

**LAW AND DEVELOPMENT:
FACING COMPLEXITY
IN THE 21st CENTURY**

Essays in honour of Peter Slinn

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CONTENTS

<i>Preface</i>	<i>iii</i>
<i>Foreword, by James C N Paul</i>	<i>vii</i>
1 INTRODUCTION	1
<i>John Hatchard and Amanda Perry-Kessaris</i>	
PART 1: THEORETICAL DEVELOPMENTS	
2 'LAWS AND DEVELOPMENTS'	17
<i>David Kennedy</i>	
3 DECISION-MAKING IN A REGULATORY ENVIRONMENT: REPRESENTING THE BUTTERFLY	27
<i>Amanda Perry-Kessaris</i>	
4 JURIDIFYING GENDER JUSTICE: FROM GLOBAL RIGHTS TO LOCAL JUSTICE	36
<i>Ann Stewart</i>	
PART 2: INTERNATIONAL PRACTICE	
5 TECHNOLOGY TRANSFER: SHIFTING MODELS OF LAW AND DEVELOPMENT	57
<i>Peter Muchlinski</i>	
6 PATENTS AND HEALTH IN DEVELOPING COUNTRIES	78
<i>Philippe Cullet</i>	
7 INTERNATIONAL COMPETITION LAW AND POLICY IN DEVELOPING COUNTRIES	99
<i>Emmanuel Opoku Awuku</i>	
8 TECHNICAL ASSISTANCE AND TRADE LAW REFORM POST-DOHA: BRAVE NEW WORLD	108
<i>Mary E Footer</i>	

CHAPTER 2

'LAWS AND DEVELOPMENTS'

David Kennedy

THE 'RULE OF LAW' AS DEVELOPMENT

Law and development is back—taught again in law faculties, the focus of policy initiatives at the leading development institutions, the subject of numerous books and conferences. Renewed interest in bringing law to bear in the struggle for development offers an opportunity to contest the distributive choices and market alternatives of development policy-making. Unfortunately, too often this has been an opportunity missed. The idea that building 'the rule of law' might *itself* be a development strategy instead encourages the hope that choosing law could substitute for the perplexing political and economic choices which have been at the centre of development policy-making for half a century. The legal regime offers an arena to contest those choices, but it cannot substitute for them. The hope that it might encourages people to settle on the particular choices embedded in one legal regime as if they were the only alternative.

The ideas about development which fuel contemporary interest in the law also seem to encourage the hope that law could simplify development policy-making, toning down its engagement with political and economic controversy. I encounter these ideas first in the classroom. In the First World settings where I have recently taught law and development, the field now draws numerous students from the broad centre-left of the political spectrum. Young people with humanitarian, progressive, generally cosmopolitan and internationalist sensibilities. The more technocratic specialists of the centre-right who flocked to the field in the eighties and early nineties seem to have retreated, or have come to express themselves in more restrained terms. But gone also are the social democratic internationalists of the fifties and sixties who inaugurated the field, and whose contributions we have celebrated here.

These contemporary students of law and development seem to share a mid-level conception of 'development policy'—neither a narrow matter of technical economic detail nor a broad vocabulary for political struggle, but something in between. In my experience, this is new. I may be idealising, but fifteen years ago, students of development policy in First World institutions were split between confident First Worlders for whom 'development' was a project of technical adjustment or economic management; and equally confident, if often angrier, students from developing societies for whom the term 'development' brought to mind the entire field of national—and international—political struggle. For both groups in those days, 'development' was a universal phenomenon. For the technocrats of the north, it meant the adjustment of developing societies to economic axioms of universal validity—growth is growth. For students from the south, development meant broad questions of political economy and social theory which must be confronted by all societies, regardless of their place *in the world system—politics is politics.*

Henry Shattuck Professor of Law, Harvard Law School. I would like to thank Duncan Kennedy and Scott Newton with whom I have taught law and development, David Trubek and Bob Meagher who first excited me about the field, and the extraordinary group of law and development students from whom I have learned so much in the last few years.

