to resolve (*The Economist*, 1997; Barth *et al*, 1999).

There are also microlevel analyses suggesting that specific reforms can influence certain aspects of development. For example, there have been a number of successful experiences with tax reform. Such reforms are particularly important from a welfarist perspective because the taxation system is the primary mechanism that a state can use to redress inequalities of wealth. These reforms were inspired in part by the fact that, although many developing countries have nominally progressive income tax systems, the actual incidence of taxation is often not significantly progressive. This is in part because income tax represents only one component of the tax system; in part because nominal income tax rates are eroded by the presence of a large number of exemptions; in part because of massive tax evasion; and in part because of bracket creep caused by inflation (Thirsk, 1997). These problems have led to proposals favouring a 'levelling-up' approach to tax reform. This entails reducing the progressivity of income tax

rates while simultaneously raising basic exemptions so as to drop the least well-off from the tax rolls. Countries that have implemented reforms along these lines appear often to improve revenue collections while also having a modest effect on poverty alleviation (Gillis, 1989; Thirsk, 1997).

Minimum wage legislation has also proven to be effective on occasion. For instance in the first half of the 1990s the real minimum wage in Indonesia doubled. Rama found that compliance was far from perfect but that there was a clustering in the distribution of wages around the minimum wage, indicating that the law did have an effect (Rama, 1996).³ But of course for every example there is a counter-example. In a study of Costa Rica, Gindling and Terrell (1995) found that at least one-third of workers covered by minimum-wage legislation were earning less than the legal minimum, and even in uncovered sectors of the economy almost the same proportion were earning less than the legal minimum. It is also important to keep in mind that the effects of minimum-wage legislation on the welfare of the least well off in society are debatable. The benefits of higher wages for employees may be offset by the costs of reduced levels of employment.

Finally, there has also been some success in reforming family law, an area that is of particular interest to feminists. Charrad (1994) reports that Tunisia's 1956 reforms had a meaningful and positive impact on the status of women. Among other things, the Personal Status Code made it more difficult for men to divorce their wives unilaterally without providing support, gave women the right to initiate divorce, and made both spouses equally eligible to obtain custody of children. Charrad reports that women's chances of obtaining custody of their children upon divorce increased dramatically. However, she notes that the impact of the reforms concerning the initiation of divorce has been limited by the fact that women's chances of obtaining adequate levels of financial support after divorce remain slim (Charrad, 1994). In other countries the impact of family law reforms on the status of women appears to have been less significant, mainly because women are often poorly informed about their formal legal rights and find the formal courts inaccessible and alienating (Armstrong, 1992).

The importance of enforcement and administration

Many of the studies reviewed above examine either the effects of reforming only substantive legal rules or the effects of reforms that combine changes in substantive rules with changes in the institutions responsible for enforcing or administering these rules. As we have attempted to show, studies of this sort have generally yielded inconclusive results. Nevertheless, we are not prepared to discard the notion that legal institutions play an important role in development. In many areas further research is required before such a pessimistic conclusion can be drawn. Moreover, in our view the available evidence supports the notion that reforms designed to improve the enforcement and administration of laws are likely to achieve positive and significant results.

This latter claim is consistent with the aggregate studies that have emphasised the connection between the quality of bureaucracy and economic growth (Barro, 1997) and World Bank-sponsored research on the importance of predictable

judicial enforcement (World Bank, 1997; Brunetti *et al* 1997). It is also consistent with Mahoney's (2000) hypothesis that differences in levels of judicial independence are part of the reason why countries with a common law background have experienced faster rates of economic growth than countries with a civil law background. We also take comfort in the fact that this view is borne out by several more fine-grained analyses of specific institutions.

