

**WHAT ROLE DO LEGAL INSTITUTIONS PLAY IN
DEVELOPMENT?**

by

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EXECUTIVE SUMMARY

I. INTRODUCTION

This paper explores the relationship between law and development. In analyzing this relationship, the authors suggest that this relationship implicates three large questions: (1) Does formal law and do formal legal institutions significantly contribute to a developing country's development prospects (however development is conceived)?; (2) To the extent that law and legal institutions are important determinants of a country's development prospects, what factors explain why some developing countries have chronically poor "legal capital"?; and (3) For those countries which have failed to capitalize on the developmental potential of law, what reform strategies are likely to prove both significant and feasible? This paper largely confines itself to the first question, on the premise that unless the answer to this question is at least qualifiedly affirmative, the other two questions need never be answered.

The authors note that an earlier law and development movement flourished briefly in the 1960s and early 1970s but was declared by two of its leading proponents to have been a failure by the mid-1970s, largely because its participants had over-estimated the importance of formal law and legal institutions in developing countries. While in recent years there has been a resurgence of interest in law and development both in the academy and policy-making areas, it is important to ask whether the prognosis for the new law and development movement is likely to prove more promising than the earlier movement.

II. THEORETICAL PERSPECTIVES ON LAW AND DEVELOPMENT

The strategy adopted in the paper is to adopt an eclectic conception of development, reflecting a wide variety of theoretical perspectives on development that overlap and diverge in various respects: modernization theory; dependency theory; economic growth theories; welfarist theories of development; feminist theories of development; and sustainable development; and attempts to identify which areas of substantive law and which legal institutions these perspectives would prioritize in identifying the potential of a country's legal system as a significant determinant of development.

Modernization theory largely subscribes to the view that developing countries' development prospects depend, for the most part, on convergence on the policies and institutions of developed Western societies, including assigning a prominent role to both liberal political values (democratic institutions and a welfare state), and liberal economic institutions, in particular a prominent role for private markets. On this view, formal laws, particularly those relating to property law and commercial law, are important in providing predictability and security in fostering investment, while other bodies of law would protect civil and human rights and legal entitlements to various social welfare benefits. The civil and criminal court system would be an important bulwark for the protection and enforcement of these rights.

By way of reaction to modernization theorists, dependency theorists reject the notion that different countries should be expected to experience similar forms of development and 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. Consequently, legal scholars influenced by dependency theory tend to be relatively skeptical of the merits of relying on legal institutions transplanted from developed countries to promote development in less developed countries, and indeed are skeptical that law reform, in the absence of radical political reform, is likely to have any significant impact on a country's development prospects. However, to the extent that law is seen as an instrument for political and social change, dependency theorists would assign a significant role to its redistributive potential, for example in the redistribution of real property and the reform of oppressive land tenure regimes, as well as enhancing the wealth and power of workers through greater reliance on cooperative ownership of private enterprises and a larger role in the governance of all enterprises. In addition, some dependency theorists would assign a significant role to constitutional enshrinement of various economic and social rights such as rights to education, health services, food, housing, employment and income.

Economic theories of development have focused primarily on policies that seek to promote aggregate economic growth rates. Early economic development 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 neo-classical or neo-liberal economic perspectives on development would dramatically shrink the role of the state and liberalize participation in both domestic and international markets, to some extent marginalizing the role of the state. An intermediate position is commonly taken by proponents of the so-called "New Institutional Economics" which view the state and the institutions that comprise it as endogenous to the development process and view the design and functioning of public sector institutions and private sector organizations that interact with these institutions as critical determinants of country's development prospects. The current economic consensus would probably accord priority, in terms of the role of law in development, to 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. On this view, the role of the court system in protecting private property rights and enforcing contracts that facilitate their transfer to higher value uses would be assigned a high priority.

Welfarist perspectives on development challenge the premise of many economic 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 and other dimensions of human well-being, including health and educational status. A welfarist perspective is likely to prioritize various substantive areas of law such as a progressive tax policy, redistributive property tax regimes, social welfare policy, and human and civil rights

policies. In terms of institutional implications, it is likely to prioritize inclusive and empowering forms of political expression and participation and broad scale access to a credible legal system for vindicating rights and enhancing governmental accountability.

Feminist perspectives on development have evolved over time from an emphasis on ensuring that women in performing their traditional functions in developing societies obtain adequate access to public services such as health care and food subsidies, to an emphasis on policies that facilitate the integration of women into the economic system and combating gender-based discrimination in the productive sphere, to a contemporary focus on self-empowerment that emphasizes more bottom-up than top-down strategies for enhancing the well-being of women and focuses equally on aspects of the well-being of women in both public and private spheres. This focus leads to prioritizing areas of law such as family law, property law, employment law, criminal law, and human rights law, and to institutional reforms that empower women in legislative, administrative, and adjudicative processes.

A sustainable development perspective on development emphasizes causal relationships between environmental quality and human well-being, in terms of both present and future generations of a country's citizens. Specific relationships between the environment and health status have been identified, as well as relationships between poverty alleviation and enhanced environmental quality. In order to mitigate collective action problems, an environmental perspective would emphasize that legal institutions should be designed to ensure that the widest possible range of interests are considered in the formulation of legal rules that are designed to influence human interactions with the environment, and that particular consideration should be paid to the views of people whose well-being is closely tied to that of the eco-system. In addition, effective public access to law enforcement institutions in this context would be prioritized. This perspective has important implications for public international law, constitutional law, administrative law, civil procedure, and property law which may or may not assign the power to make and enforce environmentally significant decisions to those who have relative interests or expertise.

III. EMPIRICAL EVIDENCE ON THE RELATIONSHIP BETWEEN LAW AND DEVELOPMENT

With these various theoretical perspectives on the potential relationship between law and development as reference points, the study then proceeds to review existing empirical evidence on this relationship, first by looking at various aggregate bodies of evidence, and then undertaking various case studies of particular bodies of law that are implicated by one or another of the foregoing theoretical perspectives.

With respect to aggregate (typically cross-sectional) studies of a number of countries, 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 over-all maintenance of the rule of law on growth rates,

mainly by influencing investment rates. Most of these studies find that these factors significantly influence growth and investment rates. 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. It should be noted that almost all of these studies use economic growth as the dependent variable, and not other dimensions of human well-being that are emphasized in various of the theoretical perspectives on development reviewed in the first part of this study.

With respect to the relationship between property rights and development, the study reviews empirical evidence on the formalization of title to land; individualization (and formalization) of title to land held under communal tenure; reforms designed to enhance the alienability of property; and redistribution of land. With respect to titling projects, the empirical evidence on the impact of titling on incentives to invest in the acquisition or improvement of real property is mixed, with some evidence suggesting that the provision of complementary government services to land-holders may be at least as important in enhancing these incentives as titling. With respect to the privatization of land held under customary tenure the evidence again is mixed in terms of the impact on economic incentives, and suggests that in fact customary land tenure systems have proven surprisingly adaptive in providing for various kinds of dealings in customary land and in facilitating the creation of new forms of property rights in such land. With respect to alienability of interests previously held under customary land tenure systems, removal of formal restrictions on alienability often do not seem to have had dramatic effects on patterns of land dealings or land holdings. With respect to land redistribution policies, Japan, Taiwan, and South Korea, following World War II, embarked upon ambitious and generally successful land redistribution programs that both enhanced agricultural productivity and reduced inequalities of wealth. Land redistribution programs in many other developing countries 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 programs.

With respect to commercial law, the aggregate evidence on the economic significance of the availability of formal enforcement mechanisms for long-term contracts suggests that both a well-developed body of formal contract law and an effective civil court system may be important determinants of growth, and that informal methods of contract enforcement are not perfect substitutes for formal mechanisms, although evidence from various Asian and other economies that have strong development records but where formal civil enforcement regimes seem to play a limited role suggests a basis for caution in over-stating the significance of formal contract enforcement. With respect to the protection of investors, there is some empirical evidence that suggest that countries which give a high priority to creditors receiving the full present value of their claims in bankruptcy or corporate reorganizations have better developed financial intermediaries and higher rates of economic growth.

With respect to taxation, to the extent that the taxation system might be viewed as a major vehicle for redressing inequalities of wealth, the empirical evidence suggests that

despite the fact that many developing countries have nominally progressive income tax systems, the actual taxation incidence is often not significantly progressive, 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 due to inflation. These problems have led to proposals favoring a levering-up rather than levering-down approach to tax reform, entailing reducing the progressivity of income tax rates while simultaneously raising basic exemptions so as to drop the least well-off from the tax rolls, and increasing reliance on value-added taxes, perhaps with exemptions for certain basic necessities. Countries that have implemented reforms along these lines appear often to improve revenue collections while also having some modest effect on poverty alleviation. Beyond the design of tax systems in developing countries, tax administration has proven a major problem, reflected in the high incidence of tax evasion, and high levels of corruption in tax administration and collection. The empirical evidence suggests that countries that have privatized the filing of returns and processing of payments (e.g. by utilizing local banks); facilitated the solicitation of information from third parties (such as banks); more widely utilized 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 in this context.

With respect to criminal law, from an economic perspective there are a number of reasons why crime is problematic. First, crime and violence deplete the stock of physical capital. Second, crime erodes the development of human capital. Third, crime and violence destroy social capital. Fourth, crime and violence vitiate government capacity in many ways, in part by diverting resources to criminal law enforcement and away from other developmentally important activities, and undermine political authority. The few attempts that have been made to quantify the economic effects of crime yield striking results, consistently finding that losses from the direct and indirect costs of crime and violence are a significant fraction of many developing countries' GNP. Beyond direct economic costs, the impact of crime and violence on women and children is often particularly severe. While there is some evidence of a positive link between the level of crime and the amount of policing, further research is warranted on the relative importance of deterrence and incapacitation as opposed to other factors that may affect crime levels such as unemployment, inequality, or family structure.

With respect to social welfare policies, most LDCs rely only to a very limited extent on transfer programs creating legal entitlements and instead rely principally on health and education expenditure programs as the principal vehicle for mitigating inequalities and alleviating poverty. While a number of empirical studies suggest substantial social returns from public investments in education and health services, empirical evidence also suggests that in many cases these expenditures are poorly targeted on those segments of the population who would benefit most substantially from them, including in particular residents of rural areas and the very poor. With respect to entitlement programs, many developing countries have old age, disability and survivor's benefits programs, and also work injury schemes,

while very few have unemployment insurance programs. A much smaller number of LDCs maintain public employment schemes as an alternative to welfare or unemployment insurance, and many maintain minimum wage laws. With respect to social security/pension programs, these tend to favor strongly citizens employed in the formal sector, in particular the public sector, and like other public expenditure programs, confer dramatically fewer benefits on citizens in rural areas and individuals in self-employment or in the informal sector. The empirical evidence on the effect of public employment programs is mixed, as is the evidence on the effect of minimum wage laws, finding that in a wide range of contexts, but not all, such laws may raise wages for some workers but have a significant off-setting effect on employment levels.

With respect to family law, empirical studies of the impact of family law reforms on the actual situation of women in developing countries are scarce, in part due to the fact that the extension of formal rights to women is a relatively new phenomenon in many developing countries, but in part also because formal law reforms in this area tend often to be in severe tension with long-standing cultural norms and customary family law. In a number of countries, customary family law co-exists with formal family law regimes, in theory providing women with the most favorable options available to them under either legal regime. However, the empirical evidence suggests that women in many developing countries are poorly informed about their rights under formal family law regimes, find the courts often inaccessible, and the formal adjudicative experience foreign and alienating to them.

With respect to environmental law, while collective action problems and poorly developed and non-inclusive institutions often do not ensure wide-spread public participation in environmental law-making in much of the Third World, the empirical evidence suggests that many developing countries have environmental legislation on the books that is often quite stringent by global standards. Rather, the empirical evidence suggests that more serious problems in this area relate to inadequate public resources devoted to enforcement activities, and inadequate public access to the courts and other enforcement mechanisms.

With respect to human rights, in most third world countries social and economic rights are non-justiciable, while justiciable civil and political rights vary dramatically from one developing country to another, with wide-spread disregard of such rights or unwillingness to recognize them in the first place on the part of many military or authoritarian regimes throughout the developing world. Even where human rights have received legal recognition, enforcement of such rights by the courts has been very uneven across developing countries, with courts often unwilling to risk alienating the legislative or executive branches of government. This problem has often been compounded by lack of effective access to the courts by aggrieved parties.

IV. CONCLUSIONS

The authors conclude their study by noting that despite the contemporary focus in many development circles on enhancing legal system capacity in developing countries, as an empirical matter surprisingly little is known about the relationship between law and

development. Despite these deficiencies in our present knowledge base, the authors also conclude that from the evidence reviewed in this study, enacting or adopting appropriate substantive bodies of law or regulation designed to vindicate the particular conception of development that motivates them has not, by and large, been a major problem for many developing countries. Rather the much more daunting challenge has proven to be that of enhancing 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.

While the relationship between law-making institutions and development is contested, it would be surprising if further empirical research did not reveal that high quality democratic law-making institutions impact in significant and positive ways on various dimensions of development beyond simple per capita growth rates or income levels. With respect to institutions vested with responsibility for the administration and/or enforcement of laws, 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, the authors also conclude that an exclusive or predominant preoccupation with the court system inappropriately discounts the important role played by government departments and agencies and specialized 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. Perhaps this is one of the most important lessons that can be drawn from the failure of the earlier law and development movement and suggests a need for situating law reform in this broader agenda of public sector reform if the current interest in the relationship between law and development is not to suffer the same fate as the earlier law and development movement.

I. INTRODUCTION

In the 1960's and early 1970's an intellectual discipline known as 'law and development' emerged and flourished in the legal academy, particularly in the United States. Not only did leading law schools in the United States begin to offer courses in law and development, but legal scholars also began to write in the area and in many cases offered their services as lecturers and consultants in developing countries. By 1975, however, the law and development movement had disintegrated. In a famous article two of its leading figures proclaimed that the movement had failed as both an academic and a normative enterprise, largely because its participants had overestimated the importance of formal legal institutions in developing countries.

In recent years there has been a resurgence of interest in law and development, both in the academy and in policymaking arenas. Not only are legal scholars displaying renewed interest in legal institutions in developing countries, so are scholars in the cognate disciplines of economics, political science and sociology. Moreover, prominent members of institutions such as the World Bank and the IMF are proclaiming that quintessentially legal institutions such as contract law and property rights are critical to the development process. Once again there is a sense in both the academy and the larger policy-making community that rather than being merely epiphenomenal, law plays an independent and significant role in the development of less developed countries. Relatively little attention has been paid to the fact that just over twenty-five years ago very similar claims were discredited and renounced by the very scholars who had been their most ardent proponents.

In this essay we seek to determine whether the new law and development movement is destined to meet the same fate as its predecessor. Our objective is to analyze critically the theoretical and empirical bases for the assertion that legal institutions play a significant and independent role in development. We should mention at the outset however, 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 development while others have not? The third and final question is what steps if any can be taken to encourage the emergence of the legal institutions that facilitate development in countries where those institutions have not evolved?

In this essay we limit our inquiry to the first of these three questions. Our analysis proceeds in two stages. The first stage, which can be found in Part II below, consists of our outline of various theoretical perspectives on the role that law plays in development. Each of these perspectives is described by reference to both its conception of what development entails and its explanation of the causal role that law plays in achieving development. It would be too strong to say however, that these perspectives embody wholly different conceptions of development. It seems fairer to say that each perspective focuses on different facets of the human condition in the process of determining whether or not development has been attained. It also would be an overstatement to claim that each of those perspectives

offers a wholly distinct analysis of the factors that contribute to or impair development. Rather, in many cases it seems more appropriate to say that each perspective devotes greater attention to some causal factors rather than others.

These summaries are so brief that they inevitably elide serious differences within the scholarship associated with each perspective. In fact, to some our presentations may resemble caricatures rather than summaries. Our only defense is that where we have obscured differences within perspectives it is in an attempt to highlight the differences between perspectives and their implications for the design of legal institutions.

As it turns out, even our abbreviated analysis reveals that depending upon which perspective one uses to analyze the concept of development it becomes more or less plausible that law exercises an independent influence on the process of development. Moreover, to the extent that law does appear to play this sort of independent role in development, different perspectives focus upon different aspects of the legal system and ultimately lead to different prescriptions for the design of legal institutions.

The second stage of our analysis consists of a survey of the evidence bearing on the question of what role legal institutions play in development. Here we concentrate on the institutions that appear to play an important role in development from at least one theoretical perspective. In Part III we identify several such bodies of law—property law, commercial law, family law, criminal law, tax law, social welfare law, environmental law and human rights law—and canvass the available evidence concerning the role that each has played in the development process. Part IV presents our summary of that evidence and corresponding inferences about the validity of the theoretical claims identified in Part II.

Before turning to the first stage of our analysis we should say a few additional words about the scope of this exercise. Specifically, we ought to clarify what we mean by the phrases 'law' and 'legal institutions' and to emphasize that our analysis is limited to exploring the relationship between *formal* legal institutions and development. When we refer to legal institutions we mean three sorts of social phenomena: rules that govern behavior in a given society, the means by which those rules are made, and the means by which the rules are administered or enforced. Moreover, since our focus is upon formal legal institutions we are only concerned with the rules that may ultimately be enforced by the state as opposed to other actors in a society. This definition encompasses various types of substantive legal rules (laws) such as contract law, property law and family law, constitutional provisions and procedural rules that govern the enactment of legislation or judicial decision-making, and rules that govern litigation and enforcement of judgments. Finally, our definition of a legal institution includes not only rules but also the actors who make and enforce those rules such as politicians, bureaucrats, judges, lawyers and the police.

II. THEORETICAL PERSPECTIVES

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.

A. Modernization

The post-WWII period marked a growing interest in the poor nations of the world among scholars and policymakers in industrialized countries, particularly the United States. Following in the footsteps of the American economic historian Walt W. Rostow, theorists of the 1950s and early 1960s contended that the process of development could be seen as a series of successive stages of economic growth through which all countries must pass.¹ This school of thought came to be known as modernization theory.

Modernization theorists contended that a society's underdevelopment was both caused by and reflected in its traditional (as opposed to modern) economic, political, social and cultural characteristics or structures. In order to develop, underdeveloped societies would have to undergo the same process of transition from traditionalism to modernity previously experienced by more developed societies. However, while the impetus to modernize in the now developed countries had resulted from endogenous changes, the transformation of developing nations would come about primarily from exogenous stimuli. That is, the modernization of the Third World would be accomplished by the diffusion of capital, institutions, and values from the First World.²

In modernization theory, modernity was defined exclusively by reference to the characteristics of developed Western countries. As Cyril Black, a noted historian and modernization theorist put it: "Although the problems raised by generalizations from a rather narrow base (the now modern countries) must be acknowledged, the definition of modernity takes the form of a set of characteristics believed to be applicable to all societies. This conception of modernity, when thought of as a model or ideal type, may be used as a yardstick with which to measure any society."³ This universalistic conception of modernity formed the basis of a belief that the development of the Third World would essentially entail

¹ Rostow identified five such stages: the traditional society, the preconditions for takeoff, the takeoff, the drive to maturity and the age of high mass consumption. See W.W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge: Cambridge University Press, 1960).

² Peter F. Klarén, "Lost Promise: Explaining Latin American Underdevelopment," in Peter F. Klarén and Thomas J. Bossert (eds.) *Promise of Development: Theories of Change in Latin America*. (Boulder: Westview Press, 1986), at 11.

³ See Cyril Black, *The Dynamics of Modernization; a study in comparative history* (New York: Harper and Row, 1966), at 68-75.

a process of convergence upon the economic, political, legal and social institutions found in the First World.⁴ More specifically, this would involve the emergence of a free market system, the rule of law, multi-party politics, the rationalization of authority and growth of the bureaucracy, and protection of human rights and basic freedoms. It was presumed that Westernization, industrialization, and economic growth would generate the preconditions for the evolution of greater social equality and consequently the rise of stable, democratic institutions and a welfare state. Throughout this process the state would serve as the primary agent of social agent.

Drawing on modernization theory, the first wave of law and development theorists presumed that the diffusion of Western law to the Third World would aid in its modernization. Indeed, modern law was believed to be the “functional prerequisite of an industrial economy.”⁵ That is, law would provide the necessary elements for the functioning of a modern market system, including contract and private property rights, and universal and uniformly applied rules that allow for predictability and planning. Furthermore, modern law was viewed as essential to political development as it would help create a pluralist, liberal-democratic state, and serve as the primary restraint on arbitrary state action.⁶

This latter point illustrates the powerful instrumentalist conception underlying the law and development movement’s view of the relationship between law and development. As defined by Burg, this conception “sees law as a force which can be molded and manipulated to alter human behavior and achieve development.” It “focuses above all on substantive rules of law, looking to the state for the promulgation of these rules and reserving for the legal profession a prominent role in formulating them.” Such a conception of law as an instrument of development (and not merely a response to it), and the lawyer as a ‘social engineer’ was entirely in line with the “perceived need for rapid, directed change” underlying the modernization school’s notion of development.⁷

⁴ Brian Z. Tamanaha, “The Lessons of Law and Development Studies,” in (1995) 89 *The American Journal of International Law* 470, at 471.

⁵ David M. Trubek, “Toward A Social Theory of Law: An Essay on the Study of Law and Development,” (1972) 82 *Yale Law Journal* 44.

⁶ *Ibid*, at 44-7. The core conception of modern law outlined above and which was expected to be exported to and take root in LDCs, was essentially the American formal legal system, named “liberal legalism” by Trubek and Galanter in their 1974 article announcing the demise of the law and development movement (see *infra* note 17 at 1071-2). The core components of this model were as follows:

1) Society is made up of individuals who consent to the state for their own welfare; 2) the state exercises control over individuals through law, and it is constrained by law; 3) laws are designed to achieve social purposes and do not offer a special advantage to any individuals or groups within the society; 4) laws are applied equally to all citizens; 5) courts are the primary legal institutions with the responsibility for defining and applying the law; 6) adjudication is based upon a comprehensive body of authoritative rules and doctrines, and judicial decisions are not subject to outside influence; and 7) legal actors follow the restraining rules and most of the population has internalized the laws, and where there are violations of the rules of enforcement action will guarantee conformity.

⁷ Burg, at 505-6.

Armed with this instrumental model of the role of law in development, the movement adopted a top-down approach. It emphasized the reform of legal education and the legal profession and to a lesser extent the reform of formal legal rules. The assumption was that lawyers trained to use law as an instrument for change would promote the developmental goals of the state.⁸ It was presumed that reform of legal education and the legal profession would stimulate other forms of modernization, including the emergence of other institutions integral to an effective modern legal system such as those responsible for administering and enforcing legal rules. There was some recognition that there might be a “gap” or lack of perfect correspondence between “law on the books” and “law in action.” In these cases, the response of law and development scholars was still to rely on legal education reform and better “penetration.” Friedman defined penetration as “the degree to which a rule, code, or law takes hold in a population.”⁹ Key to closing the gap and improving penetration was better communication of law to the populace.¹⁰

The law and development movement was short-lived; scarcely begun in the mid-1960s, Trubek and Galanter—two leading figures in the field—signaled its demise in their 1974 article “Scholars in Self-Estrangement”.¹¹ To a certain extent the movement's decline can be traced to uniquely American experiences with the civil rights movement and the Vietnam War. Those experiences may have led to an awareness of the discrepancy between American ideals and the reality of the American legal system. In other words, as Americans began to question their ideals at home they also began to question their value as models for other countries. Financial considerations may also have played a role: government agencies and private foundations began to lose interest in the role of law in the development process and so academics were deprived of necessary financial support.¹² However, the most fundamental reason for the decline of the law and development movement was that it was widely perceived to have been a failure.¹³

According to Trubek and Galanter in “Scholars in Self-Estrangement,” the notion that American liberal legalism could be successfully transplanted to LDCs was completely

⁸ David M. Trubek and Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,” in (1974) *Wisconsin Law Review* 1062, at 1075-6; Burg, at 509-11. As noted by Trubek and Galanter: “The legal development scholars produced critical appraisals of the law schools in Asia, Africa, and Latin America, arguing that by training lawyers to think more instrumentally, the schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities. Thus it was proposed that law schools study and explain the relationship between specific legal rules, doctrines, and procedures on the one hand, and national developmental goals on the other, urging their students to work to reform those laws and institutions that failed to further the goals.”

⁹ L. Friedman, “Legal Culture and Social Development,” (1969) 4 *Law and Society Review* 29, at 43.

¹⁰ Robert B. Seidman, “The Communication of Law and the Process of Development,” (1972) *Wisconsin Law Review* 686.

¹¹ See *supra* note 17.

¹² John Henry Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement,” in (1977) 25 *American Journal of Comparative Law* 457, at 459-60; Tamanaha, at 474.

¹³ For example, Merryman suggests that this is why financial support for law and development dwindled.

misguided. This notion was simply “ethnocentric and naïve” as the pre-conditions to successful implementation of the liberal legal model contrasted sharply with reality in developing countries. As Trubek and Galanter stated:

Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.¹⁴

Because of the divergence between the conditions in developing countries and those in the developed world, reform of legal institutions had little or no effect on social or economic conditions in the former set of countries. This was due in part to the fact that the formal legal system—the main focus of liberal legalism—was not accessible to the majority of the populace in most developing countries. In this respect, the first law and development movement could be faulted for paying too little attention to customary laws and other informal legal institutions.¹⁵ Worse yet, to the extent that it emphasized the instrumental potential of law the law and development program had the effect of reinforcing pernicious inequalities and enabling legal institutions to serve as tools of domination in developing societies. Furthermore, the development of instrumental skills of local lawyers might actually reinforce social and economic inequalities by raising the cost of legal services and by reducing participation in decision-making (by increasing the formalization of legal decision-making). An improvement in the instrumental skills and capacity of lawyers could simply lead to more effective resistance by elites toward development efforts; they would hire those in the legal profession (a usually conservative group) for such ends.¹⁶

B. Dependency Theory

One of the principal tenets of modernization theory is that development can and should follow much the same path in less developed countries as it did in the more developed countries. This view began to come under attack in the 1960's from a group of Latin American scholars known as dependency theorists.¹⁷

¹⁴ Trubek and Galanter, at 1080-1.

¹⁵ Ibid, at 1078-9.

¹⁶ Ibid, at 1076.

¹⁷ Some of the key English-language works in this school are: F. H. Cardoso and E. Faletto, *Dependency and*

Dependency theorists rejected the notion that different countries should be expected to experience similar forms of development. They pointed out that development in many less developed countries would inevitably be conditioned by the fact that it occurs in the context of a complex economic, political and cultural relationship with more developed countries. Building on this premise, dependency theorists began to analyze the processes of development in less developed countries and, generally speaking, came to the following conclusions:¹⁸

1. The economic development of certain countries in the world (the periphery) is strongly influenced by economic conditions in other more central capitalist countries. However, the reverse is not true.
2. Some groups in the periphery benefit, at least relative to other members of their society, from the maintenance of relationships of dependency with the center.
3. Over time, the existence of relationships of dependency tends to increase economic inequality in the periphery.

Although most dependency theorists would probably endorse these abstract propositions they would probably disagree with any attempt to provide a more specific definition of the concept of 'dependency'. This is partly because those scholars would claim that forms of dependency vary significantly over time and space. Nevertheless it is possible to identify some paradigmatic examples of relationships of dependency. One such case involves the local dominant class controlling an export-oriented sector that produces primary products. Another paradigmatic form of dependency would be the enclave economy, in which multinational corporations dominate either mining or the production of manufactured goods with the products being either exported or consumed by local elites. In this scenario income is concentrated in the enclave sector and the local dominant class benefits to the extent that it provides political or administrative services to the foreign multinationals. In each case the leading sector of the peripheral economy is mainly export-oriented and so is subject to terms of trade established in the center. In addition, the majority of the local population is excluded from any economic benefits derived from activities in the leading sector.¹⁹

Development in Latin America (University of California Press, 1979); Theodore dos Santos, "The Crisis of Development Theory and the Problem of Dependence in Latin America" in Henry Bernstein (ed.) *Underdevelopment and Development: The Third World Today* (Hammondsworth: Penguin, 1973) at 57-83 and "The Structure of Dependence", (1970) 60 *American Economic Review* 231-236; Andre Gunder Frank, "The Development of Underdevelopment" (1966) 18 *Monthly Review*, 17-31, *Latin America: Underdevelopment or Revolution* (New York: Monthly Review Press, 1969) and *Lumpenbourgeoisie: Lumpendependence, Class and Politics in Latin America* (Marion Davis Berdecio, trans.) (New York: Monthly Review Press, 1972). A leading work by an intellectual focused on the African experience is Samir Amin, *Accumulation on a World Scale* (Brian Pearce, trans.) (New York: Monthly Review Press, 1974).

¹⁸ For a similar summary see Richard Fagen, "Studying Latin American Politics: Some Implications of a Dependencia Approach" (1977) 12 *Latin American Research Review* 3-26.

¹⁹ These examples are drawn from Cardoso and Falleto, *supra*.

Most, but not all, dependency theorists tend to presume that the way in which a society organizes production and consumption determines the characteristics of other structures in the society. This approach, which is a form of historical materialism, implies that the features of legal institutions, and particularly domestic legal institutions, have relatively little influence on the economic development of the periphery. Rather, it suggests that legal institutions in dependent societies simply reflect the interests of the dominant class. In other words, as far as development is concerned legal institutions are epiphenomenal.²⁰ Therefore, rather than considering methods of reforming legal institutions most dependency theorists seemed to focus their attention on methods of bringing about fundamental political changes in dependent societies.

Historically, most dependency theorists advocated the replacement of regimes dominated by a relatively small elite with more populist governments that would adopt socialist economic policies. Those governments would assume control over critical sectors of the economy and shape the pattern of industrial activity into one conducive to a relatively balanced form of development. This would entail shifting industrial activity away from the production of exports and luxury goods and towards the production of consumer goods for the local market and intermediate capital goods required in their production. This would be accomplished through a combination of state ownership of critical industries, restrictions on foreign investment and protectionist tariffs. In addition, the introduction of socialism would permit a significant redistribution of wealth and power in dependent societies.²¹

These prescriptions have clear implications for the design of both domestic and international legal institutions. At a general level, it is important to recall that the critique of modernization theory launched by the dependency theorists was inspired by their rejection of models of development based solely on the successful experiences of other societies. This implies that even if certain types of legal institutions actually did make positive contributions to the development of some countries similar institutions will not necessarily make similar contributions to the development of other countries. Consequently, legal scholars influenced by dependency theory tend to be relatively skeptical of the merits of relying on legal institutions transplanted from developed countries to spur development in less developed countries. This view became increasingly prevalent in the American legal academy in the period coinciding with the decline of the law and development movement.

The prescriptions typically associated with dependency theory also have fairly specific implications for the design of legal institutions in less developed countries. For instance, dependency theorists have long been concerned that the distribution of real property and the legal rules governing land tenure in dependent societies tend to be disadvantageous to

²⁰ See e.g. Francis G. Snyder, "Law and Development in the Light of Dependency Theory" (1980) 14 *Law and Society Review* 723 at 780 ("scholars must recognize that legal forms and ideas are secondary and ultimately derivative").

²¹ For a recent statement of these views see Samir Amin, *Maldevelopment: Anatomy of a Global Failure* (New Jersey: Zed Books, 1990) . For a collection of detailed analyses of socialist policy see "Socialist Models of Development", Special Issue of *World Development* (1981), Vol. 9, No. 9/10.

the rural poor. Rectifying these problems implies the redistribution of property and the reform of oppressive land tenure regimes. Similarly, in socialist philosophy, enhancing the wealth and power of workers involves placing great reliance on co-operative ownership of private enterprises and granting workers a significant role in the governance of all enterprises. Both these measures represent significant departures from the conception of workers' rights that is embodied in Anglo-American corporate, labor and employment law.

Opting for socialism also has implications for the design of legal institutions that protect human rights. This is because the redistributive components of the socialist program can be expressed in legal terms as so-called economic and social rights, *i.e.* constitutionally enshrined rights to education, health services, food housing, employment and income. It is not uncommon for socialists in less developed countries to assert that economic and social rights should be given priority over civil and political rights.²²

To the extent that dependency theorists aspire to modify the legal rules governing dependent states' relationships with foreign actors those aspirations implicate both domestic and international legal institutions. Most of those implications are summarized, at least in general terms, in the documents describing the so-called New International Economic Order (NIEO).²³ One of the main objectives of the NIEO was to permit less developed countries to adopt legal rules pertaining to trade and foreign investment that would serve to reduce their dependence on more developed countries. Thus, through the NIEO developing countries sought to modify the existing rules of international trade law concerning the most-favored nation principle and the principle of non-discrimination so as to permit preferences to be extended to developing countries. They also sought to limit the amount of compensation payable for the nationalization and expropriation of foreign-owned property. In a similar vein, there was a movement to modify international law to permit developing countries to adopt laws that would diminish the rights of foreign actors over intellectual property and encourage technology transfer.²⁴

Although it is possible to derive prescriptions for the design of legal institutions from dependency theory it is important to emphasize the fact that dependency theorists did not envisage legal institutions playing an independent role in development. Consequently, they would expect any attempts to use legal institutions to improve the lot of dominated classes in dependent societies to be undermined, if not neutralized, by the dominant classes in the absence of fundamental political reform.

²² Adamantia Pollis, "Human Rights, Third World Socialism and Cuba" (1981) 9 *World Development* 1005-1017.

²³ Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI) May 9, 1974 29 UN GAOR (Supp. No. 31) 50, UN Doc. A/9631 1974 and Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX) December 12, 1974, 29 UN GAOR Supp. (no. 31) 50, UN Doc. A/9631 (1974).

²⁴ See *e.g.* Constantine V. Vaitsos, "Legal Issues in the Revision of the International Patent System" (1976) 4 *World Development* 85-102; Daniel Chudnovsky, "Foreign Trademarks in Developing Countries" (1979) 7 *World Development* *.

