

1997

Law in Development: On Tapping, Gourding, and Serving Palm-Wine

Maxwell O. Chibundu

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 Case W. Res. J. Int'l L. 167 (1997)
Available at: <https://scholarlycommons.law.case.edu/jil/vol29/iss2/1>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

ARTICLE

LAW IN DEVELOPMENT: ON TAPPING, GOURDING, AND SERVING PALM-WINE*

Maxwell O. Chibundu**

TABLE OF CONTENTS

I. Introduction	169
II. The First Law and Development Movement	171
A. Origins	171
B. Liberal Legalism	173
C. Law and Development as Pragmatic Intercourse Among Nations	185

* Palm-wine is a sweet alcoholic beverage that occurs naturally as the sap of the *Rafia Palm* and *Oil-Palm* trees. See Y. Combet-Blanc et al., *Bacillus Thermoamylovorans*, 45 INT'L J. SYSTEMATIC BACTERIOLOGY 9, 9 (1995); E.E. Osim et al., *The Effects of Fresh Palmwine on Human Gastric Acid Secretion*, 68 E. AFR. MED. J. 959, 959 (1991). In many West African societies, offering and drinking palm-wine is a social and communal act that is the core symbol of hospitality, with the informality and solemnity of the occasion distinguished not by the kind or quality of the brew, but the ritual of its presentation. See, e.g., CHINUA ACHEBE, *THINGS FALL APART* 20-23 (1959). Having a shelf-life of less than six hours, the naturally occurring qualities of the palm-wine disintegrate rapidly, and fresh palm-wine must be replaced at dawn and dusk. Quintessentially a tropical product, the disintegrating processes of the palm-wine appear impervious to arrest by standard refrigeration.

** Associate Professor of Law, University of Maryland School of Law. I acknowledge with gratitude the research help of Nii-Ayikwei Quaye (J.D., 1996), and Claudia Zuckerman (J.D., 1997). I would like to thank also participants in the workshop "Law and Development" at the 1995 conference on "New Approaches to International Law" held at the University of Connecticut School of Law, and the sponsors and co-chairs of the conference, Professors Joel Paul and David Kennedy. Funding by the University of Maryland School of Law's Summer Research Program facilitated the production of the article, and the administrative help of April Cropper and Tina Kelleher. I am grateful to all of them. My longest abiding debt of gratitude which this article does not begin to discharge is to the many wonderful Western professors such as Thomas J. Biersteker, William Foltz, Gustav Ranis, and David Smith to whose tribute and dedication this article is offered.

D.	Law, Underdevelopment, and Dependency	188
III.	The Renaissance of Law and Development	197
A.	The Lost Decade	197
B.	The State and African Development in the 1980s	202
C.	Law and Development in the 1990s	205
IV.	A Reappraisal of Law and Development	214
A.	Law's Reach	214
1.	Law in "Law and Development"	216
2.	The Relationship of Law to Development	219
3.	The Transplantation of Law	221
4.	The Causation Difficulty	224
B.	Reconceptualizing the State, Law and Development in Sub-Saharan Africa	229
1.	The Social Context of the Post-colonial African State	231
2.	The State, the Rule of Law, and the Law of Rules	235
C.	A Proposed Agenda for the Study of Law and Development in Sub-Saharan Africa	242
1.	The African State as a Legal Institution	244
2.	Harmonizing Internal Development with External Pressures	254
V.	Conclusion	258

One day, they brought a man to give the ministers and the parliamentarians and the party activists a lecture The man had many degrees, and he was very boring. In the first place, he was dressed like a poor man, . . . and for a long time, he spoke to us about Economics. They say he was telling us about how to make poor countries rich; something called stages of growth I woke up when I heard some clapping. The others also woke up and we all clapped and said "yah, yah!" Then the attorney-general who was one of our party scholars got up to give a vote of thanks.

"You have told us, Professor so and so the stages of growth. We thank you very much for having told us about your specialty Now, we shall share our special knowledge here with you. We present the stages of booze Stage one, the mood jocose; stage two, the mood morose; stage three, the mood bellicose; stage four, the mood necrimose; stage five, the mood comatose."¹

I. INTRODUCTION

Before "law and economics," "law and literature," "law and . . ." became established fixtures in the American legal education curriculum, there was "law and development." In the late 1960s and early 1970s, a recognizable cadre of legal scholars, foundation grantors, and government officials emerged touting the relevance of inquiry into and the promotion of law and legal institutions for the social and economic development of the newly emerging or modernizing states of Africa, Latin America, Southeast Asia, and the Indian subcontinent. Sprouting from field work sponsored by development agencies and private foundations, writings on the significance of law for nation-building, economic growth, and social justice blossomed with brilliance for barely a decade, and with equal suddenness withered. Excepting the occasional seminar — taken by and taught mainly to exchange students from developing countries — and the reminiscences of a practitioner, a discipline that had flourished brightly became virtually invisible, even as the academic community of the law school in the late 1970s and the 1980s witnessed perhaps its greatest period of ferment in the critical exploration of ideas.²

¹ AYI KWEI ARMAH, *THE BEAUTYFUL ONES ARE NOT YET BORN* 132-33 (Heinemann Educational Books Ltd. 1985) (1969).

² See, e.g., Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 602-32 (1989) (reviewing the law and economics, critical legal studies, and critical feminist theory movements); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1479-87 (1994) (discussing the "law and literature" and "critical legal studies" movements). Professors David

The dissolution of Communist governments in Eastern Europe and the restructuring of East European and Latin American economies to emphasize the role of private actors is again generating pronounced interest in American academic legal and governmental circles, demonstrating claimed linkages between law and economic performance.³ It is unclear how long this interest will last, but it has led to proselytizing and economic missionary activities and undertakings not unlike those that dominated law and development inquiries in the late 1960s and early 1970s. Although somewhat less obvious to mainstream opinion-shapers, substantial programs of political and economic restructuring emphasizing pluralism and the preeminence of private actors are afoot even in the backwaters of Africa.⁴ These developments, influenced no less by policy-makers and consultants to international financial institutions in Washington as by local African policy-makers, have resuscitated questions that were shelved prematurely by the sudden demise of the law and development movement — questions that are not dissimilar nor unrelated to those that a genuine search for answers should raise in the mind of any but the most unalloyed propagandist.

This Article inquires into the revival of interest in the relevance of law for development in the less-developed or Third World countries. Although the focus of this Article is Sub-Saharan Africa, many of the issues and ideas considered have resonance for other areas of the world. The ideas expressed have certainly been enriched by work done by others in diverse regions of the world, and this Article freely borrows the insights of those studies.

Trubek and Henry Schlegel have documented the substantial contributions of scholars originally involved in the law and development movement to the founding and growth of critical legal studies in the late 1970s and 1980s. See, e.g., David Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 4, 37 n.71 (1990) [hereinafter Trubek, *Short Happy Life*]; John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). Cf. David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 3 n.7 (1972) [hereinafter Trubek, *Social Theory*] (listing contributors to law and development scholarship).

³ See generally Support for East European Democracy Act of 1989, Pub. L. 101-179, 103 Stat. 1298, 1299-1300 (1989) (linking the development of democratic institutions and political pluralism with the promotion of a free market economic system in East European countries).

⁴ For lively and sympathetic accounts of some of these changes on the daily lives of Africans, see, e.g., BLANE HARDEN, *AFRICA: DESPATCHES FROM A FRAGILE CONTINENT* (1990); ROBERT KLITGAARD, *TROPICAL GANGSTERS* (1991).

The Article begins with a restatement of the teachings of the first law and development movement. The restatement is important because it helps place in context the current revival of law and development. Next, the Article recounts economic and political developments between the first law and development movement and the current revival. Third, the Article explores the nature of the revival of law and development, paying attention to the similarities and differences between the new and old learning. Fourth, the Article evaluates and critiques the collective teachings; and finally, suggests an alternative conceptual framework for investigating, presenting, and nurturing the role of law in development. The Article contends that the relevance of law for development must be grounded in the experiences of the society under study and in ways giving form and meaning to those experiences by their institutionalization, not through internationalizing the societies, nor through a universalist or global conception of procedural mechanisms or substantive rights and duties.

Throughout the Article, recreation of the past and interpretation of the present is self-consciously transdisciplinary because the development of legal ideas about development and law have been stunted by a remarkable unidirectional flow of propulsive impact from the social sciences. Legal theory shamelessly has bought into or borrowed from theories of economic and political development, but has not repaid the debt in any currency of its own. In turn, the social sciences have taken law and legal institutions as a static, or in their parlance, as an epiphenomenon.

II. THE FIRST LAW AND DEVELOPMENT MOVEMENT

A. *Origins*

Most movements are at once the product of shared interests and divergent views as to how identifiable objectives may be realized.⁵ Since both interests and views tend to be dynamic, each having direct influenc-

⁵ The term "movement" is used to denote a distinguishable set of views relating to a subject shared by a body of persons who view themselves as distinct. *But see* Trubek, *Short Happy Life*, *supra* note 2, at 24 (commenting that his earlier implication that a movement is "a unified group of people sharing common views and goals" is misleading because of the "many different currents of thought about law, society, and social science in the movement"). Whether a sufficient consensus exists among a group of people, and whether that consensus is a shared subject to suggest the existence of a movement has been a focus of argument among American legal scholars in recent years. *See, e.g.*, Mark Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515, 1516 (1991); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983) (stating that definitional consistency and certitude may be important for participants in a movement who seek to define the elements of their commitment in terms of a clear and active political agenda).

es on the formulation and structure of the other, stating and describing the elements of any movement must necessarily be incomplete, with the significance of some features overstated at some times and understated at others. The following description of the law and development movement, which can reasonably be said to have reached its apogee in the first half of the 1970s, provides a conceptual representation of the epitome of the movement.

The law and development movement may be classified into four strands. The most prolific writers and articulate spokesmen of the movement were American legal academics, many of whom began as crusaders for U.S. foreign assistance to the newly emerging countries of Africa, Latin America, and Tropical Asia.⁶ Deriving their implicit assumptions of what constitutes development from the prevailing socio-economic and political liberalism of Western (and particularly American) industrial and post-industrial society,⁷ these liberal legalist scholars confronted the relevance of law to the formation of like societies in Africa, Latin America, and Asia.⁸

The second group consisted primarily of decision-makers from the countries of the "South,"⁹ Western technocrats, consultants, and publicists

⁶ See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 6-7 (1980); see also Francis G. Snyder, *The Failure of "Law and Development,"* 1982 WIS. L. REV. 373 (book review).

⁷ "West" and its derivatives as used in this Article refer to the industrial states and societies of Western and Northern Europe, and those of North America that conventionally are defined as embracing liberal-democratic ideology, the privately organized capitalist mode of production, and a preference for economic distribution through self-regulating market exchange. Archetypes of these societies are the United States, France, Germany, and the United Kingdom. Depending on the context, the reach of the term may include other countries such as Australia and Japan which, while falling outside of the standard geographical boundaries, fully embrace the defining socio-political and economic structures possessed by Western societies.

⁸ See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1070; see also Trubek, *Short Happy Life*, *supra* note 2, at 21-22 (referring to liberal legalists as imperial legal scholars and imperial jurists). Professors Galanter and Trubek assert that proponents of liberal legalism share common views relating to two basic tenets: "(1) a general model of the relationship between law and society, and (2) a specific explanation of the relationship between legal systems and development." Trubek & Galanter, *supra*, at 1070, 1071.

⁹ The term "South" is employed to designate those countries of Africa, Latin America, and East and Southeast Asia commonly characterized by economists as nonindustrialized, less-developed, developing, and underdeveloped and by sociologists and political scientists as modernizing, Third World, and nonaligned.

who wielded law as a practical instrument in the argument for restructuring the international economic order. This group and a third group consisting of lawyers and academics from the South and the West sought to employ law in the conventional sense of seeking to resolve specific disputes between private investors and the states of the South to unite to form the "pragmatic internationalists."

Finally, a small number of intellectuals sought to situate the relevance of law to development within the context of the neo-Marxist analytical and structural framework then prevalent in academic social science theory and exemplified in the works of dependency and underdevelopment scholars.

Despite their numerous theoretical and methodological differences, these groups all took as given certain key concepts that form the focus of exploration in Part IV. These shared axioms are worth highlighting because they provide the organizational skeleton for much of the following description.

First, although varying somewhat in their emphasis, each group viewed law *and* development as more or less autonomous concepts related only by virtue of the role of the state. Second, the identity of the state was assumed to be a known quantity.¹⁰ Third, the primary orientation of the functions of the state was outward; that is, the state acted predominantly, if not exclusively, in terms of its interests vis-à-vis its place in the international system. The state was thus endowed with plenary capacity to act within its borders. Fourth, the meaning of law was taken generally as self-evident, and commentators tended to present and view the rule of law and the promotion of development as positive attributes of society found in the West, but requiring growth and maturity in much of the South.

B. Liberal Legalism

Liberal legalists provided the most highly developed articulation of law and development. Despite being consciously self-analytical,¹¹ there was remarkable consensus within the movement on the origins, purpose, content, and style of their scholarship. For these writers, law and development studies was a special circumstance of the broader inquiry into the

¹⁰ *But see infra* Part II.D (discussing dependency and underdevelopment theories).

¹¹ *See, e.g.,* Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969) [hereinafter Friedman, *On Legal Development*]; Trubek & Galanter, *supra* note 8, at 1067; Eliot M. Burg, *Law and Development: A Review of the Literature and Critique of Lawyers in Self-Estrangement*, 25 AM. J. COMP. L. 492 (1977); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

relationship of law and society.¹² Four factors conjoined to generate and sustain law and development as a distinct field of study.

First, the competitive ideological environment of the Cold War opened both private and public purse strings in the United States for programs that would encourage the less-developed countries of the Southern Hemisphere to line-up with capitalist states. International law provided the most powerful rhetoric for assuring these nonaligned societies that the ideas they were asked to embrace were principled and objectively neutral. The private sector, led by the Ford Foundation, was innovative and influential,¹³ such that when funding from these private sources dried up, the movement shriveled as well.¹⁴ Public funding blossomed with the passage of the Foreign Assistance Act of 1961,¹⁵ and mushroomed in the late 1960s as the Johnson Administration employed foreign aid directly in the war against Communism.¹⁶

¹² See, e.g., Burg, *supra* note 11, at 516-17; Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y. REV. 29, 29 (1969) [hereinafter Friedman, *Culture and Social Development*]; Trubek, *Social Theory*, *supra* note 2, at 1; Merryman, *supra* note 11, at 464-65.

¹³ See Merryman, *supra* note 11, at 457. The earliest major private funding of law and development studies is generally said to be that of the Harvard International Tax Program by the Ford Foundation in 1952. See *id.* at 457 n.4. In 1966, the foundation created an independent entity (the International Legal Center) to sponsor and monitor work in the area. The mission statement of the center is an exemplary statement of the mood of the times:

Working with U.S., foreign, and international agencies, foundations, universities, and practicing lawyers and jurists, the center will stimulate and support systematic study of the role of law in international relations and the development of modern nations. The center will also be concerned with recruitment and training to expand the ranks of lawyers, social scientists, and others qualified to work on problems of law and development and with projects to help developing countries establish legal institutions essential to the functioning of modern free societies.

Id. at 459 n.6. (quoting FORD FOUNDATION, 1966 ANNUAL REPORT 23 (1967)).

Other private entities, notably the Asia Foundation and American Bar Foundation, also made contributions to the law and development project. See Merryman, *supra* note 11, at 457-58 n.4; see also Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?* 1972 WIS. L. REV. 767 (summarizing findings of funded empirical research).

¹⁴ See Merryman, *supra* note 11, at 459-60 (associating the demise of law and development studies to the withdrawal of foundation funding); see also Burg, *supra* note 11, at 496 n.17 (listing studies by the Ford Foundation).