For instance, many developing countries have experienced high levels of tax evasion and corruption in tax administration and collection. These phenomena are problematic from virtually any perspective. Fortunately, there is evidence that certain types of administrative reforms can be effective. Countries that have privatised the filing of returns and processing of payments (*eg* by utilising local banks); facilitated the solicitation of information from third parties (such as banks); more widely utilised computer systems in processing tax reforms and targeting enforcement efforts; and adopted incentive measures for remunerating tax collection officials by providing them with some percentage of taxes collected have all had significant and positive impacts on levels of tax evasion and corruption (Silvani, 1992; Silvani & Radano, 1992).

Another area in which the potential for useful administrative reforms seems great is the area of social welfare legislation. Social security programmes in LDCs have typically not focused on legal entitlement programmes like the social assistance and social insurance programmes prevalent in the developed world. Although many LDCs have enshrined rights to healthcare or education in their constitutions, these guarantees are rarely justiciable,⁴ and so existing healthcare, education and food subsidisation programmes typically do not create legal entitlements.⁵ Instead social welfare programmes in LDCs typically consist of direct provision of goods such as health care and education and subsidisation of foodstuffs. There is considerable evidence that these types of programmes both reduce poverty and promote economic growth (World Bank, 1990, 1993). On the other hand, there is also evidence that in many developing countries these and other social welfare programmes are often poorly targeted and fail to reach the segments of the population who would benefit most substantially from them. The neglected groups usually include residents of rural areas, self-employed and temporary workers and the very poor (World Bank, 1990, 1993; Midgley, 1984). These problems often have little to do with legal institutions; they are usually caused either by poor design or lack of financial resources. Under the circumstances, further research on ways to improve the targeting of public benefits seems more worthwhile than research on the legal aspects of social welfare policy.

A similar point can be made about the relationship between legal institutions and the environment. In recent years many developing countries have adopted fairly stringent environmental legislation. In many countries there is even a constitutional obligation to protect the environment. Generally speaking, however, environmental problems in developing countries seem to be getting worse not better and one of the main reasons is because existing environmental legislation is often poorly administered and enforced (*The Economist*, 1998). For example, Brazil's Constitution gives the Attorney General the right to initiate inquiries and judicial actions to protect the environment. Yet, as of mid-1997,

there had been no cases of judicial actions against the country's extensive illegal trade in fauna (de Aragão & Bunker, 1998). In Cameroon, as of 1998 it was widely reported that logging concessions were being issued in contravention of established land-use criteria; for example, they were being given inside national parks and forest reserves. Understaffing and widespread corruption in the Department of Wildlife have also crippled Cameroon's efforts to enforce legislation against poaching and smuggling of wildlife (Blaikie & Simo, 1998). Again, the moral seems to be that the most critical reforms are those that address defects in the enforcement and administration of law as opposed to the content of substantive legal rules.

This message is also consistent with the relatively scarce evidence concerning the relationship between legal institutions and protection of human rights. In a study mentioned earlier in this paper, Cross (1999) found that the existence of a constitutional guarantee of freedom from unreasonable search and seizure had no impact on the actual level of protection from unreasonable search or seizure. However, Cross also found that the level of judicial independence was a significant determinant of the actual level of protection in countries with no express constitutional protection. Again this suggests that attention must be paid to the institutions responsible for enforcing and administering laws as opposed to the substantive laws themselves.

Finally, another area in which differences in substantive law seem less significant than differences in administration and enforcement is in the criminal justice system. Although there may be some differences in the treatment of violence against women, we suspect that most legal systems contain roughly equivalent criminal prohibitions against the use of violence and actions such as theft and vandalism. The significant differences in levels of criminality across societies are largely driven by factors such as differences in macroeconomic variables and differences in levels of income inequality, factors that are not directly related to the characteristics of legal institutions (Fajnzylber *et al*, 1998). Moreover, to the extent that crime levels are influenced by institutions, improvements in the effectiveness of the police and the courts can be presumed to play a more significant role than changes in substantive legal rules.

Conclusions

In this brief survey we have attempted to highlight the fact that, despite the resurgence of interest in reforming legal institutions as a means of pursuing development, there is a great deal of room for debate about the relationship between legal reforms and development.

