

7 THE WORLD BANK'S USES OF THE "RULE OF LAW" PROMISE IN ECONOMIC DEVELOPMENT

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INTRODUCTION

Law is at the center of development discourse and practice today. The idea that the legal system is crucial for economic growth now forms part of the conventional wisdom in development theory. This idea's most common expression is the "rule of law" (ROL): a legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish. Enthusiasm for law reform as a development strategy boomed during the 1990s and resources for reforming legal systems soared everywhere.¹

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¹ The World Bank estimates to have supported 330 "rule of law" projects dealing with legal and judicial reform in over 100 countries. *Legal and Judicial Reform Observations, Experiences, and Approach of the Legal Vice Presidency*, Legal Vice Presidency, The World Bank, p. 14, (2002) <http://www4.worldbank.org/legal/publications/ljrobervations-final.pdf> [hereinafter *Observations, Experiences and Approach*]. It has spent about \$3.8 billion since 1993 (World Bank Annual Reports 2003 and 2004, p. 30 and 35, respectively). See Thomas Carothers, *The rule of law revival*, 77 *Foreign Affairs* 95–107 (1998) (noting the expansion of legal reform programs); YVES DEZALAY and BRYANT G. GARTH (EDS.), *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (2002) (analyzing how international

After more than a decade of reforms of the legal systems, and particularly of the judiciaries of developing countries around the world we are in a position to analyze the theoretical premises of the programs and the strategies of implementation. By many compelling accounts, these projects have been disappointing, failing to deliver the expected results. On the one hand these critiques challenge the theory that a preordained legal institutional framework is necessary for economic growth. On the other, they review particular reforms of laws and of judicial systems carried out in a variety of countries. However, despite these critiques, the appeal to establishing the “rule of law” by the “right” combination of legal rules and institutions continues to spur hope and inspire reforms.

The critical energy comes from both veterans of the “Law and Development Movement”² and from contemporary scholars in the field.³ In addition, a number of current participants in these reforms have voiced criticisms of the strategies and projects promoted by their institutions.⁴ I endorse this critical practice and to some extent, this chapter forms part of and benefits from that enterprise. However, rather than insisting that these available and powerful critiques must be considered, I intend to explore the persistence of the assumptions about the relationship between law and development by looking at the conditions that have made the “rule of law” such an enduring strategy. Thus, the first question I explore is what makes projects of legal and

development institutions and other transnational actors participate in promoting a particular set of legal reforms, believed to be favorable to economic development and democracy).

² For a classic account of this movement see David Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States* 4 WISCONSIN LAW REVIEW: 1062–1102 (1974). See Trubek’s contribution to this volume for a comparison of the current boom in law and development projects with the earlier reform effort in which he took part.

³ See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN THE STRUCTURE OF MARKET REFORM (2002); Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT’L L. & POL. 243 (2000); John Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA 91 (Christoph Antons, ed., 2003); Jorge Esquirol, CONTINUING FICTIONS OF LATIN AMERICAN LAW, 55 FLORIDA LAW REVIEW 41 (2003); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE, (2003); Joel Ngugi, *Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT’L L. 467 (2004); James Ghatti, *Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILLANOVA LAW REVIEW 5, 971 (2000).

⁴ See Linn Hammergren, *International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers* 309, in BEYOND COMMON KNOWLEDGE, EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen and Thomas C. Heller eds., 2003). See also Richard Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 The World Bank Research Observer 117 (February 1999), <http://www1.worldbank.org/publicsector/legal/Research%20Observer%20Paper.doc>; (raising concerns on the lack of knowledge about what these reforms should consist of and about its economic impact).

judicial reform so immune from these available critiques and from increasing evidence of their scant success. Thinking about what makes the continuation of these projects so appealing should help explain why the "rule of law" is so central to the way we speak about the process of development.

In exploring this question, my work benefits from and at the same time enters a discussion with other scholarly work on how the "rule of law" idea has lent more credibility to international financial institutions, in their promotion of a specific set of economic policies in developing countries. My work departs from this literature however to the extent that some of this work assumes that the World Bank is a monolithic institution with a single agenda.

The starting point of many critiques of the World Bank's work is to assume a consensus within the Bank about the strategy and programs for development. I propose to invert this assumption and begin from the opposite end. What makes the projects of the different groups in the Bank "hang together" in an apparently coherent way? The internal dynamics in the Bank suggest the lack of a consensus – let's call it a dissensus – among various groups working on "rule of law" projects about how it is that law will advance economic development. Thus, when confronted with the resemblance of a unified vision and strategy among these groups, the question I would like to pose is this: what causes the reduction of the dissensus?

In this chapter, I seek to disaggregate the Bank and provide insight on the impact that particular groups have in dominant development strategies. By analyzing the internal dynamics among groups at the Bank, I aim to illuminate the rise and fall of ideas about development and their resistance to both empirical evidence and academic critique. These internal dynamics include institutional inertia and constraints, groups' struggle and competition over resources and prestige, and the relationship between groups at the Bank and the governments of borrowing countries.

My argument is that the conceptions of the rule of law behind these various projects need not be, and indeed are not, consistent with each other. They often conflict, but their inconsistencies or contradictions regularly go unnoticed due to a conceptually confused discussion coupled with the dynamics of a complex institution. To explore this point, this chapter undertakes both a conceptual analysis of the "rule of law" and an institutional analysis of the dynamics among the groups leading these projects in the Bank. I give an account of the ways in which the rule of law rhetoric within the Bank forecloses an analysis about the very policies these reforms introduce, their consequences among groups in society, and their ultimate relationship to economic development. Finally, I argue that the agenda for the rule of law is not exclusively about the role of law in economic development. It is also about defining and expanding the role of the World Bank groups in domestic policies around the world.

I develop my argument in three parts. In the first part, I will sketch four conceptions of the rule of law, developed in jurisprudence and in the literature of economic development, as a template with which to analyze the Bank's strategies and the position of the various groups on the subject. I consider the lack of conceptual agreement on the meaning of the rule of law and explore its multiple interpretations, as well as the overlap and tensions among these conceptions. I argue that these various conceptions of the rule of law, as channeled in the Bank, constitute a hodge-podge that enables different and often conflicting projects to be pursued under the same agenda.

In the second part, I provide an overview of the World Bank's engagement with the rule of law, describing the different conceptions of the rule of law introduced at various points in time. I analyze how, since its inception, the rule of law has been a powerful rhetoric to justify the Bank's involvement in reforming developing countries' legal and judicial systems and to portray this endeavor as an apolitical one. I describe how the rule of law rhetoric has dramatically expanded from an instrumental conception focused on economic considerations to an intrinsic conception that values legal and judicial reforms as good on their own right and considers them an inherent part of the development process.

The third part will look at the practice of rule of law projects and describe the various divisions in the World Bank currently engaged in reforming courts and laws. I will highlight which conceptions of the rule of law these units have adopted and describe how, despite internal disparities and conflicting views among them, their agendas reinforce each other in what seems a common position. I offer an analysis on this apparent consensus at two levels. First, I describe how the conceptual hodge-podge bonds under the same rubric different agendas and competing interests. Second, I analyze the dynamics among the various World Bank groups, and the relationships between these groups and the borrowing countries. I will show how this implicit consensus enables them to discount unfavorable results, support the continuation of their projects and validate a variety of different policies.

THE RULE OF LAW

In this discussion, my purpose is to shed light on the multiplicity of conceptions of the rule of law at play in the discourse of development institutions. I seek to explore the ways in which people deploy and articulate the different conceptions of the rule of law, in what I see as a sort of hodge-podge that remains difficult to disentangle. Moreover, I argue that this amalgam of undifferentiated conceptions greatly contributes to the strength and appeal of the rule of law as it is used today. Before I examine just how I think this hodge-podge works in World Bank practice, I will review some of the main interpretations of the rule of law and offer a classification. This framework

will help to clarify how these conceptions coexist in development assistance projects, how they are used interchangeably by the groups in the Bank, and with what effects.

Anyone seeking to understand what the "rule of law" is will find that the term is unclear and ambiguous. Indeed, the meaning of the "rule of law" has been the subject of disagreements and heated debates among scholars. Whenever people invoke the rule of law, they advance one or several of this term's possible interpretations as if these were obvious or required. In this section, I will explore various conceptions of the idea of the "rule of law" that will serve as an analytical framework helping to probe deeper into the Bank's use of this idea in its strategy and projects.

Discussion of the rule of law ideal can be found in the writings of political theorists like Aristotle, Montesquieu and Locke, who were concerned with devising limits to the power of the government. For Aristotle, who proposed that law rather than any single one of the citizens ruled, the ideal was a society governed by reason and not by passion.⁵ Montesquieu envisioned a system of institutional restraints that could limit governmental exercise of power against citizens and guarantee individuals' freedom from fear and the threat of violence. Achieving this goal required a political system where power could check power, preventing the whims of the king or the discretion of the legislature to fall upon individuals. An independent judiciary was needed in order to check the powers of the executive.⁶ Locke reasoned that the preservation of individuals' property – the chief aim of men entering a political society – was guaranteed by three conditions: first, established law agreed by consent; second, an independent judge with power to decide controversies according to law; and third, a power to execute the sentence.⁷

Scholars writing about the rule of law rely on these and other sources for authority on what the concept means. There is however, little agreement on how the conceptions of these different authors and their positions relate to one another. Some scholars have noticed the ambivalence or vagueness of the term and the multiple ways in which it may be deployed by different actors for a variety of purposes.⁸ Even a number of scholars and analysts more closely

⁵ ARISTOTLE, *THE POLITICS*, Book III, Part 16 (Tr. T. A. Sinclair, 1962) ("He who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast. . . . In law you have the intellect without passions.") p. 142–143.

⁶ MONTESQUIEU, *THE SPIRIT OF LAWS*, Bk. VI, chs. 1–6 (1748) (ed. David Wallace 1977). See Judith Sklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW, IDEAL OR IDEOLOGY* (Hutchinson and Monahan eds., 1987) (discussing Aristotle and Montesquieu as representatives of two distinct visions on the rule of law – one the reign of reason, the other institutional guarantees for the protection of individuals against state power).

⁷ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, ed. Peter Laslett, 1988, pp. 350–353.

⁸ See, for example, Thomas Carothers, *The Many Agendas of Rule of Law Reform*, in *Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM*, pp. 4–15 (Pilar Domingo and Rachel Sieder eds., 2001); Frank Upham, *Mythmaking in the Rule of*

involved with the Bank have expressed caution about the use of the term and its imprecise nature.⁹

The following discussion presents, in a schematic form, four different conceptions of the rule of law. These conceptions are organized around two main criteria: the degree of autonomy of the legal order from other orders like morals and politics, and the degree of relative value against competing considerations. The first criterion of classification makes a distinction between an *institutional* and a *substantive* conception of the rule of law.¹⁰ For those who support the *institutional* conception, judgment about the existence of the rule of law would be rendered based on whether the rules comply with certain requirements, internal to the legal order, that make law efficacious. This view does not pass judgment upon, and is indifferent about, the actual content of these rules. This conception provides no normative criteria to evaluate whether the law in question is a good or a bad law.¹¹ Thus, the rule of law can exist regardless of whether we consider it fair, democratic, or just.¹² In contrast, a *substantive* vision of the rule of law takes these formal characteristics for granted but requires that rules enshrine specific values. It requires the existence of specific rights that are considered to be inherent to such a system.¹³ Existence of these rights becomes the yardstick to judge whether a law is a good law or a bad law.

The second criterion of classification distinguishes between an *instrumental* and an *intrinsic* conception of the rule of law. For those who support the

Law Orthodoxy, Carnegie Endowment Working Paper, Rule of Law Series, Democracy and Rule of Law Project, #30, September 2002; John Ohnesorge, *supra* note 3; Gianmaria Ajani, *The Transplant of Vague Notions* (on file with the author).

⁹ See, for example, Matthew Stephenson, *The Rule of Law as a Goal of Development Policy* (available under Rule of Law and Development section at <http://www.worldbank.org/lji>), and Mathew Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the PRC*, CID Working Paper #47, Center for International Development, Harvard University (2000) <http://www.cid.harvard.edu/cidwp/047.htm>.

¹⁰ I use the term *institutional* instead of the more-often used term *formal* to emphasize the role of society's specialized institutions, particularly that of the judiciary, in the application of rules. But apart from this qualification I use the term *institutional* as equivalent to *formal*. For an analysis of the differences between formal and substantive conceptions, see Paul Craig, *Formal and substantive conceptions of the Rule of Law: An analytical framework*, PUBLIC LAW 467, Autumn 1997, 467–487. See also ROBERTO M. UNGER, *LAW IN MODERN SOCIETY* (1976) 48–58 (analyzing the substantive, institutional, methodological and occupational aspects of an autonomous legal order associated with the rule of law ideal). For an excellent recent treatise on the rule of law, see BRIAN TAMANAHA, *ON THE RULE OF LAW* (2004).

¹¹ See Craig, *supra* note 10 at 467.

¹² For an endorsement of this formal conception see Joseph Raz, *The Rule of Law and its Virtue*, 93 LAW QUARTERLY REVIEW 195 (1977).

¹³ The most prominent contemporary legal philosopher upholding this position is Ronald Dworkin. Coined by him as the rights conception, this view does not distinguish between substantive justice and the rule of law. This conception requires that the formal rules reflect and enforce moral rights. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) 11–12.

TABLE 1. Rule of Law Conceptions

| | | Degree of differentiation of legal norms (from other systems like morals-politics) | |
|---|--------------|--|-----------------|
| | | Institutional | Substantive |
| Degree of relative value against other competing considerations | Instrumental | Max Weber | Friedrich Hayek |
| | Intrinsic | A.V. Dicey | Amartya Sen |

instrumental conception, the rule of law is an effective mechanism to achieve whatever goals a society has set for itself. It is, in other words, an important *means* for the realization of a society's ideals in the organization of government power, relations of production, and social order.¹⁴ Moreover, the rule of law is certainly a value of a society's legal system, but it is one among many competing values to be considered. Sometimes, a society may want to override the rule of law because of other values deemed of higher importance, such as national emergency or substantive justice.¹⁵ In contrast, those supporting an *intrinsic* conception of the rule of law consider it a goal in its own right. The rule of law enshrines the greatest values that societies can aspire to, such as justice, democracy, or freedom and it cannot be compromised without foregoing these values.