¹⁵ See Franck, *supra* note 13, at 767, 768.

¹⁶ See, e.g., Merryman, *supra* note 11, at 457; Burg, *supra* note 11, at 495. Law and development was not unique among academic disciplines in its deployment in the war against Communism. Other fields, notably economics and political science, waded in much earlier. See, e.g., WALT W. ROSTOW, STAGES OF ECONOMIC GROWTH: A

Second, the availability of talented and dedicated experts was essential to the implementation of the policies enumerated. These were precisely the creatures being molded in the revitalized classrooms of post-World War II American universities. These classrooms emphasized the instrumental use of the social sciences to promote human development.¹⁷ Research was relevant for the empirical data it gathered in the service of this goal.¹⁸ Such empiricism presented law like other social sciences as an objectivist statement of reality, subject to manipulation by rational rules.¹⁹ These beliefs did not originate in the classrooms, but reflected the tenor, if not the precise nature, of the systemic beliefs embedded in prevailing social thought.²⁰

Third, for the elites in many emerging developing countries, the successful post-colonial experience of the United States offered an inspirational alternative to an otherwise inevitable reattachment to a neocolonialist's umbilical cord only recently severed from the departure of the European colonial powers. These elites were receptive vehicles for the arguments of liberal legalists who posited the potential for common cause between developing country needs and principled U.S. objectives.²¹ They

NON-COMMUNIST MANIFESTO 162-66 (1960) (economics); Seymour Martin Lipsett, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 95 (1959) (comparing democracy and other political groups through a sociological analysis). Cf. Merryman, *supra* note 11, at 458 n.4 (noting that the 1966 Foreign Assistance Act authorized research and assistance in building democratic institutions). Remarkably, these intellectual disciplines sought to counter Communism by adopting much of the methodology of Marxist analysis. For example, they relied on a structuralist approach of historical determinism that sought to demonstrate by empirical evidence a theory of ineluctable movement from a traditional or feudal society to an advanced modern one. For the classic Marxist statement, see V. I. LENIN, *IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM* (1917) (using historical determinism to explain the imperialistic tendencies of the major capitalist states of the late nineteenth and early twentieth centuries).

¹⁷ See generally Myres S. McDougal, *The Law School of the Future: From Realism to Policy Science in the World Community*, 56 YALE L.J. 1344 (1947).

¹⁸ See *id.* On the significance of this orientation for law and development studies in the 1960s and 1970s, and a self-conscious of the method, see Trubek, *Short Happy Life*, *supra* note 2, at 40-46.

¹⁹ See Trubek, *Short Happy Life*, *supra* note 2, at 19-20.

²⁰ As Professor Trubek has stated in the context of Law and Development: The postwar period was a time in which lawyers thought they could devise relatively unproblematic systems of social governance and transformation. The legal culture of the time encouraged them to believe in law as a powerful instrument to change society, and - at the same time - as a repository of standards and principles for the governance of social life.

Id. at 21.

²¹ See Franck, *supra* note 13, at 771 (contending that the question of law and

contended that the coalescing of interests could be viewed in attractive terms offered by the United States for the forging of the relationship.

Fourth, liberal legalism pointed to normative components in law and development. Aside from the favorable economic terms as institutionalized in foreign aid assistance, it was also moral.²² The new order was thus normatively presented as embracing the satisfaction of utilitarian needs and the construction of socially well-ordered communities. This version of law and development offered something to all. To the American pragmatists engaged in implementing the civilizing mission²³ there was the exportation of democratic capitalism, American technology, and efficient government;²⁴ to Third World countries, there was the promise of brick, mortar, and steelworks to mould their societies into the desired image. Yet "something was missing. No one was actively 'developing' the rule of law."²⁵ In short, the physical transformations being wrought in these societies, if they were to take root and survive, needed a soul to go along with them.

The content of the law and development studies that thus emerged reflected all four driving impulses. The law to be studied and evaluated was bourgeois in the sense that it was pragmatically and instrumentally geared towards the reproduction of a middle-class dominated economic

development for the new societies is how to assure orderly radical change: a problem that implicates law as authority and law as socialization, and law's respective roles in the three stages of development: national political unification; economic industrialization; and social welfare).

²² The conventional elaboration of this point is generally taken to be President Dwight D. Eisenhower's response to the Suez crisis of 1956. But other instances abound where the United States, acting purportedly on moral grounds, took positions adverse to the ex-colonial powers and in support of the emerging states. *See generally* ROBERT A. PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD: POLITICAL DEVELOPMENT IDEAS IN FOREIGN AID AND SOCIAL SCIENCE* 3-8 (1973) (reviewing and analyzing the origins and persistence of doctrines and theories in the American liberal tradition); *see also* Franck, *supra* note 13, at 767. *Cf.* William O. Douglas, *Lawyers of the Peace Corps*, 48 A.B.A. J. 909, 910 (1962) ("Young nations need teachers from the West by the hundreds and thousands-law teachers, professors of government, research assistants. We must not miss out on this opportunity for service - for participation in the long creative period ahead of legal development in over half the world.").

²³ *See* DAVID E. APTER, *RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS* 23 (1987) (stating that "[a] perennial search . . . was for the functional equivalent of the Protestant ethic, that Holy Grail of many modernization . . . theorists").

²⁴ *See* Trubek, *Short Happy Life*, *supra* note 2, at 23-24.

²⁵ *See id.*

and political regime in the developing countries. The project was first and foremost that of lawyering. To be reproduced was the law for nurturing, shaping, and controlling a bureaucratic and pluralist state.²⁶ It priced the conversion of the middle-class or professional elites of developing countries through scholarship exchange programs and U.S. scholars funded to teach at universities located in the developing countries.²⁷ It gave lip-service to poverty or progressive lawyering.²⁸ The study of such law was desirable because it carried with it the potential to transform backward, impoverished, traditional, and dependent societies into modern, technologically advanced, and politically sophisticated industrial states. Western intellectual and Third World elite alike applauded this manifestation of progress because it confirmed the correctness of the growing transcendent belief in humanity's capacity to control and shape for the good the physical, moral, and political aspects of its environment,²⁹ and it believed in the potential for a peaceful revolution where the excesses of poverty and bondage would be eviscerated, leaving modern humanity with a more egalitarian world.³⁰

Although there was much eclecticism in the methodology adopted by the liberal legalists in furtherance of these objectives, three approaches merit attention. First, the earliest converts to law and development studies were practicing lawyers who had been deputized to the developing countries by entities such as the U.S. Agency for International Develop-

²⁶ See e.g., ROBERT SEIDMAN, *THE LAW, STATE AND DEVELOPMENT IN AFRICA* 64 (1978) (contrasting the goals of the law and development project in terms of the reduction of poverty and oppression through the radiation of privately ordered contract law and state-led "law of the plan." Kenneth Karst, *Law And Developing Countries*, 60 L. LIBR. J. 13, 17 (1967); Trubek, *Social Theory*, *supra* note 2, at 7-8 (discussing the effectiveness of law in attaining social goals).

²⁷ See, e.g., Franck, *supra* note 13, at 770; Friedman, *On Cultural Development*, *supra* note 12, at 11-12.

²⁸ In addition to sponsoring scholarship on law and development, the Ford Foundation created a committee to explore the issue of the provision of legal services to the poor in developing societies. See Merryman, *supra* note 11, at 460 n.8. Access to legal services for the poor in developing societies is the true theme of a collection of essay in *LEGAL SERVICES TO THE POOR IN DEVELOPING COUNTRIES*, 1975 WASH. U.L.Q. 1-163.

²⁹ In this context, Ayi Kwei Armah's vignette quoted at the beginning of this Article — clearly intended as a parody of Professor Rostow's theory of the stages of economic growth is particularly poignant. In his novel, Armah depicts the sad moral, economic, and social decay of a Ghana for which the promise of decolonization disintegrates into putrid and foul-smelling corruption, and ultimately, a military coup d'etat. See ARMAH, *supra* note 1.

³⁰ But see Franck, *supra* note 13, at 768.

ment (AID) as technical advisers or professional legal specialists. For these practitioners turned scholars, the focus of interest was the capacity of modern legal institutions and practices to change traditional behavior.³¹ Although rarely explicitly articulated, they had a well-developed conception of modernity, and that notion proximated their vision of the structure and role of law in American society.³² Thus, they were bound to study the role and significance of law by defining law in the conventional sense of legislative, judicial, and administrative acts intended to create incentives for desired behavior and sanctions for disfavored behavior.³³ The role of the state and the extent to which it could harmoniously and expeditiously generate and enforce applicable rules of conduct were thus critical to the understanding of modern law. The success of the field of study was measured against the capacity of law and legal institutions to replicate either the idealized regime, or more accurately, its U.S.

³¹ See Trubek, *Short Happy Life*, *supra* note 2, at 23.

We devised grand programs to re-educate Third World lawyers who we felt had failed to understand the mix of pragmatic instrumentalism and liberal idealism that had been the staple of our legal education. By exporting the educational techniques of the American law school — socratic method, social science and all — we would strengthen legal institutions just as AID agricultural technicians were transforming small yellow eggs into large white ones.

Id.

³² For a contemporaneously influential definition of what constitutes “modern law,” see Marc Galanter, *The Modernization of Law*, in *MODERNIZATION* 153, 154-65 (Myron Weiner ed., 1966) (identifying several dichotomies and eleven attributes that distinguish modern from traditional law: arguing modern law reflects tendencies towards unity, uniformity, and universality of legal principles and processes; personal law is replaced by territorial law; special law by general law; customary law by statute law; corporate rights and responsibilities by individual ones; religious sanctions and inspirations by secular motives and techniques; and moral intuition by technical expertise).

[M]odern law is transactional. Rights and obligations are apportioned as they result from transactions (contractual, tortious, criminal and so on) between parties rather than aggregated in unchanging clusters that attach to persons because of determinants outside the particular transactions.

Id. at 154.

Notwithstanding the caveats in Professor Galanter’s seminal article that he was describing a model, that our “model does not represent a goal to be pursued for its own sake,” and that “[t]hese features of a modern legal system are not necessarily a good thing per se,” it is fair to say that liberal legalists envisioned successful development as the realization of the features of modern law that he posits. *Id.* at 154, 164.

³³ See, e.g., SEIDMAN, *supra* note 26, at 74-76; BRUN-OTTO BRYDE, *THE POLITICS AND SOCIOLOGY OF AFRICAN LEGAL DEVELOPMENT* 87-91 (1976) (discussing the influence of Western law on African legal development); CSABA VARGA, *MODERNIZATION OF LAW AND ITS CODIFICATIONAL TRENDS IN THE AFRO-ASIATIC LEGAL DEVELOPMENT* (1976).

counterpart. A departure of law in action from law in the books,³⁴ at least to the extent that departure was noticeably greater than generally accepted or tolerated in the United States, indicated failure.³⁵

Second, given the driving impulses behind the funding of law and development studies by AID and private foundations, two types of scholars were likely to be dominant.³⁶ The most likely American law teachers to receive such fellowships were those interested or engaged in comparative legal research,³⁷ or those who viewed law as an instrument

³⁴ This phrase owes its origins to Roscoe Pound, one of the early proponents of the legal realism school to which the law and society movement owes much. *See, e.g.*, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912). *See also* Trubek, *Short Happy Life*, *supra* note 2, at 18-22 (explaining the influence of legal realism on the law and society movement generally, and law and development in particular).

³⁵

The tendency for proposed reforms to resemble familiar U.S. models (usually in sanitized and idealized form) is clear from a reading of the activist law and development literature. What is not so obvious is that the tendency is difficult to combat.

Merryman, *supra* note 11, at 480 n.60.

³⁶ This is not a claim that either the foundations or AID directed or dictated the subject of research or scholarship by those they funded. Furthermore, there is no claim that the source of funding affected the conclusions reached by the researchers. It would be disingenuous, however, to contend that the source of funding and the agenda of those funding the research had no bearing on the nature of the scholarship done, the sort of questions asked, and the issues highlighted by the research. Surely, the availability of funds for certain kinds and methods of research in part dictated scholarly interest, thereby influencing the willingness of particular scholars to apply for funding. This in turn affected such considerations as the selection criteria for projects to be funded. As Professor Merryman observed contemporaneously in a slightly different context:

The U.S. lawyer often had [extra leverage] because of the real or fancied possibility that his recommendation would determine whether money would be forthcoming from AID, Ford, of the ILC for legal education, legal research or other programs for which financing had been solicited by local authorities.

Merryman, *supra* note 11, at 480 n.61; *see also* Galanter & Trubek, *supra* note 8, at 1089, 1101-02 (explaining the relationship between scholarship and the ability of scholars to attract the interest of those funding the research); Burg, *supra* note 11, at 494-96.

³⁷ Comparative legal research and anthropological legal research are distinguished here. The latter which delved into the existence and content of traditional legal systems in colonial and pre-colonial Africa was the dominant mode of discourse on African legal studies prior to the emergence of law and development studies. *See, e.g.*, HILDA KUPER & LEO KUPER, *Introduction to AFRICAN LAW* 3-5 (Hilda Kuper & Leo Kuper eds., 1965). Law and development, on the other hand, focused on the post-colonial

for bringing about social change.³⁸ Their writings were directed at understanding the shortcomings of African law in the context of Western legal thought, and the advocacy of law reform in the nature of codification and similar measures for formalizing, institutionalizing, and rendering acceptable local practices within the dominant Western ethos.³⁹

In time, many liberal legalists began to question the viability of both forms of scholarship. They pointed out that these approaches embodied assumptions and propositions that were questionable, if not erroneous.⁴⁰ Implicitly and explicitly, both the comparativist and codification approaches conveyed a hierarchical structure of legal systems where traditional Third World systems, if they were to meet the needs of their societies, had to evolve or be transformed voluntarily to the supposedly more

development or modernization of African law so that it looked recognizably Western.

³⁸ Professor Friedman somewhat disparagingly has said of this group:

Ignorance about the relationship between law and development is not solely a problem of law in third world countries. There is monumental ignorance or misunderstanding about law and development in our own and other modern countries. This reflects the ignorance, equally deep, about the relationship in general between the legal system and the social system. The legal missionaries abroad are merely exotic versions of legal missionaries inside our own country, reforming, arranging, codifying and revamping the law in a vacuum of theory.

Friedman, *On Legal Development*, *supra* note 11, at 13. See also Merryman, *supra* note 11, at 479-82.

³⁹ See, e.g., Robert B. Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999, 1016; Arthur J. Von Mehren, *Some Observations on the Role of Law in Indian Society and on Indian Legal Education*, 3 JAIAPUR L.J. 13, 16 (1963). Cf. Trubek, *Social Theory*, *supra* note 2, at 10 (appraising the core conceptions about law and development as the gradual evolution of Third World states into societies characterized by the market system, the legal structures, and other cultural attributes found in the advanced industrial nations of the West).

⁴⁰ In Professor Merryman's view, the work of these law and development scholars differed from that of traditional comparativists in the sense that traditional comparative scholars seek to understand the societies they study as hosts, not mere targets of inquiry. They do not seek by juxtaposition to restructure their host societies. See Merryman, *supra* note 11, at 475-82; see also Rene David, *A Civil Code For Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187 (1962) (discussing codification and resulting problems); VARGA, *supra* note 33.

[W]hatever else African countries may lack in the way of modern armies, a literate population, an adequate infrastructure, large capital resources and an experienced cadre of leaders at all levels, there is one thing they all have which can be as rapidly and cheaply manufactured as paper money, and which has the same tempting property of seeming to be available to solve all problems: . . . legislative power.