C. Economic Theories of Development

Economic theories of development focus principally on economic growth rates, conventionally measured in such terms as real growth in GNP or GDP per capita through time, abstracting from how this growth in real income is distributed, and other measures of human well-being not captured in monetary incomes. Many contemporary development economists assign an important role to legal institutions. However, it is important to recognize that this represents a fairly recent development. The importance attached to the state and legal institutions in theories of economic development has fluctuated dramatically over time.

Economic theories of development can be traced back to classical 18th and 19th century political economists, including most prominently Adam Smith, who were centrally concerned with the course of economic development in what is now the developed world.²⁵ However, modern development economics as a discrete field of academic and policy inquiry, with a principal focus on so-called Third World countries, dates from the early post-World War II years when many developing countries became independent and the contributions of economists such as Rosenstein-Rodan, Prebisch, Nurkse, and Lewis.²⁶ As Bardhan notes,²⁷ much of this literature originated in a perception of the limited usefulness in understanding underdevelopment of orthodox economics, with assumptions of constant returns to scale, pure competition, perfect information, and insignificant transaction costs and externalities, supposed institution-neutrality, price sensitive adjustments and market clearing and so on.

While there were important differences in viewpoint amongst these early development economists, the theories they subscribed to shared in common a considerable faith in the ability of states to engineer rapid economic growth. A central design for engineering such growth was to extract economic surplus from the traditional agricultural sector to finance accumulation in a modern industrial sector, in part inspired by the apparent success of this model of accumulation in underwriting rapid Soviet industrialization in the 1930s.²⁸ The early post-war development literature emphasized: (1) Market failures in the capital investment function through various external economies that were not readily captured in private investment decisions in developing economics; (2) Low domestic saving rates, which in terms of policy prescriptions led to substantial importance being attached to economies of coordination that aggregate planning could achieve; and (3) "Big push" theories of development aimed at escaping low level equilibrium traps.²⁹ This literature

²⁵ Pranab Bardhan, "Economics of Development and the Development of Economics", (1993) 7 *Journal of Economic Perspectives* 129 at 130.

²⁶ See G.M. Meier and D. Seers (eds.) *Pioneers in Development* (Washington, D.C.: World Bank, 1984).

²⁷ Bardhan, *op. cit.* at 130.

²⁸ Michael Carter, "Intellectual Openings and Policy Closures: Disequilibria in Contemporary Development Economics", in Frederick Cooper and Randall Packard, *International Development and the Social Sciences*, (University of California Press, 1997).

²⁹ Pranab Bardhan, "Introduction to the Symposium Issue of the State and Economic Development", (1990) 4 *Journal of Economic Perspectives* 3; M. Datta-Chaudhuri, "Market Failure and Government Failure", (1990) 4

(continued...)

emphasized the truncated nature of many developing country economies that were largely dominated by raw commodity production and export. Dependence on primary products was widely thought to be an artifact of colonial exploitation and such countries were expected to be afflicted with deteriorating terms of trade vis-à-vis industrialized countries' exports. Hence the case was made for shift away from agriculture to early forms of industrialization and enhanced levels of capital investment.

Bardhan³⁰ argues that in this literature the state was often left floating in a behavioral and organizational vacuum, making it easy to support blanket endorsements of indiscriminate state intervention, often involving a proliferation of state-owned enterprises in many sectors of developing countries' economies, extensive import substitution policies entailing detailed forms of trade protection of infant industries, foreign exchange controls, over-valued currencies that penalized exports, in particular the agricultural sector, while designed or intended to favor certain classes of imports such as capital equipment and staples, and detailed price regulation designed to substitute for effective forms of competition in many domestic sectors.

By the early 1970s this mix of policies was widely perceived by development economists as producing disappointing or even disastrous results in many of the developing countries that had attempted them. Periodic balance of payments crises often arose in reaction to over-valued exchange rates, increased indebtedness, and the failure of export earnings to grow, leading to stop-go policy cycles.³¹ Corruption and rent seeking activities also often proliferated with the expanding role of the state and often perverted the policy rationales for state intervention. Growth rates in many developing countries from the 1970s onward were disappointingly low and even negative, and progress in improving various social indicators such as poverty alleviation, unemployment levels, health and education status, also proved disappointing and in some cases non-existent.

These policy disappointments yielded two diametrically opposed responses in development theory. Many of those who advocated import substitution approaches turned to dependency theory to explain the continued failure to generate adequate economic growth in many developing countries (discussed above). The opposing response, which developed substantial momentum in the 1980s and 1990s, was the adoption of a neo-classical or neo-liberal view of economic development that largely rejected the view that the conditions and challenges faced by developing countries were so distinct from those faced by developed countries that they could not be addressed by the same analytical tools of mainstream economics.

Journal of Economic Perspectives 24, Michael Todaro, *Economic Development* (N.Y.: Longman, 6th ed., 1999), chap. 3.

³⁰ Bardhan, *op. cit.* (1990).

³¹ See Anne Krueger, *Trade Policies and Developing Nations*, (Washington, D.C.: Brookings Institution, 1995).

In terms of policy prescriptions, neo-classical or neo-liberal economic perspectives on development (often referred to as the "Washington consensus") advocated a dramatic shrinkage in the role of the state in developing countries and a corresponding increase in the role of markets. More concretely, this typically entailed macro-economic stabilization policies, including expenditure reductions to eliminate or contain budget deficits and high rates of inflation, exchange rate devaluations, trade and foreign investment liberalization, privatization of state-owned enterprises, and de-regulation of price and entry controls in many sectors ("getting prices right"). On more extreme versions of this view, the problematic role of the state in discharging the responsibilities assigned to it in early post-war economic development theories is resolved by largely marginalizing the state, confining its role to the facilitation of markets through clear and stable definitions of private property rights and effective enforcement and protection of these rights and contractual transfers of these rights through a competent, honest, and politically independent judiciary. Proponents of neo-classical or neo-liberal theories of economic development more generally claim as support for their view the economic performance of the so-called East Asian Tigers over the past two to three decades, involving outward (export)-oriented market driven growth policies. However, for many developing countries which have adopted—either voluntarily or through inducement—the neo-classical policy prescriptions, results to date have been disappointing in terms of growth rates, macro-economic stability, widening income inequalities as relative returns to entrepreneurship and specialized human capital increase, and persistently high levels of poverty.³²

One feature that both early economic development theories and current neo-classical theories share in common is the treatment of the state as largely exogenous to the policy prescriptions offered—in the former case, simply by assuming infinite capacity to undertake a highly pro-active role in the development process, and in the latter case, by treating the state as largely marginal to effective development policies. In contrast to this view of the state, the so-called New Institutional Economics views the state and the institutions that comprise it as endogenous to the development process, and views the design and functioning of public sector institutions and private sector organizations that interact with these institutions as critical determinants of countries' development prospects.³³

Proponents of the New Institutional Economics can marshal considerable evidence in support of their claims. For example, in contrast to other studies that have found a high correlation between openness and growth rates,³⁴ Dani Rodrik³⁵ has recently argued that the

³² See Carter *op. cit.*; Bardhan (1993);

³³ Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); World Bank, World Development Report 1997, *The State in a Changing World* (Oxford University Press, 1997).

³⁴ See e.g. Jeffrey Sachs and Andrew Warner, "Economic Reform and the Process of Global Integration", Brookings Papers on Economic Activity, 1995.

³⁵ Dani Rodrik, *The New Global Economy and Developing Countries: Making Openness Work* (Washington, D.C., Overseas Development Council, 1999); also Rodrik, "Trade Policy and Economic Growth", NBER paper no. 7081, April, 1999.

relationship between growth rates and indicators of openness—levels of tariffs and non-tariff barriers or controls on capital flows—is empirically weak at best. He cites extensive empirical evidence that domestic investment rates are key to economic performance and argues that public policies that raise the private return to capital are desirable and indeed have been widely used in the East Asian high growth economies.

Rodrik also argues that the ability to maintain macro-economic stability in the face of external perturbations is the single most important factor accounting for the diversity in post-1975 economic performance in the developing world. The countries that performed poorly did so because their social and political institutions were inadequate to bring about the bargains required for macro-economic adjustment—they were societies with weak institutions of conflict management. According to Rodrik, societies with deep cleavages along ethnic, income or regional lines are particularly susceptible to policy paralysis in this context, and that evidence shows that participatory political institutions, civil and political liberties, high quality bureaucracies, the rule of law, and mechanisms of social insurance, such as social safety nets, can bridge these cleavages.

In terms of an investment strategy for developing countries, Rodrik suggests that investments in physical infrastructure, plant, equipment, technology, and human capital are likely to be particularly important. Other recent commentators, arguing in a similar vein, point out that recent developments in economic theory in developed economies emphasize how information asymmetries and transaction costs may result in incomplete or missing markets and that the new (endogenous) growth theory emphasizes that long-run growth can be endogenously increased and sustained through the accumulation of reproducible assets which exhibit increasing returns, such as knowledge and human capital.³⁶

On this view, very few developing countries, including successful countries, have pursued laissez-faire economic policies. As Bardhan notes,³⁷ in much of the neo-classical literature, the emphasis is on the extent of state intervention—mostly on the harmful effects of that intervention. In fact, almost all states in developing countries, successful or otherwise, are interventionist, and the important question is not really about the extent but the quality of that intervention. Thus, in important respects, the state versus market dichotomy is a false one.³⁸ Presumably the quality of a state's interventions will be largely determined by the quality of the institutions that make, administer, and enforce these policies, which returns us to the focus on institutions or governance adopted by proponents of the so-called New Institutional Economics. Perhaps the most that can be said at this juncture is that neither the heroic transformatory role assigned to the state in early economic development theories nor the minimalist role assigned to the state in some neo-liberal theories of development are compelling on the evidence to date, but that a more strategically pro-active role for the state

³⁶ See Carter *op. cit.* at 133.

³⁷ Bardhan, *op. cit.* (1990).

³⁸ See Datta-Chaudhuri, *op. cit.* (1990); Robert Klitgaard, *Adjusting to Reality: Beyond State Versus Market in Economic Development* (San Francisco: Institute for Contemporary Studies, 1991).

is required, a pre-condition to which is the existence or emergence of institutions that are capable of playing this necessarily discerning role.

On this perspective, in terms of substantive law, core priorities should attach to well defined and alienable private property rights; a formal system of contract law that facilitates impersonal contracting; a corporate law regime that facilitates the capital investment function through ease of incorporation and limited liability of small and medium sized enterprises and minimizes managerial and insider agency costs in non-owner managed firms; a bankruptcy regime that induces the exit of inefficient firms and redeployment of their assets to higher-valued uses; and a non-punitive, non-distortionary tax regime. In order to ensure the enactment and enforcement /administration of these substantive laws, priorities should attach to law making institutions that are transparent and stable in their commitment to basic legal norms and inclusive in the stakeholders to whom they are responsive; and law enforcement and administrative institutions that are competent, non-corrupt, free of undue political influence, procedurally transparent, and effectively resourced.

A final caveat is in order: both early development theories and neo-classical or neo-liberal theories of development explicitly or implicitly assume a universalistic approach to problems of under-development. In contrast, recent scholarship on issues of economic development tends to adopt a much more cautious and context-specific approach to these issues, which leaves significant room for cultural, historical, resource and geographic specificities that defy easy policy generalizations.³⁹

D. Welfarist Perspectives On Development

As noted above, economic theories of development have conventionally focussed on the objective of promoting economic growth, typically measured in terms of GNP or GDP per capita growth rates, explicitly or implicitly assuming that higher growth rates will have a "trickle down" effect on all or most citizens of a country experiencing high growth rates. This assumption has been increasingly challenged by many development economists and other scholars interested in development. As Sen argues, the success of any development strategy "has to be judged ultimately in terms in what it does to the lives of human beings. The enhancement of living conditions must clearly be an essential—if not the essential—object of the entire economic exercise and that enhancement is an integral part of the concept of development".⁴⁰

Sen notes a number of reasons for distinguishing between development and growth. First, economic growth measured only in GNP or GDP per capita leaves out of account the question of the distribution of that GNP among the population, leaving open the possibility that a country might be expanding its GNP per capita while its distribution becomes more

³⁹ See Carter *op. cit.* at 39; Todaro *op. cit.*, chapter 1.

⁴⁰ Amartya Sen, "The Concept of Development" in H. Chenery and T. Srinivasan (eds.) *Handbook of Development Economics* (Amsterdam, North Holland, 1991) vol. 1, Chapter 1.

unequal, with the poorest groups possibly even going down absolutely in terms not only of incomes. It should also be noted that measures of GNP or GNP per capita do not capture more specific inequalities, such as those relating to women or ethnic minorities. Second, GNP captures only those means of well-being that happen to be transacted in the market and this leaves out benefits and costs that do not have a price tag attached to them, reflecting externalities or non-marketabilities (including public goods). Third, even where markets exist, the valuation of commodities in the GNP will reflect biases that markets may have if market operations happen to be institutionally imperfect or if equilibrium outcomes do not prevail. Fourth, real income enjoyed by a person in a given year reflects at best the extent of well-being enjoyed by that person at that period of time, but ignores inter-dependencies over time as well as the more elementary question of the length of that life. Finally, GNP is in fact a measure of the amount of the means of well-being that people have and does not tell us what the people involved are succeeding in getting out of these means, given their ends. Ultimately, the assessment of development achieved cannot be a matter only of quantification of the means of that achievement but must take note of the actual achievements themselves. Sen notes, for example, that relative GNP per capita across a number of developing countries is very weakly and imperfectly correlated with life expectancy at birth. For example, in 1984 South Africa had a GNP per capita of \$2,340 US per capita and a life expectancy of 54 years while China had a GNP per capita of \$310 and a life expectancy of 69 years. Thus, GNP or GDP per capita is a poor proxy for these other measures of human well-being.

Todaro elaborates on this weak relationship between conventional measures of economic growth and various other measures of human well-being. He notes that over the last 30 years, income inequalities both between different countries and within individual LDCs have worsened; that absolute poverty rates have increased; that various measures of health status, such as life expectancy at birth, infant mortality rates, and rates of malnutrition, have only marginally improved in many LDCs in recent decades; and that in terms of education, illiteracy rates average 45 percent of the population amongst least developed countries. In all cases, relative GNP or GDP per capita and rates of growth thereof are only very weakly correlated with these various measures of human well-being.⁴¹ For example, while large and increasing income inequalities are sometimes argued as being necessary to increase savings and investment rates and to provide incentives to reallocate resources away from traditional sectors, growth, savings, and investment rates are not strongly correlated with such inequalities: indeed many of the high performing Asian economies in these dimensions are relatively egalitarian.

In recognition of the inadequacy of conventional measures of economic growth to capture these and other crucial dimensions of human well-being, in recent years attempts have been made to construct more comprehensive indices of development. Perhaps the best known of these is the Human Development Index (HDI) initiated by the United Nations Development Program in 1990 and published in an annual series of human development

⁴¹ Michael Todaro, *Economic Development*, (New York: Longman, 6th ed. 1999), Chapters 2 & 5.

reports. The HDI attempts to rank all countries on a scale of 0 (lowest human development) to 1 (highest human development) based on three goals or end products of development: (1) longevity as measured by life expectancy at birth; (2) knowledge as measured by a weighted average of adult literacy (two-thirds) and mean years of schooling (one-third); and (3) income as measured by adjusted real per capita income. While this index and other similar indices have proven predictably controversial in terms of the factors they weigh and the weights they attach to them (leading to some refinements in the HDI over time), it is striking that the ranking of countries on this composite index differs sharply in many cases from rankings that are produced simply by ranking countries with reference to GDP per capita or growth rates thereof.⁴² However, whatever room there may be for debating which economic, social, and political indicators to include in an index of human development and what weights to attach to them, it now seems uncontroversial that conventional measures of economic growth do not remotely capture adequately many important features of human development or human well-being.⁴³

Todaro argues that development in all societies must have at least the following three objectives:⁴⁴ (1) to increase the availability and widen the distribution of basic life sustaining goods such as food, shelter, health, and protection; (2) to raise levels of living including, in addition to higher incomes, the provision of more jobs, better education, and greater attention to cultural and humanistic values all of which will serve not only to enhance material well-being but also to generate greater individual and national self-esteem; and (3) to expand the range of economic and social choices available to individuals and nations by freeing them from servitude and dependence not only in relation to other people and nation states but also to the forces of ignorance and human misery. In terms of policy options designed to promote human development more broadly throughout the populations of developing countries, Todaro identifies a number of basic options. These include: (1) altering the functional distribution of income through policies designed to change relative factor prices, in particular factor price distortions that artificially reduce the price of capital relative to the price of labor; (2) modifying the size distribution of assets through progressive redistribution of asset ownership, especially physical capital and land, but also human capital in the form of better education; (3) reducing the size distribution at the upper levels through progressive income and wealth taxes; and (4) increasing the size distribution at the lower levels through direct transfer payments and the public provision of goods and services, including public health projects, basic education, the provision of clean water, and electrification.

A similar holistic approach to development is taken in the recent proposal by James Wolfensohn, President of the World Bank, for a Comprehensive Development Framework (1999). In this proposal he envisages a balance sheet with, on the left-hand side, macroeconomic factors, and, on the right-hand side, structural, social and human aspects.

⁴² See *Globe & Mail*, Monday July 12, 1999, p. 3. For a review of the 1999 UN Human Development Index.

⁴³ See Martha Nussbaum and Amartya Sen (eds.) *The Quality of Life* (New York: Oxford University Press, 1993).

⁴⁴ Todaro *op. cit.*

Under "*Structural*", Wolfensohn includes: Good and Clean Government; An Effective Legal and Justice System; A Well Organized and Supervised Financial System; A Social Safety Net and Social Programs. Under "*Human*" he includes: Education and Knowledge Institutions; and Health and Population Issues. Under "*Physical*", he includes: Water and Sewage; Energy; Roads, Transportation and Telecommunications; and Sustainable Development, Environmental and Cultural Issues. In addition, he proposes a need for specific strategies for the rural, urban and private sectors. He argues that developing countries and external agencies need to underwrite well-integrated development strategies across all these factors over a 10 to 20 year time frame (while seeking to avoid the vices of central planning).

In terms of the implications of this broad welfarist perspective on development for the relationship between law and development, this perspective is likely to prioritize various substantive areas of law such as progressive tax policy, redistributive property regimes, social welfare policy, and human and civil rights policies. In terms of institutional implications, it is likely to prioritize inclusive and empowering forms of political expression and participation⁴⁵, and broad scale access to a credible legal system or other forms of dispute resolution for vindicating rights and enhancing the accountability of government agents.

E. Feminism

Feminist approaches to development are generally concerned with ensuring that whatever else it does, development serves to satisfy women's needs and to further their interests and aspirations. The feminist perspective has become increasingly influential over the past three decades.

There is clearly some overlap between feminist perspectives on development and other perspectives. For example, initial attempts to integrate women's interests into development theory focused upon the need to alleviate women's poverty by ensuring that they receive the benefits of foreign aid and public services such as healthcare and food subsidies. This approach is consistent with welfarist approaches to development. However, it has been criticized for its failure to challenge the inequities implicit in the social and economic structures that define the lives of many women in LDCs.

Other feminist approaches to development have focused on integrating women into the economic system and combating sex-based discrimination in the productive sphere. From this perspective the primary policy objective is to ensure that women in developing societies attain the same benefits as women in modern societies and in particular, formally equal access to credit and labor markets. This approach can be characterized as an extension of modernization theory.⁴⁶ Taking a slightly different tack, some feminists have observed that

⁴⁵ See Amartya Sen, "Freedoms and Needs: An Argument for the Primacy of Political Rights", (1994) 10 *The New Republic* 31.

⁴⁶ Eva M. Rathgeber, WID, WAD, GAD: Trends in Research and Practice, (1990) 24 *J. of Developing Areas*

women in LDCs are more productive than men in many activities and have used this to observation to justify the implementation of policies designed to increase women's access to economic opportunities. Of course those types of policies can also be readily justified from an economic perspective.

Recent feminist scholarship on development issues has adopted an approach known as "gender and development" (GAD), this approach resembles the welfarist perspective outlined above. In that it GAD focuses upon improving women's well-being which is broadly conceived to include more than just measures of wealth and income. Significantly however, women's well-being is equated with freedom from oppression and self-empowerment. Moreover, unlike other feminist approaches to development the GAD approach is concerned with reducing discrimination against and oppression of women in the private sphere, *i.e.* the household, as well as the public sphere, *i.e.* the world of paid employment. Thus for example, feminist scholars who adopt the GAD approach pay great attention to the fact that increasing women's access to income-generating activities will not necessarily enhance women's welfare if they continue to perform significant amounts of unpaid household labor and must cede control over any income they generate to the men within their households.

Like other perspectives on development the feminist perspective has many policy implications that have little to do with the design of legal institutions. For example, from a feminist perspective reducing spending on social services such as childcare and healthcare is frequently undesirable since it shifts the responsibility for providing those services onto women and so merely adds to their burden. By contrast, such spending cuts may be defensible from an economic perspective for countries with major deficit or inflation problems.

The feminist perspective also has a number of implications for the design of legal institutions. However, the question of whether pursuing legal reforms is an appropriate strategy for attaining gains for women has been a subject of debate among feminists. Some feminists argue that legal systems designed and dominated by men and male values and maintained by educated elites cannot possibly be responsive to women's needs, especially the needs of poor uneducated women.⁴⁷ However, the dominant view among feminists seems to be that unless the current inequities in legal systems are addressed, "we abandon the reform task to those for whom the issue of gender equity is not a priority, casting our legal fate in their hands."⁴⁸

489.

⁴⁷ See Marsha A. Freeman, "Women, law, and land at the local level: Claiming women's human rights in domestic legal systems" 16 *Human Rights Quarterly* 559 (1994) at 561. See also Gayle Binion, "Human Rights: A feminist perspective" 17 *Human Rights Quarterly* 509 (1995)..

⁴⁸ Freeman, *op. cit.*, at 561.

As far as law-making institutions are concerned the overarching goal of empowering women demands that they ultimately be included in all sorts of law-making processes. On the other hand, feminists generally seem to take the view that beneficial reforms can be effected by any type of law-making institution. Consequently, feminists have opportunistically sought to ensure that feminist perspectives are taken into account in the formulation of both international and domestic law and in law-making conducted in legislative, adjudicative, and administrative fora.⁴⁹

Feminist scholars are also concerned with reforming both substantive legal rules and the manner in which they are enforced to ensure that law does not serve to exclude some or all women.⁵⁰ Different scholars have focused on different ways in which legal institutions exclude women. However, in LDCs, the literature seems to focus on the following substantive areas of law: 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. Labor 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 requires attention to the extent that it can contribute to reducing various forms of violence against women including domestic violence, rape, genital mutilation and trafficking in women. Finally, 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.

F. Sustainable Development

In recent years the concept of "sustainable development" has emerged to describe patterns of development that minimize the negative impact of human activity on the physical environment. Some scholars have suggested that the principal justification for attempting to minimize environmental degradation is to display respect for the intrinsic value of non-human components of the natural environment.⁵¹ However, there is relatively little support either in developed countries or less developed countries for the view that humanity should

⁴⁹ Freeman, *op. cit.*

⁵⁰ For an overview of the implications of feminist theory for the design of legal institutions see Denise Réaume, *What's Distinctive About Feminist Analysis of Law?: A Feminist Analysis of Women's Exclusion from Law* (1996) 2 *Legal Theory* 265.

⁵¹ B. Devall and George Sessions, *Deep Ecology, Living as if Nature Mattered* (Peregrine, 1985). See also Christopher Stone, *Should Trees Have Standing?* (1972) 45 *Southern Cal. L. Rev.* 450; Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, (1974) 83 *Yale L. J.* 1315.

pursue environmental protection where this would entail a significant diminution in the quality of life of present or future generations of human beings. In developed countries the objections to this claim have focused on the question of whether things other than human beings even have intrinsic value.⁵² Meanwhile, scholars from less developed countries have expressed concern that giving priority to environmental protection might have disproportionately severe effects upon members of already disadvantaged groups in less developed countries.⁵³

Both these sets of objections weigh in favor of a relatively anthropocentric justification for attempting to achieve sustainable development, *i.e.* one that justifies the pursuit of sustainable development by reference to the interests of human beings. In this spirit, the most widely accepted justification for seeking to achieve sustainable development relies heavily upon evidence of the connection between environmental quality and the well-being of present and future generations of human beings. The evidence of this connection is overwhelming. For instance, in 1992 the World Bank reported that more than 2 million deaths and billions of illnesses a year were attributable to water pollution; that excessive levels of particulate matter in urban areas were responsible for anywhere between 300,000 and 700,000 premature deaths annually and for half of chronic childhood coughing; and that ozone depletion may cause up to 300,000 additional cases of skin cancer a year worldwide and 1.7 million cases of cataracts.⁵⁴ The same document noted that these and other forms of environmental degradation would tend to reduce economic productivity by, for example, destroying fisheries, reducing the quantity and quality of agricultural land, eliminating genetic resources and flooding coastal areas.

In light of this sort of evidence it should not be surprising that the dominant understanding of sustainable development holds that concern for human well-being provides a sufficient justification for attempting to minimize environmental degradation.⁵⁵ In a sense therefore, that conception of sustainable development can be characterized as a refinement of what we have identified above as the welfarist perspective on development. It is worth emphasizing however, that environmentalists have made a twofold contribution to the normative aspects of welfarist thinking. First, they have highlighted the link between environmental quality and human well-being. Second, they have drawn attention to the need to consider the well-being of both present and future generations of human beings. Though

⁵² See *e.g.* P. S. Elder, *Legal Rights for Nature: The Wrong Answer to the Right(s) Question*, (1984) Osgoode Hall L. J. 285.

⁵³ Ramachandra Guha, *Radical American Environmentalism and Wilderness Preservation: A Third World Critique* (1989) ____.

⁵⁴ World Bank, *World Development Report, 1992: Development and the Environment* (Oxford, 1992).

⁵⁵ This conception is explicit in the Rio Declaration on Environment and Development which was adopted by more than 178 governments in 1992. Principle 1 of the Rio Declaration states, "Human beings are at the center of concerns for sustainable development." On this view, to qualify as a form of sustainable development a form of development must ensure that the physical environment is maintained in a state that enhances rather than diminishes the quality of human beings' life.

necessary, these refinements only serve to complicate the already difficult task of determining what is entailed in improving human well-being.

By focusing on the link between environmental quality and human well-being environmentalists have also provided insights into factors that diminish the well-being of members of any given society by contributing to environmental degradation. Some of those factors are already understood to impair well-being independently of their effect on environmental quality. For example, absolute poverty has been identified as a factor that tends to contribute to environmental degradation, mainly because it prevents people from exploring alternatives to unsustainable activities. For instance, as a result of poverty people may be driven to cultivate ecologically sensitive lands, burn biomass fuels for cooking and boiling water, or have more children. These activities are associated with, among other things, soil degradation, indoor air pollution, deforestation and pollution of ground water resources. Poverty may also limit peoples' ability to bring pressure to bear on polluters to reduce pollution. In addition, it has been suggested that poor people are more willing to trade environmental quality for income.⁵⁶ On the other hand, the claim that there is a necessary connection between poverty and environmental degradation has to be qualified to reflect the evidence that, at least initially, environmental degradation tends to increase rather than decrease as per capita incomes rise in developing countries. Only when incomes reach a fairly high level does increasing income tend to be associated with reduced levels of environmental degradation.⁵⁷

Aside from shedding new light on the roles of poverty reduction and economic growth in the process of development environmentalists have also drawn attention to the ways in which collective action problems might prevent self-interested individuals and communities from achieving their collective interest in environmental protection. The essence of the problem is that environmental quality is a good whose benefit is typically enjoyed by many people besides those who are capable of causing environmental degradation at any given point in time. This means that most people, and even groups of people, have unduly weak incentives to prevent environmental degradation.⁵⁸

Yet another theme that features prominently in environmentalist scholarship is the perceived inadequacy of our current understanding of how ecosystems function and how they are affected by human activity. Many environmentalists are troubled by the fact that governments often fail to recognize the limits of current scientific knowledge when they make environmentally significant decisions. They are particularly concerned when existing sources of environmental information are ignored by decision-makers.

⁵⁶ See *Expanding the Measure of Wealth: Indicators of Environmentally Sustainable Development* (World Bank, 1997), chapter 7.

⁵⁷ Gene Grossman and A. Krueger, *Economic Growth and the Environment* (1995) 110 *Q. J. Econ.* 352-377; Jean Agrad and Duane Chapman, *A Dynamic Approach to the Environmental Kuznets Curve Hypothesis*, (1999) 28 *Ecological Economics* 267-277.

⁵⁸ Garrett Hardin, *The Tragedy of the Commons*, (1968) 162 *Science* 1243-8.

Adopting the environmentalist perspective has a wide range of implications for public policy in developing countries. For example, governments can significantly influence the consumption of scarce resources such as water and fossil fuels by adjusting the prices of publicly provided water and electricity. They can also influence levels of water pollution by altering the amount of resources dedicated to sanitation. In the medium term, attitudes towards environmental protection can be influenced by public education. In the long run, governments might be able to reduce the amount of pressure on sensitive environmental areas by allocating resources to promoting birth control. Governments may also be able to improve our understanding of the environment by dedicating additional resources to environmental research.⁵⁹

For present purposes however, we are less interested in the general policy implications associated with the environmentalist perspective than we are in the specific implications for the design of legal institutions. The main implication is obviously that developing societies should adopt legal rules that are designed to encourage environmental protection by restricting pollution and promoting conservation. However, it is not clear that societies plagued by collective action problems and limited information will always be able to formulate appropriate rules of this sort. This insight has far-reaching implications for the design of law-making institutions.

One implication of adopting an environmentalist perspective is that legal institutions should be designed to ensure that the widest possible range of interests are considered in the formulation of legal rules that are designed to influence human interaction with the environment.⁶⁰ Those interests are likely to range well beyond the interests of the majority of the inhabitants of any given jurisdiction and specifically will include the interests of future generations of inhabitants as well as the inhabitants of foreign jurisdictions who might be affected by harm to any given ecosystem.

A second implication is that in formulating rules that will affect human interaction with a given ecosystem, particular consideration should be paid to the views of people whose well-being is closely tied to that of the ecosystem. Similarly, great weight should be given to the views of those who have the best understanding of the relationship between human activity and the ecosystem. Generally speaking, this means that either local communities or scientists or both should be given a prominent role in law-making processes. Moreover, in some cases particular groups within a local community might be recognized as having particular expertise or interest in the protection of a given resource. For example, women in rural areas are frequently the caretakers of resources such as forests and water supplies and so should presumably be given a prominent role in the formulation of whatever rules will govern the use of those resources.⁶¹

⁵⁹ *Agenda 21: Program of Action for Sustainable Development*, section 3 (New York: United Nations, 1992).

⁶⁰ *Agenda 21, supra*, section 3, "Strengthening the Role of Major Groups".

⁶¹ Vandana Shiva, *Staying alive: Women, Ecology, and Development* (Zed Books, 1988). Shiva and others also emphasize that women in developing countries may be disproportionately harmed by environmental

(continued...)

Individuals' or groups' authority to participate in environmentally significant decisions need not only be recognized by giving them a voice in formal law-making processes. An alternative technique is to grant the relevant individuals or groups proprietary rights over certain resources. This line of thinking has inspired calls to confer property rights over ecologically sensitive areas such as tropical rainforests and related intellectual products upon indigenous peoples.⁶² Yet another option is to allow rules developed by informal organizations to supplant formal legal rules in some respects.⁶³

These principles have important implications for doctrines of international law, constitutional law, administrative law, civil procedure and property law, which may or may not assign the power to make environmentally significant decisions to those who have relevant interests or expertise. For instance, doctrines of both domestic and international law that define the competence of supranational, national and subnational governmental and non-governmental organizations may need to be reformulated to ensure that power is allocated in a fashion that is likely to generate decisions that are conducive to sustainable development.⁶⁴ Similarly, principles of administrative law and civil procedure may have to be modified to ensure that groups with relevant interests and expertise have standing to influence environmentally significant decisions.⁶⁵ In addition, evidentiary rules that determine the types of scientific information required to forestall actions that threaten the natural environment may need to be modified to reflect the precautionary principle.⁶⁶ Finally, principles of property law could be modified to grant proprietary rights to certain groups such as future generations, women or indigenous peoples.

III. EMPIRICAL STUDIES

In this part of the paper we survey the empirical literature concerning the relationship between various bodies of law and development.

A. Aggregate Studies

In this section we examine the results of a number of large-scale cross-sectional studies of the factors influencing development in the hope that they will shed light on the extent to which legal institutions influence development. The studies are divided into two

degradation.

⁶² *Agenda 21; Biodiversity Convention; Forest Principles*. See generally, Dinah Shelton, "Fair Play, Fair Pay: Preserving Traditional Knowledge and Environmental Resources" (1994) 5 Yearbook of International Environmental Law 77.

⁶³ Elinor Ostrom explores the role that formal organizations might play in facilitating the emergence of informal solutions to certain types of collective action problems. See, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, 1990).

⁶⁴ See Jutta Brunnée and Stephen J. Toope, *Environmental Security and Freshwater Resources: A Case for International Ecosystem Law* (1994) 5 Yearbook of International Environmental Law 41.

⁶⁵ See e.g. Weiss, *supra* at 565-576 and Stone, *supra*.

⁶⁶ _____.

categories: those that examine the relationship between certain types of law and development, and those that examine the connection between democracy and development.

We should acknowledge at the outset that the studies that we have found are of only limited use for our purposes. There are two reasons for this. First, those studies use economic development as measured by growth in per capita GDP as their dependent variable. As indicated above, this is only one of several possible conceptions of development, and not necessarily the most appealing one.

Our second difficulty with the studies discussed below is that they do not allow us to differentiate the effects of different types of legal institutions on economic development. This is because the studies which claim to address the influence of legal institutions on development do so via measures of the reliability with which certain types of laws, *e.g.* contract law, are enforced. Consequently, those studies gauge the aggregate effect of substantive legal rules and the institutions that are responsible for enforcing them. Similarly, the studies which come closest to measuring the effects of lawmaking institutions on development focus on assessing the effect of varying levels of democratization on economic growth. However, this does not shed much light on the effects of different types of democratic law-making institutions on development.