In the following discussion, I depict these conceptions as ideal-types, relating each conception with a scholar to explore their differences and overlapping elements. These ideal-types should be understood in a continuum rather than in opposition. Table 1 illustrates the conceptions of the rule of law just explained.

Institutional conception

An institutional conception of the rule of law is mainly concerned with the efficacy of a system of rules. Joseph Raz, a prominent advocate of this conception, highlights two fundamental aspects. First, government action should be authorized by law, and second, laws should be capable of guiding people's conduct for them to plan their life.¹⁶ This conception emphasizes the formal

¹⁴ For an account of this instrumental conception, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION*, (1997) pp. 13–14.

¹⁵ See Kennedy, *supra* note 14, at 14.

¹⁶ To effectively enable individuals to plan their lives, rules should be prospective and stable. Particular laws should be guided by open, general and clear rules. There should be an independent judiciary to which all citizens have access and the discretion of law enforcement agencies should not undermine the purposes of the relevant legal rules. Joseph Raz, *supra* note 12 at 196. See also Paul Craig, *supra* note 10 at 469.

characteristics of a legal system that ensure that the rules are available and that they are susceptible of being followed.¹⁷ What are these characteristics? There is of course no definitive list, but among the elements generally included are: 1) generality, 2) notice or publicity, 3) prospectivity, 4) clarity, 5) noncontradictoriness, 6) conformability, 7) stability, and 8) congruence.¹⁸ If the rules reflect these characteristics they will enable the addressees “to *know* what they are commanded to do” and “to *do* what is commanded of them.”¹⁹ The aim of these requirements is the establishment of “rule-like commands that can successfully induce desired behavior (whatever it is) in the addressees.”²⁰ Thus, we may conclude that an *institutional* conception refers to the qualities and mechanisms of the rules in a legal system. This view is not concerned with the *content* of the rules and the values they uphold but rather on whether the legal system has the formal characteristics that make it work.

As anticipated above, the institutional conception can be divided in two further categories. Operating entirely with criteria internal to the legal order, it is possible to identify an instrumental version of the institutional conception of the rule of law and an intrinsic one. In the following sections, I discuss these categories with reference to the work of Max Weber and A.V. Dicey.

Instrumental version. A classic formulation of this conception of the rule of law is found in Max Weber’s work on the relationship between “rational law” and economic development.²¹ Weber argued that his ideal type of “logically formal rationality” as a system of general, universally applied rules was at the core of western industrialization. This type of law constituted the basis of legal domination and as such the nature of “modern” law and thus the “modern state.”²² The most important element of a legal system containing such characteristics was its high degree of stability and calculability. These features enabled individuals to predict the actions of other individuals and of the state and thus to engage securely in economic transactions. This system of rules created the social discipline necessary for a modern state where economic development could thrive.²³ Thus, these formal rules were the *means* through which individuals could enter into predictable economic transactions that would ultimately lead to economic growth.

¹⁷ See Margaret Jane Radin, *Reconsidering the Rule of Law*, 64 B.U.L.REV. 781 (1989), 784.

¹⁸ See generally LON FULLER, *THE MORALITY OF LAW* 33–94 (Ed. 1969).

¹⁹ Radin, *supra* note 17, at 786.

²⁰ *Id.*

²¹ See Max Weber, *ECONOMY AND SOCIETY* (1968).

²² David Trubek, *Max Weber on Law and the Rise of Capitalism*, WISC L. REV. 720 (1972).

²³ See G. Myrdal, *The Soft State in Underdeveloped Countries*, 15 UCLA L.REV. 1118 (1968) (discussing the relationship between a “soft” state and underdevelopment. ‘Soft’ development would be characterized as a general lack of social discipline signified by deficiencies in law observance and enforcement.)

It is worth noting that Weber was reluctant to define the modern state and its legal order based on the purpose of the political community or value judgments that inspired the belief in its legitimacy. In Weber's view, political communities could pursue any conceivable end without losing the character of a modern state just as charismatic leadership could be personified by a holy man or a tyrant.²⁴ The immediate implication of this position is that the rule of law, as Weber conceived it, can exist in any political order.²⁵

Intrinsic version. The work that best exemplifies the intrinsic/institutional conception is that of A.V. Dicey, who set out to explain the meaning of the term "rule, supremacy, or predominance of law" as one of the distinguishing characteristics of the English institutions. He identified three features of the rule of law and accorded to them a distinctively English origin. The first meaning refers to the absence of arbitrary power on the part of the government. Dicey put it this way:

[N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.²⁶

Dicey considered this feature a peculiarity of the English institutions or of those countries that had inherited English traditions. He believed that in the continental tradition the executive exercised far wider discretionary authority than the government in England. This discretion enabled government's arbitrariness and thus threatened the individual's legal freedom.²⁷

In the second instance, the rule of law meant legal equality, or more precisely, that every person, regardless of his or her position, is subject to ordinary law administered by ordinary tribunals.

[N]ot only that with us no man is above the law, but (what is a different thing) that here every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.²⁸

²⁴ See Reinhard Bendix, *Max Weber: An Intellectual Portrait* (1978), pp. 417–420.

²⁵ Joseph Raz makes precisely this point when he argues that the rule of law "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man." In Raz's view, a non-democratic legal system may be perfectly capable of conforming to the rule of law ideal. See Raz, *supra* note 12, at 196.

²⁶ A.V. DICEY, *THE LAW OF THE CONSTITUTION* (10th ed., 1959), p. 188.

²⁷ *Id.* 188. Dicey's attribution of the rule of law to the English institutions in opposition to continental institutions has been challenged by several legal scholars, most notably by Sir Ivor Jennings (*THE LAW AND THE CONSTITUTION*, 1952); See also H.W. Arthurs, *WITHOUT THE LAW, ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND* (1985).

²⁸ Dicey, *supra* note 26, at 193.

Dicey saw this trait also as a particularity of England, where every official, from the prime minister to a constable, is as any other citizen, responsible for every act done without legal justification. Thus, officials acting in their official capacity but exceeding their lawful authority are brought to courts and made, in their personal capacity, liable to punishment or to the payment of damages.²⁹ Dicey contrasted this state of affairs with the continent, where he argued that officials acting in their official capacity were regularly protected from the ordinary law of the land, the jurisdiction of ordinary tribunals, and sometimes subject only to official law administered by official organs.³⁰

Finally, in a third sense, under the rule of law constitutional norms are the result of ordinary law as established by ordinary courts. Dicey maintained that:

[T]he general principles of the constitution (as for example the right to personal liberty or the right of public meeting) are with us the result of judicial decision determining the rights of private persons in particular cases brought before the courts, whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.³¹

For Dicey, the English constitution is judge-made and the rights of individuals are mere generalizations drawn from decisions of the judges. In contrast, in continental Europe individual rights are deductions drawn from the principles of the constitution, which is the result of a legislative act. Dicey admits this distinction may be merely a formal one, but he considers that continental constitutionalists have defined rights without giving adequate consideration to providing the remedies to enforce such rights.

Nothing in any of these three prongs of the rule of law, as developed by Dicey, would conclusively indicate that in order to establish the rule of law countries should enact a specific *content* in their laws or possess specific individual rights. Dicey argued adamantly for the common law as a more effective technique to protect such rights as compared to continental legal systems, but he did not make the rule of law hinge upon the existence of a given set of individual rights.³² In this sense, Dicey's conception of the rule of law is internal to the legal order and it can be qualified as *institutional*. The definition and content of the rights available depends on myriad judicial decisions that have been gradually accumulating to formulate a remedy against a wrongdoing in the form of a right.

At the same time, Dicey identifies the rule of law with particular traits of the legal system: due process, authority's submission to its own law, and

²⁹ *Id.*, at 193.

³⁰ *Id.*, at 195.

³¹ *Id.*, at 196.

³² Craig, *supra* note 10, at 472–474.

a constitution consisting of judicially declared rights for which there are enforceable remedies. These qualities, which he so proudly found in the English system, are in Dicey's view constitutive elements of any political community governed by the rule of law. I would argue that Dicey's position is in this sense *intrinsic* because the rule of law must be pursued in its own right. Moreover, the rule of law should be viewed not as one virtue among many competing virtues of a constitutional political system, but as what having a constitutional system is all about. In Dicey's words, "the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution."³³

Substantive conception

A substantive conception of the rule of law takes the formal characteristics of the institutional conception for granted but requires the existence of specific rights that are considered to be inherent in such a system. It is also possible to identify, within the substantive conception, an instrumental and an intrinsic version. I will explore them analyzing the work of Friedrich Hayek and Amartya Sen.

Instrumental version. A powerful example of this position is articulated by Friedrich Hayek. In the instrumentalist version, Hayek regards the rule of law as a system that articulates a free market economy. For Hayek, whereas under the rule of law there is a permanent framework of rules within which individual decisions guide the productive activity, under arbitrary government a central authority directs the economy.³⁴ The rules establishing this framework under the rule of law have certain characteristics:

[This] type of rules can be made in advance, in the shape of *formal rules*, which do not aim at the wants and needs of particular people. They are intended to be merely instrumental in the pursuit of people's various individual ends. And they are, or ought to be, intended for such long periods that it is impossible to know whether they will assist particular people more than others. They could almost be described as a kind of instrument of production, helping people to predict the behaviour of those with whom they must collaborate, rather than as efforts toward satisfaction of particular needs.³⁵

Because of the system of rules in place, individuals are able to foresee with certainty how the government would use its coercive power in given circumstances and thus plan their affairs accordingly. Individuals are able to

³³ Dicey, *supra* note 26, at 202.

³⁴ FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (1944), p.80–96.

³⁵ *Id.* 81.

calculate because the government is bound by rules laid down in advance, of which individuals have knowledge. According to Hayek:

[U]nder the rule of law the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that powers of government will not be used deliberately to frustrate his efforts.³⁶

Hayek insists that the rule of law requires particular kinds of rules that would allow individuals to calculate and predict their interactions with other individuals and the state but also that would keep the government at bay from making decisions of production and exchange in the market. He draws a distinction between these formal rules and rules that depend on particular circumstances at a given moment and evaluate the interests of various persons and groups. In the second kind of rules, the government decides whose interest is more important, coercively imposing a new distinction of rank upon people. Thus, the most important criterion of formal rules, according to Hayek, is that we do not know their concrete effects, the ends they will pursue, or the people they will assist. In this sense, formal rules “do not involve a choice between particular ends or particular people” because we are ignorant of who will use them and for what purposes. For Hayek, not knowing the particular effects of the state’s measures is in fact the rationale of the “great liberal principle of the Rule of Law.”³⁷

The unpredictability of the particular *effects* is what Hayek holds to be the distinguishing feature of formal laws of the liberal system. This criterion is the yardstick with which to measure individual freedom under state action. For Hayek, the Rule of Law is “the legal embodiment of freedom.” As such, it is not concerned with whether government actions are legal in a juridical sense. These actions may be legal but inconsistent with the Rule of Law. If the law gives the government powers to act arbitrarily, or more precisely, if the government’s use of its coercive power is not limited by pre-established rules then the Rule of Law does not prevail.³⁸ Hayek stresses that:

[U]nder the rule of law the private citizen and his property are not an object of administration by the government, not a means to be used for its Purpose. It is only when the administration interferes with the private sphere of the citizen that the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect.³⁹

In order to preclude this discretion, an independent court must be able to review the substance of administrative actions. In limiting the discretion of

³⁶ Id.

³⁷ Id. 83.

³⁸ Id. 91.

³⁹ FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 212 (1978).

the authority, the judiciary must look not only at whether the executive has acted within its powers – whether the authority was legally entitled to act – but also whether the substance of administrative action fell within the government's powers or impinged upon the citizen's private property.

Intrinsic version. Amartya Sen upholds an intrinsic vision of the rule of law, which propounds that the legal system ought to be judged according to whether it enables peoples' capability to exercise their rights. The rule of law and the enhancement of people's freedoms should not be viewed as means to achieve certain ends, but as ends in their own right.

Sen argues that conceptual integrity requires us to see legal development as a constitutive part of the development process, regardless of its effects on the economic, political, and social areas. Development as a whole is an *amalgam* of developments in the distinct economic, legal, political, and social domains. The point is not that legal development causally influences development as a whole but rather that development as a whole cannot be considered separately from legal development.⁴⁰ From this perspective, Sen effectively de-centers the economic aspect of development, asserting that:

[E]ven if legal development were not to contribute one iota to economic development... even then legal and judicial reform would be a critical part of the development process."⁴¹

So far, Sen makes two distinct arguments. First, a conceptually integrated form of development makes it impossible to think of any given sphere of development in isolation. On the contrary, we must understand them "hanging together," in a relation of necessity with one another. The connection of each of the different domains – legal, economic, political, social – is *constitutive* of development. The point here is not one of a relation of causality between each domain and development but rather that development as a whole cannot be considered separately from the development in each domain. Development in an integrated form will consider legal development just as importantly as the economic, social, or political domains.

Second, assessing development in each domain requires us to go beyond its formal aspects. In this view, the rule of law is not "about what the law is and what the judicial system formally accepts and asserts" but rather it must constitutively consider "the enhancement of peoples' capability – their substantive freedom – to exercise the rights and entitlements. Seen in this light, development in each domain is related, indeed causally interrelated, to

⁴⁰ Amartya Sen, *What is the role of legal and judicial reform in economic development?* p.8, (Lecture delivered at the first World Bank conference on Comprehensive Legal and Judicial Development, Washington, DC, June 5, 2000), <http://www1.worldbank.org/publicsector/legal/legalandjudicail.pdf>). See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

⁴¹ Sen, *What is the role of legal and judicial reform in economic development?* p. 10.

instruments and policies in the other domains that cannot be excluded from consideration.