Anthony Allott, *The Unification of Laws in Africa*, 16 AM. J. COMP. L. 51 (1968) ").

efficacious and highly developed legal systems of Western countries.⁴¹ Unease with these assumptions prompted the third style of scholarship: the intramural conversation on the nature, character, and purpose of law and development studies. There were criticisms of specific elements of the developing field, such as a belief in the superiority of the Western legal tradition or a belief that tradition can be transplanted wholesale to Africa or other developing societies.⁴² The central critique was the near-absence or underdevelopment of any sense of theory of law, development, or the relationship of law to development, and, therefore, the contribution that the emerging field could make to any of the potentially implicated disciplines of law, development, or the social sciences.⁴³ American law-

⁴¹ Cf. Friedman, *Cultural and Social Development*, *supra* note 12, at 45 ("The movement for modernization of law is the Third World analogy to the law reform movement in the United States The same kind of legal theory underlies this movement, and the same skepticism about its results can be voiced."); Burg, *supra* note 11, at 503 (observing that "[s]ince virtually all of the law and development writers were born or at least educated in the West, this ethnocentric tendency is apt to be one-sided in its approval of western models.").

⁴² See, e.g., Trubek, *Social Theory*, *supra* note 2, at 20-21, 36, 42-46 (discussing how legal forms are dictated by the political and economic environment, and illustrating the point by reference to his study of the Brazilian capital market); Friedman, *Cultural and Social Development*, *supra* note 12, at 29 (asserting that law and legal systems are part of the political, social, and economic environment as are the educational system and other areas of culture); *but see* Friedman, *On Legal Development*, *supra* note 11, at 46-48 (suggesting ways in which law can be perversely effective when transferred from one society to another).

⁴³ The seminal articulation of this claim was Galanter & Trubek, *supra* note 8. See also Burg, *supra* note 11, at 502 (arguing that the expansion of the concept of law beyond the formal legal system is critical to understanding the relationship between law and development); *id.* at 517-21 (stating that some view law and development in instrumentalist terms, others doubt that law plays any role in development whether defined in terms of economic growth, or socio-political change); *but see id.* at 525-27 (writings on law and development are characterized by "two psychological" trends: the desire for clarity and order, on the one hand, and a certain frustration with the limits inherent in law and the legal profession, on the other). Cf. Trubek, *Social Theory*, *supra* note 2, at 2 (noting that whatever their differences, law and development theorists agreed on the possibility of generating general principles of broad applicability that relate law to economic growth and to political development).

It is distressing, but true, that when the lawyer goes abroad, he sails into a vacuum. He takes with him nothing that can reasonably be called a careful thought out, explicit theory of law and society or law and development - nor does he find one at his destination. Yet the economists, the political scientists and the engineers all agree that, at least for them, some general theory is vital.

Friedman, *On Legal Development*, *supra* note 11, at 12.

yers by training and experience are doers not theorists. They may function well within the American environment, but nothing in their background or training equips them to engage in the sort of social transformation implicated in the idea of law and development of Third World societies.⁴⁴ This was especially true given the minimal understanding in U.S. domestic legal studies of the relationship of law to society.⁴⁵ One commentator concluded:

I would argue that the law and development movement has been largely misdirected, and that the subsidence of interest within AID and the foundations, and among law and development scholars is the result of more or less tacit recognition that what was going on was ineffectual, or harmful as technical assistance, and peripheral as scholarship. The mainstream law and development movement, dominated by the American legal style was bound to fail, and has failed.⁴⁶

While these intellectual shortcomings go some way in explaining the demise of the liberal legalist wing of the law and development movement, they insufficiently account for it. For example, what explains the failure of the movement to take up the revivalist strategies put forward some of

44

Action in the arena of law and social change requires some coherent theory or program that is based on some justifiable assumptions about the probable effects of alternative courses of action. The American lawyer who engages in social engineering within his own society (i.e. "domestic law and development"), operates within a familiar environment, employing generally valid but unstated premises that are part of his natural "feel" for the culture. Consciously or unconsciously, he is restricted by his own background to a range of proposals that shared experience tells him have a reasonable prospect of succeeding without disproportionate social costs. The proposals he does make will be critically evaluated by his peers and by a variety of responsible individuals and agencies and may not survive that evaluation (or may be significantly changed by it). Eventually, if the action program is adopted and put into practice it would be in the proponent's own society; he and the people with whom he most closely relates will observe its results and experience its consequences. But in Third World law and development programs, the American actor has neither a reliable "feel" for the local situation nor an explicit theory of law and social change on which to base his proposals. His only recourse is to project what is familiar to him onto the foreign context. There his status as "expert," the implied superiority of foreign "developed" over domestic "underdeveloped" expertise, and other factors give the proposals privileged status, an opportunity for lateral entry at the top without the disciplining need to work the way up through the community of scholars or through society either in the U.S. or in the "target" nation.

Merryman, *supra* note 11, at 480 (citations omitted).

⁴⁵ See Friedman, *Cultural and Social Development*, *supra* note 12, at 39-40; Friedman, *On Legal Development*, *supra* note 11, at 13; Trubek, *Short Happy Life*, *supra* note 2, at 36-38.

⁴⁶ Merryman, *supra* note 11, at 481.

its members?⁴⁷ Two additional factors were significant for the disintegration of the movement and for the revival of interest in law and development studies in the 1990s.

Law and development studies needed the tacit support of the Third World elite to flourish. Like their Western counterparts, the elite viewed law in very instrumental terms. They shared the desire for the modernization of law and legal institutions such as the administrative and judicial machinery of the state, but they also articulated two other fundamental purposes for law: its unification and its Africanization.⁴⁸ Modern law's stress on the centralization or unity of the instruments of power and the elevation of the modern sector accorded with the interests of this group.⁴⁹ In unification, they expressed a desire to do away with the dualistic legal regime that had emerged in colonial times by the integration of traditional, local, or customary practices with the law left behind by the colonial rulers.⁵⁰ This reflected a belief that the result would be

⁴⁷ See, e.g., Galanter & Trubek, *supra* note 8, at 1099-1100 (arguing for an eclectic approach that retains a commitment to Third World development while being critical of governments); Burg, *supra* note 11, at 528-30 (suggesting the viability of the coexistence of diverse approaches); Merryman, *supra* note 11, at 468-74 (contending for a scholarly tradition of interdisciplinary studies that emphasizes the role of theory formation and inquiry over prescription and action).

⁴⁸ See Anthony N. Allott, *The Future of Law*, in *AFRICAN LAW*, *supra* note 37, at 216, 223.

⁴⁹ Cf. Friedman, *On Legal Development*, *supra* note 11, at 47.

A new code, from France or Switzerland, with new and different propositions of law may demand skills totally different from those of local chiefs or elders, whose authority depended on their knowledge of the ways of the people. If successfully imposed on the countryside, the new code can drive the elders or chiefs out of power unless they learn to adapt or circumvent. If they cannot, a new group of officials rises to power, riding on the crest of their knowledge and their foreign education.

Id. (citations omitted).

⁵⁰ See Allott, *supra* note 48, at 223-27. The existence of dualistic or parallel legal regimes in colonial African societies was in part the result of explicit policy decisions by the colonial rulers to exercise control through indirect rule, under which native institutions and power structures continued to direct the day-to-day life of Africans, while non-Africans were governed by the substantive and procedural laws applied in the mother country. See CRAWFORD YOUNG, *THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE* 107-17 (1994). It was also in part a reflection of the staged process of colonization. The uneven process by which the extent of colonial control depended on the ability of the colonizer to extract revenues with which to build and maintain colonial institutions meant that the levels of the supplantation of traditional legal institutions varied from one locality to another. Post-colonial efforts to unify law and legal institutions are direct elements of the overall process of nation-building, literally

the emergence of African Law, law that in its benign incarnation would reflect the experiences and aspirations of African societies and the African people.

By the mid-1970s, however, proponents of the modernizing philosophy had become suspicious of one another. The Third World elites, confident of the efficacy in domestic matters of rule by fiat, had become self-assured to take on the power structures of the developed countries in the international arena, while liberal legalists had begun to doubt that their alliance with those elites would mature into the creation of liberal or legally circumscribed power structures within the Third World.⁵¹ They viewed with dismay and ultimate resignation as African elites focused on and employed the modernization of legal and bureaucratic institutions to overwhelm the modernization of legal ideology, and transformed the quest for the unification and Africanization of law into instruments of internal repression and xenophobic rhetoric.

Finally, the liberal legalist wing collapsed when a variety of related domestic crises in the United States shook the confidence of scholars and funding agencies as to the value of studying law and development in foreign countries. The failings of the Vietnam War — notably the incapacity of the United States to nurture successfully South Vietnam as a liberal beacon in the jungles of Southeast Asia and the lack of veracity of official U.S. government pronouncements relating to the war — Watergate, and the revelations of the ensuing congressional investigations, undercut the moral underpinnings of the liberal legalists' crusade. These factors assured that funding for external interventionism from the establishment sources disappeared,⁵² and what funding remained was re-directed to domestic concerns. The bright lights of the liberal legalist wing continued their academic research and interests in the emerging domestic movements of critical legal studies, which like law and development, focused on the relationship between law and society in general, and law and politics in particular.

and figuratively.

⁵¹ See Trubek, *Short Happy Life*, *supra* note 2, at 23 ("We struggled nobly, but our efforts were disappointing. Some Third World lawyers took our money but rejected our lessons. Others accepted the message that law should become more instrumental, but saw no reason why it should also be liberal: they became willing technocratic servants of despotic regimes.")

⁵² See Burg, *supra* note 11, at 496, 496 n.17. Cf. Galanter & Trubek, *supra* note 8, at 1101-02 (outlining other factors of law and development scholarship).

C. *Law and Development as Pragmatic Intercourse Among Nations*

Academic disciplines rarely disappear, at least within the life-span of the founders. Yet, it is virtually a given that the disciplines undergo fundamental changes. By the late 1970s, what passed for law and development in American universities was demonstrably different and distinct from what had preceded. Much like the scholarship that preceded it, the sort of inquiry fostered by the new law and development field was predominantly a direct product of the changed environment in the interstate relations between the industrialized and the less-developed countries. The change in the tenor of law and development scholarship reflected the transformation of that relationship from that of new fledgling babes in need of and willing to accept succor, to that of overgrown, self-assertive adolescents.

The withdrawal of institutional support by AID and the private foundations shifted the continued funding of law and development studies to the academic institutions with pre-existing commitments to law and development scholars. That burden, to some extent, was eased by two concurrent developments. First, for sociological, economic, and technological reasons, decolonization, far from slowing down the tendency of Third World elites and their children to seek higher education at institutions in the industrialized world and especially the United States, accelerated it. U.S. institutions, responsive to the particularized needs of the influx, created or expanded programs dealing with development issues. Law and development studies provided a good fit for the niche.

Second, the decolonized states, working in concert with other predominantly nonindustrialized or non-Communist states in various international consortia,⁵³ radically transformed the rhetoric of the terms of discourse in international relations and international law.⁵⁴ Moreover, that

⁵³ Notable among these were such groupings as the nonaligned movement, the United Nations Conference on Trade and Development (UNCTAD), the Asia, Caribbean and Pacific forum (ACP), and the Organization of Petroleum Exporting Countries (OPEC).

⁵⁴ See Peter Slinn, *Differing Approaches to the Relationship Between International Law and Development*, in *INTERNATIONAL LAW OF DEVELOPMENT: COMPARATIVE PERSPECTIVES* 27, 27-35 (1987). A contentious output of this rhetoric revolved around the question of whether an international law of development exists. Proponents argued that international law *requires* industrialized states to promote the development of less-developed countries (LDCs) by granting LDC exports preferential access to industrialized country domestic markets and to technology, stabilization of LDC export earnings, a freer hand in LDC determination of the propriety and level of state control over LDC resources, and appropriate levels of compensation for nationalized or expropriated

rhetorical feistiness was sometimes accompanied by deeds that directly challenged the established order, as was the case with well-publicized incidents of the expropriation or nationalization of Western-owned or controlled property in developing economies,⁵⁵ gave credence to the perception of a restructured world order. The discourse of "peace and security," "collective security," and "anarchy and realism" were being supplanted by claims for "a development decade," "permanent sovereignty over natural resources," "international equity," "interdependence," and "a new international economic order."⁵⁶ The issue of Third World development was no longer tangential to international law and relations, but rather directly implicated the well-being of developed societies. Portentous events such as the 1973-1974 oil shocks manipulated by members of OPEC, coupled with the Chilean and Libyan expropriations of Western companies engaged in the extraction of mineral resources made this point beyond dispute.

These forces shaped the direction and content of law and development studies in the second half of the 1970s and the 1980s. Issues of the progressive codification of domestic law in African states and the efficient administration of justice in those societies gave way to studies on the treatment of foreign investment, the development of an international code for multinational corporations, and the appropriate mix between regulatory fiat and economic incentives. Comparative studies of law in action versus law on the books hitherto conducted with reference to land-tenure and customary law began to be studied in the context of the grant of extractive product concessions, tourism, and problems of corruption in international business transactions.⁵⁷ In short, law and development studies, far

property with higher levels of financial and technical assistance provided by industrialized countries to LDCs as foreign aid. *See, e.g.*, CHARLES CHUKWUMA OKOLIE, INTERNATIONAL LAW PERSPECTIVES OF THE DEVELOPING COUNTRIES 78-79 (1978) (contrasting the procedural preferences of the developed countries at the U.N. Conference on Trade and Development, representing one-third of the votes and two-thirds of world trade, with less-developed countries representing two-thirds of the vote and less than one-third of world trade).

⁵⁵ *See generally* Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDC: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329 (1984) (analyzing expropriations in 79 LDCs from 1960 to 1979).

⁵⁶ *See generally* ROBERT KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 23-37 (1977) (articulating an alternative theory to realist based responses of the Western liberal democracies).

⁵⁷ *See, e.g.*, Michael W. Gordon, *Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations*, 16 U. MIAMI INTER-AM. L. REV. 301, 303 (1984).

from being about law and society, became no more than an appendage of courses on international transactions.

The nature of the scholarship in the area similarly underwent considerable change. In the first place, there was a paucity of scholarship since much of the curriculum was devoted to teaching "how it is done," rather than "how it might or ought to be done." What little writing that occurred naturally reflected the curricula interests in the law of international investments in less-developed countries, and they were just as likely to be written by practitioners for practitioners in practitioner-oriented journals as by scholars in scholarly journals.⁵⁸ One might reasonably ask whether it

⁵⁸ See James T. Haight, *History of the Section of International Law and Practice 1913-1993: Section History 1974-75*, 28 INT'L LAW. 587, 615 (1994); DOING BUSINESS IN SUB-SAHARAN AFRICA (Peter W. Schroth ed., 1993) Although somewhat more scholarly articles typically appeared in the American Bar Association's *International Lawyer* or in student-run international law journals, the emphasis of these articles were practice-oriented, and tended to focus on the particular business environment of specific African countries, usually the larger economies like Nigeria and Egypt, whose markets, abundance of natural resources, or political location appeared to have cachet for U.S. investors. See, e.g., J.W. Salacuse, *Egypt's New Law on Foreign Investment: A Framework for Economic Openness*, 9 INT'L LAW. 647 (1975); Adly Abdel-Meguid, *Egypt's Policy Towards Foreign Investment*, 10 VAND. J. TRANSNAT'L L. 97 (1977); G.E. Nazer, *The Legal Framework of Foreign Investment in Egypt*, 11 CASE W. RES. J. INT'L L. 613 (1979); J. Gregory Bishop, *Closing the Open Door: Reappraisal of Foreign Investment in Egypt*, 1985 BRIGHAM YOUNG L. REV. 537 (1985); Bernard Blankenheimer, *The Foreign Investment Climate in Nigeria*, 10 VAND. J. TRANSNAT'L L. 589 (1977); Jerome F. Donovan, *Nigeria: Still Safe for U.S. Investors?*, 10 VAND. J. TRANSNAT'L L. 601 (1977); Allen P.K. Keese, *Secured Lending in Nigeria*, 15 INT'L L. 25 (1981); Niki Tobi, Note, *The Nigerian Enterprises Promotion Act*, 15 J. WORLD TRADE L. 543 (1981); D.K. Hill, *Transfer of Technology From U.S. to Nigeria: A Balancing of Legal Interests*, 6 TEX. S.U.L. REV. 380 (1979); Richard J. Faletti, *Investing in Nigeria-The Law, Good Intentions, Illusion and Substance*, 5 NW. J. INT'L L. & BUS. 743 (1983); Sabinus Akusobi Megwa, *The Foreign Direct Investment Climate in Nigeria: The Changing Law and Development Policies*, 21 COLUM. J. TRANSNAT'L L. 487 (1983); M.A. Haroun & T.O. Rose, *Outline-Guide to Agreements For Development Projects in Algeria*, 11 INT'L L. 681 (1977); Duane E. Sams, *The Legal Aspects of Doing Business in Cameroon*, 17 INT'L L. 489 (1983); Michael Robert Tyler, *Legal Aspects of Investing in Ghana*, 7 LOY. OF L.A. INT'L & COMP. L. J. 165 (1984); Muna Ndulo, *The Requirement of Domestic Participation in New Mining Ventures in Zambia*, 7 GA. J. INT'L & COMP. L. 579, 579 (1977).