Law, administration, and development

Recent studies by Barro and Clague et al. address the connection between economic growth on the one hand, and protection of property rights and enforcement of contracts on the other.⁶⁷ Barro performed regression studies on a panel of about 85 countries. The dependent variables in the studies are growth rates in per capita GDP over the periods 1965–75 (80 observations), 1975–85 (87 observations), and 1985–90 (84 observations). Barro's first regression has independent variables for log(GDP), rate of male secondary and higher schooling, Log(life expectancy), Log(GDP) x male schooling, fertility rate, government consumption ratio, a rule of law index, growth rate in the ratio of export to import prices, a democracy index, and inflation rate. His second regression contains, in addition, regional dummies for Sub-Saharan Africa, Latin America, and East Asia. The dummy variables were found to have insignificant effects on growth.⁶⁸

⁶⁷ R. J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (Cambridge: MIT Press, 1997); C. Clague, P. Keefer, S. Knack & M. Olson, "Institutions and Economic Performance: Property Rights and Contract Enforcement" in C. Clague, ed., *Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries* (Baltimore: Johns Hopkins University Press, 1997) 67–90.

⁶⁸ The dummies did have significant effects if certain other variables were removed from the regression: the Latin American dummy became significant if fertility rate or government consumption ratio was removed, the sub-Saharan dummy became significant if government consumption ratio was removed, and the east-Asian dummy became significant if the male schooling, rule of law, or democracy variables were removed (Barro, *ibid.* at 32).

Of most interest for our purposes are the results Barro obtained for the rule of law index.⁶⁹ Barro uses an index from the International Country Risk Guide (ICRG), a guide designed to gauge the attractiveness of a country's investment climate for fee-paying international investors. The data compiled in the guide are based on subjective measures of a variety of factors including quality of bureaucracy, level of political corruption, likelihood of government repudiation of contracts, risk of government expropriation, and overall maintenance of rule of law. As Barro points out, the willingness of investors to pay for the information provides some grounds for confidence in the quality of the data, despite the fact that they are based on subjective measures. In his regressions, Barro used the ICRG index designed to indicate the overall maintenance of rule of law.⁷⁰ The index takes integer values ranging from 0 to 6. Barro found that an improvement of one rank in the index raised the growth rate on impact by 0.5%.

In a similar regression study, Clague et al. examined the impact on growth of three different measures of security of property rights and effectiveness of contract enforcement.⁷¹ The three measures used were (1) the aggregate ICRG index, which is a composite of the sub-indices for quality of bureaucracy, level of political corruption, likelihood of government repudiation of contracts, risk of government expropriation, and overall maintenance of rule of law; (2) the Business Environmental Risk Intelligence (BERI) index, another privately produced index designed to gauge investment risk which contains sub-indices for contract enforceability, infrastructure quality, nationalization potential, and bureaucratic delays; and (3) the contract-investment money ratio (CIM), which is defined as the ratio of non-currency money to total money supply. Clague et al. argue that the CIM is a good measure of the security of property rights and contract compliance, since the willingness of people to engage in non-currency transactions will depend on the state of property rights and contract compliance in a country.⁷² Using a sample of 101 countries, Clague et al. found that an increase of about 9 points in the ICRG index (on a scale of 0-50), was associated with a 1% increase in annual growth of per capita income. Using a sub-sample of the 78 LDCs contained in the original sample, Clague et al. found that an 8 point increase in the ICRG index was associated with a 1% increase in annual growth of per capita income. For both a global sample of 48 countries and a sub-sample of 28 LDCs, an increase of a little over 2 points in the BERI index (on a scale of 0-14) was associated with a 1% increase in growth of per capita income. For a global sample of 96 countries, an increase of 0.22 in the CIM was associated with a 1% increase in growth in per capita income. For a sub-sample of 74 LDCs, an increase of 0.27 in the CIM was associated with a 1% increase in growth in per capita

⁶⁹ The results with respect to the democracy index are reviewed in subsection 2 below.

⁷⁰ Barro claims that the other ICRG measures of investment risk are insignificantly related to growth if the rule of law index is also included in the regression (Barro, *supra* n.1 at 28).

⁷¹ Clague et al.'s regressions have independent variables for Log(1969 GDP per capita), 1960 primary enrollment, 1960 secondary enrollment, mean 1969-90 currency depreciation, 1969 price of investment goods, and, for regressions using the CIM (see below) mean 1969-90 M₂ money supply/GDP (Clague et al., *supra* n.1 at 78).

⁷² *Ibid.* at 70.

income.⁷³ When investment is included as a regressor, the CIM and BERI indices are no longer significantly linked to growth, suggesting that they measure factors which influence growth primarily through their effect on levels of investment.⁷⁴

Another large scale cross-sectional regression study performed by Mauro focuses on the relationship between corruption and growth.⁷⁵ Mauro uses the corruption index produced by the Business International Corporation (BIC), a private corporation which produces data on investment risks, as a measure of corruption. BIC's corruption index is designed to measure (on a scale of 0-10, with higher values indicating less corruption) "The degree to which business transactions involve corruption or questionable payments."⁷⁶ Using per capita GDP in 1960, secondary education in 1960, and population growth as regressors, Mauro found that a one point improvement in the corruption index is associated with an increase of 0.3 percentage points in the average annual growth rate in GDP per capita for the period of 1960-1985. When an independent variable for average investment rate as a percentage of GDP for the period 1960-85 is added to the regression, the associated increase in annual growth rate falls to 0.2 percentage points, and the association becomes statistically insignificant. This change suggests that at least some of the effect that the level of corruption has on growth is achieved by the tendency that corruption has to discourage investment.⁷⁷

Mauro also considers the relationship between growth and an index of bureaucratic efficiency (BE) which Mauro considers to be a better measure of the level of corruption than the corruption index itself. The BE is an aggregate of BIC's corruption index, its legal system index, and its bureaucracy and red tape index. BIC's legal system index is designed to measure "Efficiency and integrity of the legal environment as it affects business, particularly foreign firms." The bureaucracy and red tape index is designed to measure "The regulatory environment foreign firms must face when seeking approvals and permits" and "The degree to which it represents an obstacle to business."⁷⁸ The BE for a country is calculated by summing the three sub-indices and dividing by three. Using as regressors GDP per capita in 1960, secondary education levels in 1960, primary education levels in 1960, 1960-1985 average ratio of government consumption expenditure (net of spending on defense and education) to GDP, number of revolutions and coups, number of assassinations, purchasing-power parity value for the investment deflator and its deviation from the sample mean in 1960, dummies for Africa and Latin America, and a measure of political stability based on BIC indices, Mauro found that a one point increase in BE was correlated with an increase of 0.2 percentage points in the average annual growth rate in per capita GDP for the period 1960-1985. When he included the investment rate as a variable, the increase dropped to 0.1

⁷³ *Ibid.* at 78.

⁷⁴ *Ibid.* at 79.

⁷⁵ P. Mauro, "Corruption and Growth" (1995) 110 *Quarterly Journal of Economics* 681-712.

⁷⁶ Quoted from Business International Corporation, *Introduction to the Country Assessment Service* (New York: Business International Corporation, 1984) in Mauro *ibid.* at 684.

⁷⁷ Mauro, *supra* n.9 at 702-03.

⁷⁸ Quoted from Business International Corporation, *Introduction to the Country Assessment Service* (New York: Business International Corporation, 1984) in Mauro *ibid.* at 684

percentage points, and the correlation became statistically insignificant. Once again, the drop indicates that corruption influences growth via its influence on investment.⁷⁹

The suspicion that corruption influences growth via its influence on investment gains credence from a recent World Bank study in which almost 4000 entrepreneurs in 69 countries were asked to rate the seriousness of fifteen potential obstacles to business on a scale of 1 (no obstacle) to 6 (very strong obstacle).⁸⁰ The results of the surveys were reported by regional groups of countries in order to preserve anonymity of particular countries. In all regions of LDCs, with the exception of Asian countries and one region composed of transitional economies, corruption was perceived to be among the three most important obstacles to business.⁸¹

The studies we have reviewed to this point all demonstrate the impact of effective administration on development. The next study which we examine in this section, due to LaPorta et al., focuses on determining the effects of ethnolinguistic fractionalization, legal origin, and religion on various measures of quality of government.⁸² Assuming that the quality of government influences growth (as the previous three studies examined indicate), any influence which these three variables have on the quality of government will indirectly influence growth.

LaPorta et al. divide a long list of indicators which might be thought to bear on the quality of government into five categories: measures of (1) interference with the private sector, (2) efficiency, (3) output of public goods, (4) size of public sector, and (5) political freedom. LaPorta et al. base their regression study on data drawn from a large number of different sources covering up to 152 countries. Because of the large number of variables involved, we skip over the technical details of their regression study, and move directly to their results. LaPorta et al. found that high ethnolinguistic fractionalization (EF) is associated with more interventionism; lower government efficiency; inferior provision of public goods; smaller government, as measured by transfers, consumption, and public employment; larger government, as measured by the share of the economy belonging to state enterprises; and less political freedom. However, when LaPorta et al. controlled for per capita income and latitude, the correlations between EF and poor government became insignificant, with the exception of the correlation with poor provision of public goods. LaPorta et al. suggest that the effect of the per capita income control on the correlations may indicate that EF reduces per capita income by adversely affecting government performance.⁸³

⁷⁹ *Ibid.*

⁸⁰ A. Brunetti, G. Kisunko & B. Weder, "How Businesses See Government: Responses from Private Sector Surveys in 69 Countries" IFC Discussion Paper No.33 (available for download at <<http://www.worldbank.org/ifc/DEPTS/OPS/ECON/PUBS/DP33/Dp33.htm>>

⁸¹ Interestingly, uncertainty in regulatory policy and uncertainty in administration of regulations were perceived as amongst the most serious obstacles to business only in Latin America and in transitional economies.

⁸² R. LaPorta, F. Lopez-de-Silanes, A. Shleifer & R. Vishny, "The Quality of Government" (1999) 15 *Journal of Law, Economics, & Organization* 222-79.

⁸³ *Ibid.* at 245, 261.

La Porta et al. found that socialist legal origin is, in general, associated with more interventionism, less efficiency, bigger government transfers, and less democracy. French legal origin is correlated with more interventionism, less efficiency, less political freedom, and lower provision of public goods.⁸⁴

Finally, LaPorta et al. found that governments in Catholic countries tend to be more interventionist, less efficient, worse at providing public goods, tend to have smaller governments, and tend to be slightly less democratic. Most of these effects become insignificant once LaPorta et al. control for latitude and per capita income. As with the effects of EF, LaPorta et al. suggest that the most plausible explanation of this fact is that the poor functioning of governments in Catholic countries reduces levels of income relative to Protestant countries. The same tendencies, though more pronounced, were found for Muslim countries, even after controlling for per capita income.⁸⁵

Perhaps more interesting are some of the results LaPorta et al. obtained by examining the relationships between the indices of quality of government they employ. In particular, they found that larger governments, as measured by their indices of government size, actually tend to perform better on the other indices of quality of government than small governments. They also found an interesting exception to the general rule that countries which were successful at providing public goods tended to be less interventionist: there was no tendency for countries which were successful at providing public goods to have lower top marginal tax rates.⁸⁶

A recent study by Mahoney comparing the growth performance of common law and civil law countries confirms more directly the relationship between growth and legal origin suggested by LaPorta et al.'s study.⁸⁷ Mahoney examined the growth performance of 96 countries between 1980 and 1997. His data were obtained from the World Bank's *World Development Indicators* (1999). Countries which were communist for any part of the time period were excluded. Mahoney used Reynolds and Flores's descriptions to classify the legal systems as common law or civil law.⁸⁸ He excluded countries with predominantly Islamic legal systems, three countries whose legal systems had evolved largely independently from European influence—Eritrea, Ethiopia, and Iceland—and one country whose legal systems was a hybrid of civil and common law traditions—Cameroon. Mahoney performed three regression analyses. In the first, the independent variables were a dummy for legal system, ln (1980 GDP per capita), and ln (1980 rate of enrollment in secondary education). In the second, a fourth independent variable was added: the ratio of the sum of imports and exports to GDP. In the third, ln (land area) and ln (economically active population) were used as

⁸⁴ *Ibid.* 261-62.

⁸⁵ *Ibid.* at 262-63.

⁸⁶ *Ibid.* at 239.

⁸⁷ P. G. Mahoney, "The Common Law and Economic Growth: Hayek Might be Right" (1999) draft prepared for Corporate Governance conference at the Davidson Institute, University of Michigan, September 24-25, 1999.

⁸⁸ T. H. Reynolds & A. A. Flores, 1989. *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World*. (Littleton, Colorado: Fred B. Rothman & Co, 1989).

proxies for the effect of trade on growth, instead of ratio of the sum of imports and exports to GDP. In all three regressions, Mahoney found that the growth rate in per capita GDP was about one percentage point higher in common law countries than it was in civil law countries.

Law making institutions and development

There is a great deal of debate over the relationship between democracy and economic growth. Some authors have argued that authoritarian regimes foster economic growth better than democracies. Huntington, for instance, argues that democratic governments are subject to pressures for immediate consumption, which, if heeded, reduce levels of investment and, thereby, growth.⁸⁹ It is also argued that democracies, unlike authoritarian regimes, are liable to succumb to pressures to carry out inefficient redistributions of wealth.⁹⁰ On the other hand, proponents of the economic virtues of democracy point out that the very independence from public pressure which is touted as a virtue of autocracy, may also be a liability. Autocrats are free to direct the nation's resources into nonproductive investments, or simply to plunder them. Democratic institutions, it is argued, provide a check on governmental power which prevents squandering of the nation's resources. Proponents of the economic virtues of democracy have also argued that democracy nurtures certain institutions which are conducive to growth—contract compliance and the rule of law, for instance.⁹¹

Bhagwati, who once argued that LDCs face a "cruel choice" between growth and democracy,⁹² has recently argued that democracy may be conducive to growth after all.⁹³ Bhagwati cites a number of factors which may allow democracies to grow more effectively than authoritarian regimes: democracies are less likely to go to war; democracies may permit cathartic airing of problematic issues which authoritarian regimes bottle up; lacking the restraining hand of the citizenry, authoritarian regimes may be more prone to wastefully extravagant expenditures, and may be more likely to "go overboard" in takings from their subjects. Finally, democracies may experience a higher quality of development, in the sense that they are more likely to direct public resources to the relief of extreme poverty. Sen has argued, citing the experience of India, that democracies fare better at eliminating famines than authoritarian regimes, because they are better at disseminating news of famines.⁹⁴ Bhagwati agrees with Sen that democracies have done a better job of eradicating famines than authoritarian regimes, but argues that effective dissemination of news is not the reason for the advantage. Rather, democracies do better at eradicating famine because of the possibility they afford for the affected citizenry to mobilize and get something done about their plight. Bhagwati acknowledges that democracy has certain pitfalls: democracies may

⁸⁹ S. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968).

⁹⁰ See, for instance, S. Haggard, *Pathways from Periphery: The Politics of Growth in Newly Industrializing Countries* (Ithaca: Cornell University Press, 1990) at p.262.

⁹¹ See, for instance, M. Friedman, *Capitalism and Freedom* (Chicago: Chicago University Press, 1962).

⁹² J. Bhagwati, *The Economics of Underdeveloped Countries* (London: Weidenfeld and Nicolson, 1966) at 204.

⁹³ J. Bhagwati, "The New Thinking on Development" (1995) 6(4) *Journal of Democracy* 50-64.

⁹⁴ J. Dreze & A. Sen, *Hunger and Public Action* (Oxford: Clarendon Press, 1989).

become dominated by wasteful lobbying. However, he thinks that the dangers of interest group lobbying are exaggerated, and that there is little reason to believe that authoritarian regimes would direct resources more efficiently.

The empirical evidence on the relationship between democracy and growth is mixed.

Using a sample of about 100 countries, Helliwell performed regressions examining the relationship between a composite of Gastil's indices of civil and political freedoms⁹⁵ and growth in the period 1960-1985; and between Bollen's index of political democracy and growth in the same period.⁹⁶ Helliwell found that there was a small but statistically insignificant negative effect of democracy on growth.⁹⁷ Helliwell suggests that the lack of a measurable relationship between democracy and growth may be the result of negative and positive effects of democracy balancing each other off. On the one hand, Helliwell acknowledges the theoretical literature arguing that democracies will experience slower growth because of their vulnerability to pressures from special interest groups to redistribute wealth inefficiently. On the other hand, Helliwell finds that increased levels of democracy are correlated with higher subsequent schooling and investment levels, indicating that democracy may promote growth by encouraging higher levels of schooling and investment.

Other studies have found evidence of a positive correlation between growth and various indices of freedoms. In a study of growth in 115 countries over the period 1960–1980, Scully found that countries with high levels of political, civil and economic liberties grew at three times the rate, and were two and a half times as efficient at transforming inputs into national outputs as countries where these liberties are circumscribed.⁹⁸ Interestingly, Scully also found that income is more equally distributed in countries with high levels of political, civil, and economic liberty.⁹⁹

Gwartney and Lawson's *Economic Freedom of the World* reports have occasionally been cited in the context of discussions of the relationship between democracy and growth.¹⁰⁰ Gwartney and Lawson survey the relationship between growth and a complex index of economic freedom in 115 countries. In their 1997 report, they divided the countries into quintiles, according to their ranking on the economic freedom index in 1995. For the period

⁹⁵ R. D. Gastil, "The Comparative Survey of Freedom: Experiences and Suggestions" (1990) 25 *Studies in Comparative International Development* 25-50.

⁹⁶ See K. A. Bollen, "Issues in the Comparative Measurement of Political Democracy" (1980) 45 *American Sociological Review* 370-90; "Political Democracy: Conceptual and Measurement Traps" (1990) 25 *Studies in Comparative and International Development* 7-24.

⁹⁷ J. F. Helliwell, "Empirical Linkages Between Democracy and Economic Growth" 24 *British Journal of Political Science* 225-48 at 240.

⁹⁸ G. W. Scully, *Constitutional Environments and Economic Growth* (Princeton; Princeton University Press, 1992) at 183. Scully uses Gastil's indices of political, civil, and economic liberties: R. D. Gastil, *Freedom in the World* (Westport, Conn.: Greenwood Press, 1987).

⁹⁹ *Ibid.* at 196-97.

¹⁰⁰ J. Gwartney & R. Lawson, *Economic Freedom of the World: 1997 Annual Report* (Vancouver: Fraser Institute, 1997).

1985 to 1996, the bottom quintile had an average growth rate in per capita GDP of -1.9%, the fourth quintile of 0.1%, the third of 1.1%, the second of 1.8%, and the top quintile of 2.9%. These results indicate a strong correlation between growth and the freedom index. However, it is important to note that Gwartney and Lawson make no attempt to control for the influence of other factors by using a regression analysis. As a result, their results are of limited evidential value for establishing a causal relationship between economic freedom and growth. Furthermore, given our present purposes of determining the relationship between democracy and growth, it is important to note that Gwartney and Lawson are studying the relationship between *economic* freedom and growth, not political freedom. As such, the study is of little value in determining whether there is a relationship between democracy and growth. Indeed, none of the 17 sub-indices which make up the freedom index concerns the level of democracy.

Przeworski and Limongi survey 18 studies which collectively generated 21 findings on the relationship between democracy and growth. Eight found democracies more conducive to growth, eight found authoritarian regimes to be more conducive to growth, and five found no significant difference.¹⁰¹ In a more recent study, Barro found that growth tends to increase with democracy at low levels of democracy, but to decrease with increases in democracy at high levels of democracy.¹⁰² Barro suggests the following interpretation of his results: at low levels of democracy, an increase in political rights provides a beneficial check on government power, and brings about increased investment and growth, whereas at high levels of democracy an increase in political rights impedes growth by increasing concern over distributional issues.¹⁰³ Barro is at pains, however, to point out that the relationships between growth and democracy which he finds are weak, and that they do not warrant the conclusion that level of democracy is an important factor in development.¹⁰⁴

Democracy may, however, have a positive influence on growth in more subtle ways. Ethnic fractionalization has a detrimental effect on growth. This fact was suggested by the correlation LaPorta et al. found between EF and poor quality of government. Collier confirms the detrimental effect directly. In a recent cross-sectional regression study, Collier found that a maximally ethnically diverse would have a growth rate which lags that of an otherwise identical homogeneous society by 1.6 percentage points, and a steady state income of about one fifth that of the homogeneous society.¹⁰⁵ However, Collier also found that

¹⁰¹ A. Przeworski & F. Limongi, "Political Regimes and Economic Growth" (1993) 7(3) *Journal of Economic Perspectives* 51-69 at 60-61.

¹⁰² Barro, *supra* n.1 at 58-61. These results are obtained using the same system as that discussed above in subsection 1. Barro used Gastri's subjective index of political rights as a measure of democracy. Gastri defined political rights as follows: "Political rights are rights to participate meaningfully in the political process. In a democracy this means the right of all adults to vote and compete for public office, and for elected officials to have a decisive vote on public policies" (quoted in Barro, *ibid.* at 53).

¹⁰³ *Ibid.* at 59.

¹⁰⁴ *Ibid.* at 59.

¹⁰⁵ P. Collier, "The Political Economy of Ethnicity" (Paper prepared for the Annual World Bank Conference on Development Economics, Washington, April 20-21, 1998) at 6.

ethnically diverse societies reap remarkable benefits from democracy. He found that while in a completely undemocratic political system, a homogeneous society will grow at an annual rate 3 percentage points higher than a maximally fractionalized society, the gap narrows to 0.4 percentage points for fully democratic political systems.

Clague et al. address the relationship between democracy and growth in an oblique manner. Having found in "Institutions and Economic Performance: Property Rights and Contract Enforcement" that protection of property rights is significantly correlated with economic growth,¹⁰⁶ they determine to discover if there is a relationship between level of democracy and protection of property rights.¹⁰⁷ Their results are equivocal. They find that long-duration autocracies protect property rights better than short duration autocracies. They find that long-duration democracies protect property rights better long-duration autocracies or short-term governments of either type, but they also find that replacing an autocracy with a democracy tends to decrease protection of property rights.¹⁰⁸ They suggest that the decrease is a result of the fact that new democracies tend to be marginal democracies subject to extreme populist pressures.

B. Property Rights

Property rights play a central role in virtually all theories of development. Modernization 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, offers a natural method of achieving their goals.

In the following subsections we discuss evidence concerning the effects of the following types of reforms in property law: formalization of title to land; individualization (and formalization) of title to land held under communal tenure; reforms designed to enhance the alienability of property; and redistribution of land.

Titling projects: formalizing land ownership

From an economic perspective legally enforceable property rights are considered desirable because they provide security of tenure. Security of tenure gives landholders

¹⁰⁶ Clague et al., *supra* n.1.

¹⁰⁷ C. Clague, P. Keefer, S. Knack & M. Olson, "Democracy, Autocracy, and the Institutions Supportive of Economic Growth" in Clague, ed., *Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries* (Baltimore: Johns Hopkins University Press, 1997) 91-120.

¹⁰⁸ *Ibid.* at 114.

incentives to invest in land conservation and improvement. For example, Anne Varley writes that the justification for land tenure legalization in squatter settlements is that it will lead to housing improvements. In such settlements, “the threat of eviction prevents people from investing time and money in improving their housing conditions; with legalization, this fear disappears and the new security of tenure therefore stimulates housing improvements and settlement consolidation.”¹⁰⁹ Security of tenure also helps to stave off costly disputes and to facilitate wealth-enhancing transfers of property.¹¹⁰ Finally, it is assumed that security of tenure contributes to land’s usefulness as collateral thus increasing access to credit.¹¹¹

The evidence on whether titling actually provides all of these theoretical economic benefits is mixed. For example, a study of two Brazilian frontier states found that obtaining legal title had positive effects on both land values and investment.¹¹² However, other evaluations of titling programs in both rural and urban contexts suggest that there may be little need for ambitious registration and titling projects. In Ecuador, for example, it appears that acquisition of clear title has had little impact on behavior. There was little or no difference between titled and untitled land with regard to investment in infrastructure, credit use, or crop yields.¹¹³ Similarly, there is a continuing debate about whether indigenous African land tenure systems actually represent a constraint on agricultural productivity. A study by Angelique Haugerud on land tenure and agrarian change in Kenya shows that among the Embu of Kenya, land titling has not led to significant investments in agriculture. Even though credit is now available to titleholders, funds are most often channeled into off-farm investments such as children’s education.¹¹⁴ Studies from Ghana, Kenya and Rwanda have also found that land titling has little effect on agricultural productivity.¹¹⁵

¹⁰⁹ Anne Varley, “The Relationship between Tenure Legalization and Housing Improvements: Evidence from Mexico City,” (1987) 18 *Development and Change* 463.

¹¹⁰ Gershon Feder and David Feeny, “Land Tenure and Property Rights: Theory and Implications for Development Policy,” in (1991) 5(1) *The World Bank Economic Review* 135, at 139-41.

¹¹¹ *Ibid*, 141-2.

¹¹² Lee J. Alston, Gary D. Libecap and Robert Schneider, “The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier” (1996) 12 *Journal of Law, Economics and Organization* 25.

¹¹³ Steven E. Hendrix, “Myths of Property Rights,” in (1995) 12(1) *Arizona Journal of International and Comparative Law* 183, at 193-4.

¹¹⁴ Thomas J. Bassett, “Introduction: The Land Question and Agricultural Transformation in Sub-Saharan Africa,” in *Land in African Agrarian Systems*, Thomas J. Bassett and Donald E. Crummey, eds. (Madison, Wisconsin: The University of Wisconsin Press, 1993), at 14. Of course, those off-farm investments could represent the most efficient use of farmers’ resources. In other words, titling might have beneficial economic effects aside from its effects on investment. For example, titling might simply facilitate alienability and the use of land as collateral, either of which might generate wealth that can be used for *either* consumption or investment purposes. To date however, most empirical studies have focused on the relationship between titling and productivity-enhancing investments in land.

¹¹⁵ S. Migot-Adholla, P. Hazell, B. Blarel and F. Place, “Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?” in (1991) 5(1) *The World Bank Economic Review*: 155-75; F. Place and P. Hazell, “Productivity Effects of Indigenous Land Tenure Systems in Sub-Saharan Africa,” in (February 1993) 75 *American Journal of Agricultural Economics*: 10-19.

Interestingly enough, several African case studies show that “registration can create rather than reduce uncertainty and conflict over land rights.”¹¹⁶ One reason for this lies in the idea that while titling reduces 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.¹¹⁷ 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 secondary (usufruct vary) rights to land. Denying such groups their rights could also lead to output losses. Another reason is that the registration process is often open to manipulation and abuse by elites.¹¹⁸

In recent decades, land tenure legalization has become a major area of reform in informal settlements developed illegally, either through land invasions or illegal subdivisions. A number of published studies, particularly by researchers with the World Bank, have found that “increased security of tenure positively and significantly affect[s] the likelihood of housing investment.”¹¹⁹ These results have been interpreted as providing support for the inclusion of formal titling in settlement upgrading projects.¹²⁰ However, many of these studies were undertaken in the context of integrated upgrading programs that included other elements besides formal titling such as the installation of services. Thus, the relationship between tenure legalization and increased security of tenure and housing improvements does not seem clear-cut; the integrated nature of upgrading makes it very hard to isolate the effect of legalization on housing investment.¹²¹ Indeed, Omar Razzaz concludes that formality of tenure could enhance security of tenure and investment, but emphasizes that legality is neither a necessary nor sufficient condition for secure tenure.¹²² As he puts it: “Although the evidence of investment in housing following legalization and granting of legal title is well documented, the line of causality is not as well understood.”¹²³ His fieldwork in Jordan revealed that settlers built with permanent materials despite the risk of demolition because they knew that by investing in permanent materials, their claim to the land would be legitimized. Thus, consolidation and investment seem part of the process of gaining security,

¹¹⁶ David A. Atwood, “Land Registration in Africa: The Impact on Agricultural Production,” in (1990) 18(5) *World Development* 659, at 663.

¹¹⁷ *Ibid.*, 663-4.

¹¹⁸ Jean-Phillipe Platteau, *Reforming Land Rights in Sub-Saharan Africa: Issues of Efficiency and Equity* (UNRISD: United Nations Research Institute for Social Development, Discussion Paper no. 60, March 1995), 17-9.

¹¹⁹ Raymond J. Struyk and Robert Lynn, “Determinants of Housing Investment in Slum Areas: Tondo and Other Locations in Metro Manila,” in (November 1983) 59(4) *Land Economics* 444, at 453. See also L.S. Burns and D.C. Shoup, “Effects of Resident Control and Ownership in Self-Help Housing,” in (February 1981) 57(1) *Land Economics*: 106-14.

¹²⁰ Emmanuel Jimenez, “The Magnitude and Determinants of Home Improvements in Self-Help Housing: Manila’s Tondo Project,” (1983) 59(1) *Land Economics*: 70-83.

¹²¹ Varley, 465-8.

¹²² Omar M. Razzaz, “Examining Property Rights and Investment in Informal Settlements: The Case of Jordan,” in (November 1993) 69(4) *Land Economics*: 341-55.

¹²³ *Ibid.*, 348-9.

and not simply a by-product. That is, land rights do lead to increased investment, but the reverse is also true. Furthermore, he found that as the threat of demolition is reduced and essential services are provided, the willingness to pay for title diminishes.

Privatization of land held under customary tenure

Privatization (or individualization)¹²⁴ of property rights may be the natural evolution of an economy moving toward market-based principles or the product of an imposed legal change. In either case, it is widely believed that individual ownership is the key to agricultural development. Indigenous tenure systems are viewed as inhibiting investment security, efficient resource allocation, land improvements and conservation, access to credit, and land transfers. As noted by Trebilcock, advocates for customary land reform in the Third World argue that individualization of property rights brings efficiency gains; individual incentive is seen as the key to higher living standards and overall economic growth.¹²⁵ Yet, empirical evidence is far from conclusive on the relative benefits of individualized tenure.

Communal systems of land tenure predominate in much of sub-Saharan Africa. Those systems have proved to be quite dynamic, responding to demographic pressure and economic opportunities. The commercialization of communal lands has not necessarily led to individualized land rights; different forms of tenure such as tenancy and sharecropping have emerged within customary systems in response to new economic opportunities. Governments in the region have largely left customary systems alone. Where land legislation has led to registration systems and other means of individualization and privatization of communal land rights, thriving land markets or access through inheritance have not resulted. In Kenya, land “sales” are usually only respected if they represent transfers between kinsmen. In Ghana, “descendants of ‘strangers’ who bought land in good faith from the original holders and subsequently had it registered, faced litigation from the holder’s descendants who claimed that the original ‘strangers’ had rights only during their own lifetime, so any ‘sale’ applied only to that period.”¹²⁶ Thus, individualization has not always proved more efficient than communal tenure systems. Furthermore, individualizing property rights in communal land regimes may lead to inefficient resource utilization and reduced economic growth: if traditional modes of succession prevail, extreme fragmentation of land can result.¹²⁷ This points to the need for complementary reforms to individualization to ensure beneficial results. As regards agricultural productivity, Raymond Noronha argues that neither

¹²⁴ The two terms are used interchangeably.

¹²⁵ Michael J. Trebilcock, “Communal Property Rights: The Papua New Guinean Experience,” in *University of Toronto Law Journal* (Fall 1984) 377, at 392. See also Harold Demsetz, “Towards a Theory of Property Rights,” in (May 1967) 57(2) *American Economic Review*: 347-59. Demsetz was one of the early economists who established the relationship between changes in property rights (e.g. from “communal” to private) and factors such as enforcement technology, market value, and scarcity.

¹²⁶ Jazairy, I et al. “Access of the Rural Poor to Resources: Land,” in *The State of World Rural Poverty: An Inquiry into its Causes and Consequences*. (London: International Fund for Agricultural Development, 1996), 123.

¹²⁷ Trebilcock, *op. cit.* 406.

communal nor individual tenure systems have a direct bearing on agricultural output but that more important variables appear to be such factors as security of possession, access to other productive resources (labor, credit), and managerial capacity.¹²⁸

Like titling, individualization of tenure can bring certain costs. For example, individualization of tenure signifies the elimination of both group rights and use rights held by people other than the individual owner. This places the new owner in a position of power relative to other community members, which means that disadvantaged members of the community suffer. In Kenya, for example, the process of individualization usually designates the husband as the owner of the land, eliminating protections that wives had previously enjoyed under indigenous customary systems. Women have been dispossessed, with all property rights passing to the men. Thus, individualization of tenure has actually decreased security of tenure for women in some areas.

Alienability

The expected economic benefits from a removal of ownership restrictions on land include increased access to credit, liberated land markets and increased investment. As noted in the previous section, however, formal rights of alienability do not necessarily lead to such outcomes.

This is illustrated by the example of Mexico. In Mexico, Article 27 of the Mexican Constitution of 1917 became the cornerstone of land tenure law in the country, with inalienable, communally held *ejidos* the principal vehicle of land reform. Changes to Article 27 enacted in 1992 with the new Agrarian Law included revisions lifting traditional restrictions on both ejidatarios' ability to transfer rural land and the capacity of commercial entities to own such land.¹²⁹ Thus, there was an opening of a market in agricultural land.

The most dramatic consequence of the counter-reform has been the indigenous uprising in Chiapas, the southernmost state of Mexico, by the Zapatista Army for National Liberation. Here, the pace of neoliberal reform (embodied in the New Agrarian Law) has been halted because it is feared that the loss of the ejido will effectively mean the end of indigenous agriculture and way of life in the country. In the rest of the country, recent literature has revealed that the changes made have not significantly advanced the modernization cause of the ruling Institutional Revolutionary Party (PRI) in the countryside. Notwithstanding the fear (hope by some) of immediate changes in ownership patterns leading to a reconcentration of land in the hands of the few, actual changes have been much more modest. The Program for the Certification of Ejido Land Rights and the Titling of Urban

¹²⁸ Raymond Noronha, *A Review of the Literature on Land Tenure Systems in Sub-Saharan Africa* (Washington, D.C.: World Bank, Research Unit, Agricultural Development Department, 1985).

