DISTANCE LEARNING AND RESEARCH CENTER

-VOICES OF DEVELOPMENT JURISTS-

Vol. I. No. 1, 2004

Law and Development as Democratic Practice

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Overview

Despite appreciable gains in the stature of law and development during the past decade, new doubts about the field's viability have surfaced. Recent scholarship seems united in the belief that rule of law and good governance promotion have until now delivered neither improved rule of law nor improved governance.[3] The causes of these

[3] *See generally*, Daniel Kaufman, *Rethinking Governance*, Working Paper (2003) (referencing lack of improvement in governance and rule of law worldwide) available at http://www.worldbank.org /wbi/governance/pdf/rethink_gov_stanford.pdf (last visited Oct. 15, 2003); Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Carnegie Endowment for International Peace Working Paper (2003) (citing lack of knowledge or evidence to prove the effectiveness of rule of law assistance); Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002); Yves Dezelay and Bryant Garth, THE INTERNATIONALIZATION OF PALACE WARS 221 (2002); U.S. GAO NO. 01-354, FORMER SOVIET UNION: RULE OF LAW ASSISTANCE HAS HAD LIMITED IMPACT (2001). *See also*, Elliot Berg, Patrick Guillaumont, Jacky Amprou, & Jacques Pegatienan, *Cote d'Ivoire in* SHANTAYAN DEVARAJAN, DAVID R. DOLLAR, & TORGNY HOMMGREN, AID AND REFORM IN AFRICA: LESSONS FROM TEN CASE STUDIES, World Bank (2001) ("institutional change in legal/judicial systems is notoriously difficult . . . one only has to skim the literature to understand that successful reforms in this area are few."); T.M. Issac & Patrick Heller, *Democracy and Development: Decentralized Planning in Kerala*, *in* ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY 82 (2003) ("successful and sustainable democratic decentralization has been the exception to the rule"); Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 328 (2002) ("Foreign assistance is making little impact in many of these nations because these efforts fail to understand the fundamental reason or reasons that a particularly society is not making lasting and meaningful legal reform."); Peter Evans, *Beyond "Institutional Monocropping": Institutions, Capabilities and Deliberative Development*, Working Paper, 9 (1999) (referring to the failure of donor-imposed governance conditionality to generate positive results).

alleged failures are not yet well understood.[4] This article contends that the problems critics have identified are principally the product of conceptual and methodological weaknesses of efforts in this area. After identifying some of these foundational problems, this article attempts to re-conceptualize law and development in terms of a broader process of democratic development. In a departure from the prevailing instrumentalist agenda, this article contends that rule of law promotion activities must respect the internal relation between law and democracy[5] in order to bring about the conditions under which legitimate legal orders can emerge.

I. Introduction

The recent commitment of the international community to law and development differs in kind from earlier experience.[6] That law is a critical development priority is now generally accepted. Evidencing the development community's consensus on the central importance of rule of law, donors have allocated substantial sums towards its improvement. Estimates are that approximately $3 billion has been allocated to rule of law activities in the past decade. It is against this backdrop that challenges have emerged.

While the latest law and development movement has settled upon the centrality of law in improving the well being of citizens in developing countries, the field is, according

[4] What is clear is that the response of the law and development movement to these emerging pressures will crucially determine its future. David Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, Working Paper (2003) (proposing work towards reconstructed theory of the possibilities that law and development may offer).

[5] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

[6] *See* Trubek *supra* note 3; David Kennedy, *Law and Developments in* CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21ST CENTURY (Perry et al. eds., 2003); Carothers, *supra* note 3. These authors maintain that the new law and development movement merits the name "rule of law" promotion. However, the underlying concepts remain consistent. This article will use the terms law and development, legal reform and rule of law promotion interchangeably to refer to bilateral and multilateral donor-sponsored legal assistance to developing and transition countries.

to one critic, incompletely theorized.[7] In fact, there appears to be no theoretical apparatus at work in most discussions of the subject. Generalized governance truisms, combined with instrumentalist agendas, spawn orthodox technocratic prescriptions. This state of affairs stands in stark contrast to legal thought in other contexts. Legal and political theory play little if any role in informing the approach to law and development. One significant consequence of the weak conceptual foundations of the field is the rigid analytical distinction maintained between concepts such as the rule of law and democracy.

An examination of law and development through the lens of political and legal theory can generate new insights into the purposes and processes legal reform should take. One crucial insight is the interdependence of democracy and the rule of law. One normative conclusion this article draws from these premises is the need to democratize governance and rule of law promotion activities. Honest observers recognize that much legal and judicial reform implemented to date has lacked the involvement of the public beyond the legal community.[8] Despite the acknowledgement by some of the need for

[7] Carothers, *supra* note 3 at 6.

[8] Linn Hammergren, *Political Will, Constituency Building, and Public Support in Rule of Law Programs*, CTR. DEMOC. & GOV., USAID (1998), at 4 ("most justice reforms have been negotiated and initiated without public involvement"); Jennifer Widner, *Reflections on Judicial Reform*, Working Paper, at 14, *available at* www1.worldbank.org/publicsector/legal/amjudref.doc (last visited Oct. 25, 2003) ("developing country reform initiatives usually give no heed to the problem of centralizing responsibility in a single person, usually the chief justice, and his or her small staff"); Trubek, *supra* note 4, at 10 (citing "faith that the needed reforms could be imposed from the top" in the 1990s); International Council on Human Rights Policy, *Local Perspectives: Foreign Aid to the Justice Sector* 53 (2001) (study noting that beneficiaries of legal reform surveyed generally felt that their views, experience, and needs were given too little weight by donors); Berg et al., *supra* note 3, at 427 (noting that labor market reforms in Côte d'Ivoire involved only the World Bank and government, excluding trade unions). Berg et al., offer a wide-ranging critique of legal reform programs in Côte d'Ivoire, but emphasize the non-inclusive nature of the process. They note that with respect to general law and justice reforms, the Ministry of Justice action plans were drawn up at the urging of Cooperacion Française and the World Bank, and that their main elements reflected the agendas of these donors. *Id.* at 427.

more inclusive practices[9], it is not clear that the lesson has been absorbed in practice. Owing to the highly technical and specialized nature of the field, rule of law and good governance promotion has generally been insulated from the prevailing move towards participatory development.

This article seeks to disrupt some underlying assumptions about rule of law and governance assistance and offer conceptual grounds on how to move forward. Part II describes problems at the level of expectations and in the overall approach to law and development that may undermine its effectiveness. In Part III, the article develops a directly deliberative democratic account of how law and development programs should be conceived and structured. This account can be justified on normative, cognitive and instrumental grounds. In conclusion, the article suggests in Part IV that treating law and development as a democratic practice is more consistent with the stated aims of the movement--fostering more legitimate and more democratic polities--and is thus a candidate better equipped to supply convincing answers to the movement's critics. At the level of practice, the article contends that donor financed rule of law assistance strategies should thus prioritize the creation of institutions that foster direct democratic participation in law reform.

II. Challenging Conceptual and Methodological Assumptions

As discussions of law and development have become more mainstream, many assumptions have come to be taken for granted. Strengthening the rule of law has gained widespread recognition, even among the general public, as a development priority. What conventional accounts leave out, however, is any discussion of the complexity of the endeavor. Even those who recognize the complexity of advancing the rule of law in

[9] Trubek, *supra* note 4, at 16.

difficult post-conflict states, for example, conceive of the problem in roughly instrumentalist terms. The rule of law is seen as something tangible and definable, and therefore, putting it into practice is just a matter of finding the right technocratic package and applying sufficient political muscle.

To plot a realistic approach to this field, four interrelated problems must be addressed. Broadly conceived, these problems arise from widespread misunderstanding of the dynamics and pace of social and political change. Lacking this understanding, law and development interventions frequently rest on flawed premises. The view that technocratic rather than democratic mechanisms can generate democracy and the rule of law is fostered through the persistence of these underlying assumptions.