If we accept Sen's view on the conceptual integrity of development, legal development "must be seen as important on its own as a part of the development process, and not merely as a means to an end of other kinds of development, such as economic development."⁴² This point is crucial for Sen, who wants to challenge the exclusive focus on the market system that he considers so prevalent in development studies and policy-making.⁴³

THE WORLD BANK'S USES OF THE RULE OF LAW

The ubiquitous invocation of the rule of law (ROL) by international development institutions like the World Bank is a relatively recent phenomenon. In this section, I analyze how the conceptions of the ROL just described above map out onto the rhetoric and policies of the World Bank. I trace back in time the usage of the ROL concept in the Bank and discuss how the introduction of the rule of law in the Bank was supposed to have a merely institutional meaning but it encompassed a substantive one as well. Indeed, throughout the 1990s, the World Bank's ROL rhetoric has further broadened to include the four conceptions previously discussed. Thus, starting out reflecting an instrumental conception of the ROL, both in its institutional (Weber) and substantive (Hayek) versions, the Bank gradually expanded its rhetoric to include an intrinsic conception, in its institutional (Dicey) and substantive (Sen) versions. I will conclude the section showing how current World Bank rhetoric consists of a hodge-podge reflecting multiple conceptions of the ROL.

By providing an account of its multiple uses, I seek to clarify how the rule of law has been a powerful conceptual and rhetorical tool to garner support for substantive legal reforms that have important political, social, and economic implications in the countries they are implemented. By appeal to the ROL, however, these reforms are often presented as merely institutional, economically efficient, and apolitical. Moreover, the shift in emphasis from an instrumental to an intrinsic version of the ROL is not necessarily correlated to a shift in projects. Whereas projects of legal and judicial reform have remained more or less stable, the rhetoric has shifted often making the same projects look better by the mere shift in language.

⁴² *Id.*, at 13.

⁴³ In an essay commemorating the 60th anniversary of Hayek's *The Road to Serfdom*, Sen recognized Hayek as a champion of the proposition that societal institutions, including the market, should be judged by the degree to which they promote freedom. However, Sen noted that Hayek's fascination with the market's enabling effects on freedoms made him downplay "the lack of freedom for some that may result from a complete reliance on the market system, with exclusions and imperfections, and the social effects of big disparities in the ownership of assets". Amartya Sen, *An insight into the purpose of prosperity*, Financial Times (September 27, 2004).

The policy models of the World Bank

The story of the Bank's activities on rule of law projects can be told by situating them within the main development models of the Bank in three different periods. The first period, that of "structural adjustment," goes from 1980 to 1990. The second period, which witnesses the emergence of "governance" runs from 1990 to 1999. The last period, from 1999 onward is one of "comprehensive development." These three periods attest to the changes in thinking about economic development. Broadly speaking, they encompass the rise and fall of neoliberal thinking, or the so-called Washington Consensus, and the subsequent move to an "enlightened" Washington Consensus, mediated by a decade of profound reforms and severe crisis. These periods provide the framework of the World Bank's engagement with the ROL, facilitating an analysis of the ROL rhetoric in conjunction with changes in development thinking and policy models.

"Structural adjustment" was a period of market shock and trade liberalization. In the midst of the debt crisis in the beginning of the 1980s the Bank started a lending practice that made disbursements conditional upon the implementation of reform programs in macroeconomic and financial management.⁴⁴ The Bank's involvement in reforming developing countries' laws and legal systems predates the introduction of the notion of the rule of law in the Bank's projects. The notion of the "rule of law" was not part of the development strategy and was thus absent from reform proposals. However, the Bank assisted borrowing countries in a wide variety of legal changes deemed necessary to implement the macroeconomic policies agreed to as part of structural adjustment loans. Legal reforms were thus a condition for loan disbursement. They were narrowly tailored to introduce fiscal reform, ending exchange-rate controls, liberalizing trade, securing property rights, ending subsidies, and privatizing state-owned enterprises.⁴⁵

⁴⁴ Designed as an exception to its lending practice to address the balance of payment crisis of the late 1970s, these loans increased dramatically in the 1980s and extended to the adjustment of a wide range of sectors. These reforms required widespread legislative changes in a variety of areas; especially those "enabling business environment" such as property law, commercial law, anti-trust, foreign investment, tax, banking, and labor regulation. During the 1980s adjustment lending represented 18% of International Bank for Reconstruction and Development (IBRD) and 12% of International Development Association (IDA), the two main lending institutions of the Bank. It accounted for 33% of total IBRD disbursement and 12% of IDA's. Ibrahim Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, in *THE WORLD BANK IN A CHANGING WORLD*, 53, 58 (1991).

⁴⁵ The strategy that these legal changes sought to articulate consisted of three main areas: 1) macroeconomic management (realistic exchange rates, positive real interest rates, trade liberalization), efficient resource allocation (replacement of price controls with competitive markets) and the creation of a supportive legal and regulatory framework (reducing cost of doing business and encouraging competition, streamlining procedures and reforming tax, labor, investment, credit and corporate laws), 2) privatization or restructuring of state-owned

The “governance” period was inaugurated by the dismemberment of the Soviet Union, the dramatic political transformation of Eastern Europe and a severe political crisis in the African continent in the late 1980s and early 1990s. Indeed, the term governance is supposed to have emerged from a World Bank report evaluating the crisis in Sub-Saharan Africa and advancing recommendations for a minimum institutional “governance” to create stable conditions in these countries and assure the effectiveness of development assistance.⁴⁶ In this context, the “rule of law” emerged as a central part of the strategy for transforming these countries into market economies. With the introduction of the rule of law as an area of legitimate Bank intervention, law reform became a priority and the Bank rapidly began to broaden its reach. During this period, the Bank favored a long-term approach for projects of judicial and legal reform and created independent loans, in the form of investment or technical assistance that were not necessarily subject to conditionality.⁴⁷

The current “comprehensive development” phase was inaugurated by President James D. Wolfensohn’s strategy of a Comprehensive Development Framework (CDF).⁴⁸ This strategy was launched as a response to the critiques of the neoliberal economic policies and sought to turn from a focus on economic growth to one of “interdependence” of all aspects of development. CDF seeks to reconceptualize development by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns. The quest is for a stable, equitable and sustainable development. The reduction of poverty, or rather freedom from poverty, has been introduced as a central part of the strategy.

enterprises to guarantee efficient provision of infrastructure and services (reducing or eliminating public monopolies, privatization and contracting out), and 3) developing financial systems that mobilize and allocate financial resources efficiently (develop strong financial markets, strengthen institutions promoting the private sector, and assisting micro enterprises, small-scale agriculture, and the informal sector). Ibrahim Shihata, *The World Bank Facing the 21st Century – Developments in the Eighties and Prospects for the Nineties*, in *1 THE WORLD BANK IN A CHANGING WORLD* 30 (1991). See also *Initiatives in Legal and Judicial Reform*, Legal Vice Presidency, The World Bank (2002) <http://www4.worldbank.org/legal/publications/LJR-Initiatives-2003.pdf>, p. 8.

⁴⁶ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth. A long term perspective Study* (1989); See also Ibrahim Shihata, *1 THE WORLD BANK IN A CHANGING WORLD* (1991) pp. 53–57.

⁴⁷ Practically every lending operation includes, in one way or another, a component of legal reform. It would be possible to classify operations according to how central legal reform is to the project and to whether such legal reforms are conditioned. Thus, operations vary from: 1) loans for capacity building and institutional development, which include components related to legal reform, to 2) reforms stipulated as conditions of structural adjustment programs, to 3) “freestanding” legal and judicial reform projects. Freestanding projects have been used in many countries. The first of these independent loans was given to China (1994). The largest has been the Legal Reform Project in Russia, supported by a \$58 million loan. See *Initiatives in Legal and Judicial Reform*, *supra* note 45, 6–10.

⁴⁸ James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* (May 1999), available at <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf>.

The World Bank rhetoric on the Rule of Law

In describing the incorporation of the "rule of law" agenda in the Bank, I will focus on the writings of Ibrahim Shihata, general counsel and senior vice president of the World Bank from 1983 to 1998. Shihata stands out as the main architect of the "rule of law" in the Bank and as a bridge between different phases and policy models pursued.⁴⁹

Writing in 1990, Ibrahim Shihata inaugurated and set out to justify the Bank's work on governance.⁵⁰ Mindful of the prohibitions against intervening in countries' internal political affairs under the Bank's mandate, laid down in its Articles of Agreement,⁵¹ Shihata undertook the task of defining governance and drawing its limits. Distinguishing those aspects of governance that fell within the Bank's mandate from those representing prohibited "political considerations" became crucial for considering intervention in borrowing countries without violating the Bank's mandate.⁵² Revisiting Shihata's explanation reveals the difficulties he faced trying to expand the competence of the Bank in areas understood to be reserved to the domestic jurisdiction of States. Shihata aimed at carving out a new sphere of action for the Bank while advocating its nonpolitical character. To achieve this, he emphasized the distinction between political and economic considerations, the former outside the Bank's reach, the latter within the Bank's area of expertise. This is arguably why Shihata preferred to speak of governance rather than government. Government was unmistakably political whereas governance deemphasized the

⁴⁹ Shihata was by no means alone. As can be seen by the extent and scope of his publications, he had a considerable team of collaborators who helped to formulate this new role for the Bank. Thus, when I refer to Shihata I have in mind a position or school of thought led by him but not of his sole creation. The position he developed can be found in the three volumes of IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* (1991, 1995, 2000); *COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK* (1997); and *THE WORLD BANK LEGAL PAPERS* (2000).

⁵⁰ Shihata defined governance as "the manner in which a community is managed and directed, including the making and administration of policy in matters of political control, as well as in such economic issues as may be relevant to the management of the community's resources; it conveys the same meaning as government. . . ." Ibrahim Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, in 1 *THE WORLD BANK IN A CHANGING WORLD* 53 (1991), 85 (hereinafter *The WB and Governance Issues*); See also Ibrahim Shihata, *Issues of "Governance" in Borrowing Members – The Extent of their Relevance under the Bank's Articles of Agreement*, in *THE WORLD BANK LEGAL PAPERS* 245 (2000), 268 (hereinafter *Issues of Governance*).

⁵¹ The Articles of Agreement of both IBRD (available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>) and IDA (available at <http://siteresources.worldbank.org/IDA/Resources/ida-articlesofagreement.pdf>) contain three similar provisions intended to prevent political intervention of these institutions in member countries and to prohibit the former from taking political or non-economic considerations into account. These are Article III, Section 5(b); Article IV, Section 10; and Article V, Section 5(c) of the IBRD Articles, and Article V, Section 1(g); Article V, Section 6; and Article VI, Section 5(c) of the IDA Articles. See Shihata, *The WB and Governance Issues*, *supra* note 50, at 65–67.

⁵² See *id.* pp. 81–84.

political character and stressed “management” of administrative and economic resources.

The Rule of Law as an institutional framework. It is in this context that Shihata first appealed to the rule of law, defining the sphere of legitimate action within the Bank’s action in the “governance” strategy. For Shihata, those aspects of governance consistent with the Bank’s mandate were found in the meaning of “good order,” understood as:

[A] system, based on abstract rules which are actually applied, and on functioning institutions which ensure the appropriate applications of such rules. This system of rules and institutions is reflected in the concept of *the rule of law*, generally known in different legal systems and often expressed in the familiar phrase of a ‘government of laws and not of men.’⁵³

What are the characteristics of such a system of rules and institutions? Shihata laid down five elements:

1) [T]here is a set of rules which are known in advance, 2) such rules are actually in force, 3) mechanisms exist to ensure the proper application of the rules and to follow for departure from them as needed according to established procedures, 4) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body, and 5) there are known procedures for amending the rules when they no longer serve their purpose.⁵⁴

There is nothing particularly innovative about this characterization of the rule of law, as Shihata himself recognized. Probably, the reader will already have situated Shihata’s characterization of the rule of law in the upper left corner of Table 1 in the first section of this article,⁵⁵ as an institutionalist-instrumentalist approach. The sources to which Shihata refers in his discussion further confirm this categorization.⁵⁶

Shihata noted that the concept was known in other legal systems as well under appellations such as the “supremacy of law,” and that it was not always tied to the principle of separation of powers. Embarking on a brief history of the notion, he referred to U.S. constitutional sources but made clear that there was nothing particularly western in the concept, that it was known in other systems and it had played a very important role in the evolution of the Islamic legal system.⁵⁷ Shihata’s most important point in this discussion seems to be that the rule of law is compatible with a variety of different legal systems and traditions. Moreover, he did not associate the rule of law with democracy or for that matter with any particular type of political system or

⁵³ See Shihata, *The WB and Governance Issues*, *supra* note 50, at 85 (emphasis added). Shihata, *Issues of Governance*, *supra* note 50, at 272–273.

⁵⁴ *Id.*

⁵⁵ See Table 1, p. 259.

⁵⁶ See Shihata, *The WB and Governance Issues*, *supra* note 50, p. 87, expressly referring to Weber’s theory of the role of law in the economy.

⁵⁷ See *id.* at 85, footnote 96.

government. Nor did he argue that the rule of law should be embodied in any particular kind of political and legal institutions. Shihata considered this system of rules and institutions to be important prerequisites for developing market economies. For this proposition, he referred to Weber's ideal type of "logically formal rationality" and the establishment of legal domination in a modern state as conducive to economic growth.⁵⁸ The relevance of the rule of law in development, Shihata argued, was that the effectiveness of reform policies would depend on a system capable of articulating them into workable rules and ensuring its compliance.

Following Weber, Shihata insisted that a system containing the basic elements he had pointed out for the rule of law addressed "the *process* of the formulation and application of rules, rather than the substance."⁵⁹ Thus, apart perhaps from certain formal characteristics which legal rules should fulfill in order to be observed and enforced, this approach tells us nothing about what kind of rules have to be enacted. Shihata argued that in respect of their content or *substance*, rules "will of course reflect the policies of each government and should be based on its own choices and convictions."⁶⁰ Substantive legal reform required profound knowledge of the economic and social situation in the country involved. Thus, Shihata concluded, legal reform could not be imposed from the outside and could only be useful if it was done by the country itself in response to its own needs.⁶¹

The Rule of Law as substantive rights and regulations. This is not, however, the whole story of Shihata's articulation of the rule of law. In a subtle but somewhat striking turn of position, performed in the same memorandum interpreting the Bank's Articles of Agreement, Shihata proposed that the Bank assist countries in the design of laws related to its mandate, and declared that it was free to condition loan disbursements upon adoption of legal reforms needed to implement agreed economic policies. Moreover, he argued, this focus on the content of the rules was appropriate as long as it was "based on considerations of economy and efficiency."⁶² This competence of the Bank was to be distinguished, however, from the institutional setup as a prerequisite of economic reform and stability.⁶³ After all, Shihata seemed to be arguing for the Bank's involvement in the recommendation of specific types of rules, which "based on considerations of economy and efficiency," the Bank's traditional sphere of action, can serve as best practices for development countries.