Law and development: Facing complexity in the 21st century

The last decade has chastened both groups. Today's First Worlders, in retreat from one-size-fits-all neo-liberalism, share an intuition that 'development' must mean something particular—to the specific market conditions of transitional or developing societies, and to the cultural setting of each national economy. They are often drawn to technical accounts of development's specificity—characteristic market failures in particular. Demand curves which don't slope gently off to the right, oligopolies, thin markets, peculiar information problems, transaction costs, sometimes even disparities in bargaining power. Third World students meet this intuition from the other direction—in flight from political generalities, they hope for a more technocratic development science. They aspire to participate in 'governance' rather than government, and are often drawn to more universal expressions of their political aspirations—human rights in particular.

For both groups, the economies and political systems of developing societies again seem to differ from those of the north and west—and to differ in ways which encourage attention to particular legal arrangements rather than universal economic or political theories. Development policy must be attuned to specific political, social and cultural conditions. Institutional issues are central. As politics and economics have become local, they seem to merge with the professional world of informed, empathetic and humble expertise. On the economic side, institutional economics, transaction cost problems and market failures are back. On the political side, attention to human rights, to cultural and social costs, to policy sequencing, planning, and the institutional mechanics of policy-making is in. All this places law, legal institutional building, the techniques of legal policy-making and implementation—the 'rule of law' broadly conceived—front and centre.

Unfortunately, however, this new interest in '*law and development*' is often accompanied by an ambition to leech the politics from the development process and to muddle the economic analysis. Students—like policy professionals—turn to law all too often in flight from economic analysis and political choice. As a teacher of '*law and development*,' I start with the rather old-fashioned notion that development policy is a matter of both contestable political choices and sharp economic analysis—for neither of which is 'law' a substitute.

On the political side, I start from the idea that one makes policy to distribute—to give some people, groups, interests, more wealth, status, power, than they had before and to give other people less—and that law is interesting precisely as a distributional tool. To generate 'development' one needs to distribute in ways that will encourage development—get things into the hands of those whose return on their use will have the greatest multiplier effect. There are lots of different theories about how to do this—and they are economic theories. To count as a 'development policy,' a proposal needs to be rooted in an idea about how a distributional political choice will generate economic growth of whatever kind one considers likely to bring about 'development.' If development means more than a one-time growth spurt—means some sort of sustained, upward spiral, or some kind of socio-economic transformation—then one needs an idea about how a political choice will generate such a change. Where there turns out to be more than one equally efficient way to do this, the political choices among development policies become even more salient. There is politics, in other words, right at the start, in the distributive choices which underlie the aspiration for growth and development. This approach is, I admit, old fashioned—thinking about development as contestation about what should be distributed to and from whom in the service of economic growth and political vision. We might better call this 'rulership' than 'policy-making' or 'governance.'

Attention to the place of law in development often seems to bring with it a resistance to rulership—a flight from distribution and contestation. Partly this seems a retreat from the cold realisation that policy-making breaks eggs, imposes costs, *intervenes* in foreign places with a

Chapter 2: 'Laws and developments'

view to changing them. One encounters instead the vague sentiment that getting governance right, injecting the rule of law, enforcing human rights, will somehow bring a softer gentler development graciously in its wake. Partly the resistance to rulership arises from the intuition that political and economic debates about what development is and how to make it happen—questions to which the field has been host over the last half century—have not produced an *answer*. There is, it turns out, no technical consensus on how to bring about development. As a result, focus on politics or economics places the ruler in the awkward position of having to *choose*, to choose in a way which will have consequences for people, without clear guidance from a political consensus or economic theory. This makes people, particularly policy-makers who aspire to act from expertise, uncomfortable. The 'rule of law' promises an alternative—a domain of expertise, a programme for action, which obscures the need for distributional choices or for clarity about how distributing things one way rather than another will, in fact, lead to development. Unfortunately, this turns out to be a false promise. The focus on rights, on constitutions, on government capacity or judicial independence may all be to the good—but without a sharp sense for how one is intending to affect the economy, it is hard to compare building the rule of law with leaving the economy to operate more informally, and hard to compare building the rule of law one way with building it another.

In this, the focus on law as a development policy shares a great deal with other efforts to replace political and economic thinking with a general appeal to technical expertise and ideas about best practice. The result, by default or design, is a narrowing of the ideological range. Political choices fade from view—as do choices among different economic ideas about how development happens or what it implies for social, political and economic life. Where once there might have been ideological and theoretical contestation, there is a somewhat muddy consensus.