¹²⁹ Wayne A. Cornelius and David Myhre, "Introduction," in *The Transformation of Rural Mexico: Reforming the Ejido Sector*, Wayne A. Cornelius and David Myhre, eds. (San Diego: Center for U.S. – Mexican Studies, University of California, 1998).

House Plots (PROCEDE) is only being implemented slowly. Furthermore, even in ejidos where individual land rights have been certified under the program (the first step in alienability), relatively few ejidatarios have sought to sell their land, perceiving it as a source of financial security. Similarly, there have not yet been significant increases in the level of investment in the ejido sector.¹³⁰

It must be recognized that informal systems have proved quite flexible in allowing for alienability; formalization has not been necessary for alienability to occur. As noted by Thomas Bassett, “the circulation of land via borrowing, inheritance, leasing, and pledging is a key characteristic of flexible indigenous tenure systems.”¹³¹ Steven Lawry and Mahir Ôaul show how land transfers have arisen between indigenous landholders and outsiders in rural Lesotho and Burkina Faso within the context of indigenous land systems.¹³² These case studies highlight the flexibility of indigenous tenure systems in allowing land borrowing and leasing arrangements to accommodate the needs of the landless and commercial farmers. Indeed, Ôaul argues that a major reason why transfers have taken place in Burkina Faso is because the lender feels secure that his permanent rights in the land are recognized. The flexibility of the system in allowing for alienability only breaks down when the lender is unsure about regaining control over borrowed land – formal land rights have nothing to do with it.¹³³

It must also be recognized that there are costs to introducing alienability (and individualized tenure). As pointed out in the context of Papua New Guinea’s largely communal tenure regime, there is the risk that some communal members will be deprived of the security provided by the assumed right to count on land as a source of subsistence and to look to “the social network of reciprocal obligations associated with kinship relations in the event that income-earning opportunities elsewhere in the economy cannot be realized.”¹³⁴ Thus, there is a wealth pooling in communal property regimes that may be lost if alienability (and individualized tenure) is introduced. Also, the impact of individualization on traditional lifestyles and values must be taken into account.¹³⁵

¹³⁰ Ibid.

¹³¹ Bassett, 20.

¹³² Stephen W. Lawry, “Transactions in Cropland Held Under Customary Tenure in Lesotho” and Mahir Ôaul, “Land Custom in Bare: Agnatic Corporation and Rural Capitalism in Western Burkina,” both in *Land in African Agrarian Systems*, Thomas J. Bassett and Donald E. Crummey, eds. (Madison, Wisconsin: The University of Wisconsin Press, 1993).

¹³³ In the context of Papua New Guinea, land markets have not arisen as customary law does not contemplate the sale of land outside of the kin group. Cooter has argued that customary land law is capable of evolving and modernizing itself to provide for such markets, through the mechanisms of the land courts and the common law process. See Robert D. Cooter, “Inventing Market Property: The Land Courts of Papua New Guinea,” in (1991) 25(4) *Law and Society Review*: 759-801. On the other hand, Trebilcock has argued that customary law, on its own, cannot effectively deal with the growth of non-customary direct dealings in customary land; some sort of formalization is necessary to enhance economic productivity. See Trebilcock, *op. cit.*

¹³⁴ Trebilcock, *op. cit.*, 393.

¹³⁵ Ibid.

Important in any discussion of the alienability of property rights in the Third World is the nature of the legal framework for secured transactions, as this largely determines access to formal credit. Such access in agriculture, small-scale manufacturing, and other areas is seen as a key element in any development strategy. The problem in many developing countries is that property other than real property cannot readily serve as collateral.¹³⁶ It is very difficult for merchants, farmers and others to borrow against personal property such as equipment, inventory, accounts receivable, crops, or anything else they might use in the course of their trade or business. Where borrowers cannot use this property as collateral for loans, they must pay higher unsecured interest rates. Difficulties in securing loans with property other than real property have been observed throughout the Third World, and largely stem from deficiencies in the legal framework governing the creation, perfection and enforcement of security interests.¹³⁷

For example, in many developing countries, there are legal restrictions on the creation of security interests that float (for example, against goods whose composition changes, such as rotating inventory) or that attach to the proceeds of the sale of collateral (for example, when deposited in banks or used to purchase other merchandise).¹³⁸ Many laws require that movable property be placed under the physical control of a lender to qualify as collateral, and/or that each item of collateral be carefully and minutely described, raising the supervision costs of such loans. Problems in perfecting security interests largely arise from the absence of registries that “are public and indexed by borrower, by description or security interest, and by other relevant information.”¹³⁹ As such, lenders have a more difficult (if not impossible) task in determining if any prior superior claims to the collateral exist.¹⁴⁰ Problems in enforcing security interests arise from legal procedures that are long and costly relative to the economic life of most movable collateral; private parties cannot contract to repossess and sell collateral without a lengthy legal process. When judicial intervention or the action of government officials is required for enforcement, as is the case in many developing countries, it is not surprising that lenders will only accept real estate as collateral.¹⁴¹ Thus, difficulties in creating security interests, the high cost and lack of confidence in perfecting such interests, and the delays and high costs of enforcement block access to formal credit in the Third World. An improved system of secured transactions would facilitate the creation of security interests by allowing the use of movable property, account receivables and chattel paper as collateral. On the institutional side, there is a need

¹³⁶ This is also often true of real property, in the context of communal land systems with restraints on alienability. See *Ibid.*, at 397.

¹³⁷ Heywood Fleisig, “Secured Transactions: The Power of Collateral,” in *Finance and Development* (June 1996): 44-5.

¹³⁸ *Ibid.*, 45.

¹³⁹ *Ibid.*

¹⁴⁰ Heywood Fleisig, “The Power of Collateral: How problems in securing transactions limit private credit for movable property,” in *Public Policy for the Private Sector*. Note No. 43, April 1995. Can also be located at <http://www.worldbank.org/html/fpd/notes/43/43fleisig.html>.

¹⁴¹ Heywood Fleisig and Nuria de la PeZa, “Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit,” in (Spring 1997) 3 *NAFTA: Law and Business Review of the Americas*: 33-72.

for an accessible public registry that encourages and facilitates perfection of that collateral, while the administration of justice requires streamlining in the enforcement of valid security interests in cases of default by debtors.

Other legal barriers limiting access to credit in the context of security interests in developing countries include laws setting a minimum amount of real estate that cannot be taken from the debtor—the “homestead.” Such protection means that banks will not accept as collateral land that is exempt from seizure. Other laws exempt some types of movable property, such as tools of trade. As such, small borrowers will not be able to obtain productive loans to buy needed equipment secured by that equipment; lenders will know that such property will be pooled with exempt property and so will not accept it as collateral. Thus, homestead and exempt property provisions intended to protect borrowers actually limit access to credit as they raise associated transaction costs.¹⁴² Law can both promote and impede the use of security interests, and thus lending.

The underlying premise in our discussion has been that law, through the mechanism of security interests, plays an important role in lending. Indeed, many studies have confirmed that this is the case in the West, where the regime of secured transactions does not suffer from the problems in creating, perfecting and enforcing security interests prevalent in the Third World. Such studies lend support to the contention that all a developing country needs is a proper legal system of secured transactions to promote the use of security interests, which in turn will lead to increased lending and economic development. However, the relevance of security interests to lending and development is subject to debate. In a recent study on the role of law and legal institutions in economic development in various Asian countries, the authors found that many complex factors influenced the relevance of security interests to lending. Such factors included a government’s development strategy, the existence of substitutes for security interests (such as legal criminal sanctions or the illegal use of enforcers in cases of default), and macroeconomic performance, which affects the supply and demand of loans and thus the capacity of lenders to insist on secured lending. This suggests that the strength of a legal regime for secured transactions does not solely determine access to credit. That is, simply rewriting the law of secured transactions in a developing country may not be enough to increase lending and economic efficiency.¹⁴³

¹⁴² Heywood Fleisig, “The Right to Borrow: Legal and regulatory barriers that limit access to credit by small farms and businesses,” in *Public Policy for the Private Sector*. Note No. 44, April 1995. Also located at <http://www.worldbank.org/html/fpd/notes/44/44fleisig.html>.

¹⁴³ The study, which was not limited to Third World countries, did find that Asian lenders began to rely more on security interests as alternatives became relatively less effective and as markets replaced government management of the economy. See Katharina Pistor and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (New York: Published for the Asian Development Bank, Oxford University Press, 1998), chapter six, “The Relation Between Credit and Laws Governing Security Interests”.

Land redistribution

Land redistribution—parceling out agricultural lands taken from larger holdings above a certain size limit—has often been used to improve the access of the rural poor to land. As outlined in the section on titling projects, such a measure is supposed to improve the lives of those individuals who obtain land and contribute to the overall economic growth and productivity of the agricultural sector and society at large, as well as reduce inequalities of wealth. Another economic rationale for the redistribution of agricultural lands is that small farms generally have a higher value of output per unit of land and capital than large farms. Data from the 1960s for a number of Asian and Latin American countries clearly showed this inverse relation between farm size and productivity.¹⁴⁴

The most successful land redistribution programs occurred in Japan, Taiwan, and South Korea in the aftermath of World War II. In these countries, land was redistributed to tenant farmers. As owner-operators of family farms, these ex-tenants began investing in improvements, prospered, and created effective demand for goods and services. The ex-tenants paid for their land, and the former landlords were compensated and encouraged to invest in other enterprises. These reforms thus laid the foundation for the postwar process of economic and industrial development in these countries. The success enjoyed by these three countries has prompted similar programs in much of the Third World. Yet the experience in many developing nations suggests that very little progress has been made.

Redistributive land reforms are inherently difficult political undertakings because they directly affect the alignment of political and economic power within a nation. Japan, Taiwan and South Korea experienced successful redistribution because political commitment to land reform (including the provision of credit and other support services) in these countries was high (as was the level of U.S. aid). Such has not been the norm in Third World attempts at redistributive land reforms. There are a few exceptions. The state of West Bengal in India implemented a successful land reform program that redistributed land and provided production support to the landless.¹⁴⁵ The Indian state of Kerala experienced similar success.¹⁴⁶ However, political considerations have largely inhibited the adoption of significant and effective agrarian reform laws in other parts of the Third World. The experiences of the Central American states of Guatemala and Honduras are illustrative examples. In both countries, nothing more than token redistribution programs have been accomplished, notwithstanding large numbers of landless citizens and substantial tracts of good agricultural land available, largely as the result of a lack of political support from the elites.¹⁴⁷ In the Philippines, an attempt at land reform has been made, but the results have not

¹⁴⁴ Peter Dorner, *Latin American Land Reforms in Theory and Practice: A Retrospective Analysis* (Madison, Wisconsin: The University of Wisconsin Press, 1992), 23.

¹⁴⁵ Jazairy, I. et al., *op. cit.* 107.

¹⁴⁶ Ronald J. Herring, "Explaining Anomalies in Agrarian Reform: Lessons from South India," in *Agrarian Reform and Grassroots Development: Ten Case Studies*, Roy L. Prosterman, Mary N. Temple and Timothy M. Hanstad, eds. (Boulder and London: Lynne Rienner Publishers, 1990).

¹⁴⁷ Rupert W. Scofield, "Land Reform in Central America," in *Agrarian Reform and Grassroots Development*:
(continued...)

lived up to early promises as the new agrarian law has not effectively addressed the problem of large corporate farms.¹⁴⁸

The importance of political elites and their support for land reforms is underlined by the examples of Mexico and Bangladesh. Until 1992, Article 27 of the Mexican Constitution of 1917 gave the government a constitutional mandate and the requisite authority to expropriate land from large landholders and give it to eligible agrarian communities.¹⁴⁹ However, the most extensive redistributions only occurred during the presidency of Lázaro Cárdenas (1934-40); the effectiveness and pace of land reform before and after Cárdenas were sporadic at best.¹⁵⁰ In Bangladesh, the traditional system of relationships of people to the land—which is characterized by a hierarchy of interests in land that defines one's status and relative power—has precluded a fundamental restructuring of rights to land in Bangladesh through land reform. This is evident in the most recent attempt at land reform: the Land Reforms Ordinance of 1984. A review of the main features of the law reveals that it was poorly conceived, rendering its main provisions unenforceable or meaningless. For example, the 1984 ordinance sets ceilings on the size of family holdings so as to bring about a redistribution of rights in land. Yet, ceiling laws of various types have been in effect in Bangladesh for many years and have been systematically circumvented by landholders, as they have always found different ways of redistributing land among family members. Such a longstanding practice of disguising the size of holdings does not bode well for the implementation of the current provisions. It can be inferred that those in power enacted such an ineffective law (both in design and implementation) because they benefited from the status quo.¹⁵¹ Thus, attempts to change the legal rules governing land rights in rural areas have often failed because they have not conformed to the existing political economy of many developing countries.

These examples demonstrate that the experience of land reform programs has varied across the Third World. Some land reform legislation has been poorly formulated, with loopholes allowing landholding elites to deny land to intended beneficiaries. As well, there have been delays in implementation or ineffective enforcement of such legislation, especially when administrative structures are dominated by those whose interests will be prejudiced by land reform. Clearly, a successful land redistribution program requires political commitment,

Ten Case Studies, Roy L. Prosterman, Mary N. Temple and Timothy M. Hanstad, eds. (Boulder and London: Lynne Rienner Publishers, 1990).

¹⁴⁸ Jeffrey Riedinger, "Phillipine Land Reform in the 1980s," in *Agrarian Reform and Grassroots Development: Ten Case Studies*, Roy L. Prosterman, Mary N. Temple and Timothy M. Hanstad, eds. (Boulder and London: Lynne Rienner Publishers, 1990).

¹⁴⁹ Cornelius and Myhre, *op. cit.*

¹⁵⁰ Susan R. Walsh Sanderson, *Land Reform in Mexico: 1910-1980* (Orlando: Academic Press, 1984); Meriless S. Grindle, "Agrarian Reform in Mexico: A Cautionary Tale," in *Agrarian Reform and Grassroots Development: Ten Case Studies*, Roy L. Prosterman, Mary N. Temple and Timothy M. Hanstad, eds. (Boulder and London: Lynne Rienner Publishers, 1990).

¹⁵¹ F. Tomasson Jannuzi and James T. Peach, "Bangladesh: A Strategy for Agrarian Reform," in *Agrarian Reform and Grassroots Development: Ten Case Studies*, Roy L. Prosterman, Mary N. Temple and Timothy M. Hanstad, eds. (Boulder and London: Lynne Rienner Publishers, 1990).

participation of potential beneficiaries in the design and implementation, effective administration, and financial support for complementary investments in infrastructure and services. Care must also be taken that inheritance laws do not reverse any gains from land redistribution programs, as continuous subdivision and fragmentation of landholdings by new smaller landholders will lead to plots of land too small to be productive agricultural units.

C. Commercial Law

Modernization theorists and many contemporary economists believe that formal Western-style commercial laws are prerequisites to achieving the levels of commercial activity that are characteristic of a modern market economy and that are required to achieve economic growth. By contrast, dependency theorists might argue that even if such institutions did play a critical role in the historical development of some societies, this does not mean that they will necessarily have the same beneficent effects in contemporary LDCs. In any event, for those who are inclined to adopt either the perspective of the dependency theorists, a welfarist perspective or a feminist perspective the distributive effects of various commercial laws might be of greater interest than their effects on aggregate levels of economic growth.

Within the past few years a number of sophisticated empirical studies have examined the relationship between the characteristics of countries' commercial laws and their rates of economic growth. Some of those studies are summarized below. Unfortunately we have found less research on the relationships between the form of commercial law and non-economic indicia of development.

Contract law

The main economic virtue of a formal system of contract law is that it provides a means for enforcing promises and thus facilitates non-simultaneous exchanges. This serves to expand the set of potential contracting opportunities, an expansion that is presumed to expand the set of opportunities to create wealth. However, at a theoretical level it is clear that formal legal institutions are only one of several mechanisms that might serve to enable non-simultaneous exchanges to take place. In principle personal morality, reputations, self-enforcement, or informal legal systems might serve to guarantee the performance of commercial promises as well as or better than a formal legal system.¹⁵²

There is some evidence to suggest that formal contract enforcement is not a prerequisite to economic development. As Grief points out,¹⁵³ in the developed world

¹⁵² Richard.A. Posner, "Creating a Legal Framework for Economic Development," (1998) 13 *The World Bank Research Observer* 1.

¹⁵³ Akerlof, "Contracting, Enforcement and Efficiency: Economics Beyond the Law" in Michael Bruon and Boris Pleskovic (eds.) *Annual World Bank Conference on Development Economics 1996* (World Bank, 1996) at 239.

widespread contracting without legally enforceable contracts has been documented in Medieval times among Mediterranean merchants¹⁵⁴ and more recently among mid-Western American businessmen¹⁵⁵ and international diamond traders in New York.¹⁵⁶ Similar evidence can be found in LDCs where it appears that informal mechanisms appear to permit significant amounts of exchange to take place within networks based on kinship and ethnicity. For example, African businessmen of Asian descent primarily interact with associates from the same ethnic background.¹⁵⁷

It is not clear that informal methods of contract enforcement are perfect substitutes for formal mechanisms. Gray observes that where reputation or personal morality form the basis of exchange new firms without family or ethnic connections may find it difficult to break into the contracting network.¹⁵⁸ For example, in Bulgaria private firms do not trust the formal enforcement mechanisms and hence they hesitate to deal with strangers and often require payment up front if they do. New firms encounter great difficulties in entering the market, and long-term contracts between firms are rare. The lack of new firms and new people can result in a reduction in new ideas and entrepreneurship. Furthermore, the need to find reliable business partners can impose high search costs, thus increasing transaction costs. The absence of legal enforcement mechanisms may also lead to violent methods of enforcement which entail large deadweight costs to society.

There is no conclusive evidence one way or another on the relative efficiency of informal and formal methods of contract enforcement. However, at the aggregate level the available evidence weakly supports some broad generalizations. For example, Grief distinguishes "collectivist" societies that rely upon personal reputation and trust in contracting from "individualist" societies that rely primarily upon formal legal mechanisms and reputation. He suggests in passing that "most collectivist societies are low-income economies and most individualist societies are high-income economies..." Nichols makes a similar observation.¹⁵⁹

These assertions are consistent with a recent study by Levine which finds that a) countries with legal systems that enforce contracts effectively have better developed financial intermediaries and b) the component of financial intermediary development defined by the

¹⁵⁴ Avner Grief, "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders" (1989) 44 *Journal of Economic History* 857.

¹⁵⁵ Stuart Macaulay, "Noncontractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55.

¹⁵⁶ Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry" (1992) 21 *Journal of Legal Studies* 115.

¹⁵⁷ T. Biggs et. al, "Enforcement of Contracts in an African Credit Market: Working Capital Financing in Kenyan Manufacturing," (1996) *Regional Program on Economic Development (RPED) World Bank Discussion Paper*.

¹⁵⁸ Cheryl W. Gray, "Reforming Legal Systems in Developing and Transition Countries," (1997) <http://www.worldbank.org/fandd/english/0997/articles/0140997.htm>

¹⁵⁹ Phillip M. Nichols, "A Legal Theory of Emerging Economies" (1999) 39 *Virginia Journal of International Law* 229.

legal and regulatory environment is positively associated with economic growth.¹⁶⁰ These conclusions are also consistent with the aggregate studies discussed above that have found a positive correlation between certain measures of contract compliance and economic growth. The difficulty with those studies is that they all rely upon subjective assessments of the likelihood of government repudiation of contracts and the overall level of law and order as measures of the effectiveness with which contracts are enforced. It is not clear that the law and order variable captures only the effectiveness with which contract law as opposed to how electively other bodies of law (*e.g.* criminal law) is enforced. As for the government contracts variable, it is not clear that the likelihood that government contracts will be enforced will always be perfectly correlated with the likelihood that contracts with private parties will be enforced. In fact, many legal systems treat government contracts differently from other contracts.¹⁶¹

Protection of investors

A great deal of recent scholarship has focussed on the ways in which commercial law influences the patterns of financial contracting observed in a society. For present purposes the most useful study in this vein is Levine's which finds that countries which give a high priority to creditors receiving the full present value of their claims have better developed financial intermediaries and higher rates of economic growth.¹⁶² This finding is based upon an assessment of the effects of three measures of creditors' rights: a) whether a country's bankruptcy and reorganization laws impose an automatic stay on secured creditor's upon the filing of a reorganization petition, b) whether management of a debtor firm is permitted to remain in place during reorganization proceedings and c) whether secured claims rank first in the distribution of proceeds of disposition of a bankrupt firm's assets or are subordinated to the claims of unsecured creditors such as government or workers. Levine finds that all three of these variables are positively correlated with the development of financial intermediaries and economic growth.

These findings are extremely interesting because legal scholars in developed countries continue to engage in theoretical debates about the economic consequences of granting more or fewer rights to creditors in insolvency. For example, Bebchuk and Fried have argued that it is *not* economically efficient to grant secured creditors claims priority over those of relatively vulnerable creditors such as workers and the government, essentially because secured creditors are better positioned to bear the risk of non-payment than those other creditors.¹⁶³

¹⁶⁰ R. Levine, "Law Finance and Economic Growth," (1999) 8 *Journal of Financial Intermediation* 8-35.

¹⁶¹ As mentioned above, Clague et al. also use the ratio of non-currency money to total money supply (CIM) as a measure of contract compliance. Even if this is a valid measure of contract compliance it does not indicate whether compliance is induced by formal as opposed to informal mechanisms of contract enforcement.

¹⁶² *Op. cit.*

¹⁶³ L. Bebchuk and J. Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy" (1996), 105 *Yale L.J.* 857.

Levine's findings are also interesting because they 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.

D. Taxation

There a number of perspectives that could be taken on the appropriate role of tax law in LDCs. Those committed to economic theories of development would focus on tax policies which promote economic growth. Those committed to the welfarist perspective might focus on the elimination of wealth disparities through progressive taxation, or on employment creation. Those interested in sustainable development might advocate the use of tax law to internalise or penalise negative externalities created by enterprises which exploit the environment in unsustainable ways. Whatever one takes the proper aim of tax policy to be, however, LDCs face considerable obstacles in translating their policies into reality, given widespread problems with tax evasion and tax avoidance. Indeed, in practice the main issue facing LDCs is often simply how to generate sufficient revenue to maintain the minimal government presence which virtually anyone would agree is essential to maintaining the stable and solvent society needed to nurture development, however development is defined. This section is divided into four subsections. In the first two subsections we will consider evidence regarding the relationship between law two possible aims of tax policy: (1) the welfarist goal of reducing income inequities and (2) the economic goal of promoting growth. Our discussion of the variety of types of tax measures available to LDCs will, of necessity, be selective. Most of the discussion will focus on personal income tax, and value added taxes (VATs). In the background of our discussion in both these subsections, however, will be the question of how law relates to what we might call the minimal goal of creating an adequate and stable public revenue stream. Ineffective tax administration is usually the main obstacle to effective revenue collection. In the third subsection we discuss methods of improving tax administration. The final subsection is a brief discussion of the relationship between the form of the institutions which create tax law and the success of tax reform efforts. To our knowledge there are no serious empirical studies on this relationship—not surprisingly given the difficulty of taxonomizing law making institutions for the purposes of conducting such a study. However, a number of lessons can be drawn on the basis of a broad range of anecdotal evidence from the numerous tax reforms undertaken over the last three decades in LDCs.

Taxation and welfarist goals

Reducing the large income inequities found in most LDCs is widely thought to be one of the proper functions of the tax system. However, views on how the tax system should accomplish this goal have changed markedly since the Second World War. Until the early 1970s, the prevailing view was that inequities should be reduced by highly progressive

income tax rates. Starting in the early seventies, however, the effectiveness of these measures was increasingly cast in doubt. Bird and DeWulf,¹⁶⁴ for instance, surveyed two dozen tax incidence studies—studies which measure the proportion of income paid in taxes in a variety of income brackets—and found that only four of the studies revealed significant progressivity, despite the fact that most of the countries surveyed had highly progressive income tax systems.

A number of factors contribute to this disparity between the actual effect of the tax system and the intended effect of the income tax component of the system. First, and most obviously, income tax represents only one component of the tax system. Duties and excise taxes, for instance, may reduce the progressivity of a tax system, particularly if they are applied to items which display low income elasticity in demand.¹⁶⁵ Second, nominal income tax rates are eroded by the presence of a large number of exemptions which are disproportionately used by the more wealthy. Thus, prior to 1986–87 reforms in Jamaica, a large number of tax credits were available for, amongst other things, personal allowances, savings, home ownership, and employment of helpers in the home. Furthermore, employers could grant their employees certain nontaxable perquisites. A study conducted by the Jamaica Tax Structure Examination Project found that perquisites averaged 15% of taxable income, but represented 30% for those with incomes over J\$18,000.¹⁶⁶

A third reason for the disparity between nominal and effective rates is tax evasion. In practice, income taxes in developing countries tend to be taxes on the incomes of employees of government and large firms, both because these organizations keep relatively good records and because they can be required to institute withholding schemes to collect income taxes. Employees of small firms, professionals and other self-employed, including the informal sector, by contrast, find it relatively easy to under-report their income, or simply not file tax returns at all. As a consequence, a great deal of income goes unreported in LDCs. A study of professionals in Argentina estimated under-reporting at 11% of average reported income for architects, and up to 94% of average reported income for lawyers in 1968. An estimated 70% of the 1.6 million Argentines eligible to pay taxes on non-wage income did not do so.¹⁶⁷ The consequences of this sort of under-reporting are significant—80% of gross income went unreported according to the study of Argentina. A study conducted in Guatemala estimated that in 1986, 1.6 billion Quetzals out of a national income of 9 billion Quetzals went

¹⁶⁴ R. M. Bird & L. H. DeWulf, "Taxation and Income Distribution in Latin America: A Critical Review of Empirical Studies" (1973) 20 International Monetary Fund Staff Papers 639 at 671. It should be noted that Bird and DeWulf view the implications of the studies they survey with skepticism: the main point of their paper is to question the methodology and reliability of tax incidence studies.

¹⁶⁵ It should be noted that the widespread assumption that indirect taxes like a value-added tax are necessarily regressive has increasingly been called into question. This issue is discussed below.

¹⁶⁶ R. Bahl, "The Political Economy of the Jamaican Tax Reform" in M. Gillis, ed., *Tax Reform in Developing Countries* (Durham: Duke University Press, 1989) 115 at 142.

¹⁶⁷ F. J. Herschel, "Tax Evasion and Its Measurement in Developing Countries" (1978) 33 Public Finance, 232 at 253-57.

unreported, or roughly 18% of income.¹⁶⁸ The National Tax Reform Commission (1986) in Pakistan estimated that for the 1983–84 assessment year, Rs 50.8 billion of income escaped assessment as compared to Rs 19.3 billion actually assessed.¹⁶⁹ A study by the Indian National Institute of Public Finance estimated unreported income at 15–18% of GDP for 1975–76 and 18%–21% for 1980–81.¹⁷⁰ With respect to the self-employed in particular, the final report of the Bolivian mission on tax reform estimates that \$b 55 million of income from self-employment went unreported in 1975, as compared to actual reported income from self-employment for the year of \$b 20 million.¹⁷¹

Under-reporting is exacerbated by a fourth cause of the disparity between actual and intended effect of income tax law: LDCs have tended to have tax administrations which are both poorly organized and liable to corruption. The reasons for poor administration are many: poor training, poor organization, and under-staffing, often exacerbated by poor pay.¹⁷² We discuss these reasons at more greater in subsection 3 below.

A final reason for the disparity between intent and effect of income tax law is bracket creep due to inflation. Where income tax brackets are not indexed to inflation, the high levels of inflation found in many LDCs end up subjecting comparatively low income earners to high tax rates. Prior to the 1985–86 tax reforms in Jamaica, for instance, taxpayers with incomes twice per capita GDP were subject to the maximum marginal rate of 57.5%.¹⁷³

In recent years, these considerations have led commentators to pay heed to the views expressed by Bird and DeWulf:

Taxes cannot, of course, make poor people rich. If our main concern is with poverty as such ... and the stunted opportunities of those whose incomes fall below some minimum decent standard, remedies must come primarily through the expenditure side of the budget If the principal aim of redistributive policy is to level up—to make the poor better off—the main role that the tax system has to play is thus the limited and essentially negative one of not making them poorer.¹⁷⁴

¹⁶⁸ Ministry of Finance, Government of Guatemala, reported in R. Bahl, J. Martinez-Vazquez & S. Wallace, *The Guatemalan Tax Reform* (Boulder: Westview Press, 1996) at 49-50.

¹⁶⁹ Reported in E. Ahmad & N. Stern, *The Theory and Practice of Tax Reform in Developing Countries* (Cambridge: Cambridge University Press, 1991) at 27.

¹⁷⁰ Reported in S. S. Bagai, *Black Money in India* (Bombay: K. V. Sangameshwaran Iyer, 1991) at 66.

¹⁷¹ R. A. Musgrave, director, *Fiscal Reform in Bolivia: Final Report of the Bolivian Mission on Tax Reform* (Cambridge: International Tax Program, Harvard Law School, 1981) at 291.

¹⁷² Bahl reports that in 1983 there were 150 vacancies among the 449 positions authorized for the income tax department in Jamaica, largely because salaries were so low — J\$9,000 compared with J\$14,000 with a private-sector accounting firm (*supra* n.3 at 133).

¹⁷³ Reported in World Bank, *Lessons of Tax Reform* (Washington: World Bank, 1991) at 24.

¹⁷⁴ R. M. Bird & L. H. DeWulf, *supra* n.1 at 672-73.

There is now widespread advocacy of a "leveling up" approach to tax reform which aims to reduce *absolute* impoverishment by reducing the tax burden on the least well off. This approach is to be contrasted with the "leveling down" approach popular prior to the 1970s, which advocated highly progressive income tax systems designed to reduce *relative* inequities.¹⁷⁵ Advocates of leveling up suggest reducing the progressivity of income tax rates while simultaneously raising basic exemptions so as to drop the least well off from the tax rolls. In most LDCs, the lion's share of income tax is paid by higher income earners, so dropping lower income earners off the tax rolls does not significantly reduce revenues. For instance, Pakistan's National Tax Reform Commission (1986) estimated that in 1983–84, 52% of personal income tax collections were realized from the 1.5% of taxpayers with taxable incomes above Rs 100,000, while only 24% of the total was collected from the 94% of taxpayers with less than Rs 50,000 in taxable income.¹⁷⁶ As for the drop in tax rates for those still subject to income tax, it is to be offset by eliminating exemptions and attempts to broaden the tax base to include hard-to-tax groups like professionals. It is hoped that dropping a large number of people from the tax rolls entirely, and simplifying the tax structure through elimination of exemptions and elimination of the multiple tax brackets prevalent in highly progressive systems, will free up the administrative resources needed to reach hard-to-tax groups. It is also hoped that reduced marginal rates will reduce the incentive to evade taxes.

The Jamaican reforms of 1986 followed this model. Jamaica instituted a basic standard deduction of J\$8,580—well above the per capita GDP of J\$5,706 for 1986—a flat rate tax of 33⅓%—the maximum rate pre-reform was 57.5%—eliminated exemptions for perquisites, and began to tax interest income over a certain amount—pre-reform interest income was untaxed. In some respects, the reform was a success. Despite the drop in marginal rates, revenue from the income tax went from 4.6% of GDP in the four years prior to the reform, to 6.3% in the four years after, suggesting that gains due to the base-broadening and simplification of the system outweighed the losses due to rate reductions.¹⁷⁷ However, the hoped for administrative improvements which would bring more non-wage sector income earners into the tax net did not materialize. As of 1991 only 3.8% of an estimated 70,000 filed tax returns.¹⁷⁸ As of 1993, only 274 of 458 authorized positions in the income tax department were filled by full-time employees.¹⁷⁹ Other impediments to effective

¹⁷⁵ Amongst the advocates of this approach are M. Gillis, "Tax Reform: Lessons from the Postwar Experience in Developing Nations" in M. Gillis, ed., *Tax Reform in Developing Countries* (Durham: Duke University Press, 1989) 492 at 497 (hereinafter "Lessons"); and W. Thirsk, "Overview: The Substance and Process of Tax Reform in Eight Developing Countries" in W. Thirsk, ed., *Tax Reform in Developing Countries* (Washington: World Bank, 1997) 1 at 15. Both the IMF and the World Bank now offer the leveling up approach as part of their standard advice to LDCs engaged in tax reform: see World Bank, *supra* n.10 at 26, and J. Stotsky, "Summary of IMF Tax Policy Advice" in P. Shome, ed., *Tax Policy Handbook* (Washington: International Monetary Fund, 1995) 279 at 281.

¹⁷⁶ Reported in E. Ahmad & N. Stern, *supra* n.6 at 28.

¹⁷⁷ R. Bahl, "The Jamaican Tax Reform: Its Design and Performance" in W. Thirsk, ed., *Tax Reform in Developing Countries* (Washington: World Bank, 1997) 167 at 192-93.

¹⁷⁸ *Ibid.* at 194-95.

¹⁷⁹ *Ibid.* at 220.

administration remained. For instance, bank secrecy laws make it impossible to audit interest income.¹⁸⁰ No incidence studies are yet available to measure the distributional effects of the reforms, although the relatively high basic exemption has surely dropped many of the least well off from the tax rolls.