⁵⁸ *Id.* at 87.

⁵⁹ *Id.* at 86.

⁶⁰ *Id.*

⁶¹ *Id.* at 89. He further noted that "as any student of law knows, legal evolution is normally based on the interaction of the real forces in a community and reflects the evolving interests, values and convictions that do exist with such a community."

⁶² *Id.* at 86.

⁶³ Shihata, *Issues of Governance*, *supra* note 50, at 273.

At this point, we could interpret Shihata's position as shifting from a Weberian to a Hayekian conception of the rule of law, recommending specific property and contract rights and regulations, and focusing on the substance of the rules. Shihata justified the Bank's involvement in the *content* of countries' laws by the demand for legal reforms coming from countries. The claim that it was countries that demanded these reforms needs to be taken with caution. As is widely known, the Bank developed a lending practice that required particular legal reforms from developing countries as a condition of loan disbursement. In any event, Shihata contended that this demand came from governments' realization that the private sector could not develop in the absence of an *appropriate legal framework* and well functioning mechanisms and institutions that ensured enforcement of the law, protected property and contracts, and settled disputes effectively.⁶⁴ Shihata alluded to the importance of having "an appropriate legal system, properly administered and enforced, for creating an environment conducive to business development."⁶⁵ But Shihata referred to these substantive rules of private law as a *framework* or an *environment* conducive to business development, proposing them as *institutional*, whereas they were in effect *substantive*. Thus, the concept of substantive laws forming the *appropriate* legal system favorable to business was conflated with the *institutional* character of the legal system.⁶⁶

Furthermore, the impression of the merely *institutional* and not *substantive* character of the Bank's work in reforming countries' private laws was reinforced by the limitations that Shihata laid down for the Bank's jurisdiction in projects of legal reform. In interpreting the Bank's Articles of Agreement, which define its mandate and scope of intervention, Shihata determined that the World Bank could not work in the area of human rights, and specifically of civil and political rights. That was, in his view, definitely a political area that had to be left in the hands of each country's political system.⁶⁷ Shihata also contrasted the Bank's jurisdiction with the one of the European Bank for

⁶⁴ *Id.* Shihata refers to training programs for judges in business law or the law of commercial transactions; or providing knowledge on how compliance with contracts can be ensured, or how courts can perform their work within a reasonable time to help the business community.

⁶⁵ *Id.*

⁶⁶ For a thorough discussion of the conflation of substantive and procedural conceptions of the rule of law, see Joel M. Ngugi, *Searching for the market criterion*, SJD Dissertation, Harvard Law School 2002 (on file with Harvard Law School library). Ngugi contends that a conflation between a procedural and a substantive conception of the rule of law legitimates economic reforms that may be emptied out of democratic content. This conflation enables the deployment of what Ngugi calls a "thick concept" of the rule of law, having both a descriptive and evaluative property. In Ngugi's view, the deployment of the rule of law as a thick concept "operates to justify programmatic [value-laden] reforms while maintaining a standard rhetoric of procedural necessity that is easily agreed upon politically." *Id.* at 139.

⁶⁷ See Ibrahim Shihata, *The World Bank and Human Rights*, in *THE WORLD BANK IN A CHANGING WORLD* 97 (1991), pp. 97–109.

Reconstruction and Development, which specified in its mandate the goal of establishing market democracies. In contrast, the Bank was not entitled to condition its lending to the establishment of democratic political processes.⁶⁸ Setting out these boundaries had the effect of portraying the Bank's work in private law reform as a matter of nonpolitical economic expertise.

At this point, it can be appreciated how Shihata swayed back and forth from a Weberian to a Hayekian version of the rule of law. On the one hand, he argued for an institutional approach in order to enable the Bank to get involved and even condition countries' legal reforms. On the other hand, Shihata promoted a substantive approach when he asserted the Bank's authority in designing specific private law rules, even though he declared the Bank's role to be merely establishing an appropriate legal framework. Portraying the Bank's intervention as merely institutional was further enhanced by declaring other areas typically thought of as more substantive or political, such as civil and political rights, outside its reach.

Thus, we can observe that from the very beginning, the Bank's relationship to the rule of law idea was characterized by an ambiguity between an institutional and substantive version, which allowed it a scope of action and intervention much wider than if it had clearly placed itself only in one or the other conception.

Expanding the Rule of Law to fight corruption. In 1996, the Bank announced its determination to begin projects aimed at fighting corruption and thus join other international efforts. James D. Wolfhenson, then just appointed president of the Bank, declared that "the international community simply must deal with the cancer of corruption, because it is a major barrier to sustainable and equitable development," thus inaugurating a new area for the Bank's involvement.⁶⁹

In his role as legal advisor, Shihata helped to set up and implement the Bank's agenda for combating corruption. While advocating an active role for the Bank in this area, Shihata was careful to notice once again the Bank's prohibition to intervene in political affairs of States. He made clear that fighting corruption was an important part of the Bank's "governance" agenda and that, consistent with his previous interpretation of the Articles of Agreement, it was driven by the estimation of corruption's negative effects on the appropriate use of the Bank's resources in developing countries. The Bank had an interest in ensuring that countries use its financial aid for the specific purposes agreed upon in advance and in an efficient manner. Promoting reforms

⁶⁸ See Shihata, *The WB and Governance Issues*, *supra* note 50, at 77, 79, 82, 93–95.

⁶⁹ See Ibrahim Shihata, *Corruption-A General Review with an Emphasis on the Role of the World Bank*, in *THE WORLD BANK IN A CHANGING WORLD* 603 (1991), [hereinafter *General Corruption Review*].

to increase effectiveness of development aid would thus also be consistent with the Bank's objectives.⁷⁰

Although Shihata initially recognized that there was no conclusive empirical evidence on the relationship between lack of corruption and economic growth, he pointed out an emerging consensus holding that the long-term effects of corruption in investment climate and peoples' welfare, weakened public institutions, and ultimately decreased economic growth.⁷¹ Once the Bank decided to actively participate in combating corruption, Shihata enthusiastically noted that the Bank began to produce research showing a strong correlation between low levels of corruption and income per capita, infant mortality, and literacy rate. Moreover, the Bank encouraged countries to combat corruption by undertaking a variety of reforms and sought to create the demand for reforms by getting civil society involved. It established workshops, seminars, and training programs to disseminate knowledge and gain from countries' experience. Finally, the Bank initiated an internal restructuring in the Bank to monitor procurement and loan disbursement.⁷²

Equally important in Shihata's justification is a concern with corruption's effects on a country's institutions. In this view, corruption is wrong not only because it may hinder or retard growth, but because it corrodes societies. It makes "governance" dysfunctional and ineffective, empowering particular individuals rather than institutions, and favoring discretion and arbitrary decision rather than rule following.⁷³ The Bank seems clearly concerned with corruption as it relates to an exercise of public power that lacks transparency, tends to be abusive, and is unaccountable. Thus, in this view, corruption not only produces bad effects for the country's economic progress, but it is also morally wrong. It favors the powerful and impinges upon the rights of the weak and the poor.

Shihata points out that legal scholarship treats corruption as "deviation (for private gains) from binding rules, the arbitrary exercise of discretionary powers and the illegitimate use of public resources."⁷⁴ Shihata concludes that corruption has a "devastating effect on the rule of law which . . . is substituted for by the rule of whoever has the influence or the ability and willingness to pay."⁷⁵ Thus, building the rule of law becomes a strategy to manage and reduce corruption.

⁷⁰ See *General Corruption Review*, *supra* note 69, at 626–630.

⁷¹ *Id.* at 604–605.

⁷² See Ibrahim Shihata, *Postscript* of chapter eighteen, in 3 *THE WORLD BANK IN A CHANGING WORLD* 641 (2000).

⁷³ The Bank embraced the agenda for fighting corruption to ensure an effective state, one that could reinvigorate the market reforms promoted in the neoliberal period, particularly policies of free-trade, market deregulation and privatization of state-owned enterprises and increase their likelihood of success. See *World Development Report 1997 – THE STATE IN A CHANGING WORLD*, 8 (World Bank 1997).

⁷⁴ *Corruption General Review*, *supra* note 69, at 606.

⁷⁵ *Id.* at 607.

High among the policies that countries can implement to curb corruption are legal reforms in civil service, criminal law, administrative law, and judicial reform. Changes would aim at establishing a meritocracy in the bureaucracy, guaranteeing transparency in public administration, ensuring monitoring of government procurement processes, reducing red-tape, and curbing arbitrariness and discretion in administrative and judicial decisions.

Successful reforms will ensure that in Dicey's terms, "no man is above the law," emphasizing the need for government officials to act in accordance with previously established and publicized laws. The judiciary plays a key role in this strategy. By ensuring that public officials will be held individually responsible for their actions, these projects aim at creating checks to government discretion and arbitrary power.⁷⁶ Beyond what economic effects the reduction of corruption may bring about, the institutional changes will make for a better, more transparent, accountable and, in the end, more democratic type of government. Therefore, the Bank's rationale for fighting corruption upholds an institutional version of the rule of law that is not merely instrumental but also intrinsic.

Reinterpreting the Rule of Law to reduce poverty and enhance peoples' capabilities. The Comprehensive Development Framework sets out a role for each of the actors of development (government, private sector, civil society, development agencies) and proposes a framework for coordinating their efforts. The program keeps the stress on sequencing and phasing of reforms as well as on local ownership, while preserving the role of the private sector as the main engine for development. In this holistic approach to development of the CDE, the focus of legal and judicial reform projects has moved beyond economic growth, also promoting human rights to achieve sustainable and equitable development. In the struggle against poverty, these projects emphasize access to justice as well as empowerment, ownership, and security for the most vulnerable groups, with particular emphasis on the poor, women, and children. This agenda relies on a substantive and intrinsic (Sen-based) conception of the rule of law.

The reform strategy has broadened to acknowledge an important role for the state in *regulating* the market. The task becomes one of delimiting the *appropriate* regulation to promote and encourage business activity. The goal is to generate a market-friendly and enterprise-led growth while reducing poverty and helping people improve their quality of life.⁷⁷ In addition, the Bank has argued that "a well functioning legal and judicial system is critical

⁷⁶ See Ibrahim Shihata, *Role of the Judiciary in the Prevention and Control of Corruption*, 3 The World Bank in a Changing World 277 (2001).

⁷⁷ For a strategy that reflects this goal, see *Private Sector Development Strategy-Directions for the World Bank Group*, The World Bank (April 9, 2002). <http://rru.worldbank.org/documents/PSDStrategy-April%209.pdf>.

both *as an end in itself* [*intrinsic*] as well as a means to facilitate and leverage the achievement of other development objectives [*instrumental*].”⁷⁸

Multiple Rule of Law conceptions at play. Throughout these three periods, the policy models of the World Bank signal a shift of emphasis on the rule of law discourse from an *instrumental* conception (in both its institutional and substantive versions) to an *intrinsic* one. All four versions of the rule of law seem to converge in a hodge-podge articulation as exemplified in current usage of the term in World Bank reports:

The rule of law is essential to *equitable economic development and sustainable poverty reduction*. Weak legal and judicial systems undermine the fight against poverty on many fronts: they divert investment to markets with more *predictable rule-based* environments, *deprive* important sectors of the use of *productive assets*, and *mute the voice of citizens* in the decision-making process. *Vulnerable individuals*, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities. Ineffectual enforcement of laws engenders *environmental degradation, corruption, money laundering*, and other problems that burden people and economies around the world.⁷⁹

These conceptions are overlapping but there are also tensions and contradictions between them. It seems hard that they could all be advanced simultaneously. In the following section, I will argue that, despite the promising inclusion of an intrinsic rule of law conception, there seems to be a simultaneous use of all rule of law conceptions that works as a shield. By advocating several conceptions at once, it becomes easier to justify the goals of any given project. Criticism to any one of the conceptions can be deflected by alternating between the purposes of the different conceptions at play. Looking at how projects of legal and judicial reform are justified in practice will help to clarify how the rule of law conceptions are deployed and with what purposes.

A look at its official rhetoric enables one to see that the Bank has moved a long way from the initial justification to participate in the reform of legal

⁷⁸ See *Initiatives in Legal and Judicial Reform*, *supra* note 45, at 2. This shift finds support in the work of Amartya Sen, who explicitly responded to the question of “*What is the role of legal and judicial reform in the development process?*” in an address to the Bank. See Sen, *supra* note 40. Legal’s most recent legal reform strategy explicitly recognizes a link between poverty reduction and human rights, based on the principle that freedom from poverty is an essential element of development. Moreover, it confirms the CDF’s holistic approach proposing that the protection of economic, social, and cultural human rights is an essential element of sustainable and equitable development. See *Legal and Judicial Reform: Strategic Directions*, Legal Vice Presidency, The World Bank (2003) <http://www4.worldbank.org/legal/leglr/GreyBookFinal2003.pdf> [hereinafter *Strategic Directions*] at 46.

⁷⁹ World Bank Annual Report, 2002. p.77 (emphasis added).

and judicial systems around the world. Contrast Shihata's initial position and his efforts to justify the Bank's involvement in these projects with the Bank's current position. In his reinterpretation of the Bank's Articles of Agreement, Shihata tried hard to draw a distinction between economics and politics. The prohibition from intervening in countries' political affairs was interpreted then as meaning a more overt involvement with countries' type of government and the governments' decision-making processes. Today, the Bank's reports speak, evaluate, and propose reforms about the quality of government, the level of participation of citizens in the country's decision-making processes, the protection of individuals' rights against abuse of power, the monitoring and control of public officials, and an increasing list of subjects that seem to take us back full circle to the overt political interventions that the Bank's legal advisor had initially marked out as outside the Bank's mandate. This doesn't mean that the Bank's work on legal and judicial reform did not have strong political implications earlier. But the illusion of maintaining an apolitical stance, still very much part of the Bank's discourse, has become ever more difficult to sustain. The irony is that while the rule of law was supposed to provide a justification for the Bank's apolitical involvement in countries' reform, it has expanded to the point of making the apolitical pretension untenable.