It need not be this way. One could focus on law in ways which sharpened attention to distributional choices and rendered more precise the consequences of different economic theories of development. In the days when people focused more overtly on economic theories of development, there were periods of contestation—and periods in which one or another idea drowned out all competitors. The neo-liberalism of the Washington Consensus was the last big theoretical consensus—chastening that idea by placing law and institutions in the picture might lead us back to more overt debates about economic strategy. But too often this is not the result—the turn to law has accompanied a chastening of the neo-liberal consensus, but in the name of vagueness rather than sharp economic debate.

Similarly, when development policy was understood in more overtly political terms, the result was often less contestation than ideological consensus—around a national import substitution idea in the fifties, or a free trade market shock idea in the nineties. Attention to the legal regime supporting these congealed ideological forms might heighten awareness of the choices involved in constructing either regime and help challenge the substitution of an ideological programme for political choice. But the precise opposite has more often been the case—attention to law has further muddied the waters, replacing attention to distributional and political alternatives with ideas about universal rights and technical judgments about 'the' appropriate legal regime for development. In a similar fashion, attention to the specifics of culture and place might lead us back to thinking about development policy as political choices among policy alternatives—but all too often attention to culture has led instead to hesitance about 'intervention' and policy-making, and to assessment of policy choices in a vague vocabulary of 'appropriateness' cut off from both political and economic analysis.

For me, attention to the role of law in development offers an opportunity to re-focus attention on the political choices and economic assumptions embedded in policy-making.

Elements in a legal order encode distributional choices and reflect economic and other ideological commitments. Their analysis could offer a retail level perspective on the stakes for economic and political contestation. Let me begin by affirming the centrality of law to development. Hernando de Soto, author of *The Mystery of Capital*—a book which quickly became a bestseller in development policy circles—is right to insist that ‘capital’ is a legal institution.² It is not just that you need a working legal regime to implement development policies—to collect tariffs, to manage monetary policy, to administer the state and so forth. de Soto rightly turns our attention to the background norms and institutions of ownership, exchange, money, security, risk, corporate form and so forth. Everything in a market is built on the back of norms, norms which remain, for the most part, in the background.

So far, so good. But it now gets more difficult... *what* law exactly? Is there ‘a’ rule of law suitable for development? Once we understand the centrality of law to capital formation and growth, can we simply inject ‘the’ rule of law as a development policy? It seems hard to deny the importance of some minimum national institutional functionality. But those who see the rule of law as a development strategy generally mean something more. Rather than the rule of law as a terrain for contestation, we have the rule of law as a recipe or readymade. There are two broad themes in the rule of law literature which sustain this sleight of hand, which position the rule of law as a substitute for politics and economics.

Those themes are formalisation and corruption—the notion that development requires a formalisation of law and the elimination of corruption. Each of these ideas has a long history in the rule of law literature, each suggests a set of tactics for policy-making. Each theme heightens the sense both that the rule of law can be injected without political choice, and that its implementation is a pre-condition to economic growth rather than a choice among alternative theories of development.

Each idea offers a rather simple vision of ‘law,’ which forgets much of what has become commonplace within the domain of legal theory for more than a century. It turns out that all the leading economic theories of development have implicit notions of what law is and what it can do. So do all the leading political ideas about how development should be defined and brought about. From a lawyer’s point of view, these ideas about law expect the legal order to perform feats we know it rarely can accomplish, and expect law to remain neutral in ways we know it cannot. From inside the legal field, merging the ‘rule of law’ with formality and opposition to corruption seems a typical lay misunderstanding. Non-lawyers often think of law as a matter of neutral forms, or think of corruption as something easily defined and outlawed. Insiders to legal culture generally appreciate more readily the limits and alternatives of form, and the difficulty of defining or resisting corruption.

The surprising thing about ‘law and development’ today is the emergence of these simpler images within the legal field. Their presence suggests that some forgetting is going on. Part of what is forgotten is the range of possible legal arrangements, their association with alternative political and legal ideas, and their contestability. It is by unravelling these simplifying assumptions about the ‘law’ in ‘law and development’ that I hope we can return political and economic contestation to development policy-making.