There were articles reviewing trends in Africa or the developing world, but these focused predominantly on issues of practical relevance for the outsider wishing to invest in those economies, rather than in exploring the internal dynamics of development, economic growth, or political participation. See, e.g., S. Azadon Tiewol & Francis A. Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of*

is accurate to classify these courses and scholarship as part of the law and development movement. The answer is in the affirmative because like legalists, they presented more in terms of the modernization or development of Third World societies. The myopic focus of the process of that development on external or international economic relations was no more the fault of U.S. scholars than it was of the emerging politicians, bureaucrats, and other technocratic elites of the Third World. The scholastic focus on international economic law mirrored the emerging trend of Third World countries to look for development *not* in the internal processes of their societies, but primarily in external relations. Again, scholarship could only follow; it did not lead development.

When in the 1980s Third World countries were reduced to marginal players in international economic relations and their internal processes for generating development were destroyed, law and development studies similarly withered. This occurrence is explored in Part III. Before doing so, however, a third strand of law and development studies — admittedly one that was not extensively explored — is sketched.

D. Law, Underdevelopment, and Dependency

At about the same time liberal legalists gained a foothold in academic circles, theories of underdevelopment and dependency swept through the social sciences. Although varied in their analytical and structural emphasis,⁵⁹ these theorists, though not necessarily adherents of

African Practice, 24 INT'L COMP. L.Q. 393 (1975); Leslie L. Rood, *Compensation for Takeovers in Africa*, 11 J. INT'L & ECON. 521 (1977); Lyman H. Heine, *Impasse and Accommodation: The Protection of Private Direct Foreign Investment in the Developing States*, 14 CASE W. RES. J. INT'L L. 465 (1982); T.H. Reynolds, *Clouds of Codes: The New International Economic Order Through Codes of Conduct — A Survey*, 75 L. LIBR. J. 315 (1982); *The World Bank's New Co-Financing Initiatives: Legal Mechanisms for Promoting Commercial Lending to Developing Countries*, 15 L. & POL. INT'L BUS. 911 (1983).

The nature of these articles should be contrasted with those of the liberal legalists cited above, which, whatever their shortcomings, explored the nature of development and its relationship to macro structures and ideas such as modernity, capitalism, the market, government, bureaucracies, and the state.

⁵⁹

Theories of underdevelopment and dependency, considered as a whole, are eclectic in nature The coexistence of profoundly different currents of thought further suggests that ideas of underdevelopment and dependency are described more accurately as an approach or a framework than as a theory.

Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 L. & SOC'Y REV. 723, 747 (1980) (citations omitted).

Marx but with a significant number coming from developing societies,⁶⁰ found in Marxist theory a useful starting baseline for evaluating the contemporary position of less-developed countries within the global capitalist system. As in Marxist-Leninist analysis, these theories painted a holistic portrait of global interactions and sought to draw attention to the parallel relationships over time between the modes of domination within and among societies, and the methods and patterns of global historical and economic exchanges.⁶¹

The post-World War II period, they suggested, was neither unique nor particularly enlightened, but only a phase of human history readily intelligible in the context of broader economic and historical movements. The task faced by underdevelopment and dependency scholars was how to explain and account for the persistent and indeed widening inequalities between the societies of the South and the industrialized countries of the West. Lenin's imperialism theory may have sufficed for the colonial period, but it offered an incomplete explanation for the continuing worsening of the relationship to the detriment of the South in the post-colonial period.⁶² In particular, the theory which had focused on the role of the colonizing state and its propertied class to appropriate the surplus of capital and labor from the colonized state provided insufficient explanatory force for the declining terms of trade and the continued capital outflow from the sovereign and independent states of Latin America, Asia, and Africa to Western Europe and North America.

⁶⁰ See *id.* at 737.

⁶¹ See IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY* 152-64 (1979). While many underdevelopment and dependency theorists do not necessarily subscribe to the specifics of Wallerstein's world systems approach, it is accurate to state that mainstream theorists of underdevelopment and dependency shared at least in outline the attributes described in the text: (1) a holistic view of society; (2) underpinned by economic forces; (3) shaped by global events; (4) internally and externally responsive to those events; (5) through structural definition and redefinition of all spheres of life: social, political, cultural, and economic. This was the case notwithstanding the fact that this approach was cautioned against by some sympathetic scholars of underdevelopment theory as Colin Leys, who in 1975, perceptively wrote:

[U]nderdevelopment theory is, or should be, precisely a theory of *their* [Third World countries] history, a theory of the contradictions in the development of their modes and relations of production under colonialism and imperialism, contradictions which are expressed today in the growing polarization of these countries between authoritarianism, on the one hand, and revolution on the other.

COLIN LEYS, *UNDERDEVELOPMENT IN KENYA* 7-8 (1975).

⁶² See, e.g., LENIN, *supra* note 16.

The initial attempt to develop an explanation was undertaken by the U.N. Economic Commission for Latin America (ECLA) under the auspices of Raúl Prebisch.⁶³ ECLA explained the deteriorating conditions of Latin American economies in terms of nationalistic barriers to Latin American exports by the industrialized societies,⁶⁴ the lack of sustained economic planning in Latin American economies, and the absence of adequate official intervention in domestic economies.⁶⁵ The result was continued reliance on the export of primary products to assure an ever-widening gap between the welfare of Latin American countries and the prosperity of industrialized nations.⁶⁶ Armed with this analysis, ECLA advocated self-help through import substitution policies in the industrial sector sustained by high tariff barriers and domestic incentives to selective and favored local industries.⁶⁷

The analysis and the prescriptions found favor not only with the intended Latin American audience, but also with the newly independent countries of Africa and Asia. With their numerical dominance in the U.N. General Assembly, these states of the South spearheaded the creation of the U.N. Conference on Trade and Development (UNCTAD), and the U.N. Center for Transnational Enterprises (UNCTNE), both of which played dominant roles in the regime of pragmatic internationalism for confronting issues of development in the 1970s.⁶⁸

For underdevelopment and dependency theorists, ECLA's analysis of the problem was insufficiently radical, and its prescriptions were doomed to fail because they would not solve the specific problem of interstate inequalities and because they were bound to generate internal forces that would exacerbate the distortions already at work within the dependent state. Simply put, ECLA's analysis failed to account for the breadth of the systemic characteristics of the problem.

While scholars of underdevelopment and dependency theories differed in their emphasis on the nature and scope of the systemic problem,⁶⁹

⁶³ See U.N. DEPT. OF ECONOMIC AFFAIRS, *ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPLE PROBLEMS*, at 16, U.N. Doc. E/CN. 12/89, U.N. Sales No. 1950.II.G.2 (1950).

⁶⁴ See *id.* at 16-17.

⁶⁵ See *id.* at 17-18.

⁶⁶ See *id.*

⁶⁷ See *id.* at 45-48.

⁶⁸ See Okolie, *supra* note 54, at 29. For a brief account of the formation of UNCTAD and its role in the development of the new international economic order, see Robert S. Browne, *Delinkage — Response of a Spurned Lover or a Rational Path for Africa?* 27 *How. L.J.* 937 (1984).

⁶⁹ There is disagreement regarding the scope and nature of the causal relationship

they shared a willingness to engage in a radical appraisal of the internal structures of the societies in developing countries and to relate those structures to the international capitalist system.⁷⁰ Some scholars, for example, challenged modernization's contention that developing societies would become developed by following prescribed social and economic policies. Central to the argument of such scholars was the assessment that the internal structures of developing countries were fundamentally different from those of developed societies. The problem was not simply that economic and social institutions in the peripheral countries were not modern, inefficient, or underdeveloped, but rather that these societies were characterized by non-autonomous dualistic structures where the economic and social institutions were geared to meet the demands of developed societies rather than the needs of the developing societies. The consequence of decolonization was to further aggravate the internal dualism by severing political control from social and economic domination. Incapable of autonomously exercising control over their societies, dependent countries could not expect to graduate en masse into the status of developed capitalist societies. Any attempt to use the instruments of state power in

between exploitation, capital accumulation, and underdevelopment. Some underdevelopment theorists contend that the world capitalist system created underdevelopment not because it exploited the underdeveloped world, but because the exploitation was not sufficiently far-reaching to uproot vestigial, feudal, or traditional obstacles to the new forms of capital accumulation. A more thorough exploitation, affirmative proponents of the theory contend, would have resulted in the complete destruction of the pre-capitalist modes of production that would then have had to be replaced by indigenous regimes for capital accumulation. Other scholars contend that persisting underdevelopment is essential to the global capitalist system, hence the failure to fully destroy pre-capitalist modes of production was not an oversight, but an essential element for the creation of unequal international specialization of production. See Snyder, *supra* note 59, at 753-54. A third view is simply descriptive, asserting that "[t]he situation of underdevelopment came about when commercial capitalism and then industrial capitalism expanded and linked to the world market nonindustrial economies that went on to occupy different positions in the overall structure of the capitalist system." FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* 17 (1979).

⁷⁰ See Snyder, *supra* note 59, at 751-52; SAMIR AMIN, *IMPERIALISM AND UNEQUAL DEVELOPMENT* 110-16 (1977) (arguing that (1) there is a world capitalist system that functions through the international specialization of labor and relations of exchange; (2) international specialization exhibits a hierarchic structure of heterogenous modes of production and uneven productivity; (3) linkages within the global system are such that modes of production in developing countries are geared to function in tandem with the needs of sectors in the developed countries, rather than with each other; (4) these linkages are products of political domination and unequal exchange between the center and the periphery or dependent states).

an underdeveloped society would be checked both internally and externally. From without the state, only those policies consonant with the satisfaction of the demands of the global system would be tolerable to the decision-makers, while from within the state, the absence of linkages assured that any conceptual unity in the rationalization of the modes of production internally would create friction between and among atomized local interests. State power would be deployed to serve the particularized claims of those with access to it rather than to serve any general national interests.

The dynamic of economic and political life in underdeveloped countries is that these countries appear fragmented and irrational when viewed in nationalistic terms, but rational and intelligible when juxtaposed by global capitalist needs and structures. The state was thus an article for study within the scholarship of proponents of dependency and underdevelopment theories. Unlike their liberal modernization colleagues, these radical critics of the status quo did not take the state in underdeveloped and dependent societies as a given. They viewed it as one of several players within the global capital system. The state functioned as an instrument and an expression of power relationships within the international capital system. As such, the state was subject to alteration and to the particular needs of specific participants. For example, in the context of immediate post-colonial Africa, dependency theorists' assessments varied regarding the nature of the African state and its place in African society and the international capitalist system in the period immediately following decolonization. Some contended that the state was underdeveloped; others asserted it to be overdeveloped. Those who claimed the African state to be underdeveloped had as their paradigm of the fundamental role of the state, the extraction of resources from individuals and segments of a society, and the accumulation or distribution of such resources for the general welfare. Typically, this function is performed through the legislative and administrative structures of the state.⁷¹ They claimed that in the post-colonial African state, it was not only that political structures such as party politics and national political movements were weak, but also that the institutionalized regulatory mechanisms through which the administrative state ordinarily functions including revenue raising, licensing, policing, health delivery, and labor force development and control are poorly developed. While some dependency theorists attributed this underdevelopment to the subservient status of periphery states in the capitalist system, others explained it in terms of the suddenness of the decolonization process. In either case, state power in African societies was captured not by entrepreneurial bourgeois capitalists and members of the learned

⁷¹ See THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS 29 (1979).

professions, but by the petty bourgeois and middle class professionals who proceeded to over bureaucratize it to serve their aspirations for upward social and economic mobility.

Proponents of the over-developed state, invoking essentially the same data, argued that the competing but reconcilable interests of the propertied classes in the post-colonial African state are in equipoise. Consequently, the state is able to play a mediating role among them by preserving private property and the capitalist mode of production, which embodies all three interests.⁷² This mediating role is a preeminent function of the state in the colonial period, a preeminence attained by superimposing on undeveloped colonial societies the superstructure of the state as it existed in the metropolitan colonial country, and then giving the colonial state the added task of taming the indigenous colonized peoples and structures to render them amenable to subjugation and domination by the metropolitan propertied and ruling classes. For a variety of reasons, both functions of the state continued after decolonization.⁷³ Thus, the post-colonial African state was overdeveloped in the sense that it was charged with tasks atypical of the state as understood in the developed capitalist countries.

The proponents of the overdeveloped African state contended that the state should be seen not only as the means for collective security against other states and the resolution of intragroup conflicts within its boundaries, but also as an explicit forum for social struggle and the repression of disempowered groups.⁷⁴

Whether viewed as underdeveloped or overdeveloped, the dependency and underdevelopment scholars agreed that the African state was also a weak state.⁷⁵ Its dual role as the transmitter of the demands of the international capitalist system on the peripheral peoples of the formerly colonized world and of the intergroup conflicts within these societies posed difficult challenges poorly met by its relatively undeveloped administrative

⁷² See Snyder, *supra* note 59, at 767-69.

⁷³ Cf. *id.* at 771 (articulating the mediating function of the state as applied among the classes within the state, and between the state itself and outside forces).

⁷⁴ Dependency theorists differ as to whether the additional functions of the state in the colonized countries grew out of the desire to subjugate indigenous social classes, or from the "need to subordinate pre-capitalist . . . social formations to the imperatives of colonial capitalism." John S. Saul, *The State in Post Colonial Society: Tanzania*, in THE SOCIALIST REGISTER 1974, at 351, 353 (Ralph A. Miliband & John Saville eds., 1974) (citations omitted).

⁷⁵ Although dependency theorists have long contended that peripheral post-colonial societies are composed of weak states, it is now an idea that commands acceptance among conventional liberal scholars. See, e.g., ROBERT H. JACKSON, QUASI-STATES 21-31 (1990); APTER, *supra* note 23, at 55.

and political infrastructure. Faced with the competing claims of the international system for efficient regulation of economic production and capital accumulation, and internal demands for distributive justice and social welfare, the state machinery veered from one extreme to another, losing in the process any semblance of a coherent ideology or the physical capacity to support a civil society. Not surprisingly, access to state power was achieved by a variety of means ranging from popular mobilization to military insurgencies. None of these, however, assured continuity or certainty, but rather seemed to reflect transitional victories, contingent as much on external as on internal alliances of economic and social interests.