THE PRACTICE OF REFORMING COURTS AND LAWS

Having these multiple conceptions of the ROL in mind I will move now from the realm of the rhetoric to the practice field. The question that I seek to answer is why projects of legal and judicial reform are still appealing and continue to be recommended and provided by groups in the Bank despite a number of important critiques and unfavorable evidence. To answer this question I explore the practice of Bank groups in introducing and justifying legal and judicial reform projects as well as in evaluating their work and responding to critiques. To engage in this analysis I make use of all the elements laid down and developed so far.

First, I bring back the idea of the rule of law as a hodge-podge, comprising not of one but four conceptions that are different and often conflicting. Second, I identify the use of these multiple conceptions in the Bank's rhetoric and look at how these conceptions coexist and are used simultaneously. In this section, I introduce an institutional analysis of the Bank, paying special attention to four groups that have been crucial in promoting and carrying out the transformation of developing countries' legal and judicial systems. Lastly, the analysis considers the relations between the Bank and developing countries, looking at the mechanisms that tend to perpetuate these projects regardless of their substantive merits.

Disaggregating the World Bank

This analysis builds upon my experience while working in the World Bank during the summer of 2003, where I strove to capture the understandings of the rule of law under which the Bank operated. I started this project by making a preliminary map of the different groups working on issues related to rule of law reform and identifying what their projects consist of.⁸⁰ Some people at the Bank reacted by saying that my map was too neat and I needed to add more chaos and definitely more subdivisions. The deeper I got into the study of the various Bank units engaged in rule of law projects and their respective understandings of what the concept entailed, the more this experience of fragmentation and inconsistency intensified.⁸¹

I think that the Bank's position, discourse, and reform agenda regarding the role of law in economic development can be better grasped if we understand it as the product of the interaction and even struggle between different groups within the institution. This analysis will help to clarify that groups within the World Bank have subscribed to different conceptions of the rule of law at different points in time. Before analyzing the dynamics between these groups, I explore the connection between the particular versions of the rule of law that the groups uphold and the specific projects that they work on.

The Legal Department. The *Legal and Judicial Reform* group of the Legal Vice Presidency,⁸² commonly referred to as "Legal," is the Bank's most visible department in the business of reforming laws and courts. This group was created in the early 1990s and gave the Legal Vice Presidency direct participation in the operative part of these projects, joining other divisions in the Bank already working on reforming courts. To a great extent, for the outside

⁸⁰ I use the word "groups" in this chapter to refer to the various units or divisions in the World Bank working on projects of legal and judicial reform. It should not be confused with the five "World Bank Groups," consisting of IDRB, IDA, IFC, MIGA and ICSID.

⁸¹ This analysis is by no means exhaustive. Trying to simplify the extremely complex structure of the Bank comes at the risk of leaving out groups doing relevant work in this area. However, the groups under analysis are undoubtedly important actors in the Bank and they merit discussion as driving forces within the institution. Other groups working in aspects that relate to legal and judicial reform include the International Law and Environment in the Legal Vice Presidency, and Gender and Civil Society in the Poverty Reduction and Economic Management sector.

⁸² The Legal Vice-Presidency (LGVP) operates as one integrated unit, but is composed of eight thematic practice groups: 1) Co-financing and Project Finance, 2) Corporate Finance, 3) Institutional Administration, 4) Environment and International Law, 5) Private Sector, Infrastructure and Finance, 6) Legal and Judicial Reform, 7) Policy and Institutional Affairs, and 8) Procurement and Consultant Services, and five regional practice groups: 1) Africa, 2) East Asia and Pacific, 3) Europe and Central Asia, 4) Latin America and the Caribbean, and 5) Middle East, North Africa and South Asia. The Law and Justice Group, an umbrella that includes three groups: 1) Legal and Judicial Reform, 2) Environment and International Law, and 3) Private Sector, Infrastructure, and Finance, has prepared the latest publications of the Legal Vice Presidency concerning legal and judicial reform, assessing and redefining the work of the Bank in this area.

observer Legal represents the "official" position of the Bank's work in this area through its publications. The group serves two main functions. On one hand it is involved in the design and implementation of a number of projects.⁸³ On the other hand, it gathers and publishes information about all legal and judicial reform projects, including those carried out by other units.⁸⁴

Public Sector Unit. The Public Sector Unit (Public Sector) is one of the constituent parts of the Poverty Reduction and Economic Management sector (PREM).⁸⁵ This group jump-started court reform projects in the early 1990s and it has designed and implemented a substantial part of the Bank's judicial reform projects.⁸⁶ Public Sector has focused on reforming countries' judiciaries to provide the institutional framework assumed necessary for economic development to thrive. Public Sector and Legal are the main contenders for management of judicial reform projects and are engaged in an ongoing battle for resources.

Private Sector Development Group. This group was established in 1988 in the context of the Bank's advocacy of reducing the role of the State in the economy.⁸⁷ At one with the prevailing free-market wisdom and an aversion to all things public of that time, the private sector was forecasted to be the most promising area of development assistance. More recently, the Private Sector Development Group (Private Sector) has been converted into a vice presidency, effectively creating a network of units working on issues of privatization and corporate finance. Private Sector is involved in some operational work designing laws for borrowing countries in the fields of corporations, finance, bankruptcy, and other related areas aiming to create a favorable "investment climate" where businesses can thrive.⁸⁸

⁸³ The group's webpage can be accessed at <http://www4.worldbank.org/legal/leglr/>. Legal and judicial indicators can be found at <http://www4.worldbank.org/legal/database/Justice/default.htm>. See also *Strategic Directions*, *supra* note 78, and *Observations, Experiences, and Approach*, *supra* note 1.

⁸⁴ The group's publications are accessible at <http://www4.worldbank.org/legal/leglr/publications.html>.

⁸⁵ PREM is a network Vice Presidency, which means that there is a PREM unit in each of the Bank's five regions plus an anchor unit.

⁸⁶ Apart from judicial reform, the Public Sector unit undertakes projects of public expenditure analysis and management, tax policy and administration, civil service and administrative reform, decentralization, e-government, public enterprises, technical assistance and capacity building. I will focus on the work of Public Sector of the Latin American region, which has been perhaps the most active in judicial reform projects. The number of these projects is remarkable considering that the Inter-American Development Bank has made judicial reform one of its central reform projects too. See Christina Biebesheimer and J. Mark Payne, *IDB Experience in Justice Reform-Lessons Learned and Elements for Policy Formulation*, Inter-American Development Bank (2001), <http://www.iadb.org/sds/doc/sgc-IDBExperiences-E.pdf>.

⁸⁷ See generally, Ibrahim Shihata, *The World Bank and Private Sector Development – A Legal Perspective*, in 1 THE WORLD BANK IN A CHANGING WORLD 203 (1991).

⁸⁸ See Knowledge Services for Private Sector Development at <http://rru.worldbank.org/>.

Within the Private Sector and not directly involved in operations, the Rapid Response Unit (“Rapid Response”) has clearly articulated a program for law reform, seeking to establish *appropriate* regulation for economic development. Dubbed the “Doing Business” report,⁸⁹ this project claims it has found out which legal rules promote growth and recommends their adoption to developing countries as best practices for business.⁹⁰ Rapid often presents itself as a sort of 911 for policymakers in distress. Among other online services and information available, experts provide “best practice public policy advice for private sector led growth” and prompt customized assistance for the “alleviation” of the private sector. “Do you need customized policy advice on investment climate? Click here.”⁹¹

⁸⁹ This group’s interactive webpage is <http://www.doingbusiness.org/> where the “Doing Business” projects of 2004, 2005 and 2006 can be accessed.

⁹⁰ This group is closely connected with the “legal origins” scholarly project doing comparative studies of how certain legal systems are more conducive to efficient outcomes than others. The “legal origins” theorists consist of a group of leading economists working in the fields of behavioral finance, financial markets, corporate finance, and corporate governance. Making use of legal history and comparative law, these scholars have turned to “legal systems” for an explanation of countries’ regulatory divergence and subsequent social and economic outcomes. Together, these scholars have written an already recognizable body of literature in comparative economics that informs the “Doing Business” reports. The head of the project in the World Bank is Simeon Djankov. The main academic figure is Harvard economics professor Andrei Shleifer, and the team includes Oliver Hart, Florencio Lopez-de Silanes, and Rafael La Porta, among others.

Proponents of the “legal origins” theory first advanced in the field of corporate finance (Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, *Law and Finance*, 106 *JOURNAL OF POLITICAL ECONOMY* 1113–1155, 1998) claim that legal tradition explains differences in countries’ regulation. Adopting the conventional categorization which groups countries’ legal systems into “legal families”, proponents of this theory argue that regulation in common law countries is economically more efficient and leads to better growth results than in civil law countries (Edward Glaeser, and Andrei Shleifer, *Legal Origins*, 117 *QUARTERLY JOURNAL OF ECONOMICS* 1193–1229, 2002).

These theorists are prolific and have produced a vast literature, rapidly expanding from the field of corporate finance to other areas of regulation like administrative law (Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Regulation of Entry*, 117 *QUARTERLY JOURNAL OF ECONOMICS* 1–37, 2002, and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, *The Quality of Government*, 15 *JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION* 222–279, 1999); bankruptcy (Simeon Djankov, Oliver Hart, Tatiana Nenova, and Andrei Shleifer, *The Efficiency of Bankruptcy*, Working Paper. Department of Economics, Harvard University, Cambridge, Mass., 2003); labor and employment (Juan Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Regulation of Labor*, Working Paper 9756, National Bureau of Economic Research, Cambridge, Mass., 2003); and civil procedure (Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *Courts*, 118 *QUARTERLY JOURNAL OF ECONOMICS* 342–387, 2003; and Simeon Djankov, Caralee McLiesh, and Andrei Shleifer, *Remedies in Credit Markets*, Working Paper. Department of Economics, Harvard University, Cambridge, Mass., 2003).

⁹¹ <http://rru.worldbank.org/> (as seen on December 2003). Since then, Rapid Response has nuanced its marketing to offer “customized policy research on business environment issues,” which it now provides for free at <http://rru.worldbank.org/AskQuestion/>.

TABLE 2. World Bank Groups' Use of Multiple Rule of Law Conceptions

| | | Degree of differentiation of legal norms (from other systems like morals-politics) | |
|---|--------------|---|--|
| | | Institutional | Substantive |
| Degree of relative value against other competing considerations | Instrumental | Legal Public Sector [Max Weber] | Rapid Response Unit [Friedrich Hayek] |
| | Intrinsic | World Bank Institute [A.V. Dicey] | Legal Public Sector Rapid Response Unit World Bank Institute [Amartya Sen] |

World Bank Institute. This group constitutes the major research center of the Bank. The World Bank Institute (WBI) does not participate in the operational work of legal and judicial reform projects but its research agenda has made it an important player in the area. Since 1996, WBI has published the "Governance Indicators," which report on the "good governance" of most countries, claiming to measure the institutional framework of both a country's government and market. This group defines governance broadly as "the traditions and institutions by which authority in a country is exercised." It has unbundled governance into three parts: 1) the process by which governments are selected, monitored, and replaced, 2) the capacity of the government to formulate and implement sound policies effectively, and 3) the respect of citizens and the state for the institutions that govern economic and social interactions. Through the publication of its indicators, WBI has become the authority on measuring governance around the world.⁹² In addition, WBI has invested resources in training programs, setting up regional and country courses for judges, advancing the idea that the judiciary is a fundamental actor in curbing corruption, and improving good governance.

Table 2 table situates the four groups under analysis and the conceptions of the rule of law that they more frequently invoke in their projects.

Judicial and legal reform projects

Looking at how these multiple rule of law conceptions are deployed by groups in the Bank in projects of legal and judicial reform can help us answer the

⁹² See <http://www.worldbank.org/wbi/governance/govdata/>; For the most recent paper see Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996–2004*, (The World Bank, May 2005) <http://www.worldbank.org/wbi/governance/pdf/GovMatters'IV'main.pdf> The indicators are interactive and allow the user to compare indicators across countries as well as overall rates of particular countries across regions.

puzzle of why these projects remain so appealing regardless of scant results and continued critiques. In my view, the rule of law rhetoric has facilitated the problematic continuation of projects and has further decreased the demands for delivering the economic growth originally promised. The constant practice of slippage between these ROL conceptions and the way they are deployed by the units working on these projects has two effects. First, it allows policymakers to be unclear about what they mean when they invoke the ROL. Second, it allows policymakers to not take seriously the critiques of their projects or the evidence of disappointing results by engaging in a practice of “goal-post-shifting.” When pressed by a critique of the premises with which they introduced their projects, they turn to a multiplicity of other objectives or aspirations that their projects are also supposed to pursue in relation to different conceptions of the ROL. I argue that this practice enables policymakers to disregard important critiques of their projects’ premises and of unfavorable results. Finally, this slippage encourages a continued confusion among different groups that may have very different agendas. I will discuss what I consider to be other negative effects of this dynamic, namely lack of transparency, waste of resources, and justification for opportunistic behavior.

Judicial reform. I will begin with an example of how I think this practice works in analyzing projects of judicial reform, of which Public Sector Unit and Legal are in charge. These projects started with the premise that an independent and effective judiciary is a necessary precondition for economic development.⁹³ This premise became a marching tune and was included in these groups’ reports and academic papers justifying their projects. It was argued that merely enacting property and contract laws would not suffice to attract investment unless independent and effective courts enforced them. Effective courts were in charge of setting in motion the private sector. The assumption was that courts would ensure calculability and predictability of economic transactions by effectively enforcing contracts and acting independently to prevent governments’ impingement on property rights.

The first judicial reform project of the Bank was delivered as a “technical assistance loan” to Venezuela in 1992. Gradually, the scope of these projects expanded to include aspects related to judicial independence, judicial training, court administration and case management, control of corruption, appointment of judges, criminal justice, and government accountability.⁹⁴

⁹³ This argument is clearly stated by Maria Dakolias, the director of the Legal and Judicial Reform group, in *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA.J. INT 167 (1995–1996).

⁹⁴ See *Initiatives in Legal and Judicial Reform*, *supra* note 45, at 3–5.