² de Soto, 2000.

FORMALISATION

Since at least Weber, people have asserted that 'formalisation' of entitlements, in one or another sense, is necessary for development. Necessary for transparency, for information and price signalling, to facilitate alienation of property, to reduce transaction costs, to assure security of title and economic return, to inspire the confidence and trust needed for investment, and so forth. From the start, formalisation has meant a wide variety of different things—a scheme of clear and registered title, of contractual simplicity and reliable enforcement, a legal system of clear rules rather than vague standards, a scheme of legal doctrine whose internal structure was logical and whose interpretation could be mechanical, a system of institutions and courts whose internal hierarchy was mechanically enforced, in which the discretion of judges and administrators was reduced to a minimum, a public order of passive rule following, a priority for private over public law, and more. These ideas are all associated with the reduction of discretion and political choice in the legal system, and are defended as instantiations of the old maxim 'not under the rule of man but of god and the law.'

It is easy to imagine, from the point of view of a particular economic actor, that formalisation in any of these ways might well enhance the chances for successful economic activity. A clear title may make it easier for me to sell my land, and cheaper for my neighbour to buy it. A clear set of non-discretionary rules about property, credit or contract might make a foreign legal culture more transparent to me as a potential investor. The reliable enforcement of contracts might make me more likely to trust someone enough to enter into a contract, and so forth. Indeed, it seems hard to imagine 'capital' except as a set of enforceable legal entitlements—a first lesson of law school is that property is less a relation between a person and an object than a relation between people with differing entitlements to use, sell, possess, or enjoy an object. All these themes are present in de Soto's book. The developing world is full of potential assets—but they have not been harnessed to productive use. Why? Because no one has clear title to them, nor are there predictable rules enforcing expectations about the return on their productive use.

The association of formalisation with development, however, has always seemed more problematic than this, also since at least Weber. For starters, it has also been easy to imagine, from the point of view of other economic actors, that formalisation in each of these ways might well eliminate the chance for productive economic activity. A clear title may help me to sell or defend my claims to land—but it may impede the productive opportunities for squatters now living there or neighbours whose uses would interfere with my quiet enjoyment. A great deal will depend on what we mean by clear title—which of the numerous possible entitlements which might go with 'title to property' we chose to enforce. Clear rules about investment may make it easy for foreign investors—but by reducing the wealth now in the hands of those with local knowledge about how credit is allocated or how the government will behave. An enforceable contract will be great for the person who wants the promise enforced, but not so for the person who has to pay up. As every first year contracts student learns, it is one thing to say stable expectations need to be respected, and quite another to say whose expectations need to be respected and what those expectations should legitimately or reasonably be. To say anything about the relationship between formalisation and *development*, we would need a theory about how assets in the hands of the title holder rather than the squatter, the foreign rather than the local investor, will lead to the sort of growth we associate with development.

The urge to formalise downplays the role of standards and discretion in the legal orders of developed economies. We might think here of the American effort to codify a 'Uniform

Commercial Code' to reflect the needs of businessmen—an effort which returned again and again to the standard of 'reasonableness' as a measure for understanding and enforcing contractual terms. We might remember Weber's account of the 'English exception'—the puzzle that industrial development seemed to come first to the nation with the most confusing and least formal system of property law and judicial procedure. Or we might think of Polyani's famous argument that rapid industrialisation was rendered sustainable, politically, socially and ultimately economically in Britain precisely because law slowed the process down.

The focus on formalisation downplays the role of the informal sector in economic life. It is not only in the post-transition economies of Eastern or Central Europe that the informal sector provided a vibrant source of entrepreneurial energy. The same could be said for many developing and developed economies. Think of the mafia, of the economic life of diasporic and ethnic communities. But think also of the 'old boys network,' the striking demonstrations in early law and society literature about the disregard businessmen in developed economies often have for the requirements of form or the enforceability of contracts. Think of routine debates within conventional schemes of contract about efficient breach, or within property about adverse possession. The informal sector is often an economically productive one. And there is also often security, transparency and reliability in the informal sector—the question is rather security for whom, transparency to whom?