The first problem concerns the frequent adoption of hierarchical and orthodox stances. Such approaches tax the cognitive abilities of those involved and fail to respect the multiplicity of institutional arrangements capable of supporting the rule of law. A second consideration involves the political nature of many legal reform initiatives, particularly those with implications for the distribution of resources in society. The third argument concerns the naive conception of human agency employed in law and development work. It is argued that a sufficiently rich conception of agency encompasses the cognitive grounding of existing social, political, and legal arrangements. The final argument suggests a partial explanation to the troubling question of why many law and governance reforms have been ineffective. Examining the high-powered incentives for law reform presented by international integration exposes the relative paucity of incentives presented to most developing countries for such efforts.

Together these examples speak to the need for collective and democratic solutions to rule of law promotion. In a world of increasing complexity, traditional approaches to governance no longer work. Strong, central controls over political and economic actors can no longer deliver the goods as in the days of triumphant Keynesianism. In Western Europe, as in the United States, we have moved from an interventionist to a regulatory model of the state.[10] The function of the state on this model is to steer, not row.[11] Underlying this model is an understanding that it is cognitively impossible for one group or select group of actors to control the workings of a single firm, let alone the entire economy.[12] To meet the challenges posed by these forces, we must seek new forms of democratic decision making in both mature and developing legal systems. Before embarking on that constructive venture, we must first develop a more dynamic conception of the political, social, and economic factors affecting rule of law promotion activities.

A. Orthodoxy and hierarchy

By now, most observers of law and development agree that attempts at legal transplantation and orthodoxy fail.[13] While substantial commentary has arisen regarding

[10] Giandomenico Majone, *From the Positive State to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y. 139 (1997).
[11] DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25 (1993).
[12] Thomas F. McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 COLUM. BUS. L. REV. 101.
[13] *See* Daniel Berkowitz, Katarina Pistor; & Jean-Francois Richard, *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (citing measurements indicating 33 percent lower legality in countries receiving law via transplantation). That many recognize the failure of this approach does not mean that it no longer affects the conduct of legal reform programs. *See* W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 LAW & BUS. REV. AM. 551 (2002). The author refers to a review undertaken by the World Bank of the major law reform exercises in Central and Eastern European countries, which determined that wholesale legal transplantation efforts were "alive and well." Similarly, the author cites the practice in Latin American judicial reform projects to promote Anglo-American oral advocacy models to replace traditional inquisitorial approaches of the civil law systems. *Id.*

the tendency to orthodoxy in legal reform, relatively less commentary has focused on the hierarchical approach that implementing orthodox solutions requires. Fiat rather than discourse tends to facilitate wholesale legal transplantation. Perhaps no better example of this practice exists than in the transplantation of civil law throughout the Americas during the colonial period. In modern times, the wholesale adoption of foreign commercial codes without supporting regulatory and institutional structures in the former Soviet Union states had dire economic consequences in some cases.[14] Experience shows that in legal reform, as in governance generally, unilateral solutions fail. They may work for a time but as a long-term governance approach, consolidated, central direction of the political and economic system is a losing proposition.

It fails for a number of reasons, the primary one being cognitive limitation. In societies of increasing complexity, it is quite simply untenable to contend that one person or select group of persons can steer the social, economic or political order.[15] Research in the social sciences has contributed to our understanding of the limited ability of humans to make decisions individually. These critiques come from all directions but bring us to similar conclusions. Concepts of bounded rationality and recognition of widespread irrationality in decision-making have undermined the hyperbolic assumptions of

[14] *See, e.g.*, John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure, 25 Iowa J. Corp. Law* 1, 2 (1999)(Polish and Czech privatization example).
[15] Charles Sabel & Oliver Gerstenberg, *Directly Deliberative Polyarchy: An Institutional Ideal for Europe* at 7 *in* Good Governance in EUROPE'S INTEGRATED MARKET 289 (Christian Joerges & Renaud Dehousse eds., 2002) ("in a world of radical indeterminacy, or because the costs of exploring the most promising potential solutions would overburden the most capable actor . . . even the strongest favor some division of investigative labor to incurring the risks of choosing and executing a solution alone").

rationality in neo-classical economic thought.[16] Similarly, analyses of informational asymmetries that arise in many contexts highlight the difficulty of rendering decisions under incomplete information. The understanding of the information processing function of markets further demonstrates the relative inferiority of individual cognition in directing economic activity.[17] As some observers have noted, rationality constraints become particularly acute when making institutional choices.[18] Unintended consequences associated with such choices (particularly when executed hierarchically) may be considerable.[19] From a practical point of view, the failure of centrally planned economies dramatically illustrates the cognitive limitations any hierarchical or centralized governance system faces.

Just as government officials cannot hope to improve upon the calculations of untold numbers of market participants, legal reformers who attempt to impose solutions based on unilateral assessments of what is best for a given society will surely err. It is quite simply cognitively impossible for one person, select group of elites or international donors to determine *ex ante* appropriate legal solutions for a given country.[20] Complex socio-economic factors such as competing norms, courses of dealing, vested interests, education, religion, settled expectations, and path dependencies, are but some of the factors that must be taken into account in any reform project. Forces such as these challenge the capacity of elite decision makers fed by foreign advisors to shoehorn

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[16] Jon Elster, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 31-41 (1989) (referring to indeterminacy and irrationality of decisions in opposition to rational choice theory).
[17] Freidrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519-530 (1945).
[18] JON ELSTER, CLAUS OFFE, & ULRICH K. PREUSS, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA (1998).
[19] *Id.*
[20] Elster argues that the task of implementing wide-ranging reforms is impossibly complex. No small cadre let alone an individual could obtain the knowledge needed to anticipate consequences adequately. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

solutions at odds with prevailing social structures. Complexity and bounded rationality suggest the need for collective rather than elite-driven reform.

Orthodoxy fails for similar reasons. If cognitive limitations make it impossible for an external party to determine solutions *ex ante*, then no orthodox solution—by definition determined in advance--could generally be expected to work. Though complexity no doubt makes orthodoxy a convenient option, the failure of the preordained blueprint to map reality ultimately cannot be ignored. The inability of many legal transplantations to "take" illustrates this phenomenon. Likewise, the importance of strong institutions to economic growth, creates great temptation to simply install institutions modeled on those of more economically successful countries, despite the fact that the social, political and economic capital needed to sustain those institutions do not exist.

These conceptual understandings make it all the more curious that the tendency towards legal orthodoxy in law and development has emerged at a time when great advances have been made in the comparative political economy of OECD countries. Studies in comparative capitalism have advanced new institutional thinking in an important way.[21] While acknowledging the centrality of institutions, the varieties of capitalism approach examines how economic, social, regulatory, and legal forces affect institutional structures.[22] It thus runs contrary to the prevailing view of the inevitability of international convergence and homogenization.[23] Rather than inexorable convergence

[21] *See generally*, PETER A. HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2001). Similar research can be found in ROGERS HOLLINGSWORTH & ROBERT BOYER, CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (1997).
[22] HALL & SOSKICE, *supra* note 21.
[23] In recent years, there has been a tremendous debate on whether jurisdictions engage in regulatory competition, trying to improve upon the regulatory systems of other states. Some argue that globalization

towards the model of Anglo-American market economies, research suggests surprising durability of local models and modes of accommodation characterized by local flavor.[24]

B. Money is the root of all.... politics

A further problem with conventional approaches to law and development has been a lack of attention to distributive questions, which is to say, politics. As many of the participants in legal reform are lawyers, the tendency to focus on exclusively legal questions is great.[25] Legal reform is seen as a technical activity primarily involving legal professionals, yet the best laid plans for legal change frequently butt up against other forces.

Distributive questions are everywhere in this area.[26] Something as seemingly innocuous as commercial law reform can affect the channeling of existing economic activity into the official economy, which may hurt the business prospects of someone previously operating in the unofficial economy. For instance, curtailing corruption naturally affects the income of public officials,[27] and changing an investment code may reduce or increase the power of unions or employees. A related point deals with systemic changes. Improvements in the quality of services in one area can negatively affect the provision of services elsewhere. Thomas Carothers uses the example of overwhelming

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is causing a "race to the top," with jurisdictions trying to devise rigorous regulatory systems, while others see just the opposite, that is, a "race to the bottom." A third stream, the convergence view, contends that international economic forces are driving states to adopt substantially similar regulatory approaches. All states are thus seen as converging on a single regulatory model, typically considered to be Anglo-American in nature.