If politics, the economy, and society all depict this phenomenon of internal segmentation and subservience to external structural needs, can law and the development of legal institutions be any different? Given the central role of the state in theories of law and development, the answer would seem to be a resounding no. Yet, the connection of law to underdevelopment and dependency theories has never been fully flushed out.⁷⁶ While it might be interesting to speculate on the reasons for this omission, such a project is beyond the scope of this Article. Nonetheless, it is not difficult to sketch some claims that could be made by a proponent of dependency or underdevelopment theory on the role of law in underdeveloped societies.⁷⁷

Structuralist proponents of dependency theory view law as the formal institutionalization or articulation of the internally noncohesive society and the externally unequal relationship of the underdeveloped societies to the industrialized capitalist states. Law is the expression of deeply embedded patterns of the distribution of power within and without the state, and it provides the facial rationale for the structuring of these relationships.

A legal regime's purpose, under these circumstances, is both descriptive and ideological. The function of law is to provide an internal coherence for a system of dialectical relationships. The specific provisions of laws themselves are less important than the internal consistency of the

⁷⁶ See Snyder, *supra* note 59, at 775-79.

⁷⁷ Theories of dependency and underdevelopment exhibit the classic left-of-center syndrome of elegantly formulated, thoroughgoing, and perceptive criticism of the status quo while simultaneously refraining from offering implementable solutions.

To the dismay of [Latin American] leftists, [Hernando] de Soto has wrested the debate over development in Latin America away from them by focusing attention on what he believes are the actual aspirations of the economically marginalized. De Soto, thus, is able to reject leftist analyses that blame Latin America's economic problems on multinational corporations and the local capitalists who deal with them.

Jane Kaufman Winn, *How to Make Poor Countries Rich and How to Enrich Our Poor*, 77 IOWA L. REV. 899, 901 (1992) (reviewing HERNANDO DE SOTO, *THE OTHER PATH* (1986)).

logical expression of ideologies that, in the absence of this function, would be in tension if not outright conflict. The legal legitimation of institutions such as the corporation, the market, indigenization, parastatals, and the like, act to put outside the boundaries of debate dominant power relationships, and thereby maintain the equilibrium of the international capitalist system.

Alternatively, law may be viewed in instrumentalist terms. Law functions to promote and perpetuate pre-existing power relationships, and to assure the continued viability of the rationalized systems of production and distribution that undergird the global capitalist system. Statutory enactments such as those relating to taxation, employment, foreign investment, and intellectual property can be understood in these terms.⁷⁸ Law, as the exercise of state power, creates value by motivating some and denuding others of the resources and capacity to challenge pre-existing distributive relationships. Law functions by assuring that different elements of society make their own unique contributions to the international division or specialization of roles within the capitalist framework.

In either case, understanding law requires going beyond national formalism and past positivistic statements of the law. Law should be viewed in terms of social structures and economic conflict among classes within both the national state and at the global level. It describes, prescribes, and masks the ever-present battle for distributive justice among these classes. The division among these classes cuts across national boundaries, even if the formal articulation of dominant rules is framed by and is consonant with national frontiers.

Central to any view of law within the dependency and underdevelopment regime, then, is the question of the nature and relevance of the state to the formulation of socio-economic and political interests, and the extent to which law, as the embodiment of the state, is an autonomous expression of those interests.⁷⁹ These issues are at best moot in the context of

⁷⁸ Cf. CARDOSO & FALETTI, *supra* note 69, at 154-55 (explaining the structural requirements for the power base in a developmentalist state).

⁷⁹ See Snyder, *supra* note 59, at 762-65. A broadly accepted interpretation is Wallerstein's claim that the state is a "disguised instrument of foreign control." WALLERSTEIN, *supra* note 61, at 228-29. See PETER EVANS, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL STATE AND LOCAL CAPITAL IN BRAZIL* 9-12 (1979) (contending that the state functions in alliance with local and foreign capital to promote capital accumulation on an international basis). Some theorists, while accepting the transnational character of class structures, nonetheless maintain that the state itself generates uniquely national classes that may be autonomous and independent of external class demands. For example, military dictatorships may serve national capitalist development, with beneficiaries being a nationalist bourgeoisie independent from trans-

the liberal legalist and pragmatic internationalist conceptions of law and development. Law may be used by the powerful and independent foreign participants in the international capitalist system to shape and control the behavior and reactions of dependent classes and groups in underdeveloped societies.⁸⁰ Alternatively, law may be used by the national bourgeoisie in dependent societies with the tacit and technical support of the international bourgeoisie to extract surplus capital from and otherwise subjugate the local petty bourgeois and similarly dependent groups.

Finally, law may function as a source of power for the local bourgeoisie in its relationship with international capital. By controlling the levers of the state, the local bourgeoisie may employ law to appropriate to itself a greater portion of capitalist production than it would receive otherwise. It does so by invoking nationalism as a potent political and economic force to be reckoned with, one that must be mollified through such processes as indigenization or nationalization requiring ownership and control of certain sectors of the economy, one that must be withdrawn from the international sector and ceded to disgruntled domestic classes. The beneficiaries of such policies are the indigenously wealthy and powerful who are already allied to and depend on international capital for the resources to acquire the nationalized assets.

There is little doubt that examples abound to provide ample support for all three views of the use of law. It is, however, the third that has raised the most controversy; doubtless its themes transcend the radical criticism of dependency theorists and intersect with some concerns of liberal legalists.⁸¹ Are state technocrats, indigenous business people, and professional classes, simply compradors that mediate between national interests and international capital, or do they represent an autonomous group of actors with identifiable interests in opposition to international capital? In other words, do dependent countries have identifiable national interests, are they only of the particularized interests of subgroups that

national capital. Yet others contend that the state, by engaging in joint ventures with multinational corporations "embodies an alliance between the interests of the internationalized sector of the [national] bourgeoisie, and those of public and entrepreneurial bureaucracies." CARDOSO & FALETTO *supra* note 69, at 210. For an interesting exploration of the interplay of internal and external factors in shaping economic trends such as privatization in Latin America and Southeast Asia, see Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

⁸⁰ See generally BENJAMIN COHEN, *THE QUESTION OF IMPERIALISM* 190 (1975) (explaining dependence).

⁸¹ See, e.g., Snyder, *supra* note 59, at 765-68 (discussing in the African context whether laws have been adapted to serve the particular needs of the petty bourgeoisie).

happen to share geographical proximity?⁸² Is state authority exerted through law employed to create and rationalize national interests (i.e., to render underdeveloped countries not merely geographical but also political expressions), or is such authority deployed to extend the reach of international capital by the internal redistribution of power and resources to the modern sector? Specifically, what is the causal linkage between law and the shaping of society in dependent and underdeveloped countries? Dependency and underdevelopment theories offer possibilities but no explicitly formulated answers.⁸³ Yet, some insights provided by these theories have continuing resonance for the contemporary study of law and development in Sub-Saharan Africa.⁸⁴ That relevance is better understood against the background of the historical forces that have shaped the return of law and development as an appropriate field of intellectual and political concern.

III. THE RENAISSANCE OF LAW AND DEVELOPMENT

A. *The Lost Decade*

The decade of the 1980s was uniformly disastrous for African countries. Without exception, economic performance during the decade was comparatively worse than that in other regions of the world.⁸⁵ Furthermore, most African countries saw absolute declines in economic indicators such as annual GDP, rate of growth, per capita income, capital investments, and agricultural output.⁸⁶ The widely reported famines in the

⁸² Cf. APTER, *supra* note 23, at 18-19 (discussing this issue in terms of political development); ANDRE GUNDER FRANK, *LATIN AMERICA: UNDERDEVELOPMENT OR REVOLUTION* 7-9 (1969) (arguing in economic terms).

⁸³ See APTER, *supra* note 23, at 29 (observing that radical dependency theory corrected the bland and benign liberal tendencies of modernization theory which could suggest what went wrong in Argentina, Brazil, and elsewhere, but does not assist in the description of societal impulses towards redemocratization).

⁸⁴ Cf. SAMMY ADELMAN & ABDUL PALIWALA, *LAW AND DEVELOPMENT IN THE THIRD WORLD* 1 (1993).

⁸⁵ See, e.g., *Stalking Africa's Fledgling Stockmarkets*, *ECONOMIST*, June 11, 1994, at 69 (stating that Sub-Saharan Africa is the only region of the world where the population was worse off in absolute terms at the end of the 1980s than it was at the beginning).

⁸⁶ See *WORLD BANK SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* 1 (1989) [hereinafter *SUB-SAHARAN AFRICA*] ("Africans today are almost as poor as they were thirty years ago"); see also Timothy M. Shaw, *Revisionism in African Political Economy in the 1990s*, in *BEYOND STRUCTURAL ADJUSTMENT IN AFRICA* 49 (Nyang Oro & Timothy M. Shaw eds., 1993) (citing stark economic, human, and political conditions of the late 1980s and early 1990s in Africa).

Sahel, the Horn, and Southern Africa were illustrative of a pervasive problem. Hitherto touted economic success stories such as Kenya and the Ivory Coast faltered. It became commonplace to compare the gross output of a continent of 600 million people with that of the tiny European Kingdom of Belgium (with one-fiftieth of its population),⁸⁷ and to ask with seriousness "can Africa survive?"⁸⁸

The maladies of the 1980s were not solely economic. Military men vied with one another to set records for the most junior or youngest uniformed officer to ascend to power. Personal rule, whether of the youthful military dictator or of the gerontocratic decolonizer, was the sole institutionalized and predictable element of African politics.⁸⁹

Yet, the decade of the 1980s began promisingly. In April 1980, a newly elected civil government in Nigeria convened a continent-wide meeting to plan a strategy for continent-wide growth to the year 2000. Reflecting on the disappointments of prior decades, the politicians gathered in Lagos determined that the Continent's future growth demanded a reorientation from external dependence to self-reliance. In adopting the "Lagos Plan of Action,"⁹⁰ they articulated a vision of continent-wide cooperation leading to a common market,⁹¹ while deep-sixing the colo-

According to Klitgaard, between 1980-1987, real personal income in Africa dropped by 20%, capital investment per capita fell by 50%, the continent's terms of trade vis-à-vis the rest of the world fell by a third, its exports by a half, and by 1988, 47% of export earnings were being used to service the continent's astronomic foreign debt. See KLITGAARD, *supra* note 4, at 7.

⁸⁷ See SUB-SAHARAN AFRICA, *supra* note 86, at 2; see also *Stalking Africa's Fledgling Stockmarkets*, *supra* note 85, at 70.

⁸⁸ JENNIFER SEYMOUR WHITACKER, HOW CAN AFRICA SURVIVE? 232 (1988) (surveying Africa's many problems and concluding that solutions, if possible, will be "difficult, messy, and protracted"). Robert Kaplan's eye-catching apocalyptic (albeit poorly substantiated) diagnosis typified the picture generally presented to the mass audience. See Robert D. Kaplan, *The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying The Social Fabric of Our Planet*, ATLANTIC, Feb. 1994, at 44. For a thoughtful rebuttal, see Charles W. Maynes, *The New Pessimism: On the World's Future*, FOREIGN POLICY, Sept. 1995, at 32.

⁸⁹ See, e.g., J. Gus Webnow, *The Military Factor in African Politics: A Twenty-Five Year Perspective*, in AFRICAN INDEPENDENCE (Gwendolyn M. Carter & Patrick O'Meara eds., 1985).

⁹⁰ THE UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA/ORGANIZATION OF AFRICAN UNITY THE LAGOS PLAN OF ACTION FOR THE COMPREHENSIVE DEVELOPMENT OF AFRICA, 1980-2000 (Addis Ababa ed., 1980). For additional background on the Lagos Plan, see Browne, *supra* note 68, at 941, 944-51.

⁹¹ See Robert J. Cummings, *A Historical Perspective on the Lagos Plan of Action*, in BEYOND STRUCTURAL ADJUSTMENT, *supra* note 86, at 29, 29-30; see also Oladele

nial patterns of engagement which they viewed as responsible for Africa's chronic underdevelopment.

The Plan, however, was not much more than the standard communiqué, expressive of aspirations but devoid of means of implementation. Juxtaposed to the Plan was a report issued by the World Bank in 1981; a document that was to be as instrumental for developments in Africa during the decade of the 1980s as the Plan was to be irrelevant.⁹² Bearing the especial imprimatur of Elliott Burg, a development economist who had been associated with the liberal legalist school of law and development, the Burg Report, unlike the Lagos Plan, diagnosed African ills in the post-colonial policies of African governments which resulted in the misallocation of factors of production. Such policies as poorly managed import substitution programs, price-controls on agricultural products, poorly devised nationalization of industries, and the maintenance of over-inflated exchange rates were more responsible for Africa's economic underperformance than were external factors. The Burg Report saw the future for African development in the harnessing and reorientation of internal resources. The critical resources were, however, those of nation-states viewed as individual political entities, not the pipe-dream of continent-wide integration.

Ultimately, the brutal realism of the Burg Report proved to be more in consonance with the facts on the ground on the 1980s than did the romanticism of the Lagos Plan. Dramatic change in the hitherto stable and seemingly successful post-World War II international capitalist system had been heralded by the first oil-shock of 1974-1976.⁹³ Despite the seemingly bellicose rhetoric of Western policy-makers like Dr. Henry Kissinger, the response to that shock had been the liberal internationalist seeking to equilibrate the shock by taking Keynesian counter-cyclical measures aimed at avoiding an international economic recession. Thus, to pay for higher oil prices and the drain of capital from oil-importing countries, the United States followed a monetarily and fiscally inflationary policy and encouraged its banks to recycle the petro dollars to oil-importing less-developed countries by making syndicated and uncollateralized loans available to such countries.⁹⁴ For those countries — many of them

O. Akinla, II, *Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment*, 7 B.C. THIRD WORLD L.J. 19, 24 (1987).

⁹² See WORLD BANK, *ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR DEVELOPMENT*, at 29, 29-30 [hereinafter BURG REPORT].

⁹³ See, e.g., ANTHONY SAMPSON, *THE SEVEN SISTERS* (1975) (providing an entertaining account of the background leading to the oil crisis); DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 588-744 (1991) (providing a readable account of the various oil crises).

⁹⁴ As Walter Wriston, former Chairman of Citicorp, explained in a phrase that was

African — that were still unable to obtain credit on these relaxed commercial terms, special facilities were set up at the International Monetary Fund and the World Bank's International Development Agency to provide concessional loans financed by the sale of gold as part of the demonetization of that commodity.⁹⁵

Between 1974-1981, this liberal internationalist response masked the fundamental transformation in ideas and policies taking place at the international level with regard to the concept of development. That transformation came into plain view with the response of the Western industrialized countries to the second oil crisis of 1979-1980. This time, the response was the monetarist and deflationary policy of raising domestic interest rates, thereby reducing the demand for oil.⁹⁶ Not only were developing countries unable to borrow dollars to meet their increased oil bills, they found their outstanding debts, which had been made on floating interest rates, ballooning beyond control.

By August 1982, the nature of the new environment became clear when Mexico essentially declared a moratorium on the payment of its liabilities to international banks. The remainder of the 1980s in Africa and in Latin America was to be dominated by the overriding need to meet external debt obligations by underperforming economies.⁹⁷ For both continents, it was to be commonly referred to as the lost decade.

This was the climate in which the Lagos Plan and the Burg Report emerged as competing approaches to the problems of Africa's economic underperformance. It is not difficult to understand why the romanticism of self-reliance was bound to lose out to the pragmatism of neo-structuralist economics.⁹⁸ The Burg Report's emphasis on a set of com-

subsequently to haunt him: "countries cannot go bankrupt." BENJAMIN J. COHEN, IN *WHOSE INTEREST? INTERNATIONAL BANKING AND U.S. FOREIGN RELATIONS* (1986).

⁹⁵ See, e.g., RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 294 (1985).

⁹⁶ Cf. STEVEN SOLOMON, *THE CONFIDENCE GAME* 125 (1995) (providing background relevant to the U.S. response to oil-producing states).