However, some tensions became apparent and the premises of these projects were subject to important objections. First, it was noted that a formal regime of property rights and contract enforcement, which the courts were deemed to make effective, is not necessarily high in the considerations of investors when deciding where to invest. Investors and business actors are generally driven by returns, and they often rely on informal mechanisms of enforcement where reputation and expectations of future transactions substitute for formal mechanisms to ensure compliance.⁹⁵

Second, there is evidence that entrepreneurs are not all that concerned with the effectiveness of judiciaries in the countries they invest. Investors' primary interest is returns, not effective courts. A 1993 survey of sixty-eight business enterprises in Ecuador, conducted by Legal itself, to determine the constraints of private sector development found that an effective judicial system came sixth in the list, after political instability, inflation and price instability, lack of skilled labor, lack of infrastructure, and high level of taxation.⁹⁶

Imagine investors considering business in China; it isn't hard to visualize that the size of the market and profit opportunities, not the structure of its legal and judicial system, will carry the day in investors' decisions. In mid-size economies like Brazil and Mexico, large domestic markets are a major draw for both national and foreign investors. In the case of Mexico, proximity to the United States and a free-trade agreement that strongly protects investors by bypassing – not making more effective – national courts, are also major factors in attracting investment. Indeed, the legal and judicial systems of these countries could probably be less effective than they currently are without affecting entrepreneurs' interest to invest.⁹⁷

The legal system could represent a marginal advantage for very small countries having little else to offer. Creating market-friendly legal enclaves of weak consumer protection, minimum labor, and employment rights or low standards of environmental protection could represent an attraction for investors. But more attractive may be special concessions to entrepreneurs in the usual form of tax exemptions, public services, and bureaucratic ease. In neither case, however, does judicial reform come high in the list.

⁹⁵ For a classic argument of business reliance on informal mechanisms see Stewart Maculay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REVIEW 55 (1963). For an argument on investor's disregard for the institutional settings often deemed required for investment see John Hewko, *Foreign Direct Investment, Does the Rule of Law Matter?* (Carnegie Endowment for International Peace, April 2002). <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=952&prog=zgp&proj=zdr1,zted>

⁹⁶ See World Bank, No. 127777-EC, Ecuador: Judicial Sector Assessment I (1994), cited in Dakolias, *supra* note 93 at 169.

⁹⁷ These examples are taken from Linn Hammergren, *Notes on the Rule of Law and Economic Development* p.5, paper presented at Harvard Conference on Rule of Law and Economic Development, April 2002, (on file with the author).

Third, it was also noted that investors usually don't solve their disputes in courts. They frequently solve their disputes through arbitration or strive to reach a settlement. But even if entrepreneurs do go to courts, they generally had access to elite lawyers who knew the system well and had high chances of succeeding. Foreign investors, for instance, can generally find their way in the domestic legal system through high-profile legal assistance that is incorporated in the business cost. Furthermore, judicial reforms were supposed to create incentives for banks and other important creditors that already have an advantage in a judicial system where they are repeat players, know the judicial personnel, have an opportunity to influence the interpretation of the law over time, have the possibility to choose their best cases, negotiate others, and generally build a practice in a specific area.⁹⁸

Finally, good legal systems do not guarantee investment. In Costa Rica, for example, constitutional protections, proworker and prolandless courts provide a clear, predictable, and fairly enforced legal framework but create problems for certain investments.⁹⁹

Beyond the problems posed by the assumptions, there were also problems of implementation. The standard judicial reform project ranging from 2.5 (Yemen) to 58 (Russia) million dollars carried out by Legal or Public Sector, included building new courtrooms, implementing technology for court administration and case management, and training judges. There was practically no diagnosis on the particular conditions of the judicial system of the country in question and on why it was necessary to reform. What were the problems that needed solution, for what purposes, and with what strategy? There was simply no empirical study of how the system worked and what the red lights that needed change were. Consequently, little attention was paid to the impact of the projects on the effectiveness of judicial processes or their ultimate economic impact. This lack of diagnosis usually transpired to the evaluation of these programs. A successful project would report that infrastructure, technology, and training had been effectively introduced, but there were hardly other systematic criteria against which to evaluate the impact of these projects.

When reforms aimed at increasing the effectiveness of adjudication, they focused on decreasing backlogs and reducing the time of disposition and enforcement.¹⁰⁰ Critiques highlighted the lack of empirical research carried out to identify the causes of the problems, (backlogs, delays,

⁹⁸ For a seminal account of this phenomenon see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOCIETY REVIEW 95 (1974).

⁹⁹ See Linn Hammergren, *supra* note 97 p.6.

¹⁰⁰ Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE H.R. & DEV. L.J. 87 (1999) and Edgardo Buscaglia and Maria Dakolias, *Comparative International Study of Court Performance Indicators*, The World Bank (1999) <http://www4.worldbank.org/legal/publications/CourtIndicators-72.pdf>.

nonenforcement) or to design the most effective strategy to address them. The results of these projects remained barely open to evaluation on the basis of the identification of a problem, or on the depth of a program of action and concrete and measurable expectations. Moreover, the few empirical studies sponsored by the Bank found that much of the "conventional wisdom" that had guided reforms was unwarranted.¹⁰¹

The results of judicial reform projects are of course hard to measure, especially if the projects provided no yardstick to monitor and assess performance. But there has been no clear empirical evidence of their success in spurring economic growth. Despite a variety of studies making a case for correlation, the relation of causality between effective courts and economic development, and its direction, is still highly contested. Indeed, economies in countries that reformed their judiciaries in the last two decades have not fared well and many of them are doing worse than before. Moreover, scholars have shown that countries that for decades experienced high rates of growth like Japan, Korea, Taiwan, and China, did not have a judicial system as the ideal type promoted by groups in the Bank.¹⁰²

¹⁰¹ A series of recent World Bank studies on "court uses and court users" in five Latin American countries show how much of the "conventional wisdom" about the problems of judiciaries and why reform is necessary rests on no empirical support and is often plainly wrong. This is the conventional wisdom that has guided the Bank for most of its involvement in the sector. See Linn Hammergren, *Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries*, PREM, and The World Bank 2003 (<http://www1.worldbank.org/prem/PREMNotes/premnote65.pdf>). In an empirical research of summary debt-collection proceedings in Mexico City, analysts found that the users and size of the claims were small to medium and while firms constituted barely more than half of the plaintiffs, most defendants were individuals. This was not a picture of disputes between major economic actors but of minor debts incurred for consumption or small investments. Furthermore, the overwhelming majority of judgments was in favor of the plaintiff (creditor), showing no pro-debtor bias either in the procedural norms or the judges' attitudes. Delays were overtly exaggerated by experts, and when delays occurred, plaintiffs' lawyers and bailiffs rather than judges and combative defendants seemed to be far more responsible. Findings showed a high rate of abandonment due to multiple factors such as successful out of court negotiations by the parties, the plaintiff's lack of interest in materializing the claim (filing to declare a tax), the impossibility of recuperating a debt (insolvent debtor, loans granted on creditors' poor judgment in lending decisions or troubles in identifying assets to seize) or disloyal agents (the bailiff or the plaintiff's attorney). Many of these problems were extra-judicial in origin and no amount of standard judicial reforms, as suggested by the 1996 reform undertaken in Mexico to accelerate proceedings, will solve them. Others were clearly judicial problems (the bailiff's power over the proceedings, procedural complications when dealing with multiple jurisdictions, and the execution phase) that needed well-targeted reforms to give judges a more active role in the proceedings and simplify coordination between different jurisdictions. See Report No. 22635-ME, *The Juicio Ejecutivo Mercantil in the Federal District Courts of Mexico*, The World Bank (2002).

¹⁰² See Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Endowment Working Paper, Rule of Law Series, Democracy and Rule of Law Project # 30, September 2002, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1063>; John Ohnesorge, *supra* note 3; William Alford, *The More Law, the More...? Measuring Legal Reform in*

Faced with these difficulties, judicial reformers can confidently claim that projects of reforming courts seek now also other objectives. Legal and Public Sector make reference to what seems a Senian conception of the ROL, arguing that these projects seek to empower vulnerable groups in society by giving them access to justice and legal aid. These groups also refer to a Diceyan conception of the ROL, claiming that establishing an independent and effective judiciary is an essential element in preventing and prosecuting corruption. In this view, independent courts that review the executive's actions ensure the prevention of arbitrary government.

There is no doubt that using the legal system to distribute resources in a way that empowers the most vulnerable groups in society and enhances their capabilities to pursue the life they have a reason to live is a worthwhile project. My point is not that these groups should remain within the boundaries of a growth-based approach to development. However, the confused use of a Weberian and a Senian conception cancels out a discussion of the expectations of both. On the one hand, Legal and Public Sector avoid a discussion on the growth effects by reference to Sen. And on the other, they thin out Sen's social vision of development by equating it with the formal and institutional characteristics of the legal system. From this perspective, when judicial reforms are taking place, the poor are being empowered.

When their projects are criticized because of their lack of diagnosis and strategy, Legal and Public Sector respond they *have* a strategy, which is involving all stakeholders and promoting ownership of the project. This may be desirable for increasing participation but does not substitute for having an idea of what is wrong with a judicial system, why it is desirable to spend resources there rather than elsewhere, and how these projects will achieve the goals they seek.

Legal reform. Let's take as a second example projects of legal reform such as formalization of property rights seeking to establish a regime of clear, secure, and registered title.¹⁰³ The institutional actors involved in these projects have been the private sector development and the legal and judicial reform group.

the People's Republic of China, in *HOW FAR ACROSS THE RIVER? CHINESE POLICY REFORM IN THE CHINESE WORLD*, (eds. N.C. Hope, D.T. Yang, and M.Y. Li, Stanford University Press, 2003).

¹⁰³ The work of Douglas North, in particular, had a strong impact on the way development policy-makers began to think about law and legal rules as institutional foundations for a market economy. North's historical work advanced the argument that legal institutions that securely enforced property rights were favorable for economic efficiency and growth. Divergence from this pattern could be attributed to special interest groups and transaction costs that explained the prevalence of inefficient property rights and lack of economic growth. It is not difficult to imagine the enthusiasm with which international development organizations, like the World Bank, embraced North's theory of institutional change. Changing developing countries' institutions, and primarily legal systems, could break the institutional path dependence responsible for countries' economic stagnation and pave the way to more efficient markets. See

Starting from a Hayekian conception of the ROL announcing that clear and secure property rights were the foundation of a market economy that would lead to growth, these units have recently incorporated a Senian conception that advocates the enhancement of peoples' capabilities as justification of their projects.¹⁰⁴

Projects of formalization of property rights were implemented in several developing countries, seeking to unleash the dormant capital potential. The premise was that as long as assets remained in the informal sector, they constituted a "dead capital" that could not be used productively because no one had clear title to them. Potential entrepreneurs could not use their assets as collateral to obtain credit and could not predict the enforcement of the return on their productive use.¹⁰⁵ Hernando de Soto has been the main campaigner of titling projects aiming to bring assets into the formal sector and his work has been optimistically received by international development agencies and other development scholars.

The premises of these projects, however, raise a number of important objections.¹⁰⁶ In informal settings, as contextual legal analysis of customary norms has shown, people often have clear ideas about what they can or cannot do without formalized legal entitlements. Legal and economic scholarship has shed light on social cooperation and efficient markets that do not rely on formal entitlements or formal mechanisms of enforcement.¹⁰⁷ That these informal mechanisms have been found to be prominent in business circles

DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

¹⁰⁴ See *Doing Business in 2005, Removing Obstacles to Growth* 33–40 (The World Bank, 2004) <http://www.doingbusiness.org/documents/DoingBusiness2005.PDF> (arguing that weak property rights exclude the poor from doing business). See *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION*, The World Bank, 2003 (arguing that securing land rights of the poor and reducing barriers to title transactions can trigger important social and economic benefits, including empowerment of women and other marginalized people, as well as increased private investment, and more rapid economic growth). See *THE WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT*, The World Bank, 2005 (arguing that inequality of opportunity weakens prospects for overall prosperity and economic growth. To reduce poverty more effectively the report recommends ensuring more equitable access by the poor to secure land rights, along with health care, education, jobs, and capital. It also appeals for greater equality of access to political freedoms and for improving access by the poor to justice systems and infrastructure.)

¹⁰⁵ See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) and *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1990).

¹⁰⁶ My discussion in this section builds on David Kennedy's *Laws and Developments*, in *CONTEMPORARY COMPLEXITY: LAW AND DEVELOPMENT IN THE 21ST CENTURY* (Amanda Perry and John Hatchard eds., 2003).

¹⁰⁷ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Avner Greif, *Contracting, Enforcement, and Efficiency: Economics Beyond the Law*, in Michael Bruno and Boris Pleskovic, eds., *Annual World Bank Conference on Development Economics*, 1996 Washington, D.C., World Bank.

should cast some doubt on the need of formalizing entitlements to stimulate investment and business transactions.¹⁰⁸ Moreover, the prevalence of credit markets in informal property rights settings may help assess the extent to which formalization holds the key to an increase in capital investment.

Assuming that formalization was needed to clarify property rights, their efficient use does not require a specific set of substantively private entitlements.¹⁰⁹ Economists have shown the striking growth results of programs combining private and public entitlements, like the “shareholding-cooperative system” (SCS) in China.¹¹⁰

But even if the choice is a regime of private property rights, legal scholars have long made us aware that property is not a unified ownership conception but rather a bundle of rights, comprised of a multiplicity of entitlements that define relationships of people with one another.¹¹¹ As legal historians have shown, regimes of property rights both in common law and civil law systems did not develop out of a simple unified ownership conception but rather out of a multiplicity of entitlements subject to easements and exceptions.¹¹²

There is the additional problem that a regime of private property rights would not be self-realizable. As it becomes operative, parties will become aware that the property law scheme, applicable to their relations, contains gaps, conflicts, and ambiguities that need to be filled, resolved, and clarified. To the extent that parties are unable to resolve their disputes and in the event that they resort to courts, it will become clear to them that resolution and enforcement of disputes cannot be reached simply by reference to rights.¹¹³ The working out of these decisions will importantly affect this new property rights regime and transform parties’ entitlements and their power vis-à-vis one another.¹¹⁴

¹⁰⁸ See Stewart Maculay, *supra* note 95; Id. *The Impact of Contract Law on the Economy: Less Than Meets the Eye?*, Paper given at a Conference on Law and Modernization, Lima, Peru, July, 1994.

¹⁰⁹ See Duncan Kennedy and Frank Michelman, *Are property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1980), and Joel Ngugi, *supra* note 3.