[24] *See e.g.*, Economist, 17 October 2003 (noting that France and Germany are not challenging the social democratic basis of their societies in connection with reforms of the welfare state).

[25] Carothers, *supra* note 3.

[26] I owe these observations to David Kennedy. *See* Kennedy, *supra* note 6); Peter Evans, *supra* note 3, at 6.

[27] *See, e.g.*, Harry Blair & Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*, USAID Program and Operations Assessment Report No. 7 (1994) (resistance to structural change in the courts is particularly unyielding where rent-seeking opportunities [of judges and court staff] are endangered"); *see also* SUSAN ROSE-ACKERMAN, CORRUPTION IN GOVERNMENT: CAUSES, CONSEQUENCES AND REFORMS (1999).

the courts based on administrative improvements.[28] Any of these changes may be advisable yet they challenge the ability of law to mediate the pressures that arise. Interestingly, economists who rattle against the rent seeking behavior of individuals benefiting from an existing order, fail to deal with the incentive problems of those negatively affected by distributional consequences of legal reform.[29] While legal reform may equip lawyers and judges with cutting edge legal knowledge or "best practices," countervailing forces that cannot be mediated through the legal system may stymie efforts to see legal reform put into practice. Distributive questions may arise in any legal reform project but are, if anything, more acute in developing countries where incomes and social safety nets are modest.

Distributive questions are inherently political. In the legal context, as elsewhere, it is impossible to solve distributive questions based solely on technical criteria.[30] Weighing distributive choices requires judgment,[31] and exercising judgment with respect to the distribution of resources under conditions of scarcity is a political affair. While glazed over in mainstream discussions of law and development, practitioners are well aware, sometimes painfully so, that unresolved political battles make their technical assistance interventions sometimes exercises in futility. In such contexts, the desire to remain a neutral technician dispensing apolitical best practice advice may require especially strong blinders. Because distributive choices frequently intersect with legal choices, a theory of law and development that does not rest on a prior theory of collective

[28] Carothers, *supra* note 3, at 10.
[29] *See* Issac and Heller, *supra* note 3, at 82 (noting that mainstream development thinking perceives the world as "largely frictionless and apolitical").
[30] Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?*, available at *http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Sen.pdf* (last visited Nov. 1, 2004); *See also* Evans *supra* note 3; Kennedy, *supra* note 26, at 3.
[31] Sen, *supra* note 30.

decision making (i.e. democracy) will leave such paradoxes unresolved and ultimately result in failed assistance.

The very choice of a society to adopt a market economy requires not only political, but also ideological backing. Amy Chau has noted that in OECD countries, such support has arisen as a consequence of belief in such things as the possibility of upward mobility, the value of self-reliance, the importance of workers exercising control over the workplace, and the necessity of employer commitment to worker well being.[32] She contends that aspects of these beliefs have contributed to the durability of market economies in most OECD countries.[33] No matter how well intentioned development policies might be, at least a median segment of the population must support market reforms for them to achieve their intended purpose. Given the dramatic disparity in wealth existing in many developing countries, achieving political support will require legal reforms that entail distributive consequences acceptable to a critical mass of the population.

Historical experience suggests that while reform may be pursued for intrinsic reasons, the alignment of reform movements with political movements involving broader distributive concerns can fuel the fire. In the United States, during the period of the late 19th Century through the early 20th Century, growing dissatisfaction with corruption and inefficiency in the judiciary fed the reformist cause.[34] For years, this movement was driven primarily by elites, who sought to develop greater propriety in the legal profession

[32] Amy Chau, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 301-307 (2000).
[33] *Id.* at 306.
[34] Widner, *supra* note 8, at 8.

and the courts generally. Yet it was case of *Lochner v. New York*[35] in 1905, and the rise of substantive due process jurisprudence by the conservative Hughes court that broadened and accelerated calls for judicial reform.[36] Notably, the then powerful labor movement added judicial reform to its agenda, and populist politicians, like President Teddy Roosevelt capitalized on this sentiment and proposed radical reforms. Likewise, the existence of economic and social issues for which citizens sought judicial redress made judicial reform a matter of democratic concern.[37] What this history suggests is that the challenge of gaining popular support for legal and judicial reform hinges in part on the ability to align legal and judicial reform movements with broader political concerns that hold wider distributive consequences.

By arguing that distributive questions must be resolved by political agreement before legal reform can be achieved, I do not suggest a greater role for rule of law promotion. Instead, I argue that in order for effective law reform to occur, mechanisms for mediating conflicting political claims that arise in the process must exist. Put differently, those who would tax law with the burden of solving distributive questions prioritize the right over the good. In reality, the two are determined dialectically and interpenetrate.[38] Leaving distributive questions—whether involving resources or power--to law and development programs lacking the ability to mediate competing claims democratically is a surefire recipe for failure.

C. Rethinking Agency

[35] 198 U.S. 45.
[36] Widner, *supra* note 8, at 8.
[37] *Id.* at 13.
[38] *See*, Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, 17 CARDOZO L. REV. 1083, 1103-1105 (1996). *See also*, Jürgen Habermas, *Reply to Symposium Participants, Benjamin Cardozo School of Law*, 17 CARDOZO L. REV. 1487-8 (1996).

Further challenging law and development is the unrealistic model of agency employed by most practitioners. Those on the receiving end of legal assistance are too often conceived as passive recipients of best practice wisdom from abroad. Since the recipients of legal assistance are implicitly considered as hailing from dysfunctional legal systems, they are expected to willingly adopt and implement all changes necessary to steer their systems in the proper direction.

In reality, legal professionals may not willingly accept even well advised changes. As noted in the description of distributive effects above, lawyers receiving rule of law assistance from abroad are also the products of unique legal traditions and social positions. Regardless of the jurisdiction, legal training usually entails a great degree of socialization, and this understanding differs from the methodological individualist assumptions of many proponents of legal reform. As a result of the hegemony of economics—particularly neoclassical--in legal reform thinking, calls for an adequate sociological understanding have been drowned out.

Pierre Bourdieu's sociology illustrates the inadequacies of existing conceptions of agency in law and development.[39] In contrast to traditional structuralist thought, which concentrated principally on objective social structures, Bourdieu offers both an objective and agent-centered sociology.[40] On the former side, he examines the existence of

[39] For purposes of this paper, I rely on Bourdieu to offer a critique of existing conceptions of law and development. I do not purport to supplant empirically grounded examinations of the law and development field. Impressive empirically grounded work on the topic, which employs Bourdieuian methodology, has recently emerged. *See* Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy, in* THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Dezalay et al. eds., 2002); YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002).

[40] Wacquant, Introduction *in* WACQUANT, PIERRE BOURDIEU & J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 14 (1992).

objective social structures in what he calls various "fields" of social practice.[41] On the latter side, rather than treat such structures as having some independent ontological status, he points to their cognitive roots. In other words, external social structures exist and are replicated at the level of the individual. This cognitive basis—what Bourdieu calls the habitus—consists of historical relations that are implanted in individual bodies to form mental and physical schemata of perception, appreciation, and action.[42] These cognitive structures, rather than invariant over time, are "historically constituted, institutionally grounded, and thus socially variable, generative matri[ces]."[43] It is important to understand both the concepts of habitus and field dynamically. Agents, predisposed to a particular habitus, undertake strategic action (or "play" in Bourdieuian terms) within a particular field.[44] Actions agents take within a particular field are not predetermined but rather shaped by the habitus to which they are disposed.

Bourdieu's analysis of the extent to which individuals take on cognitive dispositions based on social structures in which they interact, conveys the extent to which strategic choices by individuals are to a certain degree conditioned. Applying thinking similar to Bourdieu, Thomas Carothers contends that law is a "normative system that resides in the minds of the citizens of a society."[45] His analysis points to the cognitive basis of the new institutionalist examination of path dependency.[46] History may not be destiny[47] but it does exert considerable inertial effect on individual actors. Attempts to

[41] *Id.*
[42] *Id.* at 16.
[43] *Id.* at 19.
[44] *Id.* at 19 (quoting Bourdieu 1989a).
[45] Carothers, *supra* note 3, at 8.
[46] *See, e.g.*, DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).
[47] ROBERTO MANGABEIRA UNGER, POLITICS: THE CENTRAL TEXTS (1997).

promote legal reform as a development project must reflect the strong influence of existing structures.