⁹⁷ By the end of the decade, more capital was flowing out of Africa to service external debt obligations entering as development assistance, new loans, or foreign investments. Despite this negative balance in capital flows, Africa's external indebtedness was increasing rather than declining because the payments were insufficient to meet the amounts due. This was the case notwithstanding that close to a third of all foreign earnings went to service the debt.

⁹⁸ The rhetoric of self-reliance was not new in 1980. The former Tanzanian president, Julius Nyerere, had become an elder statesman of the continent primarily on the force of the idea of "ujamaa" or local self-reliance. The Lagos Plan was no more explicit in how the concept was to be implemented than had been prior manifestos. The Plan was simply an undifferentiated laundry list of areas in which the Member-

prehensive specific structural changes within individual African states presaged the group of policies subsequently termed structural adjustment.⁹⁹

These fundamental changes, which had implications for politics, political institutions, and economic welfare, received little attention in the academic legal community. For practicing lawyers — excepting the handful who worked for international financial institutions and development agencies — Africa was in the backwaters of international trade and finance law. This was the case even for lawyers for whom the restructuring of international debt had replaced issues of foreign direct investment

States would cooperate with no specification as to how that cooperation would be fostered or institutionalized. To suggest uniform collaboration on a continent-wide basis in all of the following demonstrated the lack of realism of the plan: improved agricultural productivity; food security; African sovereignty over natural resources; industrialization of the continent; development and management of human resources; technology transfers and the development of appropriate technologies; improved continent-wide rail, air, shipping, and trade linkages; financial sector linkages in banking and insurance; convertibility of local currencies; standardization of the regulatory framework for multinational corporations; and the creation of a continent-wide economic community.

⁹⁹ Structural adjustment policy generally refers to the set of conditions demanded of countries by the World Bank and the International Monetary Fund as a precondition for approving loans. Typically, these conditions are premised on the belief that national economic policies should principally rely on functioning market-derived prices — excepting urban labor — and less on governmental dictates. Standard procedure involves teams of experts from international financial institutions being despatched to developing countries seeking assistance to investigate the conditions on the ground, and then prescribing policies tailored to meet those conditions. See KLITGAARD, *supra* note 4, at 229-34 (providing an account of one technical consultant's description of the environment in which these missions often operate). The prescription for growth, progress, and prosperity invariably followed a pattern: (1) liberalized external trade policies; (2) currency devaluation; (3) reduction in public sector subsidies to parastatals; (4) privatization of some parastatals; (5) reduction of money supply and growth of credit; (6) removal of bottlenecks in internal trade such as those imposed on the marketing of agricultural products by government-sponsored marketing boards and cooperatives; (7) dismantling of price-controls on basic items such as food and energy; (8) stricter controls on civil service wages and salaries. See, e.g., FINN TARP, *STABILIZATION AND STRUCTURAL ADJUSTMENT: MACROECONOMIC FRAMEWORKS FOR ANALYZING THE CRISIS IN SUB-SAHARAN AFRICA* 126 (1993); Goran Hyden & Bo Karlstrom, *Understanding Structural Adjustment: Tanzania in Comparative Perspective*, in *ECONOMIC CRISIS IN AFRICA* 41, 42-45 (Magnus Blumstrum & Mats Lundahl eds., 1993). While the purpose of these policies is the reduction of governmental involvement in the national economy, the effect has been substantial activist state intervention in the civil life of the population. These policies entailed substantial activist intervention by the government and the state. See generally WALDEN BELLO ET AL, *DARK VICTORY* (1995) (providing a systematic critique of structural adjustment).

and syndicated lending as staples of their practice. Much of Africa's debt was owed to public entities rather than private lenders.

What accounts for the noticeable international revival of interest in law and development studies in the 1990s? In explaining the reemergence, it is difficult to overstate the significance of post-Glastnost developments in Central and Eastern Europe, and of the post Brady Plan revitalization of Latin American economies. Both events indicated the reemergence as dominant actors on the world scene of Western market economies, especially the United States, and the failure of centrally planned socialist and corporatist economies.¹⁰⁰ Moreover, that success propelled public institutions in Western societies back into the funding arena. It was not enough that facts on the ground demonstrate the superiority of Western capitalism, but it was also important that superiority be scientifically explained to doubters, and that the proper structures for its functioning be correctly installed in the previously hostile environments of Eastern Europe, Central Asia, and Latin America.

The ensuing renewed sponsorship of inquiries and the training of practitioners in the relationship of law and legal institutions to economic and political activities was bound to have effects on the study of related issues in the African context. This renewed interest coincided with an emerging trend in Africa, and the understanding and exploitation of that trend is crucial if the renewed interest in law and development studies is to be more than a passing fad.

B. The State and African Development in the 1980s

In looking inward for the direction of Africa's future in the 1980s, both the Lagos Plan and the Burg Report crystallized a tendency among African intellectuals and development specialists outside the continent. Whether driven by romantic or pragmatic considerations, it was evident that transcending economic poverty and political maturity depended at least as much on the specific policies of African states as on foreign governments and the structure of the international system. The consequence of externally imposed structural adjustment policies, foreign donor fatigue, and the international debt crisis shattered any remaining illusions of the equivalence of decolonization with independence and demolished the facade of the African state as the emblem of that independence. African and foreign scholars systematically began to inquire not so much into the relationship of African states vis-à-vis other states, but into the

¹⁰⁰ See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1991) (illustrating events that marked the inevitable and complete triumph of Western liberal ideology).

internal structures of the African state and its capacity to fulfill tasks traditionally associated with the Western liberal state.¹⁰¹ Unlike the earlier work of many dependency theorists, the new inquiry was not simply a prelude to broader systemic criticism of the international capitalist system, but rather it was intended to be programmatic.

The new inquiries highlighted the remarkably advanced level of centralization of power and the control of resources within a very small number of cities (quite frequently indeed in only one city, the national capital), and an equally small number of political and economic institutions.¹⁰² The result was that bottlenecks pervaded the administrative mechanism. The quest for power revolved around the institutions of the center. The vast majority of persons including the professional and economic elites who could not aspire to gain control over these few centralized institutions, became disengaged from civic life. If political life in the immediate post-colonial societies was characterized by mass mobilization politics,¹⁰³ African societies had swung to the other extreme by the 1980s.

Nor was the state and its institutions good at efficiently organizing and superintending the economic life of its citizens. Bureaucracies abounded, but they were to be found predominantly in the capital cities, far removed from and generally indifferent to the activities they were supposed to regulate.¹⁰⁴ Above all, the dominant institution in several

¹⁰¹ See Young, *supra* note 50, at 13-42 (delineating the features of the state as classically formulated and understood in the West), see also James S. Wunsch & Dele Olowu, *The Failure of the Centralized African State*, in FAILURE OF THE CENTRALIZED STATE: INSTITUTIONS AND SELF GOVERNANCE IN AFRICA 1, 4-5 (James S. Wunsch & Dele Olowu eds., 1990).

¹⁰² See Wunsch & Olowu, *supra* note 101, at 4-5.

¹⁰³ See, e.g., SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 4 (1968).

¹⁰⁴ See Wunsch & Olowu, *supra* note 101, at 3-5. As they observe, Even within the central government there is a disproportionate share of manpower and financial resources (in quantitative and qualitative terms) located at the headquarters compared with field agencies. The most senior, trained and experienced officials live and work at the headquarters. The result is that inexperienced and junior officers located in the more populated countryside have to wait for instructions, even on routine matters, and focus most of their attention on what they must do to gain a posting at the center. *Id.* at 5 (citations omitted). Similarly poignant is the statement of one of Africa's more acclaimed leaders, the former President of Tanzania, Julius Nyerere:

There are certain things I would not do if I were to start again. One of them is the abolition of local government, and the other is the disbanding of the co-operatives. We were impatient and ignorant The real price we paid was in the acquisition of top-heavy bureaucracy. We replaced local governments and co-operatives by parastatal organizations. We thought these organizations run by the state would contribute to prog-

societies was the military, which rather than facing outward in defense of territorial borders was noted for its capacity to stage coups d'état and to terrorize and render voiceless other claimants to political power.

These centralizing tendencies could not be countered by independent social organizations because many of these had been emasculated by the state during the period of mass mobilization. The state, with its disproportionate control and consumption of national assets, had first absorbed and then rendered powerless such institutions as labor unions, ethnic benevolent associations, universities, agricultural and marketing co-operatives, and churches.¹⁰⁵

The African state was thus in a very exposed position when its legitimacy was challenged by the coalition of forces that gained ascendance in the West during the 1980s: neo-liberal economists and neo-conservative politicians.¹⁰⁶ These forces came together in the structural adjustment policies of the international financial institutions and the practical consequences of having to meet untenable debt burdens. Buffeted by these forces, the African state, at the close of the 1980s, appeared to be on the verge of disintegration, differing only in the extent, rapidity, and level of control at which the old order was to be forced out and the new order was to emerge. Thus in some countries, central authority collapsed virtually overnight, with the void being filled by unorganized groups that recalled the popular mobilization movements of the 1960s.¹⁰⁷ In other countries, the central government belatedly tried to co-opt the mass population by pleading for a united front against external pressure and by promising broader economic participation and electoral politics.¹⁰⁸

In both instances, the perception at least outside of the continent, was the resurgence of democratic participatory government; a state of affairs that fit quite nicely into the emerging global trend. The African phenomenon was viewed as similar or identical with trends in Europe,

ress because they would be under parliamentary control. We ended up with a huge machine which we cannot operate efficiently.

Deve Orowu, *The Failure of Current Decentralization Programs in Africa*, in FAILURE OF THE CENTRALIZED STATE, *supra* note 101, at 74, 74-80 (citations omitted).

¹⁰⁵ See Wunsch & Olowu, *supra* note 101, at 5.

¹⁰⁶ See generally CHRISTOPHER COLCLOUGH, STATES OF MARKETS?: NEO-LIBERALISM AND THE DEVELOPMENT POLICY DEBATE (1993).

¹⁰⁷ Events in many Francophone countries, notably Niger, the Congo, and Zaire followed this patten.

¹⁰⁸ This was the dominant approach among Anglophone countries such as Nigeria, Ghana, Zambia, and to a lesser extent, Kenya. Cameroon, Cote d'Ivoire, and Senegal indicate, however, that the approach transcended the colonial experience.

Latin America, and Asia. As in those areas, the prescription for reform was the marketization of the economy brought about by external technical assistance acting on newly created and broadly diffused economic and political pluralistic institutions.¹⁰⁹ The argument for Western technical expertise and its relevance to the institutionalization of Western liberal market ethos was frequently framed in terms of the relevance of law and a routinized legal order to the success of these transplanted modes of doing things. In many ways reminiscent of the early law and development movement of the late 1960s and early 1970s, these attempts to institutionalize change through law once again focused on external contributions rather than on the shaping of internal or local forces to support the changes.

C. *Law and Development in the 1990s*

Credit for the revival as a discipline of the systematic study of law and development may be given to the publication of the work of Peruvian political economists.¹¹⁰ Led by Hernando de Soto and operating under the auspices of the Institute for Liberty (ILD), these political scientists, economists, and lawyers set out to investigate the "informal economy, a parallel and in many ways more authentic, hard-working and creative society than the one that hypocritically calls itself legitimate."¹¹¹

The data that they unearthed suggested that state institutions and actors in case after case, industry after industry, and sector after sector, operated as negative constraints on an otherwise enterprising population. The state, their data suggested, rather than acting as the engine of growth, undermined it.¹¹² Moreover, in their most controversial arguments, they attributed the deadening hand of the state not primarily to the classic institutional shortcomings of administrative incapacities, bureaucratic inefficiencies, lack of political will, or absence of managerial and human resources, but to a narrower and highly specific cultural flaw: the state's reliance upon certain types of legal mechanisms to assert its supremacy over private actors.¹¹³

¹⁰⁹ See, e.g., JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 2 (1991).

¹¹⁰ See HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott trans., 1989).

¹¹¹ *Id.* at xv.

¹¹² *Id.* ch. 1-4 (cataloguing and discussing the cost of formality in industry, housing, trade, and transportation).

¹¹³ See Winn, *supra* note 77. Cf. Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 *YALE L.J.* 2157-60 (1994); George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 *YALE L.J.* 2259

Under this view, informality represented the creative response of marginalized people to a mercantilist state that employs law to favor narrow circles of elites. There is nothing inherently bad with the state's use of law, only with specific legal processes. Thus, "good law" guarantees and promotes economic efficiency, while "bad law" "impedes or disrupts it."¹¹⁴ Defining law in the positivistic sense of the existence of formal rules, regulations, statutes, and procedures, de Soto maintained that law imposes two sorts of constraints on economic actors: the cost of access or entry, and the cost of remaining formal.¹¹⁵ The definition of interests, their protection, promotion of general well-being, and the raising of revenues are legitimate concerns of law. However, the costs associated with effectuating these objectives can be overbearing. It is in the state's capacity to calibrate properly and minimize such costs that difficulties arise. If the costs are too high, persons otherwise disposed to conform to the law (and de Soto contends that most economic actors ordinarily seek to obey the law)¹¹⁶ are transformed into informals, who skirt legal constraints by carrying on economic activities outside of formally regulated sectors. The consequence is a net loss to society because the informals lose the protection of legitimation through law, and society suffers the erosion of protected activities, confidence in legal protections, and revenue loss from the taxing of economic activities withdrawn from the formal sectors. Informality, de Soto and his colleagues argue, must be understood as an indigenous response to the unproductive use of law.¹¹⁷

While these are interesting insights, they might have gone unnoticed, — at least outside of Peru and perhaps Latin America — but for two additional conclusions said to flow from these research findings. First, the crisis of Peru's economic underperformance, claimed de Soto, and other publicists such as the novelist Varga Llosa and U.S. based law and economic scholars, was attributable as such to the waste of human resources generated by bad law as to external factors.¹¹⁸ In this sense, the empirical evidence furnished by de Soto directly challenged the hypothesis and conclusions of dependency and underdevelopment theorists who attributed underdevelopment to the peripheral placing of the peoples and countries

(1994); Arthur J. Jacobson, *The Other Path of the Law*, 103 YALE L.J. 2213 (1994); Saskia Sassen, *Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994).

¹¹⁴ DE SOTO, *supra* note 110, at 132.

¹¹⁵ *Id.* at 133-46.

¹¹⁶ *See id.* at 153 (stating that in its interviews, ILD found that avoiding punishment was the main concern of informals).

¹¹⁷ *See id.* ch. 5.

¹¹⁸ *Id.* at xxiii.

of the Southern hemisphere within a hierarchically structured capitalist system.¹¹⁹ Second, the determination of a nation's economic performance was within its regulatory control. To assure optimal economic performance, the state had to reduce the regulation of economic activities and allow the market to flourish.

This analysis coincided with the increasingly dominant neo-liberal teachings of economic development experts in the 1980s, and with the law and economic school that gained significant sway in American legal institutions.¹²⁰ Proponents of these schools of thought were found to be not only in academic settings, but in the 1980s, they were dominant actors and advisers in policy-making positions within the Thatcher and Reagan governments and the government-sponsored international financial institutions.¹²¹ Indeed, taken at face value, these conclusions were equally acceptable to the increasingly influential nongovernmental organizations in the West which, while not fully endorsing the marketization creed, nonetheless sought to have official Western assistance redirected from government-to-government funding to the funding of private initiatives and programs to be directed and channelled, whenever possible, by NGOs.¹²² Put another way, the findings of de Soto and the ILD were in perfect sync with the determinative spirit of the 1980s.