Indonesia also followed the "leveling-up" model in 1984, reducing its top marginal rate from 50% to 35%, increasing the basic exemption from approximately \$1,000 U.S. to \$3,000 U.S., and eliminating many exemptions.¹⁸¹ As a percentage of GDP, income tax revenue remained stable after the reforms. It stood at 2.42% in 1983, 2.45% in 1985, and had risen to 3.45% in 1989.¹⁸² Administrative efforts were somewhat more successful than in Jamaica. Efforts to register taxpayers managed to double the number of people with official taxpayer ID numbers, partly through a tax amnesty and partly through requirements that those paying utility and phone bills have a taxpayer ID number. However, despite the increased registration of taxpayers, the number of returns filed did not significantly increase.¹⁸³ There are as yet no incidence studies of the distributional effects of the reforms. However, as in Jamaica, the increase in the basic exemption has dropped many of the least well off from the tax rolls.¹⁸⁴

Flattening of the income tax structure in this way is certainly no cure-all for the problems posed by hard-to-tax groups. Other reform strategies have been suggested to try to reach those groups. Bird advocates presumptive taxation for these groups.¹⁸⁵ Under presumptive tax schemes, indicators of wealth are used to compute presumed income, and income tax is imposed on the basis of this presumed income. Bolivia, for instance, uses a presumptive income tax system, basing presumptions of personal income on the registered property which one owns—real estate, motor vehicles, motor boats, and aircraft—and corporate income on the net worth of a corporation.¹⁸⁶ McClure suggests that doctors and

¹⁸⁰ *Ibid.* at 221.

¹⁸¹ M. Gillis, "Comprehensive Tax Reform: The Indonesian Experience, 1981-1988" in M. Gillis, ed., *Tax Reform in Developing Countries* (Durham: Duke University Press, 1989) 79 at 95, 101-103.

¹⁸² M. Asher, "Reforming the Tax System in Indonesia" in W. Thirsk, ed., *Tax Reform in Developing Countries* (Washington: World Bank, 1997) 127 at 132-33.

¹⁸³ *Ibid.* at 152.

¹⁸⁴ According to Bahl and Martinez-Vazquez, the introduction of the standard deduction reduced the number of taxpayers in the system by 100,000, or 1/3 of the total (Bahl, R. & J. Martinez-Vazquez, "The Nexus of Tax Administration and Tax Policy in Jamaica and Guatemala" in M. Casanegra de Jantscher & R. M. Bird, eds., *Improving Tax Administration in Developing Countries* (Washington: International Monetary Fund, 1992) 66 at 86.

¹⁸⁵ R. M. Bird, *Tax Policy and Economic Development* (Baltimore: Johns Hopkins University Press, 1992) at 201.

¹⁸⁶ Bolivia has, in fact, taken matters further than Bird's recommendation. In Bolivia there is no regular income tax: everyone is taxed under the presumptive system. Employees in the modern sector of the economy are, however, subject to something akin to an income tax. A so-called "complementary tax" of 10 % of wages is withheld at source in the modern sector. This tax is called complementary because it is designed to complement the 10% VAT. VAT paid can be used as a credit against the complementary tax. The idea is to encourage compliance with the VAT by giving customers an incentive for asking for VAT receipts. See Silvani, C. A. & A. H. J. Radano, "Tax Administration Reform in Bolivia and Uruguay" in M. Casanegra de Jantscher & R. M.

(continued...)

lawyers could be required to keep a complete log of patients and clients seen, and charges made for services, so that spot checks could be made against a sample of people seen leaving the doctor's or lawyer's office.¹⁸⁷ Both suggestions, however, require considerable administrative resources and sophistication. As a consequence it would often be the case that reforms of the sort envisioned would fail to expand the tax base enough to compensate for the flattening of the rate structure. Indeed, income tax reforms of the sort envisaged here are often instituted on the understanding that they will not be revenue neutral. Rather, they will reduce the amount of revenue collected through the income tax system. The shortfall is to be compensated for through reforms of indirect taxes, usually institution of a VAT. We postpone discussion of the VAT to the next section.

The conclusion of this section is not, as the overwhelming evidence about failure of LDCs to collect the income taxes on the books might suggest, that tax law does not matter to welfarist goals. There are two reasons for resisting this conclusion. First, part of the discrepancy between the progressive tax laws on the books and actual taxes collected is due to the fact that there were many *legal* loopholes written into the tax laws—a plethora of exemptions and credits which allow people to avoid taxes by shifting their income into untaxed sources and shifting their spending to goods and services for which tax credits are available. Failure to collect taxes because of such loopholes does not demonstrate the irrelevance of law. On the contrary, these failures are *created* by the law. Second, tax law matters even when we focus on evasion (as opposed to avoidance) of taxes. While it is true that the prevalence of evasion in LDCs indicates limitations of tax law in achieving welfarist goals, it is also true that carefully crafted tax laws may be able to mitigate the problem posed by evasion. The point of the current widespread advocacy of flatter income tax systems with large basic exemptions is to simplify the task of tax administrators and reduce the incentive to evade, while simultaneously achieving welfarist goals by dropping the least well off from tax rolls. As yet, however, there is no strong evidence that flatter income taxes succeed in accomplishing these goals.

Taxation and economic growth

The current popularity of flatter income tax structures is due not only to the perceived welfarist and administrative benefits of such structures. Economic justifications have also been given for this approach. The first justification is the traditional view that the rich in LDCs should not be too highly taxed, because economic growth is driven by savings and the rich in LDCs save proportionally more than the poor.¹⁸⁸ Indeed, Bird suggests that many of the exemptions and credits which the richer have often been able to avail themselves of in LDCs may have been justified on these grounds, and viewed as a way of promoting growth while at the same time having nominally progressive taxes on the books to mollify welfarist

Bird, eds., *Improving Tax Administration in Developing Countries* (Washington: International Monetary Fund, 1992) 19.

¹⁸⁷ C. E. McClure, "Taxation and the Urban Poor" (1977) 5 *World Development* 169 at 181.

¹⁸⁸ Bird discusses this justification in chapter 4 of *Tax Policy and Economic Development*.

political forces.¹⁸⁹ The evidence on this issue is mixed. A number of studies on the relationship between growth and tax rates have been conducted over the past 15 years, beginning with a well known study by Marsden.¹⁹⁰ Marsden examined the growth performance of twenty countries during the 1970s. The countries were selected so as to provide a sample of ten pairings with comparable per capita incomes, but contrasting tax levels. OPEC countries and other countries which relied heavily on non-tax sources of revenue were excluded from the sample. Marsden found that the average (unweighted) annual rate of GDP growth was 7.3% for the ten low-tax countries, and 1.1% for the ten high-tax countries. Gross domestic investment grew at 8.9% annually in the low-tax group and declined by 0.8% annually in the high-tax group.

Marsden's study has been criticized for the relatively arbitrary procedure he uses to select his sample. A number of other studies have subsequently been conducted with mixed results. Skinner looked at the growth performance of 31 sub-Saharan countries, and found negative associations with level of average total tax, average personal tax, and average corporate tax.¹⁹¹ Rabushka found a slight *positive* correlation between growth and average tax rate in a sample of 49 LDCs.¹⁹² Reynolds looked at the relationship between growth and a combination of top marginal income tax rate and corresponding threshold for the top rate, and found a negative association.¹⁹³ Easterly and Rebelo found a statistically insignificant negative correlation between GDP growth between 1970 and 1988, and marginal tax rates in 1984, in a sample of 26 LDCs, and three OECD countries.¹⁹⁴

Perhaps the most careful study of this sort was conducted by Koester and Kormendi.¹⁹⁵ Koester and Kormendi point out that there is a danger in such studies of finding spurious negative results. It is well known that there is a positive correlation between per capita GDP and tax/GDP ratio. The presumptive explanation for this correlation is endogenous growth in demand for government services as per capita GDP grows.¹⁹⁶ There are also studies which show a correlation between low per capita income and high growth rates.¹⁹⁷ Given these two correlations, one would expect to find a negative correlation

¹⁸⁹ *Ibid.* at 41.

¹⁹⁰ K. Marsden, "Taxes and Growth" (1983) 20(3) *Finance and Development* 40.

¹⁹¹ J. Skinner, "Taxation and Output Growth: Evidence from African Countries" (1987) National Bureau of Economic research Working Paper No.2235; reported in R. B. Koester & R. C. Koermendi, "Taxation Aggregate Activity and Economic Growth: Cross-Country Evidence and Some Supply-Side Hypotheses" (1989) 27 *Economic Enquiry* 367.

¹⁹² A. Rabushka, "Taxation and Liberty in the Third World" (1985) paper presented at the Liberty Fund Symposium, September 1985; reported in Koester & Koermendi *ibid.*

¹⁹³ A. Reynolds, "Some International Comparisons of Supply-Side Tax Policy" (1985) *Cato Journal* 543; reported in Koester & Kormendi *ibid.*

¹⁹⁴ W. Easterly & S. Rebelo, "Marginal Income Tax Rates and Economic Growth in Developing Countries" (1993) 37 *European Economic Review* 409.

¹⁹⁵ *Ibid.*

¹⁹⁶ Peltzman "The Growth of Government" (1980) 20 *Journal of Law & Economics* 209.

¹⁹⁷ See, for instance, R. J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (Cambridge: MIT Press, 1997) at 17-18.

between tax rate and growth, but the correlation would be spurious since there would be no reason to believe that lower tax rates cause higher growth rates. Rather, the presumptive explanation would be that higher per capita income causes higher tax rates *and* lower growth rates. With this potential pitfall in mind, Koester and Kormendi looked at a sample of 63 non-communist, non-oil exporting countries for which data on revenue were reported for at least 5 consecutive years in the 1970s. Controlling for the fact that tax rates go up with per capita income, they looked for relationships between growth and either marginal or average tax rates. They found no statistically significant correlation. Controlling for average tax, they did, however, find a correlation between marginal rates and the absolute level of economic activity.

A second economic justification for a flatter income tax structure is the fear of capital flight. Given increased capital mobility, it is feared that if marginal rates in one country are very much higher than those in others, capital will simply move to avoid the high marginal rates. Just such fears led Jamaica to lower its corporate tax rate to 33⅓% in 1986, so as to remain comparable to the recently lowered U.S. rate of 34%.

A final economic justification which has been proposed for a flatter income tax structure is the contention that progressive income taxes introduce distortions into the economy which produce welfare costs. Ideally, taxes should be economically neutral—that is, they should not change the relative incentives for conducting various sorts of economic activity. The most economically neutral form of taxation is a poll tax. However, in practice such a tax is politically (and many would say morally) unacceptable because it is highly regressive. However, it is argued that more relative economic neutrality could be achieved through a flatter income tax structure, elimination of exemptions, and through broadening the tax base to include hard-to-tax groups. To our knowledge, there is no empirical evidence on the welfare costs of progressive income tax in LDCs. There are, however, studies which are tangentially relevant to this issue. In a well-known study of the American tax system, Ballard *et al.* estimated that if the current tax system in the U.S. were replaced with a lump-sum poll tax designed to generate equivalent revenue, the welfare benefits would be from between 13 and 24 cents per dollar of tax.¹⁹⁸ If the current system were replaced with a VAT, the welfare benefits would be between 11 and 13 cents per dollar.

Clarete and Whalley conducted a similar study looking at the welfare costs of trade taxes in the Philippines in 1978. They estimated that the marginal welfare costs of trade taxes were much higher than a more economically neutral commodity tax. A 5% increase in trade taxes would increase welfare costs by 28 cents per dollar, while a 5% increase in commodity taxes would actually decrease welfare costs by 7 cents per dollar. At an increase of 30%, the comparable numbers were \$5.99 in welfare costs for trade taxes, and 11 cents for commodity taxes. Ahmad and Stern obtained similar results in a study of India based on 1979–80

¹⁹⁸ C. L. Ballard, J. B. Shoven & J. Whalley, "The Total Welfare Cost of the United States Tax System: A General Equilibrium Approach" (1985) 38 National Tax Journal 125.

statistics.¹⁹⁹ There are also studies which link low growth with price distortions due, for instance, to trade taxes. Agarwala studied the relationship between an index of price distortions and growth in LDCs. The average annual GDP growth rate for the ten countries with the lowest distortion index was 6.8%, for the middle nine countries it was 5.7%, and for the highest twelve it was 3.1%.²⁰⁰

This last economic justification has been used to argue for implementation of VATs as a more economically neutral alternative to import and export duties in LDCs. Many LDCs rely heavily on trade taxes both because they represent a relatively easy "tax-handle"—it is relatively easy to tax goods as they pass into and out of a country—and because, in the case of import duties, they can be used to protect domestic industries from foreign competition. According to Stotsky, trade taxes accounted for between 24.9% and 36.6% of revenue in LDCs in the 1986–92 period, while they accounted for only 2.5% in OECD countries.²⁰¹ Studies like Clarete and Whalley's, and Agarwala's cast doubt on the idea, popular in the early postwar years, that policies of protecting nascent domestic industries from foreign competition are economically beneficial. The IMF and World Bank now both advocate reducing reliance on trade taxes and increased reliance on a VAT.²⁰²

The VAT is claimed to have other virtues. First, it broadens the tax base so as to provide for increased revenue stability. Indonesia, for instance, implemented a VAT in 1985 partly in order to decrease the heavy reliance on oil revenues. In 1983, 67.9% of revenues were generated from oil firms and 5.4% from sales taxes. In 1986 these figures had changed to 36.4% and 19.2% respectively, although part of the change was due to a sharp drop in oil prices.

A second reason for the VATs popularity lies in the perceived administrative benefits associated with a VAT. In particular, where intermediate producers are allowed to deduct what they pay for inputs from the value of their products, there is an incentive for them to demand receipts from suppliers for VAT purposes, thereby creating a paper trail which can be used to catch evaders. In practice making use of this paper trail has been too daunting a task given limited administrative resources. A cross-checking system attempted in Korea, for instance, proved to be impracticable.²⁰³

¹⁹⁹ E. Ahmad & N. Stern, "Alternative Sources of Government Revenue: Illustrations from India, 1979-80" in D. Newbery and H. N. Stern, eds., *The Theory of Taxation for Developing Countries* (Oxford: Oxford University Press, 1987).

²⁰⁰ R. Agarwala, "Price Distortions and Growth: A Study of the Association in Developing Countries" (1984) 21(2) *Finance and Development* 33.

²⁰¹ Stotsky, *supra* n.12 at 281.

²⁰² See World Bank, *supra* n.10 at 31-33, and Stotsky, *ibid.* at 279-81.

²⁰³ K. Choi, "Value-Added Taxation: Experiences and Lessons of Korea" (1984) 2 *Asian-Pacific Tax and Investment Bulletin* 231, excerpted in R. M. Bird & O. Oldman, eds., *Taxation in Developing Countries*, 4th ed. (Baltimore: Johns Hopkins University Press, 1990) 369 at 385.

A final point which has been raised in favor of the VAT—or at least by way of defense against criticisms—is that it need not be regressive. In many cases, VATs have been implemented which exempt or zero-rate necessities like non-luxury food goods. Variable rate VATs have also been instituted, with higher rates applying to luxury goods.

The moral of this section is that there is some economic evidence in favor of flatter income tax, and the use of more economically neutral taxes like a VAT. Thus, there is a certain amount of evidence that tax law is relevant to economic development.

Tax administration

In our introduction to this section, we noted that the main issue facing LDCs in the tax policy arena is often simply raising enough revenue to remain solvent while providing basic government functions. As the statistics reviewed above in subsection 1 demonstrate, the main source of difficulty for LDCs is the failure of tax administrations to enforce the tax laws which are on the books. Silvani provides a useful enumeration of the sources of slippage between legal tax liability and actual tax collection.²⁰⁴ First, unregistered taxpayers may simply not file returns. Second, taxpayers who are registered and have filed returns in past may stop filing returns. Third, taxpayers who continue to file returns may use inaccurate information on their returns in order to evade taxes. Finally, those who have filed returns and had tax liabilities assessed against them may fail to pay their taxes. There are obvious remedies for each of these sources of slippage—door-to-door registration campaigns for unregistered taxpayers, computer systems which identify stopfilers and delinquents, and more extensive use of auditing to catch evaders—but all these solutions require administrative resources which are often lacking in LDCs. As a consequence, one of the main focuses of reform efforts in LDCs has been on ways of making more effective use of limited resources. In what follows we review a number of techniques which have been used to achieve this end.

As we discussed at the end of subsection 1, legal reforms do have an important role to play in facilitating successful administrative reforms. One of the benefits of the "leveling up" approach to reform of tax law has been a significant simplification of the tax laws in LDCs which have adopted this approach. In Bolivia, for instance, formerly complex tax returns were reduced to one two-sided page in length in 1985. This reduction in complexity reduces the number of personnel needed to process returns, and liberates administrative resources for enforcement efforts like auditing. In 1987, Bolivia took its efforts to free up administrative resources a step further by privatizing the filing of returns and processing of payments. Under the new system, taxpayers file returns with private banks. The banks process tax payments and carry out the initial stage of processing returns by entering the data into electronic format. The banks are allowed to withhold 0.8% of revenues collected as payment.²⁰⁵ These reforms have allowed the Bolivian tax administration to undertake

²⁰⁴ C. A. Silvani, "Improving Tax Compliance" in M. Casanegra de Jantscher & R. M. Bird, eds., *Improving Tax Administration in Developing Countries* (Washington: International Monetary Fund, 1992) 274.

²⁰⁵ W. Thirsk, "Bolivia's Tax Revolution" in W. Thirsk, ed., *Tax Reform in Developing Countries* (Washington: (continued...))

important enforcement projects like a major taxpayer registration campaign which brought the total of registered taxpayers to over 360,000 by 1990, far in excess of the goal of 190,000.²⁰⁶ Because these reform efforts were part of a broader reform of tax law and administration undertaken in 1985, it is difficult to ascertain how significant these particular elements have been. However, the reform effort as a whole has been a remarkable success. Bolivia went from collecting about 1% of GDP in taxes in 1985 to 7.4% in 1990.²⁰⁷

Elsewhere other techniques have been used to liberate administrative resources. Prior to 1988, Columbia issued tax clearance certificates to those who paid their taxes. The certificates stated that the taxpayer had no outstanding tax liabilities. A clearance certificate was needed to leave the country, to transfer real estate, to register an automobile, and to enter into contracts with the government amongst other things. Of the 6,000 employees of the tax administration, 3,600 were occupied with the process of collecting taxes and issuing certificates. Unfortunately, their efforts were of little use, since there was an active market in both legitimately obtained and counterfeit certificates. In 1988, Columbia did away with the clearance certificate system, and instituted a privatized system for filing returns and making tax payments through private banks similar to Bolivia's. Columbia thereby freed 60% of its tax administrators for more productive activities like auditing returns.²⁰⁸ The privatized filing system has also significantly sped up the process of processing returns. The government now has data in machine-readable format within 15 days. Under the old system processing could take up to two years, significantly reducing the value of taxes collected through audits, because of inflation, the increased likelihood that a taxpayer had gone bankrupt, and a two year statute of limitations.²⁰⁹ The results of Columbia's new system and reallocation of resources were striking. In 1987, 1.6% of income tax and 2.7% of sales taxes collected were the result of audits. By 1989, 15.7% of income tax and 7.1% of sales taxes were collected on a result of audits. In absolute terms, these percentages represent a jump from \$40.5 million U.S. to \$293.5 million U.S. collected as a result of audits.²¹⁰

Another way of improving tax compliance with limited administrative resources is to solicit information from third parties. Part of the success of enforcement efforts in Columbia is due to the fact that officials made use of information from banks and notaries public. Banks are now required to identify and provide information returns on individuals or companies with more than C\$120 million in annual transactions, in an effort to identify wealthy individuals who have not filed returns. For similar reasons, issuers of credit cards must identify all businesses that charge more than C\$10 million in a year, and all individuals

World Bank, 1997) 33 at 50.

²⁰⁶ Silvani & Radano, *supra* n.23.

²⁰⁷ Silvani & Radano, *supra* n.23 at 19.

²⁰⁸ C. E. McLure & S. Pardo R., "Improving the Administration of the Colombian Income Tax" in M. Casanegra de Jantscher & R. M. Bird, eds., *Improving Tax Administration in Developing Countries* (Washington: International Monetary Fund, 1992) 124 at 129-32.

²⁰⁹ *Ibid.* at 132.

²¹⁰ *Ibid.* at 134.

who charge more than C\$1 million, and notaries public are required to inform the tax administration of real estate transactions in excess of C\$10 million.

Computer systems can be a useful aid in the effort to target enforcement efforts. Silvani claims that businesses which report sales and purchases for a year with a sales to purchases ratio in the range 0.5 to 1.1 are most likely to be VAT evaders.²¹¹ This technique has been used in Uruguay to target audit efforts. Effective computer databases can be used to target these businesses for audits.²¹² Uruguay's reform efforts have also demonstrated the importance of computer systems in carrying out more mundane tasks. Prior to the 1985 reform efforts, there was no effective review of tax files to discover stopfilers and delinquents. In 1985, Uruguay instituted a new pilot program for processing of tax returns of the 2,700 largest taxpayers. Under the new system, data on returns is entered into a computer system, and is subject to subsequent review.²¹³ The first time the new computer system was used, it identified 300 of the 2,700 as stopfilers or delinquents. Although it is impossible to tell how much of the improvement is due to the new system—which was to be expanded in stages to include several thousand more of the largest taxpayers—revenue collection improved from 11% of GDP in 1984 to 13.5% in 1990.²¹⁴

We have already pointed out several ways in which legal reforms can have an important impact on administrative reform efforts—through, for instance, simplification, abolition of a dysfunctional clearance certificate system, and granting of access to information about taxpayers in the possession of third parties like banks. There are other areas in which legal reforms have been able to facilitate reform efforts, or, on the other hand, the failure to reform tax law has continued to make tax collection more difficult than it could be. In Columbia, for instance, prior to the 1986 reforms there was no legal authority for requiring large taxpayers to provide information in magnetic format. Large taxpayers can now be required to do so, thereby reducing the manpower resources needed for data entry.²¹⁵ On the other hand, auditing efforts have been hampered in Columbia by the generous interpretation of a law designed to protect taxpayers' rights, which provides that a tax return can only be audited and corrected by officials once. According to McClure and Pardo R., some taxpayers put glaring errors near the beginning of their returns—e.g. failing to include the taxpayer ID number of a supplier—in the hope that auditors will use up their one chance to correct the return on the glaring error and thereby make the taxpayer legally immune from liability for tax evasion efforts which might be uncovered later in the return.²¹⁶

To this point, our discussion has focussed on how to make better use of the limited administrative resources available in most LDCs. A related problem is the lack of qualified

²¹¹ Silvani, *supra* n.41 at 292.

²¹² Silvani & Radano, *supra* n.23 at 49.

²¹³ Uruguay's tax administration did have a computer system prior to 1985, but it was so ineffective that officials disconnected it in 1981 (*ibid.* at 39).

²¹⁴ *Ibid.* at 19.

²¹⁵ McClure & Pardo R., *op. cit.* at 131

²¹⁶ *Ibid.*

administrative staff due to poor public sector wages. Klitgaard argues that simply raising wages across the board is not the proper response to this problem (nor, indeed, a viable response, given budgetary pressures).²¹⁷ Rather, Klitgaard suggests better use of pay incentives for improved performance. In the area of tax administration, one way of generating the revenue necessary for instituting an incentive system is through granting officials a share of any revenues they collect beyond targets. Klitgaard cites the success of reform efforts carried out by Mayor Ronald MacLean Abaroa in LaPaz, Bolivia beginning in 1985 as an example of this sort of use of incentives. In 1984, LaPaz was essentially bankrupt: the city's revenues covered only 24% of expenditures, and new laws passed in 1985 stipulated that the central government could no longer provide budget support to municipalities. As a result of budgetary constraints and hyperinflation, real wages for municipal employees had collapsed by a factor of four, and the salary scale had become highly compressed, with directors earning only 1.4 times as much as manual laborers. The result was an exodus of talented workers and a serious deterioration in public services. In order to remedy the situation, the mayor gave employees involved in revenue collection a share of any new revenues generated as an incentive. The results of the reform efforts were striking: within two years, revenues rose by a factor of about ten in real terms.²¹⁸

Incentive measures adopted in Mexico as part of a comprehensive reform of tax administration undertaken from 1988-92 also appear to have been successful. Under the Mexican system, offices are awarded about 60% of additional collections in a bonus fund, which is distributed to members of the office according to their "proximity" to the discovery and collection process. Bonuses are capped at between 120% and 250% of wages, depending on one's proximity to the discovery and collection process. In the early 1990s, bonuses amounted to 130% of aggregate wages. As a result of the reforms, audits rose from 3.2% of taxpayers in 1988 to 5.5% in 1990, and 8.9% in 1993. The benefit-cost ratio of audits rose from 4 in 1988 to 27 in 1990, and 46 in 1996.²¹⁹ Since the incentive system was part of a larger reform, these improvements may not have been the result of the incentive system.

²¹⁷ Klitgaard's stance on this issue is supported by a large cross-sectional regression study in which it was found that raising the ratio of government wages to per capita GDP does not improve output of public goods. LaPorta et al. found that performance on four indicators of output of public goods—infant mortality, school attainment, illiteracy rate, and an index of infrastructure quality—is *negatively* correlated with the ratio of government wages to per capita GNP ("The Quality of Government" (1999) 15 *Journal of Law, Economics, & Organization* 222-79 at 240-41). Performance on these measures was, however, found to be positively correlated with various measures of bureaucratic efficiency: an index of corruption (higher values indicate less corruption), an index of bureaucratic delays (higher values indicate fewer delays), and an index of tax compliance (*ibid.*).

²¹⁸ R. Klitgaard, *Adjusting to Reality: Beyond "State versus Market" in Economic Development* (San Francisco: ICS Press, 1991) at 92, 104. We should note that the incentive system was not the mayor's only reform. For instance, as a short term measure, the mayor required property owners revalue their own homes in an effort to restore a property tax base which had been eroded by hyperinflation. The threat that the city would expropriate property at the self-valued price was used as an incentive for honesty.

²¹⁹ Reported in D. Mookherjee, "Incentive Reforms in Developing Country Bureaucracies: Lessons from Tax Administration" in B. Pleskovic & J. E. Stiglitz, eds., *Annual World Bank Conference on Development Economics 1997* (Washington: World Bank, 1998) 103 at 116.

However, tax officials reportedly believe that the incentive scheme was the most significant factor in bringing about the improvements.²²⁰

Klitgaard emphasizes the importance of incentives for public employees for a second reason: poorly remunerated public employees are more liable to supplement their incomes through corrupt practices. To this point, we have said little about corruption in tax administration. Administrative corruption is, in fact, a relatively neglected topic in the literature on tax administration. The focus of this literature—and our discussion, to this point—is on how to make more efficient use of presumptively honest tax officials. However, corruption is undoubtedly an important impediment to effective tax administration in many LDCs.²²¹ In a discussion of administrative reform more generally, Klitgaard has made a number of useful suggestions, based on the experience of a number of successful anti-corruption campaigns, most of which involved tax administration.²²²

Klitgaard suggestions fall into two broad (and overlapping) categories. Successful anti-corruption campaigns will (1) alter tax officials' incentives, either by increasing the rewards accruing to honest officials or by imposing effective disincentives to discourage corruption, and will (2) decrease officials' opportunities to solicit bribes. On the latter point, Klitgaard points out that an official's opportunity to solicit bribes is proportional to the degree of monopoly he holds over his function and the degree of discretion which he has in carrying out the function.²²³ In order to reduce monopoly power, Klitgaard suggests introducing competition into the provision of services, either through privatization, public-private competition, or competition between public officials, and rotating officials both geographically and functionally. In order to reduce the discretion of tax officials, Klitgaard recommends clarifying rules and procedures, having agents work in teams and subjecting them to hierarchical review, and dividing large decisions into discrete parts carried out by different agents or groups²²⁴

According to Klitgaard, many of these techniques were used in the highly successful reform of the Philippine's tax administration which Justice Efren Plana undertook in 1975.²²⁵ Klitgaard reports that within three years Plana's reforms greatly reduced the practice of taxpayers and assessors colluding to reduce tax assessments in exchange for bribes, significantly reduced the practice of officials accepting bribes to speed the processing of paper work, and eliminated a market for jobs in the tax administration, which at one point were, because of the lucrative opportunities for corruption which they provided, being bought and sold for \$75,000, despite the fact that they only paid \$10,000 per year.²²⁶

²²⁰ *Ibid.*

²²¹ We are unaware of any studies which give an accurate measure of the degree of corruption in tax administrations, or the proportion of slippage due to corruption as opposed to poor or insufficient enforcement.

²²² Klitgaard, *op. cit.*, chapters 6-8.

²²³ *Ibid.* at 126-27.

²²⁴ *Ibid.* at 131.

²²⁵ *Ibid.* at 132.

²²⁶ *Ibid.* at 121-22, 128.

The Bolivian experience with privatization of filing of returns and processing payments discussed above may also be an instructive example of successful use of these techniques. Under the new system instituted in 1987, taxpayers file returns with private banks. Because the banks have an incentive to collect as much tax as possible, they are unlikely to tolerate corruption on the part of their agents. Furthermore, competition amongst the private banks is likely to discourage any bank from soliciting bribes in a systematic way.

Uruguay's tax reform efforts involved reducing the monopoly power of officials. According to Silvani and Radano, prior to reforms instituted in 1985, all tax returns were submitted in person and at the time of submission they were examined by an official in the presence of the taxpayer. There was no effective review of tax returns after the initial screening by the official, so any errors or irregularities in the return would not be detected after this point.²²⁷ Silvani and Radano were concerned to point out how liable this system was to error and oversight. However, the situation they describe is also a prime example of a situation in which tax officials are effectively granted monopoly power over tax assessment, making corrupt practices extremely easy. Under the new pilot system described above, the monopoly power of front-line tax officials is significantly reduced, since the data on returns is entered into a computer system, and is subject to subsequent review.²²⁸

A quite simple change in Columbia has significantly reduced the opportunity for officials to solicit bribes. As we discussed above, processing of returns could take up to two years under Columbia's old system. These delays created an opportunity for tax officials to solicit bribes in exchange for expediting processing of returns. Under new administrative regulations, officials can be dismissed if they fail to process a return within 30 days, or within 5 days where a claim has been made for an expedited refund. As a result, the opportunity to solicit bribes has been significantly reduced.²²⁹

Efforts to simplify tax laws can themselves be seen as a way of reducing administrative discretion, and thereby reducing the opportunity for corrupt practices. Gillis, for instance, has suggested that simplification efforts in Indonesia could reduce corruption, because officials were using the complexity of the tax system to cloak corrupt practices.²³⁰

Some of the suggestions about how to reduce monopoly power and discretion are also ways of introducing disincentives to discourage corruption. Hierarchical review, for instance, increases the likelihood that a corrupt official will be caught, and thereby discourages corrupt practices. There are a number of other ways of introducing disincentives. Most obviously, new penalties for corruption can be introduced. As Klitgaard points out, the penalties need not be formal—they might involve loss of professional standing, loss of perks, or

²²⁷ Silvani & Radano, *supra* n.23 at 40.

²²⁸ Uruguay's tax administration did have a computer system prior to 1985, but it was so ineffective that officials disconnected it in 1981 (*ibid.* at 39).

²²⁹ McClure & Pardo R., *supra* n.45 at 134.

²³⁰ Gillis, *supra* n.18 at 93.

embarrassing publicity. In certain situations, negative publicity may be more effective than a legal remedy. Justice Plana, for instance, realized it would take two years to convict corrupt officials. Although he proceeded with legal prosecutions, he also released information about transgressors and their offences to the press, thereby setting an immediate example, and also setting off a wave of investigative reporting.²³¹

The threat of penalties, however, is perhaps less important than increasing the likelihood of detection. This can be achieved through a number of means. In addition to internal methods like hierarchical review processes, and the use of undercover agents, Klitgaard suggests using external parties to obtain information about corruption. Hotlines for the public can be used to encourage reporting of corrupt activities, and information from banks and the media, for instance, could be used to detect unaccounted for wealth acquired through corrupt practices.²³² Columbia's use of third party information from banks, credit card companies, and notaries public, is an example of the use of third party information. Justice Plana used all these methods, with the exception of hotlines for the public.²³³

Law making institutions and tax reform

There are, to our knowledge, no studies of potential links between law making institutions and development. Gillis draws a couple of morals relevant to this question from the studies which appear in the volume *Tax Reform in Developing Countries*.²³⁴ These morals, it must be admitted however, are little more than truisms. First, Gillis claims that hurried reforms are less likely to succeed. Gillis argues that time is required to make a convincing case for reform, to evaluate competing proposals, to scrutinize data prepared in support of reform, and to take steps to ensure that reformed tax structures will work well with available administrative resources. As examples of reforms which failed due to inadequate time, he cites Venezuela (1957–58), Columbia (1968–69), Liberia (1969), Ghana (1969–70) and Bolivia (1976–77). Reforms in Jamaica and Indonesia, by contrast, were developed over a period of years. Second, Gillis suggests that continuity in decision-makers responsible for tax policy is conducive to more successful reforms (this moral is undoubtedly related to the first). Continuity helps to insure sensible reform, but also, according to Gillis, that effective follow-up legislation will be enacted to address inevitable unforeseen problems with reforms.

There are, also, certain anecdotes to be drawn from studies of tax reform which are relevant to understanding the relationship between law making institutions and development. However, these anecdotes are largely to do with how to get good reforms instituted in the face of strong vested interests. Harberger, for instance, recounts how tax reformers in Uruguay in 1974–75 were able to simplify the tax system by doing away with a large number of little taxes imposed in response to pressure groups. Worried that reform efforts would bog

²³¹ Klitgaard, *supra* n.55 at 137.

²³² *Ibid.* at 129.

²³³ *Ibid.* at 132.

²³⁴ M. Gillis, *supra* n.12 at 492.

down as each pressure group came out in defense of its own tax, the reformers simply set up a computerized system which identified each tax and its recent revenue history. Taxes were eliminated according to the following procedure: taxes were ranked in descending order of revenue yields. In 1975 roughly the bottom 50 were eliminated, and in later in 1975, the next 80 or so were eliminated. The automatization of the system largely undercut attempts by interest groups to defend their favored taxes.²³⁵

E. Criminal Law

Widespread crime, and particularly violent crime, is antithetical to virtually any conception of development, and particularly economic, welfarist and feminist conceptions.