The debate begins at the theoretical level. Different perspectives on development generate different claims about both which legal institutions are important in the development process and how those institutions ought to be reformed to induce or facilitate development. Our brief review of the theoretical literature only allows us to hint at the potential conflicts between the prescriptions associated with different theoretical perspectives.

The utility of many legal reforms can also be challenged on empirical grounds. In recent years a number of scholars and commentators have vigorously

advocated reforms to property rights, contract law, and political and civil rights. Interestingly enough though, there is little conclusive evidence that reforms in these areas have been effective in furthering development, however conceived. Further empirical research on these topics is clearly warranted. In the meantime however, we tentatively conclude that, as far as legal reforms are concerned, developing countries should not focus exclusively on enacting or adopting appropriate substantive bodies of law or regulation designed to vindicate the particular conception of development that motivates them. Rather, the empirical evidence suggests that it is appropriate to emphasise reforms that enhance the quality of institutions charged with the responsibility for enacting laws and regulations, and institutions charged with the subsequent administration and/or enforcement of those laws or regulations.

The evidence reviewed in this study suggests that effective access to the courts for individuals and groups of citizens, and the integrity, competence and independence of the formal criminal and civil courts systems, as well as adequate staffing and resourcing of them, is a major problem for many developing countries. However, we also believe that an exclusive or predominant preoccupation with the court system inappropriately discounts the important role played by government departments and agencies, the police and specialised administrative or regulatory bodies in the administration and enforcement of laws. In fact, the challenge facing many developing countries in upgrading the quality of their legal systems is far more daunting than simply reforming their civil and criminal court systems, and is likely to reach deep into the domain of government or public administration more generally. In this sense, the relationship between law and development is likely to elide, to a significant extent, with the relationship between public sector institutions and development more generally rather than being a discrete focus of reform. This suggests that the current wave of legal reforms must be situated in a broader agenda of public sector reform if these are not to suffer the same fate as the reforms inspired by the original law and development movement.

Perhaps this is one of the most important lessons that can be drawn from the failure of the earlier law and development movement—legal institutions do not play a wholly autonomous role in development; their effectiveness is contingent upon the effectiveness of a number of other institutions.

Notes

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¹ This notion is supported by Berkowitz *et al* (1999) who find that countries that have developed legal orders internally, adapted transplanted law to local conditions, and/or had a population that was already familiar with the basic legal principles of the transplanted law have more effective legal institutions than other countries.

² Even scholars influenced by dependency theory seem to agree that some legal institutions, such as those

providing for democratic elections, can play a transformative role in society. See, for example, Viera-Gallo (1972).

³ In the absence of an effective minimum wage law, or in the case where the minimum wage was set so low as to be otiose, one would expect a relatively smooth distribution. An effective law, on the other hand, would raise the wages of some to the minimum and, perhaps, eliminate some jobs below the minimum through layoffs, thereby creating a cluster around the minimum wage.

⁴ For example, Part II, section (1) of the constitution of Tanzania reads as follows:

The state shall, within the limits of its economic capacity and development, make adequate provision for securing the right to work, education and public assistance in cases of old age, sickness and disablement, and in other cases of undeserved want. Subject to those rights, the state shall make provisions ensuring that every person earns his livelihood.

However, article 7 of the constitution specifies that these rights are not justiciable. (Quoted in Mgongo (1998) pp 72-73.

⁵ Although we have categorised food subsidy programmes as social welfare policies that do not create legally enforceable entitlements, the distinction between legally enforceable welfare programmes, and mere social welfare policies is difficult to draw with precision. Targeted food subsidy programmes, for instance, often do create a legal entitlement for certain portions of the population to shop in ration outlets. However, this entitlement is not the same as a justiciable entitlement to food. If a ration shop happens to be out of stock, there is no legal recourse.

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