A related point stems from the strong tacit dimension of much legal knowledge. It is a notion not captured by the distinction between procedural and substantive law. Both procedural and substantive law can be found codified in the form of rules contained in books. Knowledge of the law on the books is explicit. Someone can ask a question about what the law is by pointing to a page of text, but no lawyer who has practiced for any period of time would say that merely knowing the laws on the books suffices to make one a lawyer. Lawyers exiting law school and passing entrance examinations to the bar may have obtained a large amount of explicit knowledge, but they generally know how to do very little. What they lack--and what experienced lawyers have--is tacit knowledge. As Michael Polyani noted in connection with the transplantation of a light-bulb machine from overseas to his native Hungary, the machine failed to operate notwithstanding the fact that the same machine was in operation in Austria next door.[48] His explanation of what was lacking, tacit knowledge, helps illustrate an important aspect of what it means to be a lawyer. Included in this notion are techniques for writing, research, speaking, advising clients and, most importantly, making judgments on the meaning of statutes, the willingness of a given judge to accept one argument over another, or how to draft a contract that will stand up in court.

As described in connection with the limitations on knowledge above, the tacit dimension of the law imposes significant hurdles on those seeking to transform a legal system. Lawyers in any system can relearn certain practices—indeed, must—to keep

[48] MICHAEL POLYANI, TACIT DIMENSION (1966); *see also* Richard Langlois & Nicholai Foss, *Capabilities and Governance: The rebirth of Production in the Theory of Economic Organization*, DRUID Working Paper (1997).

pace with changes that occur over time. Fundamental change poses greater difficulties, because the wider the legal reform, the more tacit knowledge that is lost. Since tacit knowledge is often what distinguishes a good lawyer from a mediocre one, making existing tacit knowledge irrelevant carries certain hazards.[49] Here too, distributive consequences play a role. Only infinite faith in the altruistic tendencies of lawyers could support the view that change that threatens their livelihoods will be willingly accepted solely because it will improve the general welfare.

D. State-level Incentives

The limited progress of legal reform in many transitioning and developing economies contrasts sharply with the recent experience of some states proceeding towards economic integration. The power of incentives in motivating states to undertake broad legal reforms holds significant explanatory potential in this regard. Some of the most dramatic examples of widespread legal reform in the past fifteen years can be attributed to the power of international integration, notably in connection with EU and WTO accession. The high-power, state-level incentives that opportunities for economic integration offer have driven countries like the Czech Republic, Poland, Hungary and other EU accession states to undertake significant reforms. Likewise, China's efforts to comply with WTO guidelines before joining that organization speak to the tremendous motivation the prospect of WTO membership engendered. Certainly more work remains in many of these countries. All too often we read these reforms as merely the process of coming into conformance with the guidelines of the organization in question, yet what this interpretation fails to take into account is the convergence of political forces within a

[49] Widner, *supra* note 8, at 6 ("one of the reasons for the slow response [to judicial reform in the United States] was that some lawyers profited from the archaic procedures others wanted to abolish").

country necessary that enable such reforms to take foot. Despite opposition--in some cases significant--political forces in these states have consolidated around reform priorities and delivered on a substantial scale.

Indeed, the experience of international integration makes a key argument for state interest in legal reform appear impotent. Vague promises of potential gains in foreign direct investment from legal reform are quite simply too intangible to generate the massive mobilization of political and social forces needed to realize far-reaching reform. One need only survey statistics on foreign direct investment concentrated in only a handful of countries to wonder whether those states looking in from the outside will really be incentivized in the way the law and development movement generally hopes. While the economic literature seems fairly settled on a positive correlation between well-developed legal systems and development (with causation appearing plausible but unproven)[50], the gains states can expect to experience from general improvements in the rule of law are long term. Compared to the relatively short-term incentives political and economic integration poses, such long-term promises may be of limited force in mobilizing significant political and social power behind legal reform. Incentives that are more tangible and compelling are necessary. The deliberative approach to law and development described below can explain how equally powerful incentives for legal reform can arise under the right institutional conditions.

III. Deliberative Democratic Model of Legal Reform

Once we depart from orthodoxy and hierarchy, we open ourselves to a range of possibilities. As the varieties of capitalism approach suggests, institutional starting points

[50] Kaufman, *supra* note 3, at 17.

will dictate widely different reform options.[51] Only a deliberative democratic approach is capable of responding to these factors. While many in the development community express their support for a participatory approach to development, the justification is usually instrumental. This article contends that the rationale for inclusive law and development goes beyond mere instrumental reasons. Instead inclusive and deliberative legal reform is a *sine qua non* for the creation of legitimate law and democracy. Rather than a nice thing to choose from a menu of options, the application of a truly deliberative participatory legal reform process is essential to upholding the very purpose of reform.

Through contemporary legal and democratic theory we can obtain greater clarity on the preconditions of legal reform, which bears on the question of legitimacy. Any program of law and development must have the creation and maintenance of a legitimate legal order as both its starting point and ultimate goal. An illegitimate legal order may in some instances generate economic development, but at a minimum, law and development interventions must posit transformation to a legitimate order as a favored result.

Habermas' discourse theoretic account of law and democracy provides a basis for considering the preconditions of any law and development program. With appropriate adjustments, this account of how legitimate law is formed provides a metric against which legal reform work may be judged. Habermas' call for deliberative democracy resolves both normative and instrumental questions facing the law and development movement.

The root of Habermas' legal theory is his intersubjective theory of truth and morality. Writing in response to postmodern critics of traditional rationalism, he contends that truth is determined by virtue of intersubjective discourse. He extends this

[51] *See also* Berkowitz et al., *supra* note 13.

argument to develop his moral theory of discourse ethics, according to which, morality is determined by virtue of the achievement of a hypothetical unanimous agreement by all concerned persons who engage in a process of moral argumentation and debate.[52] Translated to the legal context, this theory is used to develop an account of legitimate law creation. Discourse is essential to the creation of legitimate law. Habermas writes, "under post-metaphysical conditions, the only legitimate law is one that emerges from the discursive opinion- and will-formation of equally enfranchised citizens."[53]

Habermas' discursive model of law and democracy is procedural rather than substantive.[54] He does not posit some transcendent value as the basis for law's legitimacy,[55] instead, he views democratic procedures as the basis upon which a legitimate legal order can arise.[56] As one commentator has stated, in a post-Enlightenment world, "legitimacy stems from these procedures and not from the assertions of those who claim, for instance, the divine right of kings."[57] It is a view that simultaneously avoids the inadequacy of strongly positivist accounts of the rule of law as mere legality[58] while steering clear of expansive substantive criteria for legitimacy (e.g. natural law).[59]

Civil society resides at the core of this proceduralist legal theory. Habermas conceives the informal sphere of civil society as the locus of free wheeling political

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[52] This is a translation of the Kantian principle of never acting in a way that one cannot also will the maxim of the action to become a universal law. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).
[53] Habermas, *supra* note 5, at 408.
[54] *Id.* at 408-409.
[55] *But see*, Richard J. Bernstein, *The Retrieval of the Democratic Ethos*, 17 CARDOZO L. REV. 1127, 1130-1137 (1996) (arguing that some shared substantive ethical pre-commitment is required before discursive democratic practices can be initiated).
[56] Habermas, *supra* note 5at 453 (noting that discourse-theoretic approach steers between two pitfalls of positivism and natural law).
[57] Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943, 950 (1999).
[58] HANS KELSEN, THE PURE THEORY OF LAW (1934).
[59] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

debate and exchange.[60] This informal public sphere involves voluntary associations, media, and religious organizations, among others, which perform the task of feeding the public institutions with democratic input. Formal legal institutions render decisions and produce laws, but also perform the essential function of taking up input from the public sphere and translating it into binding law. According to this model, legal legitimacy is determined in terms of a "decentered, civil society-based theory that focuses on the forms of communications between the unrestricted, but weak, societal sphere and the necessarily restricted, but relatively strong, public political spheres."[61] In a sense, "procedural law becomes, above all law *of*. …civil society."[62] In the discursive model of democracy, civil society acts as the conduit for transmitting the input of the public to state institutions.