From an economic perspective, there are a number of reasons why crime is problematic. First, crime and violence deplete the stock of physical capital.²³⁶ At the most basic level, acts of terrorism or vandalism destroy physical infrastructure such as roads, power generation facilities, and other public facilities. Beyond such immediate effects, the state of law and order can affect investment in a country. Crime is generally perceived to have an adverse effect on the overall investment climate. Crime causes a reduction in investment by creating a risky environment wherein businesses are likely to resist investment because criminals are likely to reap the returns. A recent IFC discussion paper which surveyed approximately 4000 entrepreneurs in 69 countries by asking them to rate a list of fifteen obstacles to doing business for their seriousness revealed that corruption and crime are considered important obstacles for business, particularly when the government fails to implement law and order and tolerates criminal action and extortion.²³⁷ It can be surmised that countries which have greater crime rates may suffer from reduced investment if entrepreneurs view the crime rate and inefficacious law enforcement to be insurmountable barriers to doing business in those countries. In this way, crime causes a reduction in investment in physical infrastructure.

Second, crime erodes the development of human capital.²³⁸ The most obvious destruction of human capital is the squandering of lives and the associated human productivity lost due to homicide. For example, the homicide statistics from Columbia indicate that the high homicide rates persisting since the late 1980s are costing Colombia about two percentage points annually in the rate of growth of gross domestic product.²³⁹ In

²³⁵ A. C. Harberger, "Lessons of Tax Reform from the Experiences of Uruguay, Indonesia, and Chile" in M. Gillis, ed., *Tax Reform in Developing Countries* (Durham: Duke University Press, 1989) 27 at 31.

²³⁶ Robert L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean*, (Washington, D.C.: The World Bank, Washington, 1998).

²³⁷ A. Brunetti, G. Kisunko and B. Weder, "How Businesses See Government: Responses from Private Sector Surveys in 69 Countries," (1999) IFC Discussion Paper Number 33.
[Http://www.worldbank.org/ifc/DEPTS/OPS/ECON/PUBS/DP33/DP33.htm](http://www.worldbank.org/ifc/DEPTS/OPS/ECON/PUBS/DP33/DP33.htm).

²³⁸ Robert L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean*, (Washington, D.C.: The World Bank, Washington, 1998).

²³⁹ Robert L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean*,

(continued...)

addition, crime and violence have become increasingly recognized as a public health issue with associated economic costs. A recent study which estimated the economic costs associated with homicide in New Zealand used a human capital approach to assess direct costs using information on incidence and costs from government agencies, and to assess indirect costs based on loss of productivity resulting from death.²⁴⁰ The total estimated cost of homicides in 1992 was NZ \$82 997 065 (U.S. \$53 948 092), averaging NZ \$1 012 159 per homicide (U.S. \$657 903). This total was comprised of the estimated total cost associated with homicide victims of NZ \$37 017 010 (U.S. \$24 061 056) and the estimated total cost associated with homicide perpetrators of NZ \$45 980 055 (U.S. \$29 887 035). While limitations of the incidence data and the methods employed suggest that these costs are likely to be underestimated, nevertheless the figures calculated represents an enormous drain on New Zealand's economic resources.

Another commonly cited manifestation of the erosion of human capital is the negative effects on women and children's health arising from domestic violence. Furthermore, the negative effects of domestic violence ripple into the workplace as there are costs which arise from the disability and the ensuing absenteeism from work as a result of victimization from crime.²⁴¹ In education, there are costs which stem from the inability of children, especially girls, to attend school in a violent climate. A 1996 World Bank poverty assessment of Jamaica found that thirty percent of girls surveyed said they were afraid to go to school because of the threat of crime and violence.²⁴² While there have been few attempts to quantify the destruction of human capital due to crime and violence, a recent analysis concluded that the "net accumulation of human capital" in upscaled on Latin America and the Caribbean had been cut in half because of the increase in crime and violence over the past fifteen years.²⁴³ Another indirect cost to human capital associated with crime and violence is the allocation of governmental expenditures to strengthen police forces or expand prisons, thus sacrificing resources which could have been spent on human development. It has been estimated that expenditures on protection and the associated indirect costs of crime and violence, together with the direct costs resulting from criminal activity, could be as high as 13% percent of GDP in Colombia.²⁴⁴

Third, crime and violence destroy social capital. Social capital has been defined as the "features of social organization, such as trust, norms, and networks that can improve the

(Washington, D.C.: The World Bank, Washington, 1998).

²⁴⁰ Janet Fanslow, "The Economic Cost of Homicide in New Zealand," (1997) 45(7) *Social Science and Medicine* 973.

²⁴¹ See *World Development Report 1993: Investing in Health* (Washington, D.C.: World Bank, 1993), pp.25-29.

²⁴² World Bank, *Violence and Urban Poverty in Jamaica: Breaking the Cycle* (Washington, D.C.: September, 1996), p.13.

²⁴³ Juan Luis Londono, "Violence, Psyche and Social Capital," paper prepared for the Second Annual World Bank Conference on Development in Latin America and the Caribbean, Bogota, July, 1996, p.2.

²⁴⁴ Caroline Moser, "Urban Poverty and Violence: Consolidation of Erosion of Social Capital," paper prepared for the Second Annual World Bank Conference on Development in Latin America, Bogota, July 1996 p.4.

efficiency of society by facilitating coordinated actions.”²⁴⁵ Crime and violence destroy norms of trust and reciprocity, resulting in the collapse of community-based organizations and other social networks which have increasingly been considered to be critical for growth and the alleviation of poverty. The recent World Bank study of crime and poverty in Jamaica²⁴⁶ concluded that one of the clearest effects of crime violence in Jamaican communities is the social fragmentation that impairs social capital. Crime and violence create impediments for community members to associate with one another; for example, in many areas of Jamaica, recreational centers and youth clubs could not function because of the high incidence of crime and violence. Furthermore, other costs to social capital due to crime and violence include: disaffection and migration of the urban middle class; reduced access to social services; dysfunctional families; and an overall climate of fear that replaces the spirit of cooperation and participation in community life, so that any sort of community organization not based on fear and coercion cannot function.²⁴⁷ Given the important contribution that social capital can make to economic growth and development,²⁴⁸ the erosion of social capital due to crime can be devastating to development.

Fourth, crime and violence vitiate government capacity in many ways.²⁴⁹ For example, the resources that have to be spent to fight crime and maintain order are substantial, which, in circumstances of constrained public resources, likely come at the expense of resources which could be employed for purposes related more directly to development. Indeed, there is research which indicates that developed countries with high property crime rates feel the effects of these crimes less as there is much more economic support and affluence within which the crimes are experienced, whereas developing countries with lower economic outputs feel the effects of property crimes more, since the relative cost of such crimes to countries with lower economic outputs are greater than for developed countries.²⁵⁰ Additionally, crime and violence directly and indirectly contribute to corruption within the government sector. As people are forced to turn to private security forces such as gangs for protection, the state is increasingly seen as ineffective in providing basic services. As government agencies begin to be perceived as irrelevant or illegitimate, political authority will be undermined.

²⁴⁵ Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993), p.167.

²⁴⁶ World Bank, *Violence and Urban Poverty in Jamaica: Breaking the Cycle* (Washington, D.C.: September, 1996).

²⁴⁷ World Bank, *Violence and Urban Poverty in Jamaica: Breaking the Cycle* (Washington, D.C.: September, 1996), chapter 6.

²⁴⁸ A recent report by the World Bank’s Task Group on Social Development emphasized the importance of paying greater attention to the contributions that social capital can make to economic growth and development. See World Bank, *Task Group Report: Social Development and Results on the Ground* (Washington, D.C.: October, 1996).

²⁴⁹ Robert L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean*, (Washington, D.C.: The World Bank, Washington, 1998).

²⁵⁰ See Graeme Newman, “Crime and the Human Condition” in Uglejesa Zvekic, ed., *Essays on Crime and Development* (Rome: United Nations Interregional Crime and Justice Research Institute, 1990) p.69.

While there is substantial agreement that crime adversely affects economic growth, quantitative analyses of the economic effects of crime are hard to come by. However, the few attempts that have been made to quantify those costs are alarming. For example, a recent study of the effects of crime and violence on Columbia's economic growth found that the cumulative effect of crime and violence has reduced Columbia's per capita income by 32 percent.²⁵¹ Furthermore, for purposes of comparison, losses from the direct costs of crime and violence in Colombia are estimated to be roughly twelve times greater than the net profits of the fifty largest industrial enterprises in the country.²⁵² Bourignon estimates the aggregate cost of crime in Latin America at 7.5 per cent of GDP.²⁵³

Widespread crime is not only undesirable from an economic perspective; it is also problematic from a welfarist perspective since the fear of crime can significantly reduce the quality of life of the members of a society. It is also important to note that at least some forms of crime have a disparate impact on women and girls. This is particularly true of domestic violence. More generally, however, it seems to be the case that the fear of violent crime has its most serious effects on the quality of life of women and girls. The World Bank's study of crime in Jamaica found that thirty percent of girls surveyed said that they were afraid to go to school because of the threat of crime and violence.²⁵⁴ Of course these effects also have economic consequences in the form of absenteeism and under-education.

Although it is clear that crime has negative implications for development, it is less clear what role legal institutions play in reducing crime, or at least the legal institutions traditionally regarded as comprising the criminal justice system. This is partly because in most countries, almost all deliberate acts of violence or harm to property are subject to penal sanctions. This implies that the only legal reforms that seem to hold out any hope of reducing crime rates are reforms designed to improve the enforcement of criminal laws. There is however, one notable exception to this statement; not all nations have criminalized domestic violence. In some countries traditional notions that a wife is the property of her husband have prevented the passage of laws against domestic violence. The idea of the wife as property is reinforced in those countries where prevailing religious or customary law requires payment by the husband to the bride's family—"bridewealth"—upon marriage:

[A] parliamentary debate [in the late 1980's] in Papua New Guinea on whether wife-beating should be made illegal clearly reflects the widely perceived link between bridewealth and the

²⁵¹ Mauricio Rubio, "Crimen y crecimiento en Colombia," in *Inter-American Development Bank, Hacia un enfoque integrado del desarrollo: ética, violencia y seguridad ciudadana, encuentro de reflexión* (Washington, D.C.: 1996) p.94.

²⁵² Mauricio Rubio, "Crimen y crecimiento en Colombia," in *Inter-American Development Bank, Hacia un enfoque integrado del desarrollo: ética, violencia y seguridad ciudadana, encuentro de reflexión* (Washington, D.C.: 1996) p.68.

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²⁵⁴ World Bank, *op. cit.*, p. 13.

right to discipline . . . Most ministers 'were violently against the idea of parliament interfering in traditional family life'. Minister William Wi of North Waghi argued that wife-beating 'is an accepted custom . . . we are wasting our time debating the issue'. Another parliamentarian added: 'I paid for my wife, so she should not overrule my decisions, because I am the head of the family.'²⁵⁵

Such statements on the part of lawmakers highlight the role that attitudinal factors can play in impeding legal reforms aimed at advancing the status of women.

As far as the connection between improved law enforcement and reductions in crime is concerned, there is one area in which it seems reasonably clear that changes in law enforcement might have beneficial impacts. Inadequate enforcement of criminal laws designed to protect women has proved to be a persistent problem in developing nations. In 1999 Human Rights Watch reported the findings of a study of female rape and domestic violence victims in Peru, Russia, South Africa and Pakistan.²⁵⁶ It concluded that government agents were the "first and most persistent" obstacle to victims bringing complaints under the criminal law. Rape victims who underwent forensic examinations were subjected to invasive procedures that were not required in order to gather evidence to support their claims, but seemed aimed rather at determining aspects of the victims' sexual lives. Police "exercised undue and arbitrary authority regarding the types of complaints they accepted, and actively discouraged women from filing complaints—a pattern reported by women's advocates in other countries." With regard to domestic violence, women whose claims did result in police charges were subsequently confronted with courts that valued family unity over the safety of victims: "For example, in Peru judges often referred married domestic violence victims and their batterers to counseling before charges could be laid against the accused, with the alleged batterer remaining in the home." Thus, in developing nations, inadequate enforcement of the criminal law has often served to support aspects of the family which make it the major site of violence against women.²⁵⁷ The nature of the enforcement is, in itself, inextricably linked to government agents' perceptions of men and women's rights within society—perceptions that often mirror those of the society as a whole.

Further quantitative research on other aspects of the relationship between legal institutions and crime reduction would be extremely useful.²⁵⁸ Research on the relationship

²⁵⁵ K. Tomasevski, *Women and Human Rights* (London & New Jersey: Zed Books Ltd, 1993) at 94 (footnote omitted).

²⁵⁶ Human Rights Watch World Report, 1999 - Violence Against Women. Online: <http://www.hrw.org/worldreport99/women/women3.html>

²⁵⁷ Commission on the Status of Women: Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women - Report of the Secretary General. E/CN.6/1995/3 Add 18 January 1995.

²⁵⁸ Edward L. Glaeser, "An Overview of Crime and Punishment," Harvard University and NBER (March 10, 1999). <http://www.worldbank.org/research/conflict/papers/crimex1.htm>

between policing and crime is particularly important. A recent World Bank study has attempted to explore the relationship between policing and crime in both developed and less developed countries.²⁵⁹ This study presents the results of a cross-national and time series analysis of homicide and robbery rates for a large sample of countries for the period 1970–1994 based on information from the United Nations World Crime Survey. Using crime statistics to analyze the determinants of national homicide and robbery rates, this study's findings included the facts that: economic downturns and other social shocks (such as a rise in drug trafficking in Colombia in the 1970s) can raise violent crime rates; increases in income inequality raise crime rates; and that “deterrence effects” as measured by the strength of the police and the judicial system are significant determinants of violent crime. Through econometric modeling, the study found that the crime-detering impact of a strong police and judicial system, which is proxied by the rate of policemen per inhabitant and the crime conviction rate, is so significant that an increase in either proxy leads to a lower incidence of violent crime.

These results are not entirely conclusive. As Glaeser notes, a positive link between the level of crime and the amount of policing can be explained by the fact that localities often increase the amount of policing when the levels of crime rises. There is recent research by Levitt²⁶⁰ which uses clever statistical techniques to isolate the estimate of the causal link between deterrence and crime; such studies to determine the correlation between deterrence and crime can presumably be carried out in less developed countries as well.

Further research is also warranted on the relative importance of deterrence and incapacitation as opposed other factors as determinants of levels of criminality. In principle, it could be the case that crime levels are more susceptible to policies that affect conditions such as unemployment, inequality or family structure than levels of policing.

F. Social Welfare Legislation

Social welfare programs in LDCs typically have not focussed on legal entitlement programs like the welfare and unemployment insurance programs prevalent in the developed world. Although many LDCs have enshrined rights to healthcare or education in their constitutions these guarantees are rarely justiciable,²⁶¹ and so existing healthcare, education

²⁵⁹ Pablo Fajnzylber, Daniel Lederman, Norman Loayza, *Determinants of Crime Rates in Latin America and the World: An Empirical Assessment*, <http://www.worldbank.org/research/conflict/papers/fajnzylber.htm>.

²⁶⁰ S. Levitt, “Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime,” (1997) 87(3) *American Economic Review* 270.

²⁶¹ 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.

(continued...)

and food subsidization programs typically do not create legal entitlements.²⁶² Instead social welfare programs in LDCs typically consist of direct provision of goods such as healthcare and education and subsidization of foodstuffs. However, there is considerable evidence that these types of programs both reduce poverty and promote growth. That evidence is canvassed in the first subsection below. Evidence concerning the effectiveness of social welfare programs that do involve the creation of legally enforceable entitlements is canvassed in the second subsection.

Programs that do not create legal entitlements

One of the principal aims of social welfare policy is to eliminate poverty. The most straightforward way to achieve this aim would be to provide direct monetary transfers to the poor in order to raise their incomes above the poverty line. This has not, however, been the policy in LDCs. There is a tendency for a substantial proportion of spending on social welfare in LDCs to be directed to programs which do not involve legally binding entitlement mechanisms—to healthcare, education, and food subsidy programs, for instance. In Indonesia in 1996, out of a total central government expenditures of 77,964 billion rupiah, 7,040 billion were spent on education, 1,962 billion on health, and 5,643 billion on social security and welfare.²⁶³ At the provincial level in 1993 (the most recent statistic available), out of total expenditures of 7,576 billion rupiah, 2,604 billion were spent on education, 409 billion on health, and 23 billion on social security and welfare.²⁶⁴ In 1993 in Columbia, total expenditures of the central government were 6,309.4 billion pesos, 1,200 billion of which were spent on education, 341.2 billion on healthcare, and 493.5 billion on social security and welfare.²⁶⁵

There are undoubtedly political reasons why direct monetary transfers to the poor have been uncommon in LDCs, having to do with the unwillingness of well off and politically influential groups to pay for the transfers through taxes. The transfers involved would be substantial. According to the *World Report 1990*, a perfectly targeted transfer scheme²⁶⁶ in Bangladesh would have to transfer an amount equivalent to 15% of

However, article 7 of the constitution specifies that these rights are not justiciable. (Quoted in F. Mgongo, "Legal Foundations of Social Services Delivery in Tanzania" in A. K. Tibaijuka, ed., *The Social Services Crisis of the 1990's: Strategies for Sustainable Systems in Tanzania* (Aldershot: Ashgate, 1998) 71-82 at 72-73.

²⁶² Although we have categorized food subsidy programs as social welfare policies that do not create legally enforceable entitlements, the distinction between legally enforceable welfare programs, and mere social welfare policies is difficult to draw with precision. Targeted food subsidy programs, 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. The important issues in food subsidy programs (and health and education programs) are not legal, but administrative issues to do with effective targeting and distribution.

²⁶³ International Monetary Fund, *Government Financial Statistics Yearbook, 1998* (Washington: IMF, 1998) at 183.

²⁶⁴ *Ibid.* at 185.

²⁶⁵ *Ibid.* at 96-97.

²⁶⁶ A perfectly targeted transfer scheme is one which provides benefits to only the group intended to be

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Bangladesh's GDP in order to eliminate poverty.²⁶⁷ To give an idea of how significant an increase in government spending such a transfer would entail, consider that in 1985, total government expenditures in Bangladesh amounted to a little over 12% of GDP, while expenditures on health, education, social security, and welfare—by no means perfectly targeted towards the poor—totaled only 3% of GDP. However, there are also sound reasons for targeting spending towards direct provision of primary goods like health, education, and nutrition, rather than providing monetary transfers.

It has often been argued that there is a trade-off to be made between growth and poverty. One version of the argument has it that since the poor save less than the rich, social welfare spending, if financed by taxes paid proportionately more by the rich, will reduce savings, and thereby reduce investment and growth. We have already reviewed a series of empirical studies of the relationship between tax rates and growth in our discussion of tax law. The results of these studies, it will be recalled, were mixed. A number of studies have also been conducted which examine the relationship between inequality and growth. Some of these studies have found a negative correlation between initial inequality and subsequent economic growth. The suggested explanation of this correlation is that inequality engenders conflict over distributional issues, and encourages governments to levy higher taxes, thereby restricting capital accumulation and slowing growth. Persson and Tabellini, for instance, performed a regression analysis on data from 56 countries over the period 1960–1985. The analysis contained independent variables for primary school attendance, and initial per capita GDP.²⁶⁸ They found a negative correlation between inequality and GDP growth. The negative correlation was only found in democracies, however, suggesting that it is only in democracies that less well off groups are able to pressure governments to redistribute wealth from rich to poor.

Clarke carried out a similar study on samples of between 74 and 81 observations, for four different measures of inequality—Gini coefficients, coefficients of variation, and Thiel's indices, and ratio of share of national income accruing to the bottom 40% to the share accruing to the top 20%—for the period 1970–1985. His analysis included independent variables for initial per capita GDP, primary and secondary enrolment rates lagged 10 years, average number of coups and revolutions per year between 1970 and 1985, average number of assassinations per million persons per year between 1970 and 1985, the deviation of the price level for investment from the 1970 sample mean, and average government share of GDP.²⁶⁹ He found that all measures of inequality were negatively correlated with growth in

benefited. In practice, administrative limitations make perfect targeting impossible to achieve. There may also be sound economic reasons for avoiding perfect targeting. For instance, in certain circumstances one might want to have benefits taper off gradually as income rises above the poverty line so as to avoid creating disincentives to work for those near the poverty line (so called "poverty-traps").

²⁶⁷ World Bank, *World Development Report 1990* (New York: Oxford University Press) at 50.

²⁶⁸ T. Persson & G. Tabellini, "Is Inequality Harmful for Growth?" (1994) 84 *American Economic Review* 600-621.

²⁶⁹ G. R. G. Clarke, "More Evidence on Income Distribution and Growth" (1995) 47 *Journal of Development Economics* 403-28.

per capita GDP. Unlike Persson and Tabellini, Clarke found no difference between democracies and non-democracies. However, a recent study which uses a more extensive and higher quality database casts doubt on the merits of these studies. Deininger and Squire started with a database of 2,621 observations, and selected from it only those observations based on household surveys with comprehensive coverage of the population and of income sources.²⁷⁰ Using this database, they found no negative correlation between growth and inequality.

Even if there were data clearly showing a negative correlation between growth and inequality, it is unclear what the implications of the correlation would be. One might be tempted to say that the correlation would be grounds for redistributive policies aimed at reducing the inequalities which ostensibly dampen growth. However, if Persson and Tabellini are right about the cause of the putative correlation, it is precisely the attempt to reduce inequalities which causes the dampening of growth. Thus, a proponent of the economic approach might argue that the correlation is grounds for *reducing* spending on social welfare programs. This conclusion would be premature, however. There is a great deal of evidence that certain sorts of social welfare spending are actually growth promoting. Thus, even if these studies had shown a clear negative correlation between initial inequality and subsequent growth, they would not have demonstrated that there is a trade-off to be made between growth and poverty. At best, they would show that governments must be careful to direct their social welfare spending in ways that are growth promoting. Indeed, Alesina and Rodrik, who conducted a study which obtained results similar to Clarke's, suggest that the strong post-war economic performance of Japan, South Korea, and Taiwan is, at least in part, to be attributed to the extensive inequality reducing land redistribution programs these countries undertook.²⁷¹ They do not explain why this form of redistribution should have been growth promoting rather than dampening, but they presumably have in mind a point which has often been made about land distribution in LDCs: land concentrated in large holdings is often not used as productively as it would be if it were redistributed in smaller packages to the rural poor.²⁷² Thus, land redistribution can both promote growth and improve the condition of the poor.

²⁷⁰ K. Deininger & L. Squire, "A New Data Set Measuring Income Inequality" (1996) 10 World Bank Economic Review 565-91.

²⁷¹ A. Alesina & D. Rodrik, "Distributive Politics and Economic Growth" (1994) 109 Quarterly Journal of Economics 465 at 483.

²⁷² R. A. Berry & W. R. Cline (*Agrarian Structure and Productivity in Developing Countries* (Baltimore: Johns Hopkins University Press, 1979)), for instance, is a thorough study of the relationship between farm size and productivity in LDCs. They find striking negative correlations between farm size and per hectare productivity in LDC's. To cite one example amongst many, in a study of farm productivity in Brazil based on 1973 statistics, they found that in a region containing some of the most fertile land studied — the coastal "Zona de Mata" — average gross receipts per hectare declined from \$US 353.03 for farms smaller than 10 hectares to \$US 7.76 for farms larger than 500 hectares.

As a result of such studies, the World Bank (in World Bank, World Development Report 1990 (New York: Oxford University Press) at 64) speaks approvingly of land redistribution policies, although it acknowledges that, for political reasons, such policies rarely achieve extensive success. The exceptions to this rule — the aforementioned Japan, South Korea, and Taiwan — were all implemented in the context of major upheavals

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To return to the topic at issue—why LDCs direct spending towards direct provisions of primary goods like healthcare, education, and food—there is a strong case to be made that spending in these areas can both reduce poverty and promote growth. In a seminal survey of studies of returns on education spending in 32 countries spanning all six continents, Psacharopoulos estimated the social rate of return on education spending at 19.4% for primary schooling, 13.5% for secondary schooling, and 11.3% for higher education. He estimated the private returns at 23.7%, 16.3%, and 17.5% respectively.²⁷³ In a subsequent updating of the work, he estimated returns as follows: for Africa, 26%, 17%, and 13% respectively for public returns on primary, secondary, and higher education; and 45%, 26%, and 32% for private returns; for Asia, 27%, 5% and 13% for public returns, and 31%, 15%, and 18% for private returns; and for Latin America, 13%, 10%, and 8% for public returns, and 17%, 13% and 13% for private returns.²⁷⁴ Similarly positive results are reflected in more recent studies. Lau et al. estimate that in east Asia and Latin America, a one year increase in the average level of education results in a 3-5% increase in GDP.^{275, 276} Recent studies assuage concerns that improved earnings from education are a result of credentialism, rather than actual increases in productivity. For instance, in a study of Kenya and Tanzania, Boisier et al. found that the increased earnings which accrued to those who had more than a primary education (a 15-24% increase in Kenya, and 8-18% in Tanzania) were the result of the cognitive skills—literacy, numeracy, etc.—which were acquired through schooling, not credentialism, the practice of rewarding those who have certain credentials regardless of actual abilities.^{277, 278} Glewwe obtained similar results for the private sector in Ghana, but found that there was some credentialism in the public sector.²⁷⁹ Other studies have demonstrated very direct links between education and increased productivity which could not be the result of credentialism. For instance, the *World Development Report 1990* cites a study on Africa showing that farmers who have completed four years of education—the minimum

brought on by the Second World War.

²⁷³ G. Psacharopoulos, *Returns to Education* (San Francisco: Jossey Bass, 1973).

²⁷⁴ G. Psacharopoulos, "Returns to Education" (1985) 20 (4) *Journal of Human Resources* 583-604.

²⁷⁵ L. Lau et al., "Education and Productivity in Developing Countries: An Aggregate Production Function Approach" (1990) World Bank, mimeo., cited in P. Glewwe, "Schooling, Skills, and the Returns to Government Investment in Education: An Explanation Using Data from Ghana" Living Standards Measurement Study Working Paper No.76 (Washington: World Bank, 1991).

²⁷⁶ They found no relation between average level of education and GDP in Sub-Saharan Africa. Glewwe suggests that this result indicates that schools in Sub-Saharan Africa are of poor quality, and do not actually do a good job of providing people with the cognitive skills necessary to increase productivity ("Schooling, Skills, and the Returns to Government Investment in Education: An Explanation Using Data from Ghana" Living Standards Measurement Study Working Paper No.76 (Washington: World Bank, 1991)).

²⁷⁷ M. Boisier et al., "Earning, Schooling, Ability and Cognitive Skill" (1985) 75 *American Economic Review* 1016-30.

²⁷⁸ They also found that increased earnings were not a result of those undertaking post-primary schooling having greater innate cognitive abilities: increased earnings accrued as a result of cognitive skills acquired at school rather than innate abilities.

²⁷⁹ P. Glewwe, "Schooling, Skills, and the Returns to Government Investment in Education: An Explanation Using Data from Ghana" Living Standards Measurement Study Working Paper No.76 (Washington: World Bank, 1993)

for achieving literacy—produce, on average, 8% more than farmers who have not gone to school.²⁸⁰

On the subject of the economic benefits of healthcare, the *World Development Report 1993* points out several ways in which improved health contributes to economic growth: it reduces production losses due to worker illness, it permits the use of natural resources which had been wholly or partly inaccessible due to disease, it increases the enrolment of children in school and makes them better able to learn, and it frees up resources which would otherwise have been expended on treating illness.²⁸¹ Historical evidence from developed countries supports the contention that there is a healthcare-growth link. Meeker found that the social rate of return on public health expenditures in American cities in the period from 1880-1910 was between 6% and 16%, higher than private market rates at the time.²⁸² Other studies support some of the *World Development Report's* particular hypotheses about how healthcare spending can contribute to economic growth. For instance, Schultz and Tansel found that a reduction of inactivity due to illness of one day per month increased annual wages by 29% in Côte d'Ivoire. Only one-third of the increase was due to the increase in time worked. The other two-thirds were due to the higher wage rate obtained by those with lower morbidity, presumably because their health made them more productive.^{283, 284}

There is evidence that education programs can reinforce the benefits of health programs. For instance, the *World Development Report 1990* cites a study showing that one year of mother's education is associated with a 9% decrease in under 5 mortality.²⁸⁵ Osmani argues that one of the main factors explaining the impressive performance of the Indian state Kerala in health indicators is the level of education of the populace. In Kerala, the per capita income was \$225 US in 1985. In 1980/81, the infant mortality rate stood at 37 per 1,000, life expectancy at 66 and the literacy rate at 70%. In India as a whole, by contrast, in 1984/85, infant mortality stood at 106 per 1,000, life expectancy was 56.5, literacy 36%, and the per capita income \$270 US.²⁸⁶ Osmani points out that Kerala's performance on health indicators cannot be solely the result of Kerala's extremely well administered food distribution

²⁸⁰ World Bank, *supra* n.5 at 80.

²⁸¹ World Bank, *World Development Report 1993: Investing in Health* (New York: Oxford University Press) at 17.

²⁸² E. Meeker, "The Social Rate of Return on Investment in Public Health 1880-1910" (1974) 34 *Journal of Economic History* 392-421 at 417.

²⁸³ T. P. Schultz & A. Tansel, "Measurement of returns to Adult Health: Morbidity Effects on Wage rates in Côte d'Ivoire and Ghana" *Living Standards Measurement Study Working Paper No.95* (Washington: World Bank, 1993).

²⁸⁴ In Ghana, annual wages increased by 10% for every one-day reduction in monthly inactivity. By contrast with Côte d'Ivoire, the increase was entirely due to increased work hours. M. M. Pitt et al. ("Productivity, Health, and Inequality in the Intrahousehold Distribution of Food in Low-Income Countries" (1990) 80 *American Economic Review* 1139-56) have also found, in a study of Bangladesh, that healthier workers earn more.

²⁸⁵ World Bank, *supra* n.5 at 81.

²⁸⁶ From S. R. Osmani, "Social Security in South Asia" in Ahmad et al., eds., *Social Security in Developing Countries* (Oxford: Clarendon Press, 1991) 305-49 at 339.

programs, since, according to one study of south Indian states, poor Keralite adults consume fewer calories (1,751) than the poor in neighbouring states—Andhra Pradesh (1,847), Karnataka (1,902), and Tamil Nadu (2,019)—which do not show the same impressive results in measures of health.²⁸⁷ Nor, Osmani argues, can Kerala's performance be explained by the level of health spending alone. Although in 1977 Kerala had 1,975 hospital beds per million population as compared to 791 per million in India as a whole, and the beds were spread widely across the state as opposed to being concentrated in urban areas, as they tend to be in other parts of India, Osmani points out that there are states in India which perform more poorly than Kerala on health indices, despite expending more per capita on health, having more hospital beds per capita, and even having more rural medical facilities per person.²⁸⁸ Kerala's superior performance is to be explained by two factors, according to Osmani: a highly cost-effective focus on preventive health-care in addition to curative care, and health consciousness of the population as a result of superior levels of education.²⁸⁹

There are some grounds for believing that nutrition programs, like health and education programs, can be both directly poverty reducing and indirectly growth promoting through their beneficial effects on health and education. Nutritional programs can certainly increase the effectiveness of education programs. For instance, the *World Development Report 1990* cites a study showing that providing iron supplements to children in Thailand increased test scores.²⁹⁰ There is also evidence of economic loss due to malnutrition. Glewwe and Jacoby found that delays in enrolling children in school in Ghana were due to the fact that many children were malnourished and, as a consequence, unable to benefit from attending school. They estimate the effect of average delays in enrolment at 6% of lifetime earnings, and on this basis suggest that a case is to be made for early childhood nutrition interventions.²⁹¹ The *World Development Report 1990* cites studies showing that productivity of workers in Indonesia who received iron supplements for two months increased by 15–25%, that there is a significant link between wages and weight-for-height (a measure of short-term nutritional status) among casual agricultural labourers in India, and that there is a significant positive effect of energy intake on real wages in Sri Lanka.²⁹² One study in Chile found that a program designed to improve the health of pregnant women and children under the age of six by providing free milk and milk substitutes, promoting periodic examinations of mothers and their children in local health clinics, and monitoring mothers and children at risk of malnutrition and diverting them to specialised recuperation programs, had a long-run

²⁸⁷ Quoted in Gwatkin, "Food Policy, Nutrition Planning and Survival: The Cases of Kerala and Sri Lanka" (1979) 4 *Food Policy*; cited in Osmani *ibid.* at 345

²⁸⁸ Osmani *ibid.* at 346.

²⁸⁹ *Ibid.* at 346-47.

²⁹⁰ World Bank, *supra* n.5 at 81.

²⁹¹ P. Glewwe & H. Jacoby, "Delayed Primary School Enrollment and Childhood Malnutrition in Ghana: An Economic Analysis" Living Standards Measurement Study Working Paper No.98 (Washington: World Bank, 1993).

²⁹² World Bank, *supra* n.5 at 81.

social rate of return substantially higher than the 17% rate of return suggested at the time by the Chilean National Planning Commission for evaluation of public investment projects.²⁹³

One might wonder why governments tend to spend on direct provision of food and nutritional supplements rather than simply providing monetary transfers on the assumption that people will use the money to provide for their own nutritional needs. In some cases, the motivation may be entirely unrelated to poverty reducing objectives. In Bangladesh, for instance, although provision of food rations was originally motivated by welfarist aims, it became, according to Bhatia primarily "an instrument of agricultural price support and price stabilisation policies."²⁹⁴ In other cases—like the aforementioned Chilean program—the program has an immediate aim of improving very particular health indicators, and as such would not be successful if transformed into a monetary transfer. However, where the objective is broader, like improving calorie intake, this rationale would not apply. According to Pinstруп-Andersen, the reason why LDCs have eschewed cash transfers is that, according to the received wisdom, food transfers have more effect on food consumption than cash transfers. However, as Pinstруп-Andersen points out, empirical studies on this issue have had mixed results. Studies of food stamp programs in Sri Lanka and Columbia showed that the effect of the food stamp programs on household food consumption were not significantly different from the effect of a comparable increase in wage income,²⁹⁵ and a study in Puerto Rico found no significant difference in marginal propensity to consume food from food stamps and cash transfers.²⁹⁶ On the other hand, a study in the Philippines found that food subsidies had a larger effect on household calorie consumption than an increase in wage income equal to the income transfer embodied in the food subsidy, and a study of the U.S. food stamp program found that marginal propensity to consume food increases with the proportion of household income originating from food stamps.²⁹⁷

The studies reviewed in this section suggest solid economic reasons for targeting social spending towards health, education, and nutrition programs, and suggest, furthermore, that one might well expect to find a degree of agreement between proponents of the welfarist

²⁹³ A. Torche, "Evaluacion Economica del Programa Nacional de Alimentacion Complementaria (PNAC)" (1985) 66 Cuadernos de Econmía 175-94; discussed in A. Valdés, "Explicit versus Implicit Food Subsidies: Distribution of Costs" in P. Pinstруп-Andersen, ed., *Food Subsidies in Developing Countries: Costs, Benefits, and Policy Options* (Baltimore: Johns Hopkins University Press, 1988) 77-91 at 89-91.