¹¹⁰ See Dani Rodrik, *After Neoliberalism, What?* (June 2002) available at <http://ksg.ghome.harvard.edu/~drodrik.academic.ksg/After%20Neoliberalism.pdf> (arguing that Chinese institutional innovations like the household responsibility system, the township and village enterprises, and the two-track pricing regime succeeded in providing effective property rights despite the lack of *private* property rights); Zhiyuan Cui, *Wither China? The Discourse on Property Rights in the Chinese Reform Context*, 16 *Social Text* 55 (1998).

¹¹¹ For a canonical exposition see Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 *YALE LAW JOURNAL* 28 (1913).

¹¹² See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*; Thomas Grey, *The Disintegration of Property*, *NOMOS XXII: PROPERTY* 69–86 (1980); Carol Rose, *Crystals and Mud in Property Law* 40 *STANFORD L. REV.* 577 (1988).

¹¹³ See Hohfeld, *supra* note 111; Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935); Duncan Kennedy, *supra*, note 14.

¹¹⁴ See Lee J. Alston, Gary D. Libecap, and Bernardo Mueller, *Property Rights And Land Conflict: A Comparison Of Settlement Of The U.S. Western And Brazilian Amazon Frontiers*, in *LATIN AMERICA AND THE WORLD ECONOMY SINCE 1800*, (eds. JOHN H. COATSWORTH AND ALAN M. TAYLOR,

It turns out to be impossible to determine in the abstract what combination of property rights entitlements would lead to more efficient outcomes. For instance, would it be better to maximize the freedom of possessors to do as they please at the expense of their neighbors' security? Or rather, would it be better to maximize the security of possessors from neighbors' free exercise of power? The first one would arguably reduce protection; the second would reduce flexibility in the ways parties can relate to one another. Moreover, we would need evidence that a one-time increase in efficiency as a result of a given arrangement of legal entitlements would generate growth, rather than just another equilibrium level.¹¹⁵

A scheme of formalization of land title in Peru could enable a squatter with new title to exclude the trespasser. But we need an explanation of why assets in the hand of the title holder, rather than the reverse, would yield the more efficient outcome that would lead to growth. So, it becomes clear that attention to context is crucial. But projects of formalization generally disregarded the need for this type of contextual analysis by assuming that what was needed was simply *clear and secure* property rights.

By accounts of outside critiques and analysts within the Bank, titling programs aimed at bringing assets into the formal sector have not had the impact that reformers hoped for. But the objections mentioned are rarely addressed. Departing from a Hayekian ROL perspective, programs of formalization of property rights seem to have incorporated a version of Sen's vision for empowering the poor, women, and other vulnerable groups.¹¹⁶ A recent report advocated by the "Doing Business" project in the private sector predicts that titling will help the poor because weak property rights exclude the poor from doing business and prevent them from higher income levels.¹¹⁷ But the study has stayed remote from a contextual analysis of the kind that is needed by relying on the incorporation of best practices of other regulatory areas that are supposed to keep titled assets from falling back in the informal sector.¹¹⁸

1998) p. 55–84 (providing a historical example of how land titling policies in the U.S. and Brazil gave rise to important disputes between different groups of claimants with a right to the land. It was not merely the formal property rights regime but its interplay with parties' asymmetrical power and the states' enforcement in favor of one or the other that ultimately determined the land distribution).

¹¹⁵ For an explanation of this type of dynamic efficiency see Gunnar Myrdal, *AN APPROACH TO THE ASIAN DRAMA*, 1843, Appendix 1 (1970); See also Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (P. Newman ed. 1998).

¹¹⁶ See *LAND POLICIES FOR GROWTH* and *THE WORLD DEVELOPMENT REPORT 2006*, *supra* note 104.

¹¹⁷ See *Doing Business in 2005*, *supra* note 104.

¹¹⁸ It should be noted that development policymakers at the Bank adopted North's theory only partially. What was taken from North's theory of institutional change was the proposition that formal legal institutions, notably a system of clear and secure property rights and contracts, were generally conducive to efficient markets and economic growth. However, this wisdom missed one of North's most important contributions, namely a theory of institutional change

I started this section by stating that this practice came at a high cost, namely lack of transparency, waste of resources, and justification for opportunistic behavior. This is a puzzle: I take people at the Bank to be serious about their commitment to improving life conditions in developing countries and I can attest to the professionalism with which they do their work. In my view, the explanation is twofold. On one hand, the answer lies on the conceptual confusion about the ROL. On the other hand, it rests on the internal dynamics between units in the Bank and the relationship between the Bank and its borrowing countries. These are both aspects of the ROL agenda within the Bank that we are still a long way from fully understanding. I believe, however, that this type of inquiry is urgently needed. I propose some lines of thought here that would hopefully lead to further research.

Internal dynamics within the World Bank

The dynamics among the Bank divisions reflect the structural incentives that foster continuation of these projects and help explain the success in portraying legal and judicial reform as a necessary and promising enterprise. At first sight there is, of course, the problem of institutional inertia. As one analyst in the Bank put it “a bank is a bank is a bank.” The Bank’s business is to lend money and it does so to fund projects where it has experience. Moreover, people working in the projects that I just described, have developed technical expertise and have an interest in the projects’ continuation and future funding. These professional interests are motivated by career aspirations in the Bank as well as desire for status in the development assistance community more broadly.

There is also competition and struggle for power, resources, and prestige among the different units in the Bank. So, despite their doubts about the projects’ potential, Legal and Public Sector are involved in a race for finding borrowers and taking on more projects while doing little to reflect on their results. Apart from competition between them, there is also rivalry within

that could account for the existence of inefficient property rights over time despite the existence of formal legal institutions and of competitive pressures. North defined institutions as “the rules of the game in a society” or as “the humanly devised constraints that shape human interaction”. See North, *supra* note 103 at 3. This broad conception of institutions included not only formal and state-enforced rules but also informal and uncodified social norms that effectively constrained behavior. In North’s view, these formal and informal rules, together with their enforcement mechanisms, provided the framework within which human beings interact. North’s insistence on the importance of informal rules as building blocks of the institutional framework seemed to have been lost in the work of the Bank groups reforming laws and judiciaries aimed at providing an institutional framework conducive to growth. Similarly, his account on the role of organizations and of their interaction with institutions as the driving force of institutional change seems to have been left out. Finally, the impact of imperfect information and ideology on organizational actors’ perception of their gain in altering institutions was simply neglected. See *id.*

Public Sector and Legal among potential project managers seeking to obtain funds and claim ownership.¹¹⁹ Furthermore, as divisions of the World Bank, Legal and Public Sector also face external competition from other developing agencies and regional banks. This external competition lowers the common denominator for Legal and Public Sector when they perceive that being too demanding on borrowing countries may encourage countries to seek another lender with bigger and less conditioned loans. These institutional incentives and multiple conflicts undermine cooperation between and within Public and Legal at the expense of the projects and ultimately of results in borrowing countries.

Evaluating impact. The lack of coordination and sharing of knowledge prevents a practice of evaluation that could capitalize experience and avoid waste. There is no long-term involvement in the reform projects and thus analysts rarely take responsibility for failure. Moreover, the lack of evaluations makes it harder to detect problems and, even if setbacks were visible, nobody has an interest in pointing out that one has occurred.

For more than a decade now, Legal and Public Sector have been in a privileged position to test their assumptions. They have been involved in a wide variety of judicial reform projects in different countries and have had the opportunity to monitor their progress and evaluate their impact. In addition, these groups have access to an unparalleled breadth of relevant country data accessible to the Bank. Equally, they have access to the highest authorities in the borrowing countries and can avail themselves of the information relevant for assessing the need and impact of their projects. Moreover, they have the comparative experience that the implementation of judicial reform projects in so many different countries has given them. Thus, these groups have had the opportunity to test their theory and corroborate, refute, or modify their assumptions according to the results of their own endeavors. This seems largely an opportunity missed.¹²⁰

One effort to scrutinize the projects' assumptions however, has been made by the Public Sector anchor group. Staffed with people not involved in reform projects, it has engaged with academic criticism and layered the Bank's discourse with a more sophisticated, nuanced, context-specific understanding

¹¹⁹ In addition, Legal faces both an inter-divisional and intra-divisional struggle. Apart from its quarrels with Public Sector, there is conflict in the Legal Vice Presidency between Legal (the Legal and Judicial Reform Group) and the country lawyers.

¹²⁰ Thomas Carothers, *Promoting the Rule of Law Abroad: The problem of knowledge*, Carnegie Endowment Working Paper, Rule of Law Series, Democracy and the Rule of Law Project #34 (2003) <http://www.carnegieendowment.org/files/wp34.pdf>; Linn Hammergren, *Are We There Yet? Developing Empirically Based Strategies for Judicial Reform* (Feb. 2002) (on file with the author). Published in Spanish as *¿Hemos llegado? El desarrollo de estrategias empíricas para la Reforma Judicial*, Revista del CLAD Reforma y Democracia. No. 23. (Jun. 2002). Caracas. <http://www.clad.org.ve/fulltext/0041020.pdf>.

of the role of law and legal institutions in economic development.¹²¹ This work has the effect of conveying that the Bank is reconsidering or moving away from its original assumptions. Unfortunately, this work bears practically no effect in the assembly line of judicial reform projects carried out by Legal and the operational groups in Public Sector.

In regard to evaluating court reforms' impact, the divisions of Development Economics (DEC) and Operation's Evaluation Department (OED) have done some research but their efforts aren't coordinated and their results don't seem to affect operations. Except for a handful of assessments published by Legal to support their own projects, there seems to be a lack of connection between the barely available research on impact and the content of operations.

Rankings as substitution of evaluation and strategy. At the same time Rapid Response and WBI, which do not directly participate in the reform of courts, have produced extensive macroeconomic indicators and statistics to advance their projects while remaining impermeable to the critiques of the assumptions in which they rely, to the self-hesitation of Legal and Public Sector and to the evidence of the Bank's decade-long involvement in reforming courts. The "knowledge," popularized by the WBI's Governance Indicators and Rapid's Doing Business, comes in handy to the operational groups as a substitute for evaluation. Thus, it is no surprise that all units in the Bank resort to the Governance Indicators and Doing Business benchmarking to justify their work. These indicators lend force to the credibility and the economic prospects of judicial reform projects while reinforcing its prominence in development assistance. To a great extent, reforming the judiciary, in itself, has become a goal of development policy. That court reform has positive effects on growth is the default position and skeptics have the burden of proof, rather than the reverse.

But WBI and Rapid also compete and often undercut each others' work to take the upper hand in the reputation market of development assistance. Moreover, users of these rankings seem to pay little attention to the inconsistencies between the two sets.¹²² WBI provides Legal and Public Sector with the

¹²¹ See <http://www1.worldbank.org/publicsector/legal/index.cfm>. Formerly called the *Legal Institutions of the Market Economy*, this thematic group has recently changed its name to *Law and Justice Institutions*, thus reflecting the shift of emphasis in the Bank from a market-based approach to social development. A good example of the theoretical engagement fostered here is Richard Messick, *Judicial Reform and Economic Development*, *supra* note 4.

¹²² For example, as Linn Hammergren notices, Costa Rica and Uruguay do not score well in Doing Business but do with "Rule of Law" Governance Indicators. On the other hand, Paraguay and Nicaragua score high in Doing Business but not with Governance Indicators. Although both estimates are measuring judicial functioning and its probable effect on stimulating market activity, they seem to be measuring different things. While WBI focuses on corruption and quality, Doing Business is looking at speed. For an overview of the problems with current use of statistics to improve courts' performance, see Linn Hammergren, *Making justice count: a review of the*

"evidence" necessary to support their projects. Arguably, the WBI governance indicators have two components. The first one is descriptive, assessing country performance on each indicator and drawing a *correlation* with countries' income per capita. These governance reports purport to explain bad economic performance by identifying poor ratings in any given indicator. Even though the reports offer a correlation, the indexes derive strength from an assumed relation of causality between a given indicator and economic performance. Moreover, what is assumed is a unidirectional relation of causality, going from governance institutions to economic growth and not vice versa.

The second component is normative and puts forward an agenda for reform. Once "Governance Indicators" have identified which institutions are lacking or deficient, the need for reform becomes self-evident. It is important to notice that measuring governance institutions always entails a comparison. It provides an assessment of governance performance relative to the rating of other countries. And the project seems to suggest to developing countries that by adopting the institutions that a few developed countries have now, growth will ensue in some automatic fashion.

These indicators are widely used within the Bank and are often taken as hard evidence in both their descriptive and normative facets. For instance, a comparison of countries based on these benchmarks produces "institutional gaps." In a research entitled "Lessons from NAFTA for Latin American and Caribbean Countries,"¹²³ a team of World Bank economists identified institutional gaps to explain why NAFTA failed to deliver the results free trade had once promised. Concretely, they argued that institutional gaps constrained the reduction of the income per capita gap of Mexico as compared to the United States. One of the indicators in which Mexico fared worse and thus mattered most for the analysis was "rule of law." The research concluded that a crucial lesson for Latin American countries, then considering a free trade agreement with the United States, is that they must reduce "their" institutional gap to capture the benefits of trade and spur economic growth. But this vague conclusion seems to lead us back to the multiplicity of goals that the ROL may entail, and to the problem that building the rule of law by implementing the Bank's legal and judicial reform projects hasn't yielded growth results.

Moreover, WBI has produced a wide variety of data that correlate its "rule of law" indicator with other variables, showing the desirability of rule of law

issues and obstacles affecting the use of management statistics for improving Court performance in Latin America, Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, 10 (2005 Oct. 18–21 : Santiago) <http://www.clad.org.ve/fulltext/0052444.pdf>.

¹²³ Guillermo Perry, Daniel Lederman, William Maloney, and Luis Servén, World Bank (April 2003), accessible at [http://wbln0018.worldbank.org/LAC/LACInfoClient.nsf/1daa46103229123885-256831005ce0eb/717aaa5b2cbdd9c885256cf00062fa44/\\$FILE/NAFTA-US%20v2Final.pdf](http://wbln0018.worldbank.org/LAC/LACInfoClient.nsf/1daa46103229123885-256831005ce0eb/717aaa5b2cbdd9c885256cf00062fa44/$FILE/NAFTA-US%20v2Final.pdf).

beyond or even regardless of its impact on economic growth. A favorite datum among these, used by Legal in its latest reports, is the correlation between rule of law and reduction of infant mortality.¹²⁴ The implication is clear: attaining a high level of rule of law is good, even if it has no direct impact on growth. How are developing countries supposed to improve their institutional quality? What can help them improve their “rule of law” performance? The answer at this point is almost self-evident: judicial reform. At this point, the reasoning can become circular: judicial reform leads to higher levels of rule of law, which in turn is measured by judicial change.