Because of the centrality of civil society in contributing to the law making process, deepening the rule of law from a Habermasian perspective requires strengthening the cultural sphere of the public space.[63] A fundamental failing of existing legal orders in many liberal democratic states is not at the level of the content of existing law, but rather a result of the inadequate procedures of public communication that inform the justification and adoption of legal norms.[64] Law, in this theory, is at the heart of democracy; each presupposes the other.

> The discourse theory of law conceives constitutional democracy as institutionalizing – by way of legitimate law (and hence by also guaranteeing private autonomy) – the procedures and communicative presuppositions for a

[60] William E. Scheuerman, *Between Radicalism and Resignation: Democratic Theory in Habermas's Between Facts and Norms*, *in* HABERMAS: A CRITICAL READER 156 (Dews ed., 1999).
[61] Anthony Arato, *Reflexive Law, Civil Society and Negative Rights*, 17 CARDOZO L. REV. 785, 787 (1996).
[62] *Id.* at 787. [emphasis added]
[63] Jacques Lenoble, *Law and Undecidability: A New Vision of the Proceduralization of Law*, 17 CARDOZO L. REV. 935, 947 (1996).
[64] *Id.* at 948.

> discursive opinion and will-formation that in turn makes it possible (the exercise of political autonomy and) legitimate law making."[65]

The procedures that law establishes thus make possible lawmaking informed by civil society.

The codetermination of law and democracy explains why mere grants of formal legal rights or the adoption of formal legal constructs cannot result in legitimate law. For the substance of the rights conferred requires democratic input before their conferral.[66] The democratic process itself is necessary to determine the very content of rights. Put differently, we cannot even *conceive* of political ends without first having gone through a process of political deliberation.[67] Likewise, on Habermas' inter-subjective theory of truth, determining how to implement substantive legal commitments must occur discursively. In concrete terms, Habermas faced this issue in connection with the unification of Germany. At that time, he argued that the inclusion of the German Democratic Republic in West Germany should have occurred pursuant to a process of public debate on a large scale.[68] Only such a debate would have regenerated the autonomous public spheres, lacking in the previously totalitarian state, and have set the requisite normative parameters for the process.[69] For Habermas, discursive processes are a *sine qua non* for the creation of a democratic order.

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[65] Habermas, *supra* note 5, at 437.
[66] *Id.* at 449-50 ("The democratic process bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because individual private rights cannot even be formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases alike or different, and then mobilized communicative power for the consideration of their newly appointed ends").
[67] Habermas, *supra* note 5at 450 ("individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted ends").
[68] Pierre Guibentif, *Communicative Action and Production of Law*, *in* HABERMAS, MODERNITY AND LAW 59 (Mathieu Deflem ed., 1996).
[69] *Id.*

In societies of increasing complexity, creating the conditions under which discourse can occur is difficult. Law itself plays a critical role. Relying on systems theory, Habermas argues that in functionally differentiated societies, law plays a role as mediator between autonomous subsystems. Because each subsystem has a unique expert language (in systems theoretic language, a code) understandable only to participants in that subsystem, some connecting language is needed to integrate the disparate subsystems into a single society. That language is ordinary language. Habermas argues that non-specialized ordinary language roots specific action systems in society (in his words, the lifeworld). Institutions capable of steering specialized subsystems through ordinary language anchor those subsystems in the broader social world.[70] The language of law in turn transmits ordinary communication from the public and private spheres and acts as a "transformer" enabling communication between autonomous subsystems. To the extent that legal language penetrates functional subsystems, it distributes ordinary language throughout society.

In this way, Habermas sees law as a source of social integration. Rather than the driver of social and political change, law serves as a mediator between functional subsystems, the state, and civil society. The function of law is to translate the inputs of civil society (communicative power) into a form accessible to the state apparatus (administrative power).[71] In an attempt to democratize existing institutions, Habermas wishes to prioritize the ordinary language of the public in deliberations on public matters. Through the language of law, we can engage in a broader discourse that deals with the political, social, and economic effects of legal reform. But law as the medium of

[70] Habermas, *supra* note 5, at 354.
[71] Scheuerman, *supra* note 60, at 158.

discourse does not mean that we can technocratically burden law with the task of political and economic reform exclusively.

There are multiple ways to read this call to institutionalize discursive procedures for gathering the "wild" inputs of civil society and feeding formal state decision-making.[72] One could read it as a call for simply grafting institutions or mechanisms onto existing state structures. Such an approach would, in his words, "substitute facticity for validity".[73] In other words, it would be to assume the ineluctable quality of existing state structures. Yet Habermas' long-standing commitment to revitalized democracy calls for a more adventurous reading. Rather than accept all institutions as given, we must conceive of new institutions capable of performing the necessary function of giving voice to citizens. One cannot reasonably consider the institutional legacies of colonial or authoritarian regimes as necessarily capable of responding to the problem solving needs of developing economies today.[74] Imaginative approaches to institutional design—informed by deliberation among all affected participants—may give rise to institutions better aligned with history, culture, and development priorities.

B. From Civil Society Alongside the State to Empowered Participatory Governance

Recent studies on institutions that make broad participation an operating principle are consistent with the spirit of Habermasian discursive democracy but deepen its democratic impulse in important ways. Notions such as empowered participatory

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[72] Kenneth Baynes, *Democracy and the* Rechtstadt*: Habermas'* Factizitat und Geltung, *in* THE CAMBRIDGE COMPANION TO HABERMAS (Stephen White ed., 1995).
[73] That is, a statement of what *is* for what *should be*.
[74] *Introduction*, *in* DEMOCRACY UNREALIZED: DOCUMENTA 11_PLATFORM 1 (Enwezor et al. eds., 2002); *Cf.* Charles Sabel, *Democratic Experimentalism: What to Do About Wicked Problems After Whitehall (And What Scotland May Just Already Be Doing)*, presented to the OECD Conference on Devolution and Globalization (2000).

governance,[75] directly deliberative polyarchy[76] and associational democracy,[77] have been developed to explain the innovative institutional structures of these new approaches to democratic governance. In contrast to Habermas' strict division between private and public spheres, this school posits the creation of hybrid institutions that mediate public and private institutions in novel ways. Democratic decision making, viewed in this manner, is not something that happens exclusively in the confines of state institutions fed by civil society inputs—a more or less pluralistic model—but instead occurs through the engagement of citizens in direct decision making under the auspices of the state.

Although a relatively new subject of research, initial empirical analysis suggests that the empowered participatory governance model can potentially solve intractable social problems through unorthodox means. Drawing from a range of examples, Archon Fung and Erik Olin Wright identify the key elements that characterize this model. These elements include: "(1) focus on specific, tangible problems, (2) involvement of ordinary people affected by the problems and officials close to them, and (3) the deliberative development of solutions to these problems."[78] The variety of examples to which this model has been applied and the open-ended and diverse manner in which institutions satisfying these criteria can be configured makes it clear that something different than a new orthodoxy is at work.

The practical orientation of these deliberative processes ensures that the focus remains on problem solving rather than ideological or partisan concerns. Persons deriving from diverse backgrounds can reach agreement on problems ranging from

[75] ARCHON FUNG AND ERIK OLIN WRIGHT, DEEPENING DEMOCRACY (2003).
[76] Joshua Cohen & Charles Sabel, *Directly Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).
[77] Joel Rogers & Joshua Cohen, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393 (1992).
[78] FUNG AND WRIGHT, *supra* note 75, at 15.

community policing to economic development without becoming burdened by political concerns that often undermine cooperative political relations. The grass-roots nature of the approach de-privileges experts and brings into play the substantial local knowledge that ordinary people hold. The benefits of such an approach are better-informed policies and improved accountability over political principals. Experts are not irrelevant to the process but they play a supportive rather than dominant role.[79] Fung and Wright contend that experts serve to "facilitate popular deliberative decision-making and to leverage synergies between professional and citizen insights rather than pre-empt popular input."[80] Finally, the process of deliberation involves participants reciprocally listening to each others' positions and generating group choices after due consideration.[81] The process of deliberative decision-making—in which consensus, not unanimity results--avoids the deficiencies of winner-takes all voting.