²⁹⁴ B. M. Bhatia, *A Study in India's Food Policy* (Kuala Lumpur, Asian and Pacific Development Centre, 1983) at 69, cited in S. R. Osmani, *supra* n.24 at 342.

²⁹⁵ N. Edirisinghe, "The Food Stamp Scheme in Sri Lanka: Costs, Benefits, and Options for Modification" (1987) International Food Policy Research Institute Research Report No.58; International Food Policy Research Institute, "The Nutritional Impact of the Colombian Food and Nutrition Program in the State of Canca, Columbia" (1984).

²⁹⁶ T. Fraker, B. Devaney & E. Cavin, "An Evaluation of the Effect of Cashing Out Food Stamps on Food Expenditures" (1986) 76 American Economic Review 230-34.

²⁹⁷ M. Garcia & P. Pinstруп-Andersen "The Pilot Food Price Subsidy Scheme in the Philippines: Its Impact on Income, Food Consumption, and Nutritional Status" (1987) International Food Policy Research Institute Research Report No.61; B. Senauer, and N. Young, "The Impact of Food Stamps on Food Expenditures: Rejection of the Traditional Model" (1986) 68 American Journal of Agricultural Economics 37-43.

approach to development and proponents of the economic approach in this area. In actual practice, however, the welfarist may have reason to complain, because the poverty reducing aims of social welfare spending are have often not been served as well as they could be in LDCs. The reason is that spending in these areas is often poorly targeted towards the poor. Healthcare spending, for instance, is often focussed in urban areas, in hospitals and curative care, whereas many of the most poor live in rural areas, and would be better served by preventive and community services. In 1981 in China, for instance, per capita government healthcare spending was three times higher for urban dwellers than rural dwellers.²⁹⁸ In Senegal, 70% of physicians and pharmacists, 60% of midwives, and 40% of nurses are concentrated in the Dakar-Cap Vert region, where less than 30% of the population lives. In Peru, two-thirds of doctors live in the capital, where only 27% of the population lives.²⁹⁹ If Osmani's arguments, reviewed above, are correct, Kerala's remarkable success in health indicators is, in large part, due to Kerala's focus on preventive healthcare, and its efforts to ensure that healthcare is provided relatively evenly across rural and urban areas.

Public expenditures on education, in particular, tend to be poorly targeted at the poor. Psacharopoulos's work demonstrates that the social rate of return on primary education is significantly higher than that on tertiary education, and subsidies to tertiary education tend to benefit the well-off more than the poor.³⁰⁰ Nonetheless, LDCs tend to spend disproportionately on tertiary education. The result is that total spending on education is actually regressive in absolute terms in many LDCs. Selowsky found, for instance, that the average per capita subsidy for education in Columbia was 280 pesos for the poorest quintile, and 486 pesos for the richest—although, in terms of percentage of household income, the subsidy is highly progressive, ranging from 18.4% for the poorest quintile to 1.9% for the richest.³⁰¹ There is often also an urban bias in education spending, which tends to result in less effective provision of education to the poorest rural dwellers. Selowsky found, for instance, that the total average education subsidy was 1,779 pesos per urban households, and 1,106 pesos per rural household.³⁰²

Food subsidies are also often poorly targeted. Many LDCs have or have had general price subsidy programs, which provide unlimited amounts of subsidised food to anyone who wishes to buy it—Brazil, Egypt, and Pakistan, to name a few. Those who are well off tend to benefit more in absolute terms from such programs, since they can afford to spend more on the subsidised foodstuffs. In 1981–82 in Egypt, for instance, the poorest quartile of urban households received, on average, the equivalent of a transfer of 15.4 Egyptian pounds, while

²⁹⁸ World Bank, *supra* n.5 at 77.

²⁹⁹ *Ibid.* at 78.

³⁰⁰ In a study of public expenditures in Columbia based on 1974 figures, Selowsky found that the poorest quintile received, on average, a per household subsidy of 1,305 pesos for primary education, while the richest quintile received 252 pesos. For university education, by contrast, the poorest quintile received 18 pesos per household on average, while the richest received 1,257 pesos. (M. Selowsky, *Who Benefits from Government Expenditure? A Case Study of Columbia* (Oxford: Oxford University Press, 1979) at 67).

³⁰¹ *Ibid.* at 66-67.

³⁰² *Ibid.* at 67.

the richest quartile received, on average, 18.1 Egyptian pounds.³⁰³ There has also been an urban bias in food subsidy schemes. The poorest quartile of rural households received the equivalent of a transfer of 11.9 Egyptian pounds, while the richest quartile received 15.2 Egyptian pounds. The urban bias is presumably the result of the greater accessibility of outlets.³⁰⁴

One reason LDCs have not targeted their large-scale food subsidies more carefully is because of the administrative difficulties involved. As we have already seen in our discussion of tax administration, LDCs have had a great deal of difficulty instituting effective income taxes. Any food subsidy program which attempts to limit access to subsidised goods on the basis of income faces precisely the same administrative difficulties. Furthermore, given that the point of targeting programs is to reduce poverty while placing less of a strain on limited budgets, spending more on administration may not always be an effective remedy to the problem of targeting, since the increased costs associated with more effective administration may outweigh the savings achieved through more effective targeting.

There are, however, a number of ways LDCs have managed to mitigate these difficulties. One method is to subsidise foodstuffs which are in higher demand amongst the poorest members of society. Bangladesh experimented with this technique by distributing sorghum, a grain which was viewed as inferior. However, although the experiment was apparently a success, it was never widely implemented.³⁰⁵ The World Bank has suggested using this technique in Brazil by shifting subsidies to casava, and away from milk, beef, and vegetable oils. Similarly, it suggests that Egypt focus subsidies on coarse flour.³⁰⁶ Another possibility is targeting subsidies by providing them only in regions which are disproportionately poor. The Pilot Food Price Subsidy Scheme in the Philippines applied this approach by selecting villages with high rates of child malnutrition as recipients of food subsidies. Geographical targeting of this sort has its disadvantages, however. Some administrative apparatus has to be in place to ensure that only those who live in the region have access to the subsidised food. There is also a danger of leakage through resale of subsidised goods to those who live outside the region.³⁰⁷ A third way of targeting food subsidies more effectively is to ration subsidised foodstuffs so that those who are well-off cannot take advantage of their superior spending power to purchase greater amounts of subsidised foodstuffs. The World Bank has also suggested placing ration shops in poor neighbourhoods where the rich may be less willing to venture.³⁰⁸ Jamaica has used a similar method with considerable success. In 1984, Jamaica introduced a food stamp program which was targeted to pregnant and lactating women, and children under 5 who registered at public

³⁰³ World Bank, *supra*. n.5 at 93.

³⁰⁴ *Ibid.*

³⁰⁵ R. Karim, M. Majid & J. F. Levinson, "The Bangladesh Sorghum Experiment" (1980) 5 Food Policy 61-63.

³⁰⁶ World Bank, *supra*. n.5 at 93.

³⁰⁷ M. Garcia, "Food Subsidies in the Philippines: Preliminary Results" in P. Pinstrup-Andersen, ed., *Food Subsidies in Developing Countries: Costs, Benefits, and Policy Options* (Baltimore: Johns Hopkins University Press, 1988) 206-18.

³⁰⁸ World Bank, *supra* n.5 at 94.

primary health care clinics. The wealthy, who tend to use private clinics, were largely screened out by this method. Thirty-one percent of the expenditures on this program went to the poorest quintile, while only 8% went to the richest.

Social welfare programs that create legal entitlements

Although spending on social welfare programs in LDCs typically has not focused on programs that create legal entitlements nevertheless, there are some areas in which law plays a significant role in effecting states' redistributive goals. We have already discussed one of those areas in our section on land reform. Laws designed to protect share-cropping tenants, for instance, have fundamentally welfarist aims. Other areas include programs designed to provide social security or guaranteed public employment and minimum wage legislation. We discuss each of these types of programs in turn in the following subsections.

Social security

Perhaps the most significant area where law plays a role in social welfare policy is in the institution of social security schemes. Work injury programs, and old age, survivor, and invalidity programs are, in fact, extremely common in LDCs. Unemployment insurance, by contrast, is much less common. In Latin America and the Caribbean, which have some of the most developed social security programs in the developing world, 34 countries had old age disability and survivors benefits programs by 1985, and 30 had work injury schemes, while only 6 had unemployment insurance programs.³⁰⁹ Social security programs are viewed as important by proponents of the welfarist perspective because the poor, who save proportionately less than those who are better off, tend to be particularly vulnerable to sudden fluctuations in income brought on by illness or unemployment, and are less able to save for old age.

We will focus our discussion on two Latin American countries: Uruguay, which has one of the most mature social insurance programs, having established its first pension program for federal employees in the central administration in 1838;³¹⁰ and Columbia, which has a social security system whose maturity falls in the mid-range for Latin American countries, having established its first pension programs in the 1940s. In 1980, in Uruguay 11% of GDP was spent on social security programs, while 38% of the national budget is spent on social security. In Columbia expenditures represent 4% of GDP and 14% of the national budget.³¹¹ These figures include expenditures on health. In Uruguay, the percentage of social security expenditures devoted to pensions is 79%, while in Columbia it is 20%. Uruguay has an unemployment insurance program, while Columbia has only a statutory

³⁰⁹ Mesa-Lago, C., "Social Security in Latin America and the Caribbean: A Comparative Assessment" in Ahmad et al., eds., *Social Security in Developing Countries* (Oxford: Clarendon Press, 1991) 356-94 at 367.

³¹⁰ U.S. Social Security Administration, *Social Security Programs throughout the World 1985* (Washington: U.S. Government Printing Office, 1985) at 272.

³¹¹ Mesa-Lago, C., "Social Security in Latin America and the Caribbean: A Comparative Assessment" in Ahmad et al., eds., *Social Security in Developing Countries* (Oxford: Clarendon Press, 1991) 356-94 at 364.

requirement that employers provide one month's severance pay per year of service to those dismissed without just cause.³¹²

Although social security programs are, in principle, of great importance to the poor because of their ability to mitigate the fragility of the economic position of the poor, even in Latin America those most in need of the protection of social security programs are rarely covered. Most programs began as programs for specific elements of the public service—the armed forces, civil servants, and teachers—and expanded to cover other non-informal sectors. In 1985, 72.4% of the economically active population was covered in Uruguay, while only 30.2% was covered in Columbia.³¹³ In the Latin American countries with more mature systems, efforts have been made to achieve universal coverage. However, there are still large variations in rates of coverage depending on one's occupation or geographical region in Latin America. In one survey of Columbia, Costa Rica, Chile, Ecuador, Mexico, and Peru for the period 1979-84, it was found that the highest level of coverage was in the electricity, gas, and water industries (ranging from 65-100%), while the lowest was in agriculture (4-59%). Geographical variation is also high, with more urban, industrialized, and unionized regions better covered than more rural, agricultural, less-unionized regions. In the period 1979-84, coverage varied by region from a low of 3% to a high of 25% in Columbia, and from 17-69% in Uruguay.³¹⁴ According to Meso-Lago, the effect of these variations, and the fact that the poor are often employed on a part-time basis which does not qualify them for social security programs—are usually not covered by them.³¹⁵ The obvious way to remedy these defects would be to expand coverage of the programs. However, expanding coverage would require greater financial resources. At present, most programs are funded by a combination of employer and employee contributions set by statute at a percentage of wages. This model of financing does not work for the self-employed, who are often not able to afford the combined employer and employee contributions, or for the informal sector. Meso-Lago suggests that LDCs consider financing expanded coverage through general tax revenues.³¹⁶

Public employment programs

Many LDCs have instituted public employment schemes as an alternative to welfare or unemployment insurance. One of the benefits of such schemes is that they can be used to carry out infrastructure projects which may themselves be both growth promoting and of significant benefit to the poor—roads, irrigation, and safe water, for instance. Wages are low in such schemes, but this is seen to offer two benefits. First, the public works projects can be completed relatively cheaply, and second, fairly effective targeting towards those most in

³¹² U.S. Social Security Administration, *supra* n.48 at 56.

³¹³ *Ibid.* at 370.

³¹⁴ Studies cited in *ibid.* at 372.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*, at 380.

need is achieved through self-selection, since the non-poor will not be willing to work for low wages.³¹⁷

In most jurisdictions, public employment projects would perhaps not be best classified as legal entitlements. However, in some jurisdictions employment under these schemes has been legally guaranteed. The right to work has the status of a non-justiciable directive principle in the Indian constitution. However, in 1983 the Rural Landless Employment Guarantee Program (RLEGP) instituted a justiciable guarantee of up to 100 days of employment to at least one member of every landless household in the country. Payment is through a combination of cash and food. It was projected that the program would create the equivalent of 1.6 million full-time jobs in 1986. Osmani estimates that even given optimistic assumptions about the level of unemployment, the program would have reduced unemployment by 9% if the projections had been met.³¹⁸ The usefulness of the RLEGP guarantee is limited, too, since it contains a 100 day ceiling rather than a floor, and can, in principle, be satisfied by providing only one work day. Osmani cites an unpublished study which found that only 5% of participants received more than 100 days employment through the scheme.³¹⁹

The state of Maharashtra has a more robust program—the Employment Guarantee Scheme (EGS)—which guarantees a job within fifteen days, and no more than five kilometers away from the participant's home village, to every adult in rural areas who wants one. When this is not possible, an unemployment allowance is paid.³²⁰ Osmani estimates that the EGS eliminated 22% of unemployment in 1977–78.³²¹ The program has expanded significantly since then, providing three times as many person-days of employment by 1984-85.³²² Osmani quotes studies which found that in 1977–78, the average participant in EGS received 160 days of work, as compared with 44 days for the non-guarantee Food for Work Program run by the Indian central government.³²³ Thus, the guarantee of employment which the EGS provides seems to be robust by comparison with non-guarantee programs (and less ambitious guarantee programs like RLEGP) not only on paper, but in practice. Guaranteed employment programs are, of course, more expensive than non-guaranteed programs, but, as the World Bank points out,³²⁴ guaranteed employment programs have certain virtues. First, for obvious reasons they are much more effective as safety nets. Second, they may be less vulnerable to corruption on the part of officials who would otherwise be able to demand rents in exchange for scarce non-guaranteed jobs.

³¹⁷ See, e.g., World Bank *supra* n.5 at 97. According to the World Bank, over 90% of participants in the Indian state Maharashtra's Employment Guarantee Scheme and Bangladesh's Food for Work Program were below the poverty line in the early 1980s (*ibid.* at 97-98).

³¹⁸ Osmani, *supra* n.24 at 332-33.

³¹⁹ *Ibid.* at 333.

³²⁰ World Bank, *supra* n.5 at 98.

³²¹ Osmani, *supra* n.24 at 335.

³²² World Bank, *supra* n.5 at 98.

³²³ Osmani, *supra* n.24 at 334.

³²⁴ World Bank, *supra* n.5 at 99.

Minimum wage laws

Not all government interventions in the domain of social welfare entail spending. Minimum wage laws, for instance, are conceived of as a way of ameliorating the condition of the least well paid wage earners. Such laws only affect government expenditures indirectly by requiring the government to raise the wages of any of its employees who happen to earn the minimum wage or less. The effectiveness of minimum wage laws is a matter of some dispute, however. First, in some (though not all) circumstances, raising the minimum wage may reduce levels of employment. In such circumstances, it is unclear whether an effective minimum wage law should be considered beneficial for the poor, since although those who keep their jobs are better off, those who lose them are worse off. Second, minimum wage laws may have long term detrimental effects on the poor by dampening growth. Third, even if it were agreed that an increase in the minimum wage would be beneficial from the social welfare perspective, minimum wage laws are often poorly enforced, and thus of little effect in practice. In a study of Costa Rica, Gindling and Terrell 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.³²⁵

There are, however, cases where minimum wage laws have been relatively effective. In a study of the effect of a doubling of real minimum wages in Indonesia in the first half of the 1990s, Rama found evidence that the wage laws did have an effect. Compliance was far from perfect, but there was clustering of wage distributions around the minimum wage, indicating that the law did have an effect.³²⁶ 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.

According to Rama, the main mechanism for enforcement of minimum wages in Indonesia is bad publicity. As of 1994, companies that do not respect labor rights are put on a public black-list, from which they are dropped if they "confess guilty and pledge to apology."³²⁷ Economic sanctions are unlikely to have been the cause of compliance, since the fine for breaking minimum wage laws is approximately \$50 U.S.³²⁸ Strikes are also unlikely to have been the cause of compliance, since Rama found only a very weak correlation between minimum wage increases and labor conflicts.³²⁹ It should be noted that the black-

³²⁵ T. H. Gindling & K. Terrell, "The Nature of Minimum Wages and their Effectiveness as a Wage Floor in Costa Rica" (1995) 23 *World Development*, 1439-1458.

³²⁶ M. Rama, "The Consequences of Doubling the Minimum Wage: The Case of Indonesia" (1996) *World Bank Policy Research Working Paper No.1643* at 20.

³²⁷ *Ibid.* at 9.

³²⁸ *Ibid.* at 10.

³²⁹ *Ibid.* at 9. Rama does admit, however, that the *threat* of strikes and associated bad publicity may have had an effect in securing compliance.

listing policy was instituted the year *after* the data Rama uses were collected. Rama does not explain what mechanisms brought about compliance in 1993.

In theory, the effect on employment of a successfully enforced minimum wage law will depend on the structure of the labor market. In what Rama calls the "neoclassical case," firms compete for workers, driving wages to an equilibrium level *D* where the alternative earnings that a marginal employee could obtain elsewhere are equal to his or her contribution to output at a competing firm.³³⁰ In this case, if the minimum wage is set lower than *D*, it will have no effect. If set higher, firms will shed employees in order to increase marginal productivity. In the alternative "monopsony case," individuals compete for jobs, but there is only one firm operating in the region. In this case, the effect of increasing wages is to attract more potential laborers to the region where the firm operates. The firm will then select a wage level *D* which maximizes its profits. In this case, if the minimum wage is set above *D*, the effect is to attract more workers who produce more than they are paid, thereby increasing employment. However, overall levels of profit decrease, because all the employees of the firm have to be paid the higher wage, not just the new employees.

Rama found that urban wage employment followed the neoclassical model. Given his data, he predicts that doubling the minimum wage again would increase average urban wages by 10%, and decrease employment by 2%. He also predicts that total investment would fall by 4–6%, thereby dampening long-term growth. However, his results for large manufacturing firms indicate that these firms fit the monopsony model. Thus, at least over the short term, there would be no tradeoff between wage gains and job losses for employees of these firms.³³¹

In studies of other countries, results have been mixed, which is as one would expect given that the appropriateness of the neoclassical or monopsony model depends on the specific structure of the labor market examined. In Morocco, an increase in agricultural supply with increase in rural minimum wage has been interpreted as evidence of the applicability of the monopsony model.³³² In Mexico, an increase in minimum wage was found to have no negative effect on employment. However, the minimum wage was only 13% of the average unskilled manufacturing wage, so the lack of a disemployment effect was likely because the minimum wage was otiose, not because of the applicability of the monopsony model.³³³ In Columbia, where the minimum wage was about 53% of the average unskilled manufacturing wage, there was a significant disemployment effect. Elasticity of

³³⁰ In this section, we follow Rama *ibid.* at 10-11.

³³¹ *Ibid.* at 33-34.

³³² J. P. Azam, "Effects of Minimum Wages in Developing Countries: an Exploration" (1994) draft background paper for World Bank, *World Development Report 1995* (Oxford: Oxford University Press, 1995); cited in Rama, *ibid.* at 16.

³³³ L. Bell, "The Impact of Minimum Wages in Mexico and Columbia" (1995) World Bank Policy Research Working Paper; cited in Rama, *supra* n.65 at 16.

unskilled employment was about -0.1, indicating that a doubling of the minimum wage would result in a 10% decrease in levels of employment.³³⁴

G. Family Law

Feminist scholars suggest that when discussing the effectiveness of legal reforms in enhancing the position of women, a great deal of attention must be focused on family law. The argument forwarded by Archana Parashar for identifying family law as the area of the legal system most relevant to Indian women is applicable to the general situation of women in developing countries:

Because of the lack of adequate education and vocational training facilities as well as a scarcity of opportunity for wage employment, for the majority of Indian women there is no meaningful alternative to the family. It follows that laws governing family relations have a greater significance for most Indian women than laws governing equal pay, maternity benefits, property or laws dealing with the lending policies of banks. . . For these affect only a small number of women who are in wage employment or have access to their own property or occasion to deal with financial institutions.³³⁵

While treatises advocating family law reform abound, empirical studies of the impact of such reform on the actual situation of women in developing countries are scarce. This is due primarily to the fact that the extension of rights to women is a new phenomenon, with a great deal of reform occurring in the last quarter century. The experiences of women in Tunisia who were, at an early date, granted rights under a family law code varying dramatically from traditional practice, have been documented extensively relative to many other developing nations. As such, an analysis of Tunisia's Personal Status Code can be used as a starting point for discussing efforts at family law reform in the developing world.

In 1956, after achieving independence from France, Tunisia adopted the Personal Status Code—a piece of legislation that transformed the nation's family law. In drafting the Code, which governs the creation and dissolution of marriage, child custody, spousal maintenance and the law of succession, the Tunisian government "followed the Islamic interpretive practice of *Takkhayur*. . . choosing the most suitable existing jurisprudence from among Islamic schools."³³⁶ Specifically, the government chose those rules deemed to be most suited to the needs of the newly independent state, and to the Tunisian people.³³⁷ The

³³⁴ *Ibid.*

³³⁵ A. Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992) at 17.

³³⁶ M. Brandt and J. Kaplan, "The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia" (1996) 12 *Journal of Law and Religion* 105 at 131.

³³⁷ A. Morse, Jr. and L. Sayeh, "Tunisia: Marriage, Divorce, and Foreign Recognition" (1995) 3 *Family Law*

(continued...)

interpretation of Islamic family law contained in the Code is a modern and dynamic one, which promotes greater rights for women than those enjoyed under traditional religious law.

The Personal Status Code abolishes polygamy, and requires consent to marriage to be given by both spouses. The Code requires all marriages to be officially recorded, and requires judicial intervention in all cases of divorce. As such, the Code abolishes the practice of "talaq", or repudiation, whereby a husband is empowered to terminate his marriage unilaterally, at will. While the Code allows a divorce to be granted upon request, without the need for mutual consent or fault, this right is extended to both the husband and the wife. The Code also provides that men and women have equal rights and obligations upon divorce, and that those obligations may include alimony. Such a principle contrasts with Islamic tradition, which tends toward absolving men of support obligations upon the dissolution of marriage, at which time a woman returns to, and is maintained by, her family. The Code also governs child custody, and recognizes the equal eligibility to custody of a mother and father, with consideration being given to the best interests of the child. Under Islamic law, children remain in the custody of their mother until puberty, at which time custody passes automatically to their father.

According to Mounira Charrad, the reforms initiated by the Personal Status Code have impacted Tunisian family dynamics in ways that have often benefited and empowered women. The abolition of "talaq" and the requirement that a divorce be obtained through judicial channels, has made it more difficult for a man to obtain a divorce. He can no longer sever ties by way of a unilateral, private action and, upon dissolution, may be required to continue to support his former wife. Such legal constraints make men think twice about getting a divorce, and offer greater security to women within marital relationships.³³⁸ Meanwhile, many women have themselves made use of their right to initiate divorce, and have had success in obtaining it.³³⁹

The extent to which the Code has altered family dynamics in Tunisia is a function not only of its provisions, but also of its enforcement—specifically by the judiciary. As has been noted above, the regulation of the family by the Code diverges from the traditional regulation of the family by Islam, the religion of the majority of Tunisians. In the years after the implementation of the Code, its lack of conformity with traditional norms, coupled with its granting of broad discretion to judges when calculating alimony and identifying, for custody purposes, the best interests of the child, meant that "members of the judicial system repeatedly had to choose between the continuity of Islamic legal tradition versus conformity

Quarterly 701 at 704.

³³⁸ M. Charrad, "Repudiation versus Divorce: Responses to State Policy in Tunisia" in E. Ngan-ling Chow and C. White Berheide, eds., *Women, The Family and Policy: A Global Perspective* (Albany: State University of New York Press, 1994) 51 at 58.

³³⁹ M. Charrad, "Repudiation versus Divorce: Response to State Policy in Tunisia" in E. Ngan-ling Chow and C. White Berheide, eds., *Women, The Family and Policy: A Global Perspective* (Albany: State University of New York Press, 1994) 51 at 59.

to values embodied in the new laws."³⁴⁰ The courts have demonstrated a varying degree of faithfulness to the values underlying the Code, depending upon the provision in question. This, in turn, has affected the newly emerging familial status of the Tunisian woman. For example, a woman's chances of obtaining custody of her children upon divorce have increased dramatically.³⁴¹ Meanwhile, her chances of obtaining adequate levels of financial support remain slim: "Many judges continue to be influenced by the Islamic principle that allowed a man to terminate the marriage at will without incurring much financial responsibility for his former wife."³⁴² As a result, women may continue to remain in unhappy marriages—not because they are legally restricted from initiating divorce, but because of financial constraints. Many married women are dependent upon their husbands for financial support. In addition, many Tunisian women lack the skills that would enable them to obtain adequately paying jobs upon divorce. The 1999 World Health Report indicates that Tunisian women over 25 have, on average, only two years of education—half that of men.³⁴³ Entrance into the formal employment sector is also hampered by social and religious conceptions of women as inhabitants of the "private" sphere, defined by the household and the family. Despite progressive legislation such as the Personal Status Code, traditional conceptions of appropriate gender roles continue to pervade society. These conceptions add personal costs, including social and familial stigma, to the financial costs of divorce, and serve as powerful impediments to Tunisian women's exercise of their legal rights.

The impact of family law reform on the status of women in Tunisia can be used as a starting point for discussing similar attempts at reform in other developing nations. The Tunisian experience raises the following issues: first, the influence of cultural and political norms on the creation, enforcement and exercise of family law and, second, the extent to which accessibility to the law affects the exercise of legal rights.

In recent years, most developing countries have ratified international conventions declaring women's physical, social and economic equality with men, and many have incorporated equality provisions into domestic legislation. However, the adoption of conventions and domestic legislation aimed at improving the position of women often does not change the *de facto* situation of women in developing countries. This is due in large part to the unique nature of the locus of reform: family law. The "family" is by its very nature private and personal, such that individuals often resent the law's intrusion into its structure. In a study of the enforcement of maintenance rights and obligations in six Southern African

³⁴⁰ M. Charrad, "Repudiation versus Divorce: Response to State Policy in Tunisia" in E. Ngan-ling Chow and C. White Berheide, eds., *Women, The Family and Policy: A Global Perspective* (Albany: State University of New York Press, 1994) 51 at 57.

³⁴¹ M. Charrad, "Repudiation versus Divorce: Response to State Policy in Tunisia" in E. Ngan-ling Chow and C. White Berheide, eds., *Women, The Family and Policy: A Global Perspective* (Albany: State University of New York Press, 1994) 51 at 58.

³⁴² M. Charrad, "Repudiation versus Divorce: Response to State Policy in Tunisia" in E. Ngan-ling Chow and C. White Berheide, eds., *Women, The Family and Policy: A Global Perspective* (Albany: State University of New York Press, 1994) 51 at 60-61.

³⁴³ The World Health Report 1999 - Annex Table 1 Basic Indicators for all Member States

nations (Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe) almost all participating men and women believed that a father had a duty to maintain his (legitimate) children.³⁴⁴

However, although they were not opposed to maintenance *per se*, men (and many women) opposed the enforcement of maintenance obligations through the court. The male attitude, in particular [was,] "I have a duty to support my children, but it should be *my* choice whether I uphold that duty."³⁴⁵

The composition and functioning of the family is often intimately related to the religious and cultural practices of a community. Indeed, in many societies the family is conceived of as the "kernel" of the community, and thus a reflection of the community itself. As a result, family law is often infused with community mores and values, to an extent not found in other areas of a nation's legal system. Farida Shaheed notes that in most Muslim countries, the vast majority of laws implemented in the field of commerce, tax, public service and administration do not apply the religious principles of the Islamic law:³⁴⁶

In sharp contrast, the laws governing personal and family matters are regulated almost universally through Muslim jurisprudence and justified by reference to Islamic injunctions . . . Precisely because personal/family laws are so consistently labeled "Muslim" and justified with reference to Islamic doctrine . . . the identity/space defined for women is put forward as that of a "Muslim" woman.³⁴⁷

Countries that resist international pressure to abolish, officially, practices deemed detrimental to the status of women, including restrictions on the availability of divorce and contraception, often invoke preservation of national identity as their justification. When the family is defined as a focal point of community, attempts to reform the rules and practices governing family matters become an intrusion upon community identity.

Even when, in response to international pressures, a nation does adopt legislation aimed at improving the status of women, if the legislation varies greatly from customary or

³⁴⁴ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 42.

³⁴⁵ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 42.

³⁴⁶ Faria Shahed, "Linking Dreams: The Network of Women Living Under Muslim Laws" in M. Schuler, ed., *From Basic Needs to Basic Rights: Women's Claim to Human Rights* (Washington, D.C.: Women, Law & Development International, 1995) 305 at 313.

³⁴⁷ Faria Shahed, "Linking Dreams: The Network of Women Living Under Muslim Laws" in M. Schuler, ed., *From Basic Needs to Basic Rights: Women's Claim to Human Rights* (Washington, D.C.: Women, Law & Development International, 1995) 305 at 313.

religious practice, it is unlikely to be enforced. According to Archana Parashar, most women in India

may spend all their lives without coming into contact with the legal system. So it might be argued that whether the State legal system upholds gender equality or not makes little difference to their lives. On the other hand, religion clearly has a positive function as. . . [r]eligious norms shape the everyday lives of Indian women in very tangible ways. . . ³⁴⁸

The constitutions of both Bangladesh and India guarantee women the same employment opportunities as men, and equal pay for equal work. Such guarantees echo the common feminist belief that a woman's right to gainful employment is a necessary precondition for her empowerment.³⁴⁹ However, Bangladeshi and Indian women who seek gainful employment face several constraints, including gender-based segmentation of the labor market, and norms of seclusion which confine women to their homes.³⁵⁰ In both nations, an important symbol of a household's social position is the type of work its women are allowed to do. As wealth and status increase, women's participation in work outside of the home decreases sharply.³⁵¹ Thus, even in situations of financial hardship, women in India and Bangladesh are constrained from seeking gainful employment by threats of social stigma and, often, violent recriminations from their families.

Patriarchal social structures may affect the manner in which women perceive themselves and their roles within the community, thus inhibiting them from exercising their rights. Southern African women going to court to obtain maintenance from their husbands were found to be influenced by traditional practices that exclude women from public life:

Most women stand silent in court . . . When answering questions or requested to cross-examine the respondent, women are clearly shy and speak very softly. . . This tendency may affect women's chances by rendering her too shy to ensure that enough information is placed before the court and that the information is true. They find it difficult to argue their case.³⁵²

³⁴⁸ A. Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992) at 35.

³⁴⁹ See, for example, M. Chen, "A Matter of Survival: Women's Right to Employment in Indian and Bangladesh" in M. Nussbaum and J. Glover, eds., *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995) 37 at 54.

³⁵⁰ M. Chen, "A Matter of Survival: Women's Right to Employment in Indian and Bangladesh" in M. Nussbaum and J. Glover, eds., *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995) 37 at 38.

³⁵¹ M. Chen, "A Matter of Survival: Women's Right to Employment in Indian and Bangladesh" in M. Nussbaum and J. Glover, eds., *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995) 37 at 38.

³⁵² A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 91.

The study of maintenance rights in Southern Africa revealed that women who took their claims to court had invariably sought recourse through traditional, community-based structures first.³⁵³ Ironically, the very remedies that the women were seeking—maintenance after separation or divorce, or maintenance payments controlled by the individual woman rather than her family—were incompatible with customary family law. Thus, the women had been disappointed at the community level. However, due to the coexistence of customary and statutory law within the nations studied the women were, in theory, able to pursue maintenance through another channel—the formal judicial system. The coexistence within many developing nations of customary and statutory law dates back to colonialism, during which Western legal systems were imported to govern the activities of white settlers. The affairs of the native population were regulated by indigenous, "customary" law, which was enforced "by District Commissioners or other White male civil servants chosen by the settler regime or by chiefs chosen and paid by the colonial administration."³⁵⁴ Upon achieving independence many African nations chose to maintain separate statutory and customary legal systems. In many of these countries customary law remains the primary regulator of family law, but there is the option to invoke "Western-based imported [family] laws [which] give rights to women which are not available under most traditional legal systems".³⁵⁵ Ideally, the coexistence of legal systems would allow women the choice of enforcing rights under the system that would be most sympathetic to their claims. In practice, however, the Southern African maintenance study found that even when a nation's statutory law includes rights that enhance women's position relative to the customary law, few women are able to mobilize the system to enforce these rights.³⁵⁶ Women's inability to enforce their rights can be linked to the very nature of a legal system incorporating statutory and customary law:

[t]he creation of [a] multi-tiered and multi-sourced system of law encourages the process of playing with the rules and choices so as to obtain the best perceived advantage. Clearly those with knowledge of or control over the rules, and the power to manipulate them, have the most to gain in such a system. This is unlikely to be to the advantage of women.³⁵⁷

Specifically, the Southern African study found that lack of access to the court system, and inadequate enforcement of maintenance orders, deterred women from pursuing claims

³⁵³ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 146.