The formalisation story downplays the range of possible formalisations, each with its own winners and losers. In a world with multiple potential stable and efficient equilibria, a great deal will depend upon the path one takes, and much of this will be determined by the choices one makes in constructing the system of background norms. Does 'being' a corporation mean having an institutional, administrative or contractual relationship with one's employees? With their children's day care provider? And so forth. Looking at the legal regime from the inside, we encounter a series of choices, between formality and informality, between different formalisations—each of which will make resources available to different people. What is missing from enthusiasm for the rule of law is both an awareness of the range of choices available *and* an economic theory about the developmental consequences of taking one rather than another path.

In a particular developing society, for example, it might be that the existing—discretionary, political, informal—system for allocating licenses or credit is entirely predictable and reliable for some local players even where it is not done in accordance with published rules. At the same time it might not be transparent to or reliable for foreign investors. This might encourage local and discourage foreign participation in this economic sector. We might well have a political theory of development which suggests that one simply cannot have access to a range of *other* resources necessary to develop without pleasing foreign direct investors. Or we might have an economic theory suggesting that equal access to knowledge favours investment by the most efficient user *and* that this user will in turn use the profits from that investment in ways more likely to bring about 'development,' perhaps based on a projection of how foreign, as opposed to local investors will invest their returns. But the need for such theories—which would themselves be quite open to contestation—is obscured by the simpler idea that development requires a 'formal' rule of law.

Interest in the rule of law as a development strategy gets in trouble when it replaces more conventional questions of development policy and planning which demand decisions about distribution. Traditional questions about who will do what with their surplus, how gains might best be captured and reinvested or capital flight eliminated. Or about how one might best take spillover effects into account and exploit forward or backward linkages. Or questions

Chapter 2: 'Laws and developments'

about the politics of tolerable growth and social change, about the social face of development itself, about the relative fate of men and women, rural and urban, in different stable equilibria, along different policy paths.

We might return to de Soto here for an example, although he is far from alone in his disinterest in the distributional choices one must make in designing a rule of law suitable for a policy of 'formalisation.' In discussing land reform, de Soto is adamant that squatters should be given title to the land on which they have settled to create useful capital by permitting them to eject trespassers. His implicit assumption that squatters will make more productive use of the land than the nominal current owners may well often be correct. But he provides no reason for supposing that the squatters will be more productive than the trespassers. Nor for concluding that exclusive use by one or the other group is preferable to some customary arrangement of mixed use by squatters and trespassers in the shadow of an ambiguous law.

None of these observations is new. Development planners and practitioners have long struggled with precisely these problems. The puzzle is how easily one loses sight of these traditional issues of political and economic theory when the words 'rule of law' come into play. There is something mesmerising about the idea that a formal rule of law could somehow substitute for struggle over these issues and choices—could replace contestable arguments about the consequences of different distributions with the apparent neutrality of legal best practice.

CORRUPTION

A second theme running through enthusiasm for treating the 'rule of law' as a development strategy is the desire to eliminate corruption. Like formalisation, the elimination of corruption is linked to development in a variety of ways. Eliminating corruption is promoted to avoid squandered resources, to promote security and predictability, to inspire confidence, eliminate price distortions and promote an efficient distribution of resources. These things will lead, in some way, to development. Many of the advantages of corruption run parallel to those of formalisation—eliminating corruption can seem much like eliminating judicial and administrative discretion. Indeed, sometimes 'corruption' is simply a code word for public discretion—the state acts corruptly when it acts by discretion rather than mechanically, by rule.

And it is not implausible to imagine that eliminating corruption will enhance the chances for some economic actors to make productive use of their entitlements. The state's discretion, including the discretion to tax, and even the discretion to levy taxes higher than those authorised by formal law, may spur some and retard other economic activity. As with formalisation more generally, however, it is also not difficult to imagine that other actors—including those who are collecting 'corrupt' payments—will in turn be less productive once corruption is eliminated. As with the replacement of discretion by form, it is necessary to link elimination of corruption to an idea about the likely developmental consequences of one rather than another set of economic incentives. A simple example would be: Who is more likely to productively reinvest the profits, the marginal foreign investor brought in as corruption declines, or the marginal administrator whose take on transactions is eliminated? In my experience, such questions are rarely asked, and yet their answer is not at all obvious. We are back to the need for a political and economic theory about which allocation will best spur development.