The design of institutions that facilitate empowered participatory governance involves three considerations: devolution, centralized supervision and coordination, and a state-centered focus.[82] Devolution is essential to opening up existing political arrangements to democratic participation.[83] In contrast to Habermas, who hopes to drive the democratic inputs of civil society into the formal state apparatus, the empowered participatory governance approach devolves power from the state to create new deliberative institutions. Simultaneous with the process of devolution, these new

[79] *Id.* at 17.
[80] *Id.*
[81] *Id.* This characterization of deliberation is similar to Habermas' notion of the "unforced force of the better argument". JÜRGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984).
[82] FUNG AND WRIGHT, *supra* note 75, at 20.
[83] *Id.*

institutions come under central supervision.[84] Some coordinating mechanism is required to provide accountability and ensure that innovations that develop locally are shared horizontally. The combination of devolution with enhanced central monitoring constitutes a different governance model than the move to "autonomous decentralization," or wholesale relinquishment of control over devolved institutions occurring in many countries today.[85] In addition, while this governance model empowers citizen actors it is not a mere voluntaristic endeavor.[86] Unlike specialized issue groups seeking to fight state power, the citizens groups engaging in empowered participatory governance take a direct role in governance. In contrast to conventional issue-oriented activism, which seeks, consistent with the Habermasian model, to influence the state from outside, citizens are in effect brought inside the state to the extent that they contribute to the formulation of policy alongside state actors.

This model of empowered participatory governance holds great potential for the development, analysis and application of knowledge. Empowered participatory governance can overcome limitations on cognition described earlier. Through discursive processes, information sharing occurs in a much more vital manner. Therefore, the direct deliberative model offers a convincing response to theorists favoring knowledge based development assistance.[87] Contrary to David Ellerman's argument, truly open and participatory institutions should be capable of taking advantage of the technical knowledge of foreign experts without succumbing to domination by technocrats.[88] As

[84] *Id.* at 21.
[85] *Id*.
[86] *Id.* at 22-23.
[87] David Ellerman, *Knowledge-Based Development Assistance*, available at http://www4.worldbank.org/afr/stats/pdf/8cabusi.pdf (last viewed March 9, 2004).
[88] *Id*.

the examples in Section IV below show, directly deliberative processes can substantially enrich the knowledge base on which development occurs.

C. Applying the Direct Deliberative Model in Developing Countries

Before making some observations on what direct discursive democracy means for law and development, we need to consider some preliminaries. For simplicity's sake, let us assume that there are two categories of states receiving law and democracy assistance. On the one hand are states with the main institutions of government fully established and functioning to some degree, while the other category includes states with poorly developed administrations and civil society. States emerging from conflict, whether a civil war or revolution of some sort, as well as true autocracies are included in this category. The point is that this latter type of state may have very little civil society from which to draw in conducting discursive legal reform programs.[89]

From this standpoint, the manner in which Habermas' argument is applied will differ depending upon the relevant category a state falls. In the former case, a functioning legal order, empowered deliberative governance will work as an outgrowth of existing institutions. Where organized civil society is weak, efforts must be made to improve its capacity to participate in the discourse surrounding law reform. For those societies lacking a rich civic life, greater efforts need to be made. In the latter case, creation of new structures rather than devolution will be required. From a Habermasian perspective, because the constitutional order may fail to fully institutionalize—through legitimate law—the procedures and communicative presuppositions for discursive opinion and will-formation that makes the state solely able to produce legitimate law,

[89] This is the situation Habermas referred to in connection with the organization of autonomous civil society actors in the DDR to deliberate on the unification of Germany.

donors involved in promoting legal reform must replicate the conditions adhering under a well-developed constitutional order. In those cases, what is required is the creation of some functional equivalent parallel structure, perhaps on an *ad hoc* basis to bring public opinion into the process of legal reform. Nevertheless, these situations suggest that the legal reform programs cannot be expected to rely on the capabilities of a broad range of society in states recovering from intense social and political dislocation. This observation is not meant in any way to discount the democratic imperative.

D. From Lack of Will to Will-Formation

In explaining the shortcomings in law and development, those involved frequently speak of the lack of political will to implement reforms. Indeed, it appears that in many cases countries have only come to reform as a result of donor pressure.[90] Political will does not form without generative influence of the public. Conceiving law reform as a discursive process requiring the involvement of all affected persons is a more appealing—and more realistic--vision than conventional accounts of those law reformers that cite the need for "buy in", "local ownership" or "tailoring solutions to local conditions." It is not that these notions are wholly erroneous, but that when compared to a dynamic deliberative democratic model they appear weak. A proceduralist understanding of the law reform process that is properly implemented will, by its nature, ensure that solutions do not do violence to local conditions. As illustrated in the work of

[90] Hammergren, *supra* note 8, at 2; Carnegie Endowment for International Peace, Roundtable on the Rule of Law, *Making Law Reform Work*, November 16, 2001, available at http://ceip.org/files/events/events.asp?p=1&EventID=429 (referring to importance of external pressure in improving human rights conditions for homosexuals in Romania).

Bourdieu, for that discourse to generate change and for changes to be internalized by agents, takes time.[91]

The role of technical assistance and training for the legal profession is essential to this process. Instead of hoisting "best practices" onto existing legal systems, lawyers should be given the tools with which to advise participatory reform groups and, in the case of law, steer reform in a way that builds on existing functioning institutions and advances alternatives where appropriate. Indeed, the experience with a number of the empowered participatory governance experiments is that training of ordinary citizens is often required to allow them to participate more fully.[92] Rather than treating technical complexity as a barrier to exclude citizens, the empowered democratic model attempts to overcome such barriers through capacity building.

Berkowitz et al. are persuasive in showing that the receptiveness of a country to a given legal transplant affects the transplant's success.[93] Demand in a country for legal change will intuitively be more likely to generate a fit with existing systems. The details of the domestic receptivity to the transplant need fleshing out. The argument becomes more convincing if receptivity has some procedural connotation. This article suggests that receptivity to legal transplants must germinate organically, through directly deliberative processes. Wholesale transplantation that does not involve such processes is likely to run afoul of all four problems discussed in Part II.

E. After Elites and Technocrats, Citizens

[91] OFFE ET AL., *supra* note 18.
[92] For instance, this occurred in connection with Chicago Public School reform, which included the participation of persons in local school councils who were given training on technical matters such as budgeting.
[93] Berkowitz, et al., *supra* note 13, at 2 ("Our basic argument is that for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand").

As Habermas has argued in connection with the role of civil society in conferring democratic legitimacy on expert subsystems, participation of constituencies outside of the legal profession is necessary for legal reform initiatives to gain legitimacy. Research on empowered participatory governance buttresses this claim. This broadened discourse of interested participants is particularly important when issues having distributive consequences are involved. Since, I have argued, most legal reform issues entail distributive consequences, participatory processes in legal reform are probably advisable as a matter of course.

Of course, there is a question as to the level of generality with which we are speaking. One can imagine that the more technical the questions involved, the less likely broadly participatory processes should be employed. Questions of broader significance, particularly those with distributive consequences, merit involvement of a wider number of citizens. As the earlier remarks about orthodoxy suggest, no categorical commitment to particular processes can be made. Instead, the processes must be drawn to solving the particular societal problems to which legal reform efforts are directed.

It is important to recognize countervailing forces at work. Participatory approaches undermine the ability of one interest group—whether lawyers, economists, or politicians—to determine outcomes. Setting programmatic priorities through participatory development processes thus requires lawyers to relinquish a degree of control. They become one of a number of interested actors. The extent to which legal professionals are willing to accept more inclusive approaches will bear on the legitimacy and durability of changes that occur.