³⁵⁴ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 5.

³⁵⁵ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 6.

³⁵⁶ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 89.

³⁵⁷ A. Armstrong et al, "Uncovering Reality: Excavating Women's Rights in African Family Law" (1993) 7 *International Journal of Law and the Family* 314 at 328

through the statutory legal system.³⁵⁸ Travelling the distance to the nearest state court was often costly and time consuming. The procedures of state courts were complex, and were generally conducted in the colonial language, making female applicants unfamiliar with the language uncomfortable.³⁵⁹ The requirement of an interpreter prevented applicants from relating their story in their own words, and posed the risk that the interpreter—most often male—would infuse his relation of the facts with gender-based social judgments.³⁶⁰ Indeed, the majority of court personnel in the Southern African nations studied were male:

It is the clerks, interpreters and other court employees . . . who has the first contact with the female litigant. It is his attitude which is most likely to influence her decision to continue or to make it impossible for her to do so by giving her incorrect or incomplete information. We found that these clerks were often . . . unsympathetic, brusque, and unhelpful, further intimidating female applicants.³⁶¹

Exacerbating access problems was the lack of legal literacy amongst the Southern African women surveyed. While many of the women were familiar with customary law practices, the level of knowledge of statutory law was generally low.³⁶² By gaining knowledge of the content and process of the law, an individual becomes more comfortable mobilizing it to assert entitlements. Only when women's inferior treatment conflicted with the objectives of political campaigns did the issue of gender inequality become a policy concern.³⁶³

States may also reveal their ambivalence toward advancing women's rights by favoring nationalism over gender equality when the two policies conflict. According to Archana Parashar, despite India's claims

that it is working to improve the position of women by ensuring sex-equality in personal laws, the decision whether to reform . . . religious personal law[s] . . . is ultimately dependant upon considerations of national integration. Whenever the political goal of national integration appears to be in jeopardy,

³⁵⁸ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 89.

³⁵⁹ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 94.

³⁶⁰ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 94.

³⁶¹ A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 93.

³⁶² A. Armstrong, *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* (Harare: University of Zimbabwe Publications, 1992) at 130.

³⁶³ X. Li, "Gender Inequality in Chin and Cultural Relativism" in M. Nussbaum and J. Glover, eds., *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995) 407 at 410.

the State abandons its efforts to incorporate sex-equality in religious personal laws and, more often than not, argues that the religious nature of personal laws prevents any intervention by the State.³⁶⁴

Thus, the impact of family law reform on the position of women in developing nations may be seriously hampered by deeply rooted cultural or religious beliefs about women's place, both within the family and within society. This does not mean, however, that the use of law as an instrument of change should be abandoned. Laws provide the groundwork for more widespread reforms:

The Indian Dowry Prohibition Act, 1961, as initially enacted did not result in any prosecutions but its existence on the statute book helped focus attention on the widespread prevalence of the practice of dowry. The ineffectiveness of this law generated discussion and provided the necessary starting point for further action, including efforts to suitably modify the law, and it has ultimately been used more effectively to check the practice of dowry.³⁶⁵

What must be recognized is that any attempt at legal reform aimed at empowering women should have as its focus women, rather than broader policy objectives. Reform must ensure guaranteed, continued access to all institutions within the state structure. Finally, and most importantly, "[a]ny policy designed to improve the situation of women should take as central the fact that among the things needed by women in order to be able to function in many human ways is a change in the way they are socially perceived, both by themselves and by others."

H. Environmental Law

The past two decades have witnessed an increase in concern and consciousness about environmental issues and sustainable development in LDCs. As in the rest of the global community, many countries have passed environmental laws and established environmental agencies and ministries responsible for administering those laws. In this section we discuss some of those initiatives and assess the role that the resulting legal institutions have played in achieving sustainable development and environmental protection in LDCs.

³⁶⁴ A. Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992) at 21.

³⁶⁵ A. Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992) at 33.

Inclusive law-making institutions

It is sometimes suggested that there is insufficient public participation in environmental law-making in much of the Third World.³⁶⁶ However, perhaps because of the influence of international actors, it is not clear that such participation is critical at the domestic level to produce appropriate environmental laws. It turns out that anti-pollution or conservation legislation are often quite stringent by global standards. Sometimes they are even reinforced by constitutionally enshrined obligations to protect the environment.

For example, the Indian Constitution of India, through its Directive Principles of State Policy, provides the basis for that country's environmental protection and sustainable development. Article 48A imposes a constitutional obligation on the State to protect and improve the environment: "the State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country."³⁶⁷ Article 51A(g) extends this obligation to every citizen: "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."³⁶⁸ These constitutional directives provide the basis for a very sophisticated framework of anti-pollution and conservation legislation. Similarly, in 1988 Brazil adopted a new constitution containing twenty-four articles dealing directly with the environment and its environmental legislation is considered to be comprehensive and stringent.³⁶⁹

Agbese draws similar conclusions about a number of African countries, reporting that they have typically adopted stringent environmental legislation. For example, South Africa and Ghana both have constitutional provisions relating to the environment. Several African countries like Nigeria have enacted punitive legislation prohibiting the dumping of toxic wastes. Other African countries have set up special commissions by decree to tackle specific environmental problems in specific regions, and environmental impact assessments are now required for all substantial development projects in most African countries.³⁷⁰

Notwithstanding the above there are examples of LDCs that have not enacted adequate environmental legislation. For example, a review of Cameroon's compliance with

³⁶⁶ O.P. Dwivedi, "Governmental Response to Environmental Challenges: a North-South Perspective," in Joseph G. Jabbara and Onkar P. Dwivedi (eds.), *Governmental Response to Environmental Challenges in Global Perspective* (Amsterdam; Washington, D.C.: IOS Press, 1998), at 7.

³⁶⁷ India. *The Constitution of India: The (Forty-second Amendment) Act 1976*, Article 48A (effective from January 3, 1977).

³⁶⁸ *Ibid.*, Article 51A.

³⁶⁹ Murillo de Aragno and Stephen Bunker, "Brazil: Regional Inequalities and Ecological Diversity in a Federal System," in Edith Brown Weiss and Harold K. Jacobson (eds.) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Massachusetts: MIT Press, 1998), at 478-9.

³⁷⁰ Pita Ogaba Agbese, "Environmental Challenges Facing Africa: Governmental Response," in Joseph G. Jabbara and Onkar P. Dwivedi (eds.) *Governmental Response to Environmental Challenges in Global Perspective* (Amsterdam; Washington, D.C.: IOS Press, 1998).

five major international environmental treaties reveals that it has done little to enact implementing legislation.³⁷¹

The evidence that environmental laws in many LDCs are adequately formulated suggests that there is little need to improve the quality of law-making processes along the lines often recommended by environmentalists. Nonetheless there is some evidence that initiatives designed to increase public participation can be worthwhile. For instance, Zimbabwe's wildlife and nature preservation policies have yielded positive results, largely as a result of including the indigenous population in policy formulation and sharing with them any economic benefits.³⁷² For example, conservation efforts in nontribal lands include the establishment of intensive conservation areas, which are supervised by conservation committees composed of local landowners. In the Tribal Trust Lands, conservation programs must be approved by the Board of Trustees of Tribal Trust Lands. Thus, the local population participates in all resource preservation and improvement measures in such areas.³⁷³ In the area of wildlife preservation, the Parks and Wild Life Act allows landholders to use wild animals on their lands for economic purposes such as sport hunting and tourism.³⁷⁴ This economic incentive has resulted in a substantial increase in the amount of private land reserved as wildlife habitats. Furthermore, many wildlife ranchers have joined together and formed a Wildlife Producers Association, which actively participates in major wildlife conservation projects.³⁷⁵

On the other hand, it may be the case that formal legal rules are not necessary to achieve environmental goals. For instance, little has been done to implement proposals to grant intellectual property rights to indigenous groups over their traditional knowledge about natural resources on their lands. On the other hand, it is not clear that such rights are required. Greaves documents various attempts and successes of indigenous communities in asserting and maintaining control of knowledge and resources by non-legal means. Some of these mechanisms involve taking control of cultural knowledge in various ways to prevent free appropriation: by imposing isolation and secrecy on members of an indigenous society, by controlling outside access to reservations, by imposing numerous conditions on the gathering of cultural information by outsiders, and by specifying restrictions on the uses of such information.³⁷⁶ Other methods include partnerships with outside partners, particularly

³⁷¹ Piers Blaikie and John Mope Simo, "Cameroon's Environmental Accords: Signed, Sealed, but Undelivered," in Edith Brown Weiss and Harold K. Jacobson (eds.) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Massachusetts: MIT Press, 1998).

³⁷² See Brian J. Nickerson, "The Environmental Laws of Zimbabwe: A Unique Approach to Management of the Environment," in (1994) 14(2) *Boston College Third World Law Journal*.

³⁷³ *Ibid.*, at 212-13.

³⁷⁴ These economic benefits are not enjoyed by the residents of communal lands holding large wildlife populations, as they do not enjoy the same rights as private landholders over wildlife. This could be a further area of reform. *Ibid.* at 217.

³⁷⁵ *Ibid.*

³⁷⁶ The latter two are usually accomplished through the use of restrictive contracts with those seeking access to cultural knowledge. Thomas Greaves, "Tribal Rights," in Stephen B. Brush and Doreen Stabinsky (eds) *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Covelo, California;

(continued...)

the development of product supply relationships with external corporations. An example of such an arrangement is that between the Kayapo of Brazil and The Body Shop, a cosmetics firm, for the supply of forest products.³⁷⁷ Greaves suggests that these mechanisms are more effective than legal mechanisms such as patents or copyrights which are difficult to extend to traditional indigenous knowledge that is not novel and has no identifiable author.³⁷⁸ Moreover, Varese, in writing of Latin American indigenous peoples, argues that the recognition of intellectual property rights at the nation-state level will undercut supranational indigenous claims over territorial resources.³⁷⁹

Environmental legislation

Although many LDCs have adequate anti-pollution and conservation legislation, such legislation has not proven sufficient to guarantee sustainable development. Part of the problem is that even state-of-the-art legislation will be ineffective if it is not administered or enforced appropriately. For instance, 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.³⁸⁰

Sometimes the problems lie in the legal framework that governs the administration of anti-pollution laws. For example, India's Water and Air Acts (both anti-pollution laws respectively) provide for almost complete governmental discretion in determining the composition of Pollution Control Boards (which are established under the Acts). The Acts "do not stipulate any professional qualifications, skills or expertise in the matters relating to the environmental pollution for membership of these Boards."³⁸¹ In the absence of legally stipulated qualifications, appointments have become highly politicized.³⁸² The consequences of empowering unqualified individuals to manage the environmental policing and monitoring agency should be obvious. Another flaw in the design of the Acts relates to the legal right conferred on an individual to prosecute violators. Such a right has been made conditional, as there is a requirement of 60 days notice of the alleged offence to the relevant authority. Such a conditional right "not only causes delay in prosecuting an erring industry and allows it to

Washington D.C.: Island Press, 1996), at 28-31.

³⁷⁷ Ibid., 32-3.

³⁷⁸ Ibid., at 26. See also T. Greaves (ed) *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma City, Oklahoma: Society for Applied Anthropology, 1994).

³⁷⁹ Stefano Varese, "The New Environmentalist Movement of Latin American Indigenous People," in Stephen B. Brush and Doreen Stabinsky (eds) *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Covelo, California; Washington, D.C.: Island Press, 1996).

³⁸⁰ Murillo de Aragno and Stephen Bunker, "Brazil: Regional Inequalities and Ecological Diversity in a Federal System," in Edith Brown Weiss and Harold K. Jacobson (eds.) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Massachusetts: MIT Press, 1998), at 478-9.

³⁸¹ K.I. Vibhute, "Environment, Development and the Law: The Indian Perspective," in (1995) 7(2) *Journal of Environmental Law*, at 145.

³⁸² Ibid.

pollute the environment during this period, but it also gives an opportunity to the polluter to destroy the proof of such pollution and thereby avoid conviction.”³⁸³

In many cases poor administration and enforcement result from scarcities of human resource and funds. For example, there are usually insufficient numbers of trained administrative and inspectorate staff to monitor compliance under environmental laws. Brazil is an illustrative case. While Brazilian laws regarding timber extraction are rigorous, their implementation is difficult. This is because IBAMA, Brazil’s environmental agency, has few officials, and little equipment and resources to monitor logging companies, resulting in much illegal harvesting.³⁸⁴ Similarly, in Mexico, in 1992, the government created the office of the Attorney General for the Protection of the Environment, a new autonomous unit, to help implement environmental policy. However, the Attorney General’s office is too understaffed to successfully apply current environmental law: its staff of 1,850 is insufficient to oversee the over 30,000 businesses in the Federal District, not to mention the rest of the country. Furthermore, there is a need for increased technical training on the part of inspectors.³⁸⁵

Political and bureaucratic corruption is another reason for the ineffectiveness of environmental laws in the Third World. For example, it has been suggested that in Cameroon low public sector salaries force the gendarmes who police the traffic of logs on the roads, wildlife officers responsible for licensing export of specimens, and senior environmental officials to augment their earnings with corrupt benefits.³⁸⁶

It should be noted that there is some evidence that the public can play a useful role in administering and enforcing environmental legislation in LDCs. For instance, Brazil has granted public-interest groups standing to initiate suits to obtain injunctions restraining actions that threaten the environment. This legislation has resulted in a number of successful suits.³⁸⁷

Administration and enforcement of environmental legislation

Regardless of how it is administered and enforced, an important factor influencing the effectiveness of environmental legislation is the level of public support for environmental protection. For example, in Brazil local communities have been critical to the preservation of ecologically sensitive areas.³⁸⁸ On the other hand, the absence of public support may limit the effectiveness of legal institutions. State capacity for environmental protection presupposes the participation and consent of people whose subsistence routines depend on the exploitation

³⁸³ Vibhute, *supra* note 1 at 146.

³⁸⁴ De Aragao and Bunker, *supra* note 8, at 499.

³⁸⁵ Marc A. Stern, “Mexican Environmental Policy Revisited,” in (Summer 1993) *Journal of Environment and Development*, 185.

³⁸⁶ Blaikie and Simo at 461.

³⁸⁷ De Aragao and Bunker, *op cit.* 481.

³⁸⁸ De Aragao and Bunker, *Op. cit.* At 487-488.

of natural resources. In the face of poverty the populace may not adhere to laws and regulations limiting access to necessary resources. For example, in Cameroon, growing rural poverty has led to increasing pressures on large numbers of poor people to pursue illegally the commercial exploitation of wildlife, cut timber, and clear land for agriculture.³⁸⁹ In many LDCs it is not the few but the many who must exploit the environment, often in unsustainable ways, to survive. This suggests that policies designed to reduce poverty and inequality may have as much of an impact on environmental protection as policies designed to enhance the administration or enforcement of environmental laws. Public attitudes towards the environment also seem to play an important role in determining the extent to which sustainable development occurs.

I. Human Rights

This part of our study will analyze the role that legal institutions play in the protection of human rights in developing countries. Before we begin however, we should note that a distinction has been drawn within human rights law between ‘traditional’ civil and political rights on the one hand and economic, social and cultural rights on the other. This dichotomy can be traced back to the Cold War, which politicized the issue of human rights along East-West lines. The former Soviet Union and other socialist states held that economic and social rights should receive highest priority, while the liberal democratic traditions of Western States placed an emphasis on civil and political rights.³⁹⁰ The arena of human rights discourse and practice has been dominated by a focus on the more commonly known civil and political rights—rights to free expression, political and civic association, and freedom from torture, cruel, inhuman and degrading treatment. Such rights have long enjoyed justiciable status (especially in the West), increasingly as constitutional rights. On the other hand, economic, social and cultural rights, such as rights to work and adequate income, housing, adequate nutrition, health, education, language and culture, have usually been viewed as “potentially legitimate legislative aspirations or policy goals, sometimes, but just

³⁸⁹ Blaikie and Simo, at 461.

³⁹⁰ Commentators (especially from the Third World) over the past two decades have put forward claims for the recognition of new sets of rights, in particular a category known as the “third generation of solidarity rights.” One such right is the right to development, which was first recognized by the UN Commission on Human Rights in 1977 and was enshrined by the General Assembly in the 1986 Declaration on the Right to Development. Since its inception, both the existence and meaning of the right to development have been controversial. Some argue that the right embraces all human rights (civil, political, social, economic and cultural). Alternatively, there is the argument that the right is really a claim on the part of the Third World for entitlements to First World resources. Some commentators fear that the right to development will be presented as a precondition to the enjoyment of traditional human rights, thus allowing Third World countries to circumvent international human rights standards. See Brenda Cossman, “Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era” in (Spring 1991) 32(2) *Harvard International Law Journal* 339; Wade Mansell and Joanne Scott, “Why Bother About a Right to Development?” in (June 1994) 21(2) *Journal of Law and Society* 171; Philip Alston, “Making Space for New Human Rights: The Case of the Right to Development,” in (1988) 1 *Human Rights Yearbook* 3; Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” in (1985) 15 *California Western International Law Journal* 473.

as often not, constitutionally recognized.”³⁹¹

Each perspective on development surveyed above places some weight upon the objective of protecting human rights. However, the justifications for doing so vary depending upon which perspective is adopted. For instance, a fundamental tenet of the human rights movement is that every human being possesses an inherent dignity by virtue of being human. Moreover, that dignity is intrinsically valuable and worth protecting for its own sake. On this view the rationale for protecting at least some human rights is to protect human dignity because doing so involves guaranteeing conditions such as political liberty, freedom of thought and expression, economic subsistence, cultural freedom, and the provision of social services—for its own sake. Welfarists, dependency theorists and feminists often subscribe to this non-instrumental justification of human rights.

However, there are also instrumental justifications for the advancement of human rights. As indicated above in section III.A one important instrumental justification for the respect and protection of political and civil rights (as part of democratic regimes) is based on the theory that doing so promotes economic growth. It can also be argued that protecting economic and social rights is instrumental to the protection of civil and political rights. As Scott and Macklem point out: “It is trite but true that many traditional civil liberties are illusory to those living in poverty. Satisfying human needs for nutrition, housing, health, and education is a fundamental precondition of contemporary citizenship. The ability to participate in decisions that affect one’s life is in no small measure conditional not only on the existence of civil and political rights but also on material circumstance.”³⁹² Simply put, in order for people in LDCs to exercise civil and political rights they must live, not merely exist.

With these points in mind we now turn to the question of primary interest—what role do legal institutions play in determining the degree of respect for human rights in LDCs? As noted in Part II, most dependency theorists hold a pessimistic view of the ability of the law to induce respect for human rights. Feminists seem to be divided on this issue. Meanwhile, it is not clear that the welfarists have squarely addressed to the question of what role legal institutions play in determining the level of respect for human rights. What follows is a brief survey of the empirical evidence on these points.

The key question that needs to be answered is whether merely enacting legislation that guarantees human rights induces respect for those rights. Obviously, laws that are enacted with the express purpose of undermining human rights are undesirable. However, this has been an unfortunate occurrence in many parts of the Third World. Military regimes throughout the developing world have used the law to stay in power and suppress dissent,

³⁹¹ Craig Scott and Patrick Macklem, “Constitutional Ropes of Sand or Justiciable ‘Guarantees’? Social Rights in a New South African Constitution,” in (1992) 141(1) *University of Pennsylvania Law Review*, at 18.

³⁹² Scott and Macklem, at 85.

egregiously infringing basic civil and political liberties in the process.³⁹³ Perhaps the most notorious example of such a practice was South Africa during the apartheid era, where a repressive legal order was instituted to advance the cause of white supremacy. More commonly, in many developing countries, human rights protection is routinely sacrificed on the altar of development. The social cost of structural adjustment programs and other policies of the World Bank and the International Monetary Fund has included legislative changes—such as limitations on the right to strike or on the free functioning of trade unions—designed to curtail basic human rights.³⁹⁴

As regards civil and political rights, the following case studies illustrate that laws protecting human rights may be necessary but not sufficient conditions for the advancement of human rights in the Third World. The success of such protective laws seems to hinge on other factors such as political will, judicial attitudes and institutional competence.

This can be seen in the case of Peru. In Peru, constitutional safeguards for human rights have been rendered inoperative, largely due to institutional failures and the abdication of civilian political, administrative, and juridical authority over the military and its counterinsurgency campaign. This abdication by civilian authorities has enabled the armed forces to violate human rights with impunity and operate virtually unfettered by the legal and political constraints of constitutional norms and democratic accountability.³⁹⁵ Thus, the case of Peru demonstrates that legal recognition and protection of human rights is not enough. A lack of political will on the part of actors in the justice system (like the judiciary) to enforce basic human rights will be detrimental to the cause of human rights.

This has been the case in many developing nations: human rights violations continue as a result of a failure of political will on the part of those charged with punishing such violations, and not because of the inadequacy of substantive laws or constraints upon enforcement of those laws. For example, in Guatemala, undeniable systemic problems plague both the National Police and the judiciary. However, this does not wholly account for continued human rights violations. Violations continue in Guatemala because the judiciary has learned that they would be putting their lives at risk in investigating human rights abuses, while the National Police are often the perpetrators of these abuses.³⁹⁶

³⁹³ Of course, the use of the law is not necessary to undermine human rights: many military dictatorships have used extralegal measures to severely circumscribe civil liberties and constitutional guarantees.

³⁹⁴ Sigrun I. Skogly, "Human Rights and Economic Efficiency: The Relationship between Social Cost of Adjustment and Human Rights Protection," in Peter Baeh et al. (eds.) *Human Rights in Developing Countries Yearbook 1994* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994), at 60.

³⁹⁵ Angela Cornell and Kenneth Roberts, "Democracy, Counterinsurgency, and Human Rights: The Case of Peru," (1990) 12 *Human Rights Quarterly*, 529-53. Peru has also enacted 'bad' laws curtailing human rights for the purpose of national security. An example is the 1981 Legislative Decree 46, an anti-terrorist law which allows the police to detain suspects for up to fifteen days without court interference.

³⁹⁶ International Human Rights Law Group, "Maximizing Deniability: The Justice System and Human Rights in Guatemala," (1990) 12 *Human Rights Quarterly*, at 180-1.

On the other hand it is possible to point to cases in which judges have been willing to enforce human rights legislation. For instance, the Namibian Supreme Court has disallowed arbitrary official actions, struck down infringements on press freedom, and even found the Namibian system of apartheid unconstitutional.³⁹⁷ However, for every example there is a counter-example: the Bophuthatswanan bill of rights has not been a success, in part due to judicial restraint and passivity in an effort to avoid confrontation with the legislature and the executive.³⁹⁸

Even where human rights laws exist and are legally enforceable, ignorance and attitudinal factors may limit their effectiveness if enforcement requires the victims of human rights abuses to initiate litigation. For instance, Obiora interviewed roughly 70 people in a Nigerian metropolis to test their knowledge and perception of the sex discrimination prohibition in the Nigerian Constitution as well as attitudes towards litigation.³⁹⁹ Fifty-six per cent had no knowledge of the prohibition and an additional 8% conveyed "the obvious impression" that they had no knowledge; 48% expressed disapproval of the notion of general equality compared to 26% who expressed unequivocal support. Many respondents were resistant to the notion of legislated equality. Several interviewees maintained that establishing women's economic independence was the only way to normalize asymmetric power relations in the domestic realm. Of the 70 respondents who expressed their attitude toward litigation 49% of the women indicated they were averse to litigation. That group included 70% of the poor women surveyed but only 26% of the rich women. 68% of the men expressed aversion to litigation. Many respondents indicated that they were particularly reluctant to litigate domestic disputes or against relatives than against strangers in matters involving domestic disputes.

Lack of public support has also undermined the effectiveness of human rights legislation. India provides an illustrative example. Repeated attempts by Parliament to eradicate the dowry system (which perpetuates the inferiority of women and often leads to brideburning) have failed because of the lack of public support.⁴⁰⁰ Similarly, in Botswana in *Dow v. Attorney General*, MISCA 124/90 (High Court of Botswana, June 1991), Unity Dow successfully launched a constitutional challenge to a law that discriminated against Botswanan women by denying citizenship to children born of a Botswanan mother and a non-Botswanan father, but granting citizenship in the reverse case. Significantly however, the government subsequently proposed a referendum to determine whether the constitution should be amended to reinstate the discriminatory legislation. While no such referendum has

³⁹⁷ Eric C. Bjornlund, "The devil's work? Judicial review under a Bill of Rights in South Africa and Namibia," (Spring 1990) 26 *Stanford Journal of International Law*, at 391-434.

³⁹⁸ David Woolfrey and Peter Manda, "A Bill of Rights – lessons from Bophuthatswana," (1990) 23 *Comparative and International Law Journal of Southern Africa*, at 70-83.

³⁹⁹ L. Amede Obiora, *Kindling the Domain of Social Reform Through Law: A Case Study*, *Third World Legal Studies* - 1994-1995, 103.

⁴⁰⁰ Meredith Sherman Fahn, "Noncompliance with India's Dowry Prohibition Act of 1961: A Society's Reactions to Imposed Law," in (1990) 4 *Temple International and Comparative Law Journal* 101.

taken place, the mere fact that it was proposed illustrates that a judicial victory alone cannot guarantee that human rights will be respected.⁴⁰¹

In the arena of economic and social rights, the record concerning the role of law in the protection of such rights is more difficult to assess. This partly because relatively few countries have constitutionally entrenched justiciable economic or social rights. Furthermore, in the few countries whose constitutions contain such rights the rights were either created quite recently (as in the case of South Africa) or are heavily qualified.⁴⁰²

IV. CONCLUSIONS

What conclusions can we confidently draw from our review of the evidence on the relationship between law and development? Despite the contemporary focus in many development circles on enhancing legal system capacity in developing countries, a frank answer is that we know far too little. Much of the rigorous empirical work (reflected in our review of the aggregate evidence) is too unrefined to support robust policy inferences. For example, the relationship between democracy and development that has been explored in a number of empirical studies mostly uses conventional measures of economic growth as the dependent variable and does not explore the impact of democracy on other dimensions of human well-being, including inequalities of wealth, gender equality, environmental sustainability, and respect for human rights. In addition, the independent variable, democracy is often too crudely defined, so that countries are often classified in binary fashion as either democracies or autocracies. We have very little firm data on whether high quality democracies, e.g. democracies where there is a vigorous political competition, an inclusive franchise, periodic and non-disruptive change-overs of government, a vigorous free press, and a thriving civil society have significant impacts on the various dimensions of development that we have sketched in the first section of this paper.⁴⁰³ Similarly, these aggregate studies rarely are sufficiently refined to test the relevance of particular bodies of substantive law to countries' development prospects. With respect to the administration and enforcement of laws, often crude criteria such as judicial independence and delay, bureaucratic red tape and corruption are aggregated into some form of rule of law index that provides very little purchase on precisely what features of what institutions charged with the administration and enforcement of laws are critically relevant to a country's development

⁴⁰¹ Marsha A. Freeman, "Women, law and land at the local level: Claiming women's human rights in domestic legal systems," in (1994) 16 *Human Rights Quarterly* 559, at 568-70.

⁴⁰² For example, in the case of South Africa, such rights are not stated in absolute terms; they simply require the government's commitment to take all reasonable steps, within its available resources, to implement them. See Justice Richard J. Goldstone, "The South African Bill of Rights" in (Summer 1997) 32(3) *Texas International Law Journal* 451. This mirrors the treatment of economic and social rights at the international level, as reflected in Article 2 of the United Nations' International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

⁴⁰³ Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, 1993).

prospects (whatever conception of development one chooses to adopt). Hence, in many of the areas of law that we have surveyed, one is reduced to reliance on relatively unsystematic case studies, which, while suggestive, have obvious limitations in terms of their robustness and generalizability.

Despite these deficiencies in our present knowledge base, a second conclusion that we draw from the evidence reviewed in this paper is that, by and large (with some important exceptions), enacting or adopting appropriate substantive bodies of law or regulation designed to vindicate the particular conception of development that motivates them has not been a major problem for many developing countries. After all, writing laws and regulations is an extremely low cost form of legal adaptation, given the ability to draw on and adapt laws and regulations from a host of other jurisdictions around the world that have previously addressed the issue in question. However, more modesty is required than is often evinced in assuming that formal rules modeled on those found in relatively developed countries represent the best solutions to the legal issues that confront LDCs. For example, in the property rights area, the evidence is equivocal on whether titling systems (in the absence of complementary government services, such as water, sewage, and electricity) make a significant difference to incentives to invest in the acquisition or improvement of property; similarly, the evidence is equivocal as to whether individual property rights are more efficient than customary forms of communal ownership, given the often excessively discounted capacity of many customary land tenure systems to adapt through time by adopting innovative and flexible arrangements for facilitating various kinds of dealings in land. In some cases adopting formal legal rules merely supplements customary legal rules and expands the range of options in a given society. This would be true for instance of laws facilitating incorporation or the issuance of securities to the public. In other cases however, formal institutions might have a more disruptive effect upon informal arrangements. For example, permitting the alienation of land formerly subject to communal tenure might eliminate a valuable risk-spreading mechanism and undermine traditional culture.

A third conclusion that we draw from our review of the evidence on the relationship between law and development is that while the relatively low cost adaptation of substantive law is rarely the principal challenge facing developing countries in enhancing the quality of their legal system, their capacity to enhance the quality of institutions charged with the responsibility for enacting laws and regulations and institutions charged with their subsequent administration and/or enforcement has proven a daunting challenge. With respect to the relationship between law-making institutions and development, while we acknowledge that this relationship is contested, it would be surprising to us if further empirical research did not reveal that high quality democratic law-making institutions impact in a significant and positive way on various dimensions of development beyond simple real per capita growth rates or income levels.⁴⁰⁴ The case studies suggest that in low quality democracies or autocracies, elites often manipulate laws to their advantage—for example, with respect to the framing and enforcement of tax laws, and with respect to land redistribution schemes. More

⁴⁰⁴ Putnam *op. cit.*

inclusive and participatory forms of collective decision-making are likely to mitigate this tendency. Moreover, from a welfarist perspective, the empirical evidence suggests that well-conceived expenditure programs targeted at health and education are likely to play a more prominent role in enhancing the well-being of a broad cross-section of population in developing countries than legal entitlements utilizing the tax and transfer system. Again, inclusive and participatory collective decision-making processes are likely to enhance both the scale and effectiveness of expenditure programs in these areas.

With respect to institutions vested with responsibility for the administration and/or enforcement of laws, it is clear from the evidence reviewed in both the aggregate studies and the case studies herein that effective access to the courts for individuals and groups of citizens, and the integrity, competence and independence of the formal criminal and civil court systems, as well as adequate staffing and resourcing of them, is a major challenge for many developing countries. In our case studies on family law and human rights, lack of effective access to the courts in many developing countries emerges as a major problem. Even assuming effective access, lack of a high quality, non-corrupt, politically independent judiciary has proven problematic in many areas of law, including commercial law, tax law, criminal law, environmental law, and human rights. In addition, attitudinal biases or predispositions on the part of the judiciary have proven problematic in areas such as family law, criminal law, and human rights/anti-discrimination law enforcement.

However, a fourth conclusion we have drawn from our review of the evidence of the relationship between law and development, especially with respect to the enforcement and administration of laws, is that an exclusive or predominant preoccupation with the court system inappropriately discounts the important role played by government departments and agencies and specialized administrative or regulatory bodies in the administration and enforcement of laws. For example, titling systems with respect to real property or registration systems with respect to security interests in personal property entail specialized administrative regimes. In commercial law, in particular areas of commercial law such as bankruptcy and capital markets, specialized administrative or regulatory bodies such as bankruptcy trustees, securities regulators, stock exchanges, and competition authorities are likely to be the frontline administrators and/or enforcers of important bodies of law. In tax law, tax administration and collection initially is a responsibility that is likely to fall to a specialized department or agency of government. With respect to the criminal justice system the police and corrections system play a central role. In social welfare policy, particularly given the limited role that entitlement programs play in many developing countries (which in any event are likely to be administered by specialized agencies or departments of government), and the relatively much more important role played by expenditure programs in areas such as health and education, the quality of government administration is likely to be paramount. In the environmental law and human rights fields, again frontline enforcement responsibilities will often initially fall to specialized departments or agencies of government. Thus, it quickly becomes clear that the administration of the legal system cannot meaningfully be distinguished, in many cases, from government administration more generally.

The current emphasis in many law reform initiatives that are advocated for developing countries on reform of the court system, while important, reflects an excessive preoccupation with the role of the courts (perhaps reflecting the influence of the so-called "new institutional economics") in protecting private property rights and facilitating their transfer to higher value users through the enforcement of contracts (despite little rigorous empirical evidence on the impact of courts on development), while paying insufficient attention to the various other public sector institutions that play no less important roles in the administration and enforcement of laws. If this point is accepted, then it follows that 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 rather than being a discrete focus of reform. Perhaps this is the most important lesson that we can draw from the failure of the early law and development movement and suggests a need for situating law reform in this broader agenda of public sector reforms if the current interest in the relationship between law and development is not to suffer the same fate as the earlier law and development movement.

This study has addressed only one of the three large questions identified in the introduction to this paper that bear on the relationship between law and development: Is law and its institutional manifestations an important determinant of development (however conceived)?—to which we have answered with a qualified affirmative. The other two large questions remain largely unaddressed in this study: with respect to developing countries that have chronically poor "legal capital", what set of historical, political, economic, and cultural reasons explain this deficit? For those countries who have been persistently unable to capitalize on the developmental potential of law, what set of legal reform strategies are likely to be both significant and feasible? We regard these two latter questions as being at least as important and as challenging as the first question that we have addressed in this study. However, unless we can confidently conclude that law is often an important determinant of development (and not merely a dependent variable), these questions need never be answered.