Enthusiasm for eliminating corruption as a development strategy arises from the broader idea that corruption somehow drains resources from the system as a whole—its costs are costs of transactions, not costs of the product or service purchased. Elimination of such costs lifts all boats. And such costs might as easily be quite formal and predictable as variable and discretionary. Here the desire to eliminate corruption goes beyond the desire for form—embracing the desire to eliminate all costs *imposed* on transactions which are not properly costs of the transaction. There are at least two difficulties here. First, the connection between eliminating corruption and ‘development’ remains obscure. Even if the move from a ‘corrupt’ legal regime to a ‘not corrupt’ regime produces a one time efficiency gain, there is no good economic theory predicting that this will lead to growth or development, rather than simply another stable low level equilibrium. More troubling is the difficulty of distinguishing clearly between the ‘normal’ or ‘undistorted’ price of a commodity and the ‘costs’ associated with a ‘corrupt’ or distortive process for purchasing the commodity or service.

Economic transactions rely on various institutions for support, institutions which lend a hand sometimes by form and sometimes by discretion. But the tools these institutions, including the state, use to support transactions are difficult to separate from those which seem to impose costs on the transaction. The difference is often simply one of perspective—if the cost is imposed on you it seems like a cost, if it is imposed on someone else for your benefit it seems like support for your productive transaction. Here the desire to eliminate corruption bleeds off in a variety of directions. But the boundary between ‘normal’ and ‘distorted’ regulation is the stuff of political contestation and intensely disputed economic theory. When the anti-corruption project suggests that the ‘rule of law’ always already knows how to draw this line, it fades into a stigmatising moralism, akin to the presentiment against the informal sector.

de Soto again provides a good illustration. He is adamant that the number of bureaucratic steps involved in formalising entitlements retards development, and he has been a central voice urging simplification of the bureaucratic procedures which he sees as mud in the gears of capital formation and commerce. Every minute and every dollar spent going to the state to pay a fee or get a stamp is a resource lost to development. This seems intuitively plausible. But there is a difficulty: When is the state supporting a transaction by formalising it and when is the state burdening the transaction by adding unnecessary steps or costs? The aspiration seems to be an economic life without friction, each economic act mechanically supported without costs. But forms, like acts of discretion, are not simply friction—they are choices, defences of some entitlements against others. Everything which seems friction to one economic actor will seem like an entitlement, an advantage, an opportunity to another. The point is to develop a theory for choosing among them.

Let us say we begin by defining corruption as the economic crimes of public figures—stealing tax revenues, accepting bribes for legally mandated services and so forth. Even here the connection to development is easier to assume than to demonstrate: Are these figures more or less likely to place their gains unproductively in foreign bank accounts than foreign investors, say? Even if we define the problem narrowly as one of theft or conversion it is still difficult to be confident that the result will be slower growth. Sometimes, as every first year property instructor is at pains to explain, it is a good idea to rearrange entitlements in this way, adverse possession being the most dramatic example. Practices one might label as ‘corrupt’ might sometimes be more efficient means of capital accumulation, mobilising savings for local investment. Moreover, rather few economic transactions are best understood as arms length bargains. It turns out, for example, that the lion’s share of international trade is conducted through barter, internal administratively priced transactions, or relational contracts

Chapter 2: 'Laws and developments'

between repeat players. The line between tolerable and intolerable differences in bargaining power—between consent and duress—is famously a site for political contestation. And, just as sometimes what look like market distorting interventions can also be seen to compensate for one or another market failure, so what look like corrupt local preferences can turn out to be efficient forms of price discrimination.

But those promoting anti-corruption as a development strategy generally have something more in mind—a pattern of economic crimes which erodes faith in a government of laws in general or actions by public (or private) actors which artificially distort prices—unreasonable finders fees, patterns of police enforcement which protect mafia monopolies, things of that sort.

Here, the focus moves from the image of public officials taking bribes outward to actions which distort free market prices or are not equally transparent to local and foreign, private and public, interests. Corruption becomes a code word for 'rent-seeking'—for using power to extract a higher price than that which would be possible in an arms length or freely competitive bargain—and for practices which privilege locals. At this point, the anti-corruption campaign gets all mixed up with a broader programme of privatisation, deregulation and free trade (dismantling government subsidies and trade barriers, requiring national treatment for foreign products and enterprises). And with background assumptions about the distortive nature of costs exacted by public as opposed to private actors.