In an essay written at the height of postmodern debates on the role of reason, Jurgen Habermas called for philosophy to change its orientation and self-conception.[94] Recalling Kant's universalistic philosophy that sought to find an *a priori* ground for human experience as well as science, Habermas suggested that Kant had been slightly arrogant. Who were philosophers to determine for the sciences what the conditions for their validity were? Likening the rationalist philosopher to an usher assigning other disciplines to their assigned seat, he claimed philosophy had taken on too great of a role for itself. Rather than the arbiter of all other human sciences, Habermas suggested that philosophy should become "a stand-in and interpreter" for these other disciplines. Philosophy was to be a guardian of rationality, aiding the other human sciences by clarifying and interpreting issues.

I believe that the situation that law and development confronts is similar to that Habermas addressed. Too much has been put on the plate of law and development. It has come to play a starring role, when it should instead be a supporting actor. Of course, a strong legal system is *ceteris paribus* probably a good thing. Yet we must look at the legal system not as the forum in which distributive questions can be settled but instead as the source of guidance to inform democratic processes generating political and economic decisions. Like the conception of philosophy Habermas proposed, law can play a supporting role in connection with society's search for appropriate reform options.

In addition to de-privileging lawyers, the discursive model of legal development will require elites to divest themselves of a certain amount of power. This should be a positive development as it will cut down incentives for rent seeking and clientism that

[94] Jürgen Habermas, *Philosophy as Stand-in and Interpreter*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 1 (1990).

become particularly acute when the value of directing benefits to particular parties are great. As the ability to deliver benefits of legal reform to one party or group declines, so too will the value of state capture. Evidence of the extent to which neo-liberal reforms may have been used to further elite plunder of the state during the 1980s and 1990s, cautions against placing responsibility for legal and judicial reform in the hands of entrenched public sector actors.[95] While it is not self-evident that politically dominant parties will relinquish some of their power to steer reforms, donors can offer incentives that may appear preferable notwithstanding foregone opportunities for private gain.

IV. Illustrations and Applications

Examples from a number of contexts provide some indication of the potential for participatory approaches in legal reform work. While each requires additional study to determine the extent to which they live up to the democratic imperative this article posits, the three examples described illustrate options for realizing the democratic potential of law and development. The first example involves the World Bank Institute's development of participatory needs assessments for law and governance reform. This model relies on grass-roots involvement of citizens, civil society and government in assessing conditions in a society and developing strategic plans to address problem areas. The second example, drawn from the massive participatory governance program of the state of Kerala, India, illustrates options for democratic decision-making on law and policy reform. A final example involves the use of civil society actors in providing legal services to disadvantaged groups in Ecuador. Together, these cases illustrate the

[95] Luigi Manzetti, *Political Manipulations and Market Reforms Failures*, 55 WORLD POL. 315 (2003) (arguing that "if market reforms are carried out within a polity where accountability institutions are weak (or even deliberately emasculated to accelerate policy implementation), corruption, collusion, and patronage will ensue and promote disastrous economic crises in the medium term").

potential for broad participation in diagnosing, designing and implementing legal reform activities.

A. World Bank Institute Participatory Governance Diagnostics

The World Bank Institute has developed an approach to technical assistance for national anti-corruption programs that entails a high degree of citizen involvement. While the WBI is still experimenting with this approach, its basic contours are clear. Before the World Bank will provide technical assistance for anti-corruption programs, the state must formally request its assistance. Once engaged, the first step involves the creation of a national steering committee to oversee the development of a national anti-corruption strategy.[96] This steering committee is made up of equal shares of government and civil society representatives (e.g., media, NGOs, and churches).[97] The committee then initiates a participatory governance assessment of the country on corruption and governance topics to inform the development of national anti-corruption strategies.[98] It allows citizens to both provide raw data used in gaining quantitative and qualitative perspectives and participate in the analysis of that data.[99] Questions are devised through an iterative process involving citizens and local survey firms, which also rely on assistance from national statistical agencies. Surveys of citizens, businesses, and public officials are then conducted based on the methodology and questions agreed upon.

Once the survey data is compiled and refined, a final diagnostic report is circulated to all those participating in national workshops.[100] Broad national workshops

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[96] World Bank Institute, *Country-specific Technical Assistance to Develop Anticorruption Strategies*, at 1, *available at* http://www.worldbank.org/wbi/governance/capacitybuild/pdf/guide_coalitions.pdf (last visited Nov. 15, 2003).
[97] *Id.* at 7.
[98] *Id.* at 1.
[99] *Id.*
[100] *Id.* at 4.

involving all branches of the public sector, political parties, civil society, and professional groups are then held.[101] At the national workshops, different working groups are established which analyze survey results to develop a consensual anti-corruption strategy.[102] Out of this process, government and civil society devise anti-corruption strategy and action plans.[103] The action plans involve further workshops designed to foster a free press, an environment conducive to private sector investment, and transparency and efficiency of the executive, judiciary and legislative branches.[104]

This developing WBI methodology seeks to develop rigorous needs assessments through participatory processes. Implicitly, it recognizes the limited ability of international experts to even conduct quantitative assessments without receiving input from local actors. Before applying quantitative results to address local conditions, the results undergo analysis through a discursive process among a wide range of participants. The centrality of local participation in conducting assessments and defining strategies and action plans in this model deviates from technocratic development assistance strategies. Here, rather than imposing predefined (orthodox) solutions, the donor acts as the catalyst for democratic participation in legal and governance reform by creating *ad hoc* institutional structures for addressing societal needs.

B. Kerala Economic Development Project

After a new government came into office in the Indian state of Kerala in 1996, the ruling party launched a "People's Campaign for Decentralized Planning." The program is noteworthy for its scale and boldness. It is marked by three main decentralization

[101] *Id.* at 1.
[102] *Id.*
[103] *Id.* at 2.
[104] *Id.*

movements. First, administration was decentralized.[105] Second, fiscal powers were decentralized through the allocation of approximately 40 percent of all development expenditures to local self-governing institutions.[106] Third, political power was decentralized by providing elected local representatives more authority over development projects and priorities.[107] Together, the government implemented these programs in an effort to remedy failures of the previous political and bureaucratic institutions to produce economic development.[108]

The program involves a multi-tiered, grass roots deliberative process. New local institutions have arisen to cultivate, gather and mediate the concerns of "elected representatives, local and higher-governmental officials, civil society experts and activists, and citizens."[109] The structure and its functions are truly novel.

> The process begins in open local assemblies, called grama sabhas, in which participants discuss and identify development priorities. Development seminars formed by the grama sabhas are then tasked with developing more elaborate assessments of local problems and needs. The development seminars give way to multi-stakeholder task forces that design specific projects for various development sectors. These projects are in turn submitted to local elected bodies (municipal councils called panchayats) that formulate and set budgets for local plans. Final plans are presented back to grama sabhas for discussion. These local plans are then integrated into higher-level plans (blocks and districts) during which all projects are vetted for technical and fiscal visibility[110]

The core elements of this program—collection of local information and formulation of a local plan—are common to the other programs discussed in this article.

It is important to understand that this program does not merely devolve power to un-elected local authorities, leaving them to their own devices, instead, local gathering

[105] Issac & Heller, *supra* note 3.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 79.
[110] *Id.*

and analysis of information and strategy development undergoes review by successive governance layers. The system applies technical expertise in the formation of policy at all levels. One important contributor to the functioning of this system is the existence of a vital civil society, particularly NGOs.[111] Nevertheless, Issac and Heller rightly caution that causation may run the other direction as well; the degree to which associational life develops is partly a consequence of the institutional environment.[112] Put conversely, top-down governance represents a self-fulfilling prophecy: citizens are deemed incapable because their ability to engage in self-government remains uncultivated.[113]

Given the scale of citizen involvement that has occurred in Kerala, it has effectively become an important check on the power of elites. To the extent that citizens are working alongside elected officials in designing and executing programs, traditional principal/agent relationships are transformed.[114] Citizens are no longer resigned to the relatively weak accountability voting affords, but instead can express their voices in a more direct manner. The net effect of this system of open deliberative governance is to further entrench democracy through enhanced legitimacy and efficacy.