But if the conclusions of de Soto were embraced by policy-makers, its methodology did not much survive the publication of de Soto's book. While it generated renewed interest in the relationship of law and development, that interest was directed at the viability in emerging market societies of these ideas, relationships, and institutions as transplanted from Western industrial democracies, not at unearthing their roots and nurturing those roots within the local communities.¹²³ Thus transformed, de Soto's work, like Glastnost and the Brady Plan, confirmed the efficacy for development purposes of Western international capitalism, the superiority of the market approach, and the relevance to both of Western-style electoral politics.¹²⁴

¹¹⁹ See Jacobson, *supra* note 113, at 2213.

¹²⁰ Cf. DE SOTO, *supra* note 110, at xxvi (listing inter alia North American scholars involved in the law and economics field).

¹²¹ See, e.g., Colclough, *supra* note 106, at 6.

¹²² See, e.g., DAVID C. KORTEN, *GETTING TO THE TWENTY-FIRST CENTURY: VOLUNTARY ACTION AND THE GLOBAL AGENDA* (1992).

¹²³ One possible exception to this approach may be the idea of civil society. But even here, the value of the idea seems to reside in the extent to which its roots and presumptive future success can be anchored in Western classical thinkers like Hegel, Weber, and Arendt.

¹²⁴ President Clinton of the United States gave the official rationale in a 1993

As Western governments and private institutions again began financing inquiries into law and development, they explicitly stated that the goal of their financing was to underwrite tracts that established and perpetuated these axiomatic relationships.¹²⁵ Institutions such as AID and the World Bank funded research programs to demonstrate the efficacy of the market, the need for the privatization of economies, and the relationship between these economic actions and the promotion of human rights, democratic

address to the General Assembly of the United Nations:

The United States believes that an expanded community of market democracies not only serves our own security interests, it also advances the goals enshrined in this body's charter and its Universal Declaration of Human Rights. For broadly based prosperity is clearly the strongest form of preventive diplomacy. And the habits of democracy are the habits of peace

Democracy is rooted in compromise, not conquest. It rewards tolerance, not hatred. Democracies rarely wage war on one another. They make more reliable partners in trade, in diplomacy, and in the stewardship of our global environment. In democracies with the rule of law and respect for political, religious, and cultural minorities are more responsive to their own people and to the protection of human rights.

Address by the President to the 48th Session of the United Nations General Assembly, U.S. News Wire, Sept. 27, 1993, available in LEXIS, News Library, Wires File [hereinafter *Address by the President*].

¹²⁵ See, e.g., The Freedom for Russia and Emerging Eurasian Democracies and Open Market Support Act of 1992, Pub. L. No. 102-511, § 101, 106 Stat. 3320, 3322 (1992); The Support For East European Democracy Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298 (codified as 22 U.S.C.A. §§ 5401-5495 (1989)); and annual appropriation bills, which expressly provide funding for activities in the countries of Central and Eastern Europe and the former Soviet Union for the purpose of "promot[ing] political democracy and economic pluralism . . . by abetting the development in those nations of private business sectors, labor market reforms, and democratic institutions." *Id.*

institutions, and political freedom in emerging societies.¹²⁶ Some of these programs were directly geared to Africa.¹²⁷

Is this new approach any more likely to succeed? While it is too early to offer a definitive answer, contemporary evidence calls into question an unequivocal affirmative response. Although recent developments in Mexico and its reverberations in other Latin American and Southeast Asian countries¹²⁸ manifest the tender but pliant reed on

¹²⁶ SUB-SAHARAN AFRICA, *supra* note 86, at 60 ("Underlying the litany of Africa's development problems is a crisis of governance.").

In 1989, the World Bank funded an experimental program in Argentina that emphasized the development of Western-style legal institutions and which has been the foundation for other programs in Latin America and the Caribbean region. *See, e.g.,* Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* (World Bank Technical Paper No. 319, 1996). The World Bank has a unit in its Legal Department dedicated to legal reform and private sector development whose function is the provision of technical services to borrower countries on the structuring of institutions for the promotion of private sector involvement.

Programs of the U.S. Agency for International Development, the Department of State, and quasi-public institutions like the National Institute for Democratic Reform that are intended to further transplant U.S. institutions to recipients of U.S. foreign assistance abound. These programs range from activities in Africa to Latin America, Central Europe, and Eastern Europe. *See, e.g.,* U.S. GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE: PROMOTING JUDICIAL REFORM TO STRENGTHEN DEMOCRACIES 1 (1993).

¹²⁷ *See, e.g.,* Public and Private Nonprofit Organizations in Support of International Educational and Cultural Activities: Exchange Programs to Promote the Strengthening of the Rule of Law in Africa Through Judicial and Public Defender Training, 59 Fed. Reg. 22,888, 22,888 (1994); Public and Private Nonprofit Organizations in Support of International Educational and Cultural Activities: Exchange Programs to Promote the Strengthening of the Rule of Law in Africa Through the Development of Law Schools and Bar Associations, 59 Fed. Reg. 19,043, 19,043 (1994); International Educational and Cultural Activities Discretionary Grant Program, 60 Fed. Reg. 32,569, 32,571 (1995) (requesting proposals for projects addressing the rule of law to include three or four countries in one subregion of Africa); International Educational and Cultural Activities Discretionary Grant Program, 59 Fed. Reg. 64,733, 64,734 (1994) (stating that "[w]hile proposals in all fields [for Africa] are encouraged, emphasis will be given to proposals which focus on strengthening democratic institutions.").

¹²⁸ Consider, as an example, the unforeseen nature and aftermath of the collapse of the Mexican Peso in December 1994. The resulting demonstration of the fickleness of the international investment community's confidence in the Mexican economy and those of "emerging" countries does not augur well for the creation of a fully integrated international economy that is geographically or culturally undifferentiated by factors of production, access to capital, security of savings, or similar economic yardsticks. The size and suddenness of the outflow of portfolio investments from Mexico and the other emerging economies, and the radical and externally dictated measures adopted to staunch the outflows highlight the persistence of the dichotomy between the relatively

which the new order rests,¹²⁹ that uncertainty is much longer in the making in the African context.¹³⁰

independent core capitalist economies and the "disarticulated" peripheral economies that was the central contribution of the Dependency theorists. The cause of, responsibility for, and extent to which the Mexican crisis is emblematic of the emerging new economic order has generated much debate which extends well beyond the scope of this Article, but the answers to which are bound to reverberate in the study of the relationship between the international economic system and development policies in the emerging and less developed economies of the South. See, e.g., Rory Macmillan, *The Next Sovereign Debt Crisis*, 31 STAN. J. INT'L L. 305, 305-10 (1995); Clay Chandler, *IMF Ties Peso Crisis to Mexican Investors: Report Now Disputes Foreign Role in Collapse*, WASH. POST, Aug. 21 1995, at A1. On the significance of the peso crisis for Mexico and for bilateral relations between Mexico and the United States, see JORGE G. CASTAÑEDA, *THE MEXICAN SHOCK* (1995); Anne Swardson & Martha M. Hamilton, *Investment Funds Link Economies*, WASH. POST, Aug. 21, 1995, at A2. Nonetheless, the resolution of these debates is significantly relevant to any prognosis for the future direction and integration of the peripheral economies and societies of much of the Third World, including Africa, into the assertedly new order.

¹²⁹ See WORLD BANK, *THE EAST ASIAN MIRACLE* vi (1993) [hereinafter EAST ASIAN MIRACLE]. As the Bank's president acknowledged, the Southeast Asian economies "used very different combinations of policies, from hands-off to highly interventionist." *Id.*; see also Albert E. Fishlow & Katherine Gwin, *Overview: Lessons from the East Asian Experience*, in ALBERT E. FISHLOW ET AL., *MIRACLE OR DESIGN: LESSONS FROM THE EAST ASIAN EXPERIENCE* 1, 2 (1994) (stating that the Bank's report "represents an important acknowledgment by the World Bank that industrial policy, involving systematic government intervention in the market over extended periods of time, played a role in the rapid economic growth of the East Asian region."). Nor is belief in a hands-off approach by governments shared by all successful economies. Japanese officials appear to be particularly critical of the newly found zeal of the international financial institutions to condition assistance to developing countries on their adoption of Western institutions, economic practices, and political ideology. See Nira Wickramasinghe, *From Human Rights to Good Governance: The Aid Regime in the 1990s*, in *THE NEW WORLD ORDER* 305, 318-19 (Mortimer Sellers ed., 1996)

The Japanese had begun complaining about the Bank's aid policies in the early 1990s. They pointed out that Japan, Korea, and Taiwan had developed according to a far different model. The governments of the East Asian "dragons" worked closely with business to develop strategies for growth. Nationalized banks gave low-interest loans and grants to selected industries. Governments restricted foreign investment to maintain control over the direction of economic development. Subsidies were granted to businesses in exchange for specific performance requirements. Planners placed a high priority on becoming competitive through higher productivity rather than through lower wages.

Id.

¹³⁰ The contention is not that African crises are identical to the difficulties being experienced by Mexico. Africa (with the possible exception of South Africa) has not had the fortune of attracting significant foreign portfolio investments, so that loss of

African countries, like Eastern Europe and Latin America, in the late 1980s and early 1990s appeared to be undergoing fundamental economic and political structural change.¹³¹ Virtually every country on the continent embarked on significant restructuring of the economy, especially with regard to the content of governmental involvement in micro-economic activities. In many cases the countries adopted some form of privatization or commercialization,¹³² practices intended to marketize the economy, reduce public subsidies, and devolve decision-making into private hands, with the expectation that such decisions would be governed by standard micro-economic rules of efficiency and the disciplining constraints of the profit-motive. Similarly, political liberalization — in the sense of opening up the political process to permit broader popular participation through the ballot box — gained a cachet not embraced since the mid-1960s.¹³³

While there were some doubters,¹³⁴ the dominant perspective at the turn of the decade was that these policies were generating positive changes in Africa.¹³⁵ Indeed, one of those who had catalogued and decried Africa's stagnation in the mid-1980s was, in 1991, writing of Africa's recovery.¹³⁶

But this resurgence did not last. The obvious manifestations of change like the transfer of power from long-term dictatorships to popular-

confidence in its economy by foreign investors is not likely to create the widespread dislocations of daily existence evident in Mexico. Nonetheless, African economies, like Mexican and other emerging economies continue to demonstrate a high level of dependence on decisions made externally and an incapacity to shield the effects of those decisions through countervailing domestic policies. Policy makers in these societies tend to act as if restoring external confidence ought to be the dominant concern, even where the effect may be arguably antithetical to domestic interests.

¹³¹ See, e.g., Julius E. Nyang'oro, *The Evolving Rule of the African State Under Structural Adjustment*, in BEYOND STRUCTURAL ADJUSTMENT, *supra* note 86, at 12, 23; Jennifer A. Widner, *Introduction to ECONOMIC CHANGE AND POLITICAL LIBERALIZATION IN SUB-SAHARAN AFRICA* (Jennifer Widner ed., 1994).

¹³² See, e.g., PRIVATIZATION AND INVESTMENT IN SUB-SAHARAN AFRICA (Rexford A. Ahene & Bernard S. Katz eds., 1991); Maxwell O. Chibundu, *Law and the Political Economy of Privatization in Sub-Saharan Africa*, MD. J. INT'L L. & TRADE (1996); Maxwell O. Chibundu, *Privatization and Commercialization in Sub-Saharan Africa*, 87 ANN. PROC. AM. SOC'Y INT'L L. 111 (1993).

¹³³ See generally Widner, *supra* note 131, at 2-4 (discussing the political liberalization in Africa between 1989-1992).

¹³⁴ See, e.g., Julius E. Nyang'oro & Timothy M. Shaw, *African Development and the New International Division of Labor*, in BEYOND STRUCTURAL ADJUSTMENT, *supra* note 86, at 1, 6.

¹³⁵ See, e.g., SUB-SAHARAN AFRICA, *supra* note 86.

¹³⁶ See Widner, *supra* note 131.

ly elected ministers became bogged down in intricate manoeuvring that suggested the ancient regime would not compliantly wither away in the manner being forecast.¹³⁷ Even in those few instances where governments had changed hands as part of the emerging new order, policies soon relapsed into the old mode of rule by edicts and lack of accountability.¹³⁸ Moreover, change of governments through military coups d'état reappeared as the norm rather than as the exception.¹³⁹

But these political reversals were notable only for being more visible than the economic retrenchments equally underway. Privatization, the most symbolic of the alleged economic transformations in the continent, turned out to be more theoretical than real, and by mid-1994 had virtually halted.¹⁴⁰ Not even the World Bank could disguise the unsatisfactory results of structural adjustment policies or privatization.¹⁴¹

¹³⁷ This was the case notably in Zaire and Kenya. For one statement of this shifting political environment from optimism to pessimism, see Jean-Germain Gros, *The Hard Lessons of Cameroon 1993*, J. OF DEMOCRACY, July 1, 1995, at 112.

¹³⁸ Events in Zambia are the most glaring illustration of this tendency which is also noticeable in other countries such as Cote d'Ivoire, Ethiopia, Ghana, Malawi, Niger, and Zimbabwe. In Zambia, the Chiluba government which came to power through a popular election that ended a quarter of a century of dominance by Kenneth Kaunda's United National Independence Party now seeks to foreclose meaningful multiparty political processes through the dubious stratagem of amending Zambia's constitution to provide that only those persons born in Zambia, and all of whose parents and grandparents were born in Zambia, are eligible to hold the office of the President, an amendment which unashamedly is intended to rule out return to political power by Dr. Kaunda.

¹³⁹ Notable among military coups d'état in Africa since 1989 are those in Nigeria, Gambia, Sierra Leone, and Borkina Fasso. There have also been short-lived coups in the island states of Sao Tome, Principe, and the Comoros.

¹⁴⁰ The privatization process in Nigeria is illustrative. The program was the direct product of a palace coup by military officers led by General Ibrahim Babangida that ousted a previous military government in August 1985. Encouraged and supported by the Washington-based international financial institutions and a structural adjustment policy, the contours of the privatization and commercialization program were formally delineated in a highly legalistic military decree of July 1986. Implementation, however, did not begin until 1989. In 1993, following the nullification of the results of a national presidential election, the implementation process came to a halt. Following another seizure of power by the military in late 1993, the entire process was for all practical purposes terminated. In his 1994 budget speech, the new head-of-state, General Sanni Abacha, announced that government assets would be leased to private managers. Meanwhile, the country's four largest commercial banks which had been privatized amidst claims of profiteering by the purchasers are apparently under consideration for re-nationalization. See *The Political Scene: The Government is to Relaunch Privatisation*, ECONOMIST'S INTELLIGENCE UNIT, Feb. 14, 1995, available in LEXIS, Intlaw Library, EIU File.

¹⁴¹ See *Aid for Africa: Nothing to Loose But Your Chains*, ECONOMIST, Mar. 5,

The widespread protests that followed the sudden devaluation of the CFA franc in 1994 were reminiscent of the bad old days.¹⁴² Similarly, Nigeria, the bellwether of the new African age, faltered. Not only was the country besieged by political instability, a palace military coup, and the termination of its flaunted privatization program, but in 1994, it jettisoned ten years of liberalization of its foreign trade and payments regime by returning to a fixed exchange rate and imposing restrictions on foreign exchange remittances.¹⁴³

One searches in vain for adequate elucidation of these new trends in the revitalized law and development scholarship. The new teaching, like the old, is justified and legitimated in terms of the capacity to mold and adapt the internal policies of these emergent or transitional societies so that they conform to the prescriptions of the external factors. Conclusions as to the success or failure of law in the development processes of these societies are packaged and presented in terms of the interests associated with the United States and the West. These are sometimes articulated in the phraseology of "national," or "security interest," but they are more frequently stated in the culturally abstruse language of "market capitalism," "rule of law," or "democracy." Whatever the framing, the interests of the developing country are taken into account only in that they are represented as symbiotic to the primary interests of the funding body.