Here the project enters arenas of deep contestation. It has been famously difficult to distinguish administrative discretion which prejudices the 'rule of law' from judicial and administrative discretion which characterises the routine practice of the 'rule of law.' It has been equally difficult to distinguish legal rules and government practices which 'distort' a price from the background rules in whose shadow parties are thought to bargain. And there is no *a priori* reason for identifying public impositions on the transaction as distortions—costs of the transaction—and private impositions as costs of the good or service acquired. These matters might be disputed in political or economic terms. But the effort to treat corruption reduction as a development strategy substitutes a vague sense of the technical necessity and moral imperative for a 'normal' arrangement of entitlements.

It is easy to interpret the arrangement of entitlements normalised in this way in ideological terms. When the government official uses his discretionary authority to ask a foreign investor to contribute to this or that fund before approving a license to invest, that is corruption. When the investor uses his discretionary authority to authorise investment to force a government to dismantle this or that regulation, that is not corruption. When pharmaceutical companies exploit their intellectual property rights to make AIDS drugs largely unavailable in Africa while using the profits to buy sports teams, not corruption, when governments tax imports to build palaces, corruption.

Perhaps the most telling problem is the difficulty of differentiating some prices and transactions as 'normal' and others as 'distorted' by improper exercises of power when every transaction is bargained in the shadow of rules and discretionary decisions, both legal and non-legal, imposed by private and public actors, which could be changed by political contestation. This old American legal realist observation renders incoherent the idea that transactions, national or international, should be allowed to proceed undistorted by 'intervention' or 'rent-seeking.' There is simply no substitute for asking whether the particular intervention is a desirable one—politically and economically. In this sense, seeking to promote development by eliminating 'corruption' replaces economic and political choice with a stigmatising ideology.

THE LEGAL REGIME: SITE FOR CONTESTATION AND EXPERIMENTATION

Development strategy requires a detailed examination of the distributional choices effected by various legal regimes and rules to determine, as best one can, their likely impact on growth and development. It requires that we identify the choices which might lead to different development paths and compare them in social, political and economic terms. These choices cannot be avoided, even if we lack a strong consensus or decisive expertise about how to make them. One makes policy to distribute—by price, by administrative action—hoping to allocate resources to their most productive, most developmentally promising, use. It is unfortunate that there is no distributional recipe for development, but that is our situation. There are contending ideas, contending interests, contested theories, complex unknowables. Not knowing, we must decide. We might even experiment.

As a result, politics can't wait until later. Development is not a matter of 'growth plus' but of 'what growth how.' Of course, as we pursue any development path there will *also* be struggles about how to deploy resources for *other* objectives. But the struggle for development itself—the struggle to grow the pie in the first place—is also and unavoidably a place of political and economic choice. Choices which are contested. Building a legal regime involves choices, choices implicate distributive objectives which contribute to development in different ways. Sometimes, no doubt, increasingly formal rules would be a good idea. Sometimes less governmental discretion, sometimes more vigorous criminal enforcement, broader distribution of supply relationships, less local preference in contracting, all might be very helpful. But sometimes we would also expect the opposite.

The law is a terrain for this inquiry, not a substitution for it. There is no doubt that 'law' is central to development. The market rests on a set of legal arrangements. Formal arrangements and informal arrangements. Arrangements of public action and inaction. Of private and public entitlements. The rule of law is a collection of enforced distributions. Economic activity conducted on this foundation sometimes leads to growth, and sometimes to development. It seems completely plausible that different distributions will yield different economic results, and that attention to law in the development process would heighten our awareness of the choices available to us.

The emergence of the 'rule of law' as a development strategy has become a substitute for assessments of this sort. Opposing corruption leverages a shared moral opprobrium, promoting a formal rule of law leverages a common ethical commitment—harnesses them to legal and institutional changes which will strengthen some economic efforts and retard others while leaving their developmental consequences obscure. Much as we might wish it, there is no single 'rule of law' whose establishment will generate development. We know that. But we forget. Forget because remembering would take us straight back to politics, economics and to the enduring dilemmas of development policy-making.

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