C. Legal Services for Poor Women in Ecuador

In Ecuador, the World Bank sponsored a major Judicial Reform Program beginning in 1995. In addition to traditional case management, alternative dispute resolution, and courthouse modernization programs, the program involved extensive use of civil society in connection with a law and justice program.[115] Under the law and

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[111] Issac & Heller, *supra* note 3.
[112] *Id.* at 83.
[113] FUNG & OLIN, *supra* note 3, at 28 (arguing that citizens' ability to engage in self-government atrophies if not exercised).
[114] Issac & Heller, *supra* note 3.
[115] World Bank Legal and Judicial Reform Initiatives 31 (2002) *available at* www1.worldbank.org/publicsector/legal/legalprojects.htm (last visited Nov. 25, 2003).

justice program, a special fund for law and justice overseen by ProLegal was created to support a variety of activities including legal services pilot programs for poor women.[116] The program for legal services for poor women was particularly innovative in its use of service providers to gain practical grass-roots input on legal reform topics.

Before the program had been implemented, women needing legal services for such matters as child custody or domestic or sexual violence, could seek services from one of only four public defenders serving Quito, a city of 2,000,000. The program involved the creation of legal service centers run by NGOs, which coordinate their efforts with governmental and nongovernmental organizations.[117] The centers provide mediation services, educate women on the law, and provide training and raise awareness on the prevention of domestic violence. In an unorthodox approach to legal services, the centers offered both traditional legal services as well as counseling on psychological issues arising from domestic violence. Given the apparently discriminatory attitudes towards women among many Equadoran legal and judicial professionals[118], the centers have earned the trust of their clients and arguably provide better representation of women's interests than would be obtainable elsewhere.

The NGOs were required in their agreement with ProLegal to conduct minimum numbers of consultations per month. One NGO in particular, CEPAM, was quite successful in resolving cases.[119] This result was noteworthy because it was contrary to the experience of substantial delays most Ecuadorian litigants experience. Observations

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[116] *Id.*
[117] Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT'L L. J. 526, 539 (2000).
[118] Marcela Rodriguez, *Empowering Women: an Assessment of Legal Aid Under Ecuador's Judicial Reform Project*, at 24 *available at* http://www4.worldbank.org/legal/leglr/publications_ljr.html (last visited Oct. 26, 2003).
[119] *Id.* at 12.

of clients also suggest one positive unintended consequence of the program.[120] By injecting organizations capable of providing effective representations of clients into the system, competition between legal professionals could raise the overall standard of representation.

In addition to the legal services provided, CEPAM prepared a study reviewing experience with the law regulating common law marriages and obstacles to compliance with the law's intent.[121] Using knowledge gained through service delivery with the affected population, the report also examined the understanding and actual reliance on the law by women in common law marriages. The report was distributed in three cities in which workshops were held to discuss the findings of the report. A final national workshop convened in partnership with a regional Supreme Court Justice involved further discussion of the report's findings. The workshops brought together ministers, judges, and lawyers from universities and free legal clinics, personnel from the Commissariat of Women, bar associations, juvenile courts, public defenders, and representatives from grassroots women's organizations.[122] The workshops generated reform recommendations that were communicated directly to the Congress's Commission on Women, Children, Youth and Family for consideration in drafting a Family Code. CEPAM members actively participated in the Commission's meetings on this code.

In addition to this law reform activity, CEPAM used its provision of legal services to generate substantial information regarding the population it served. A database

[120] One participant reportedly said, "[b]efore in the court I was treated badly, but after the NGO took on my case, there was a difference in how the court staff treated me." *Id.* at 13. While more than one conclusion can be drawn from that observation, it seems at least plausible that by furnishing highly professional legal services that respond to client needs, existing legal professionals would be challenged in some degree.
[121] *Id.* at 15.
[122] *Id.*

compiling the information was created and used to draw comparisons with other NGO service providers. The information generated is being used to analyze and compare the experience of different local offices. This information will then be published and shared with other NGOs, including other service providers and women's groups.

This legal services program was noteworthy for its cultivation of civil society organizations as service delivery agencies. The use of NGOs in this manner ensured that the legal services programs were designed and delivered in a manner responsive to the needs of the women served. In addition, the local orientation of these NGOs made them better able to obtain accurate feedback from clients to improve the program and gain comparative perspectives. Because of the specific focus of the organizations on women's concerns, they were better placed to conduct the analysis and facilitate deliberation on the legal reform of common law marriage. The broad participatory process of deliberation on the report and tangible knowledge obtained no doubt helped CEPAM gain sufficient stature to enable it to participate in the legislative process. Although sponsored by the World Bank, the legal reforms engendered by these NGOs appear to be organic.

V. Conclusion

Law and development stands at a crossroads. At this time it may be useful to recall experience in connection with the creation of new democracies in the decolonization process of the early 20th Century. Writing of the move to establish democracy in former colonies, J.S. Furnivall suggested that there was a need to first create something he called a "democratic environment."[123] In contrast to those who suggested that a culturally specific model of democracy as realized in the West be applied to the new democracies in the East, he argued that the challenge was to create an

[123] J.S. FURNIVALL, PROGRESS AND WELFARE IN SOUTH EAST ASIA 67 (1941).

environment suited to a particular country.[124] Each society would then work to create its own unique democratic "machinery".[125] Contrary to prevailing opinion, Furnivall maintained that the colonial powers could not foist democracy on the countries becoming independent but rather would have to "establish conditions favorable to the conduct of experiments" whereby each country could work out its own solution by trial and error.[126]

This article contends that it is precisely the process of national trial and error that is an essential contributor to the realization of a legitimate democratic and legal order. Consistent with these views, the direct deliberative democratic model of legal reform holds significant possibilities for revitalizing the movement and ensuring that underlying goals are met. Problems of knowledge, politics, social practice and incentives challenge the effectiveness of hierarchical and centralized approaches to law and development. To the extent that law-making priorities are set through negotiation/bargaining between states and donors, state institutions and democratic impulses fail to grow organically. It is an example of the democracy deficit much discussed in globalization debates. The deliberative democratic legal reform model avoids stretching the cognitive limits of such top down approach and imposing an artificial separation between development of democracy and the rule of law. The deliberative process simultaneously cultivates democracy and the rule of law—not through great leaps in tension with democratic values—but through actual democratic practice.

As Habermas shows, leaps towards new legal orders without first proceeding through discursive processes hold the allure of improved formal legal structures at great cost. Without deliberative democratic input, legal rights cannot be properly formulated

[124] *Id.* at 67.
[125] *Id.* at 67.
[126] *Id.* at 70.

or implemented. The technocratic impulse in rule of law promotion correlates to the democracy deficit that occurs on the state level through the dominance of experts and the insulation of domestic governance from popular influence.[127] If we are really serious about promoting the rule of law and democracy then we must take democracy as a starting point as well as an end goal.

The directly deliberative account also provides an answer to the incentive problem discussed at the outset of this article. Through directly deliberative practices, citizens participate in identifying problems and the definition of both means and ends.[128] Participatory governance assessments help galvanize public opinion around a set of problems citizens recognize as important. Likewise, development of action plans through grass roots dialogue ensures coherence of policy ends and means. Providing services and formulating law reform priorities based on the expressed needs and experience of populations concerned ties macro policy making to micro experience organically. Out of participation, incentives emerge. Political forces naturally converge around legal reform options that have been collectively determined. Organic development of legal reform programs thus produces its own incentives.

On this model, the role of donors is still important. Rather than defining solutions for society, they use their resources, technical expertise, comparative knowledge, and moral authority to create space in which democratic self-discovery can occur. As John Stuart Mill argued in defense of freedom of expression, "it is only through unrestrained

[127] JÜRGEN HABERMAS, LEGITIMATION CRISIS (1975).
[128] Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 284 (1998) (referring to reciprocal determination of means and ends elaborated by pragmatist philosophers).

discourse that the truth may be discovered."[129] By encouraging discourse on law reform, donors applying the deliberative model of law and development may not only ensure that law and development achieves its purpose, but also strengthen democratic governance through more just and therefore more legitimate states.

[129] JOHN STUART MILL, ON LIBERTY (Penguin Ed. 1982).