In contrast to the self-doubt and hesitations expressed by Legal and Public Sector, the unit responsible for the “Doing Business” report, confidently offers a “Rapid Response.” “Doing Business” provides a clear-cut solution and easy-to-implement changes in legislation that will allegedly improve targeted areas of business regulation and give a boost to economic growth. In support of its reform agenda, this project argues that the laws of most developing countries are not indigenous but rather shaped by their colonial heritage. It is “legal origins” that accounts for variation in regulation across countries. In this view, legal transplantation suggests systematic variations in regulation that are “not a consequence either of *domestic political choice* or of the pressures toward *regulatory efficiency*.”¹²⁵ Therefore, the report suggests, developing countries have no compelling reason to preserve their current laws. Their national laws are neither these countries’ own choices in response to their particular circumstances, nor the result of various competitive forces. Rather, they will do well to introduce the benchmark rules that have induced better economic performance around the world. The good news is, of course, that now Rapid has produced this benchmark.

The Doing Business project upholds many of the assumptions under which Legal and Public Sector started their work on judicial reform a decade ago. These assumptions face important challenges. The projects consider regulation in a vacuum, severed from the political and socioeconomic context that it is supposed to affect and presents a set of legal rules as ready-mades, packaged as a strategy for development. However, even if it were possible to identify and isolate a set of rules as crucial for a country’s economic success, this project assumes that they can be transplanted and take root across the board notwithstanding different economic, social and political settings. Thus, Doing Business disregards historical institutional variation among countries with successful economic experiences as evidence that divergence is not only possible, but also desirable, as countries respond to their own conditions in their quest for better economic performance. In sum, by promoting that in

¹²⁴ See *Observations, Experiences and Approach*, *supra* note 1 at 3.

¹²⁵ *Doing Business in 2004: Understanding Regulation* xiv, The World Bank (2004) <http://rru.worldbank.org/Documents/DoingBusiness/2004/DB2004-full-report.pdf>.

the area of business regulation one-size fits all, Doing Business ignores that best practices have been importantly discredited in previous reform efforts to achieve development.¹²⁶

Second, the project's methodology relies primarily on the law in books, adjusted by a few surveyed lawyers in each country. Doing Business competes here with the much less ambitious project of Public Sector, doing empirical studies of court users and court uses in five Latin American countries. This research has looked at time of disposition and enforcement, identified bottlenecks, considered profiles of plaintiffs and defendants and winners and losers, yielding different results.¹²⁷ Although considerably more limited in breadth and scope than Doing Business, research that looks at actual court files has found that much of the conventional wisdom on what is wrong and what needs change in countries' judicial systems is unwarranted by the available evidence.

The internal dynamics between units in the Bank respond at least in part to the question of why "rule of law" reform seems to be flourishing in the Bank on the face of scholarly criticism, a few practitioners' self-doubt, and no success stories. Legal and Public Sector, directly involved in reforming courts, have great stakes in the continuation of their projects. They compete intensely to obtain new missions without needing to pay attention to the enduring effects of their projects, for they have no time to lose and no accountability to worry about. The statistical work of WBI and Rapid, not involved in operations, comes as a great relief for and fuels the machinery of court reformers. On the other hand the continued supply of judicial reforms to borrowing countries confers greater relevance to the research units and their indicators. Jointly, the operational groups and the research units take part in a self-reinforcing mechanism, advocating the many virtues of legal and judicial reform whose continuation is of their own interest.

The World Bank and the borrowing countries

What happens inside the Bank is only part of the picture. The relevance of judicial reform in the "rule of law" discourse in development is further reinforced by the high demand of judicial reform projects by borrowing countries. These projects have not been included in the conditionality requirements of the structural adjustment projects. Rather, they stand alone as projects introduced via technical assistance loans. If these projects are not imposed by conditionality, what explains their widespread existence and their popularity?

¹²⁶ For a review of the critiques to best-practices in development theory, see RITTICH *supra* note 3.

¹²⁷ Linn Hammergren, *Using case file analysis to improve judicial reform strategies: the World Bank experience in Latin America* (Nov. 2004) <http://www.clad.org.ve/fulltext/0049625.pdf>.

Why is their demand so high?¹²⁸ The second key to this puzzle lies on the relations between the Bank staff and government officials in developing countries and the built-in incentives to keep these projects running. Moreover, the multiple ROL conceptions that judicial reform projects purport to pursue make them attractive – for different reasons – to multiple constituencies in developing countries.

To answer this question I am calling for an analysis that would need to consider the relationships between the staff members in development institutions who promote these projects (the lenders) and the government officials who demand them (the borrowers).¹²⁹ Although there may be different levels of analysis, two are of interest at first glance. First, at the professional level, these people share networks and alliances built up along career paths. Many professionally successful individuals have held positions in their respective national governments and now occupy high or relatively important positions in the Bank.¹³⁰ And the opposite is also true, relatively successful World Bank staff members have been appointed with high responsibilities in their national governments.¹³¹ The actual and potential mobility between national governments and international development institutions, through some sort of “revolving door,” creates incentives among public officials and international development analysts in building relationships among them and supplying and demanding World Bank projects.

Second, at the level of ideas, staff in the World Bank groups and officials in national governments often share a common intellectual background that is informed by their educational formation and disciplinary commitments. Many have attended the same universities to undertake graduate studies and have worked with the same mentors. Among government officials and

¹²⁸ In an article titled *Don't Blame Our Failures on Reforms That Have Not Taken Place* (The Fraser Institute Forum, June 2003, available at <http://www.fraserinstitute.ca/admin/books/chapterfiles/Dont%20Blame%20Our%20Failures%20on%20Reforms%20that%20have%20Not%20Taken%20Place-diaz0603.pdf#>). Mexico's Treasury Secretary, Francisco Gil, calls for a radical judicial reform. He points out the functioning of the judicial system as the most important item for market economics to work, asserting that “respect of contracts, essential to the performance of a market economy, is a rarity” and regretted that “judicial processes are unpredictable, riddled with corruption, long, and expensive.”

¹²⁹ I have in mind a sociological analysis of the kind undertaken by Yves Dezaley and Brian Garth, *THE INTERNATIONALIZATION OF PALACE WARS – Lawyers, Economists and the Contest to Transform Latin American States* (2002).

¹³⁰ A notable case in point is Roberto Dañino, the former World Bank's General Counsel and head of the Legal Vice Presidency. Dañino was the Peruvian prime minister in the early years of Toledo's presidency, and later the Peruvian Ambassador to the United States. Only in the Public Sector Group of Latin America for instance, are there former cabinet members from Peru and Bolivia.

¹³¹ Mexico's Secretary of Foreign Affairs, Luis Ernesto Derbez, worked for fourteen years at the World Bank. He directed, structured, implemented and supervised Multilateral Economic Assistance and Structural Adjustment Programs in Chile, Costa Rica, Honduras and Guatemala.

development analysts there are also mentor-mentee relationships that gain importance as the younger generation of pupils begins to occupy higher echelons in the hierarchy ladder of international institutions. Their relationships help explain the intellectual commitments that these professionals genuinely share. These commitments include disciplinary biases and ideas about the scope of the state's participation in the market, the ideal type of government, the specific role of each of the government branches, and the fashion in which law and legal institutions matter in the development process, among many others. Thus, in this picture, people promote projects not primarily because of sheer personal interest but inspired by firm disciplinary creed. When their views are reflected in a variety of policies promoted by the Bank, such as judicial reform, professionals from both ends of the development assistance pipeline strongly advocate them.

A deeper exploration into the realm of ideas would benefit from Duncan Kennedy's contribution to this volume, using the three globalizations of legal thought as a template to situate the transmission of what today constitutes the most influential legal ideas. This inquiry will help to understand this process of globalization, exploring the flows of intellectual influence between sites of production and sites of reception through channels of economic, cultural, and military power. It can be said that groups in the Bank occupy an important position in this process and that the ascendancy of judicial reform projects is related to dominant ideas about modes of legal reasoning, institutional practices and the primary role of the judge in the United States, which have become a matter of normalcy and common sense for reformers and importers alike.

If we now look at the domestic level more deeply, governments in developing countries seem to have an incentive for implementing judicial reforms because the multiple purposes for which they are sold appeal to a broad range of groups in the political spectrum. However, the contradictions and tensions between these projects' objectives remain largely obscured by the vague promise of the rule of law. Local business communities support these projects because of their alleged prospect of creating a legal environment more favorable to business. Public officials and political parties endorse these projects because they promise to control and reduce the corruption that has plagued many of the governments which introduced the first wave of market-oriented reforms across the region. Many of the corruption scandals have involved judges who were bribed by the governments to advance their particular political interests. Governments offer these projects to the population assuring them that public funds will not be squandered again.

Judicial reform projects appeal to judges, who see their resources and their professional status increased. They are of interest to legal scholars, who participate as consultants using these projects to leverage their careers. Also, lawyers are eager to support reforms when they represent an opportunity to

increase their clients and their expertise. Moreover, the CDF's emphasis on participation of local actors has brought incentives on building up a consensus among different actors in the country. This means organizing workshops and seminars with judges and scholars to design a strategy that all can agree to. It also means involving as many actors as possible in the strategy: the more stakeholders involved the more acceptance the reform will have.

In their promise to increase access for the poor and improve legal services, these projects also appeal to activists and NGOs. Public opinion and civil society organizations are also attracted by the promise to combat corruption. Moreover, they favor judicial reform projects because of the perception that the judicial system is defective and does not serve the population well. Ironically, judicial systems in Latin American countries may be more independent and enjoy more and better technology and human resources than ever before. But as the judicial system has become the center of attention and the economic promises that justified the initial judicial reforms have not been realized, perception of their performance may well have worsened.

A brief example can help illustrate the effect of these dynamics in the popularity of these projects. The prospect of a judicial reform in Peru caused bitter divisions between President Toledo and the Supreme Court of Justice over who was going to lead it.¹³² The content of the judicial reform was not the cause of the conflict but rather who it was that was going to take credit for it. Each government branch may have a different political agenda and a project for judicial reform represents a good opportunity to advance it. In cases like this, the World Bank and other development agencies are called upon to assist in the design and implementation of the project serving at least two purposes. International development institutions validate countries' projects by providing the loans and government officials gain points for their country in international development institutions for having entered the club of countries undertaking judicial reforms.

CONCLUSIONS

The consensus about the need of reforming courts, despite a decade of judicial reform with scant economic results, can be better understood by a conceptual analysis of the different conceptions of the rule of law at play. The slippage in the conceptions of the rule of law sheds light on why these projects remain largely immune to the critique of the assumptions that upheld them and to their disappointing experience. The use of this "hodge-podge" conception of the rule of law and the internal dynamics between the groups can also help understand the self-reinforcing mechanisms within the Bank that make

¹³² Following President Toledo's proposal of several emergency reform measures which prominently included judicial reform in his speech of July 28, 2003, the Supreme Court President announced the Judiciary's own strategy of a fourteen-point reform program, on August 4th.

judicial reform seem convenient or appropriate for each of the groups, even if their versions of the rule of law differ in mutually exclusive ways. The relations between these groups and the countries which demand these projects further sustain the high demand for judicial reform projects without any other specific plans for economic development, but for the contradictory promises of the rule of law.

The Bank's turn from a growth-based development model to a comprehensive development paradigm has led groups reforming countries' judiciaries – Public Sector and Legal – to add an intrinsic conception to their formerly primarily instrumental view of the rule of law. In a moment of self-doubt about their work, this turn has infused fresh air and has given them a renewed hope if only by changing the expectations rather than the content of their projects. Judicial reform is now desirable on its own right, as an end in itself and as part of the holistic view of development that the Comprehensive Development Framework promotes.

Through the practice of measuring the best institutions for governance or benchmarking the best rules for business, the WBI and Rapid Response validate judicial reforms set in motion by Legal and Public and free these groups from the difficult task of evaluating their effects. On the other hand, ongoing reforms stand as the products that give relevance to the indicators that WBI and Rapid Response produce.

Reform recommendations by WBI and Rapid take for granted that they can determine which institutions are *appropriate* and what the *quality* of regulation must be in each country. They assume they can plausibly identify and isolate what has worked in the world laboratory, which has *already* experimented with different institutions. These groups proceed as if these institutions could be transplanted in order to improve governance and enhance the environment for doing business across countries. Institutional reforms are recommended as proven recipes, not as complex choices with multiple linkages. WBI and Rapid advocate legal reform based on their indicators as if it was demonstrated that when governance and the business environment reach certain levels in their ranking, economic development *is* taking place.

All the World Bank groups under analysis emphasize that the cause for the gigantic growth differential among countries lies on institutions, and focus distinctively on reforming law and courts. These projects reinforce the belief that the cause for a country's economic stagnation is always local. There is a paradox in development experts relentlessly repeating that the cause for economic stagnation is local while frequently introducing a univocal agenda for reform designed elsewhere. These groups' reform recommendations strengthen the belief that what is needed is institutional convergence. The resulting consensus precludes a contestation of the choices and analysis of the effects produced by the projects and policies promoted by the World Bank in developing countries.

The Bank's apparent conclusion that all ROL objectives fit into one package is neither theoretically plausible nor supported by the projects' experience. The projects of legal and judicial reform that embody the World Bank's ROL agenda are carried out under conditions that prevent an engagement in regard of their theoretical premises and their effects. These conditions favor lack of transparency and make it harder to open these projects to scrutiny and evaluation. These projects involve considerable amounts of resources and the opportunity costs for developing countries, which pay for these projects, can be significant. Finally, these conditions create incentives for policymakers at the Bank to continue to fund these projects, despite uncertainty and disappointment about results.

In this chapter, I try to contribute to a clearer discussion of the multiple different ROL concepts at play, and to illustrate how, even though some of them may be mutually exclusive, the invocation of the "hodge-podge" ROL works to justify policy proposals by shifts in expectations. My analysis of the dynamics between the different groups of the World Bank aims at highlighting institutional factors that work to exacerbate this phenomenon. I hope that both lines of inquiry can lead to a better understanding of the workings of the ROL as a development strategy and open up some space for critical interventions that take into consideration the complex role of the World Bank.