One can of course conceive of other ways to explore the interaction between law and development. The relationship might be viewed from the perspective of seeking to understand or attempting to establish the complex web of relationships existing between legal, economic, social, and political concerns. It might be postulated that a proper understanding of those relationships requires the scholar to forego an instrumentalist conception of her task. To do so, the inquiry must first look to the in-depth articulation of the societal context within which the institutions and persons that shape these concerns operate, and second, demand a focused and limited conception of development. In short, while aspirations for the routinization of the relationship of law and development may be universal, their realization is ultimately local and should be accepted as such. Similarly, while it is possible and indeed worthwhile to make general statements about the role of law *in* development, the actual operation of

1994, at 21; WORLD BANK, *BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP* (1995).

¹⁴² See, e.g., *A Flicker of Light*, *ECONOMIST*, Mar. 5, 1994, at 21.

¹⁴³ See Abiodun Alao, *Nigeria: The Return of the Military*, *JANE'S INTELLIGENCE REV.*, Mar. 1994, at 141, 143. The country has since announced a shift to market-determined exchange rate policies. See *Budget Speech of General Sanni Abacha*, BBC, Jan. 29, 1995, available in LEXIS, News Library, BBC File.

those statements will vary significantly from one society to another, and should not be examined to produce some universal outcome.

IV. A REAPPRAISAL OF LAW AND DEVELOPMENT

The discussion of the issue of what, if anything, law has to say to economic, socio-cultural, and political development understandably has been the preserve of persons trained in law. Among such trained persons, the instrumentalist view of the relationship of law and development is represented by the debate over causation. Would some positivistic piece of legislation encourage or deter particular behavior? What is the optimal tinkering with of the form or content of legislation that would produce the preferred behavior? Can the relevant processes be institutionalized?

The legal scholar tends to frame these questions in somewhat abstract or hypothetical terms, while the practicing lawyer presents them in the context of specific problems. In either case, the operative assumption is that the worth of the investigation lies in the instrumental value of the answer that is obtained. The approach thus curtails the exposition of the normative preferences embedded in the particular conception of law or development.¹⁴⁴ Lacking that foundation, the disillusionment with the various prescriptive results is hardly difficult to understand.

The remainder of this Article sketches out ways in which attention to the normative implications of the understanding of law have direct significance for the interpretation of the link between law and development, and the influence of that understanding for prescriptive recommendations. An intended collateral consequence is to explain why our normative conception of development needs to undergo some rethinking in the West.

A. *Law's Reach*

In the early days of law and development, there was a genuine debate among legal scholars, anthropologists, and sociologists as to what constituted law.¹⁴⁵ Those interested in the definition of law for instru-

¹⁴⁴ The liberal legalist scholars came closest to an analytical critique of the relationship of law and development. Yet the three most penetrating of those analyses were invariably descriptive and prescriptive. None questioned the propriety of the underlying normative ideal of transforming developing societies into prototypes of Western capitalism. Cf. Trubek, *Social Theory*, *supra* note 2; Trubek & Galanter, *supra* note 8, at 1073-78; Burg, *supra* note 11.

¹⁴⁵ See generally Kuper & Kuper, *supra* note 37 (presenting the various views and

mentalist purposes took a formalistic view that limited law to positivistic directives of the state.

Acephalous traditional societies clearly had no law since they did not constitute states, and they did not seek to compel acceptance of specified modes of behavior through the exercise of state authority. It followed that law was itself a part of development, because development required the transformation of traditional into modern societies, the definitive and central attribute of which was the bureaucratized nation-state. The more institutionalized the rule of law, the more developed the society.

Others found such a formalistic view of law too bounded. They contended that any definition of law had to be provided within the specified context of the purpose for which the definition was sought. For example, the search for a definition of law is hedged by at least three determinants. First, there is the concern over function. What is the purpose of law, and how is that purpose realized by the proposed or generally accepted definition of law? Second, there is the structural conception of law by which the definition of law is extracted from the interactions of persons and institutions in a society — interactions and relationships that occur and are fueled by both conscious and unconscious behavioral patterns. Third, law is “ideational,” in the sense that it embodies both the spirit of the times of a society, as well as the aspirations for which a people strive. Law here is the culmination of past experiences, contemporary beliefs, exigent measures, and future objectives. The meaning of law thus cannot be captured solely by the legislative and regulatory acts of the state or its institutions; rather its meaning derives from the entire society, its history, past and present, its norms as well as its practices.

Whatever those initial debates, it was the positivistic conception of law and development that triumphed under the dominant aegis of the liberal legalist school. It is also that conception of law that dominates in the revived law and development philosophy. Indeed, given the now seemingly unquestioned triumph of the market-centered industrial capitalist mode of production, accumulation, and distribution, it is generally argued that only societies that implement the legal framework underwriting this regime will experience the thrill of success as being “developed.”

Several difficulties attend this argument. In the first place, distilling magic elements of law essential to capitalism is by no means easy, and the relevant considerations that should be taken into account when doing so certainly are not uncontroversial.¹⁴⁶ Thus, it is commonplace to in-

analyses of what constitutes law in an African context).

¹⁴⁶ See, e.g., David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972

voke the necessity of a legal regime that respects and protects private property. But as the most rudimentary of comparative exercises demonstrates, what constitutes private property — and the means by which respect and protection are afforded such property — vary substantially even among related societies.

Second, demonstrating the link between the legal elements and the economic or political success of a society is hardly a straightforward undertaking: the idea that one can correlate legal measures that successfully further such respect and protection in economic development is a chimera. That many assume that relationship today is at best hubris, but more fundamentally, it is destructive of the discipline of humanistic learning.

Third, to the extent some successful legal elements can be distilled, transplanting those elements to other societies poses significant problems; although that alone does not argue against the effort.

Fourth, and perhaps most significant, on closer inspection, the assumed uniformity of factors and relationships between law and development disintegrates. Relationships exist, but they are multifaceted, dynamic, and perhaps not reproducible. This is not to argue against attempts to understand and retrieve them. The effort is worth undertaking not only for the functional utility of any results that are achieved, but also because it enriches our understanding of law. It is to suggest, however, the possibility of exploring law *in* development in non-instrumentalist terms.

1. Law in “Law and Development”

One of the more remarkable features of the current debate over the role of law in development is the persistence of a positivistic description of law. Ignoring many of the most useful insights about law in the last three decades,¹⁴⁷ positivist adherents continue to present law in terms of governments prescribing appropriate rules to regulate title and transference

WIS. L. REV. 720, 751 [hereinafter Trubek, *Max Weber on Law*].

¹⁴⁷ The legal realist and critical legal studies movements and its offshoots have effectively demonstrated that law is manifested and deployed through a variety of means, of which the positivistic elements reflect only a part. The role of state fiat in fashioning behavior and response cannot be ignored, but of no less significance are numerous intersecting formal and informal networks of processes and institutions that both shape and reflect socio-political relationships, economic interactions, and religious engagements. These networks of relationships meet the demands imposed on them through equally varied methodologies, ranging from formal adjudication to stylized story-telling. See Chibundu, *supra* note 2, at 1479-83.

of interests in property; the provision of functioning institutional processes and mechanisms by which disputes may be resolved; the existence of an efficient bureaucracy to entertain and process requests; and the provision of the assurance of transparency in the conduct of all of these functions.¹⁴⁸ For each one of these elements of law, one can usually point to a model illustration from a Western developed society. Indeed, they are all borrowed from the study of the modernization phenomenon in the West.¹⁴⁹ These contentions are usually justified on the ground that the rule of law operates to provide certainty of knowledge, security of interests, predictability, and confidence for the system's future participants.

Putting aside the validity of these claims for even Western societies, and for the moment deferring discussion of the relationship these factors have for economic and political development, there remains as a central concern their import for a modern conception of the relationship of law to society.

For African society today, there is and can be no certitude as to the parameters of what constitutes law. Neither the formalist nor the realist conception of law, grounded in the historically derived particulars of Western institutions and practices provide adequate elucidation of the path to the development of law for these societies. Thirty years of the post-colonial experience amply demonstrate these societies are not simply genetic offsprings of colonial metropolitan states. They are, in the sense that matters, separate entities the contours of whose constitution are in

¹⁴⁸ See, e.g., Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1 (1995); Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1 (1994) (applying a law and economics model to the emerging democracies of Eastern Europe).

Professor Richard Epstein has provided an elegant justification for the universal applicability of Western legal methodologies for dealing with transitional societies. Contending that all societies are confronted with two basic realities: scarcity of material goods and basic self-interest, he formulates the problem of governance in terms of the capacity of a society to define effective means of accounting for the former, while coping with the latter. Western legal regimes whether civil or common law based, share essential attributes in their conception of tort, property, and contract rights which have successfully mediated and held within tolerable bounds the competition for scarce resources by self-interested beings. Similarly, what transpires in other societies will depend on their capacity to learn from and harness these first principles of scarcity and self-interested behavior. See Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 559-69 (1991). Cf. Chibundu, *supra* note 2, at 1491-92 (discussing the significance for structural theory of changes in the conception of the "self" between the late eighteenth and twentieth centuries).

¹⁴⁹ See generally Galanter, *supra* note 32, 156-57.

flux. Equating the post-colonial African state with its Western European or North American namesake may continue to serve satisfactorily its fictional role in interstate relations — although even this claim is questionable¹⁵⁰ — but the fiction is no longer tenable when dissected from within the African state itself.¹⁵¹

The concept of the state is, at best, a complicated idea. Nonetheless, it has typically implied a territorially determined community bound with some assurance of protection to the members which is often reciprocated by a sense of belonging on the part of the protected. Law frequently mediates the protection. It may do so by prescribing and enforcing hierarchies, or by imparting a sense of procedural rectitude or legitimation to otherwise objectionable acts. The state is thus as much a creature of the law as law is of the state. Both are shaped by on-going conflicts and compromises among groups and forces within the geographical space over whose character the question of the state's nature is fought. Thus, the stability of the state depends on the predictability of law, and the predictability of the character of the state is intertwined with the stability of what counts as law. Ultimately, the contours of both are shaped and dictated by the sources of the conflicts and compromises, including human and economic resources, social and political institutions, and external pressures and alliances. External influences, however, should not be given more than their due, which for the most part are no more than tertiary or quaternary.

For the African state, in very practical terms, a discussion of what constitutes law — how it is generated, and how it directly relates to development — implicates primary questions of its being: its corporate identity and purpose, the scope of its powers, its internal structure and organization, and its responsiveness to the demands for protection from component groups and interests. Thinking about law in development, then, should not and cannot be primarily about the effectiveness or supremacy of law over extralegal or informal practices, for such a focus assumes the basic question to be answered. Namely, what constitutes law in a recently artificially constituted society being buffeted by forces that are themselves in transition, and therefore, necessarily amorphous? Similarly, the issue of law *and* development cannot be simply about the juxtaposition of formal

¹⁵⁰ See, e.g., Jackson, *supra* note 75.

¹⁵¹ See generally APTER, *supra* note 23; Young, *supra* note 50, at 3-4 (reflecting the general pessimism among African leaders regarding the growth of the newly independent state by the end of the 1970s); THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA (Donald Rothschild & Naomi Chazen eds., 1988) [hereinafter PRECARIOUS BALANCE] (discussing the interactions between state and society in terms of the erosion of the legitimacy of state institutions after African independence).

and institutional structures characteristic of modern societies by or against traditional structures.

The consequence of this orientation for the study of law in development is illustrated below. For the moment, the basic point to be underscored is that law can make substantial contributions to development, not simply by articulating and promoting well-worn conventional ideas that may have influenced economic and political growth in Western industrial societies, but by exploring and articulating unique definitions of law and the state that emerge from the relationships of internal structures, persons, and politics in societies that are in search of themselves. The critical issue in this framework is not whether military decrees, one party legislative enactments, or "kangaroo judgments" (as contrasted with bills passed by bicameral legislatures of freely and openly elected representatives, or the pronouncements of life-tenured judges) constitute law, but an understanding of why one rather than the other exists, and what that understanding tells about the process of state creation law-making. Law, then, speaks directly to the interactions of people within a society, how they shape that society to meet their aspirations: how their failures frustrate those aspirations, and how they respond to their frustrations and aspirations. In large measure, it is the need to acquire such understanding that has been missing in how lawyers and legal scholars have theorized and practiced law in the context of its relevance for development.

2. The Relationship of Law to Development

The instrumentalist approach to the study of law and development is underpinned by the assumption of a unilinear relationship between law and development in general, and law and economic performance in particular.¹⁵² The belief is that law functions to attract foreign investments, and to improve the efficient and productive utilization of resources. In this sense, law is an exogenous factor whose contribution to development can be maximized through independent action by the state.

This conventional statement of the relationship is presented at two levels. At the macro level, law is said to create, protect, and perpetuate

¹⁵² See generally Gray & Jarosz, *supra* note 148. Although the old liberal legalist view of law and development focused on economic development, the collapse of the Communist political systems of Eastern Europe in tandem with their economic systems led to sweeping generalizations where the asserted supremacy of capitalist production is equated with liberal democratic government. See, e.g., Address by the President, *supra* note 124; Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 28 (1994); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90 (1992).

the basic ingredients of development: the right to own and transfer property and the right to vote. The assumption is that these rights, being creatures of law, are fostered or destroyed by law. The goal is to nurture a legal regime that promotes these rights.

Prior to the recent unalloyed enthusiasm for the market, some suggested that there may be some trade-off at the macro level between the various forms of development. For example, it was argued that there might be an inverse correlation between economic growth and political liberalization, and perhaps between distributive equity and economic performance. To the extent that legal directives had impacts on political liberalization and distributive justice, law affected development. Moreover, the consistency and competence with which the relevant laws were generated and applied were consequential factors since they said such about the predictability and stability of the governing regime.

At the micro level, specific legal instruments operate to regulate conduct by authorizing and enforcing the use of particular incentives and penalties. In the economic arena, foreign direct investment might be encouraged or hindered by specific provisions of tax and foreign exchange regulations, import and export licenses, immigration and residency requirements, and laws on foreign and indigenous ownership in sectors of the economy. While it is accepted that the propriety of legal rules should depend to a considerable extent on the local environment, the trend more recently has been to suggest that the applicable rules should be standardized. The belief appears to be that in a competitive global marketplace, such standardization of rules renders more efficient decision making on cross-border investing, and decision makers are thus more likely to make their investments in those societies whose rules approximate those to which they already have been exposed.

Nor is the clamor for universalist rules limited to the economic arena. Although nascent, assertions increasingly are being made that political development entails not simply broad political participation such as that theoretically at the core of liberal plural democracies, but in specific forms of political engagements and guarantees such as freedom of the press, gender equality, bicameral legislatures, and judicial review.

The purported relationship of law to development is, however, no more than surmise. Stripped to its essence, it is a culturally determined argument for policies likely to encourage participation by investors from Western Europe and North America in the economies of Southern countries. However, the countries commonly pointed to as illustrations of the possibility of economic development for the periphery — the so-called newly industrialized countries of Southeast Asia — hardly provide support for the significance of law for economic or political development. Rather, to the extent that the economic performance of those countries were

influenced by external forces and investments (and it is difficult to argue otherwise), explicitly political rather than subtle legal factors shape these involvements. The ideologically framed and politically motivated anti-Communist campaigns against the People's Republic of China, Vietnam, North Korea, and the Soviet Union were a good deal more responsible for Western participation and the successes of the "Southeast Asian Tigers" than was their use of legal instruments to shape the form of their development. This is not to deny the importance of local personnel, policies, and culture; but to iterate that the emphasis on the packaging of legal attributes was not decisive. These countries may have succeeded despite the absence of such legal underpinnings. Thus, the conventional assertion of the role of law in protecting private property tended to be conspicuously absent with regard to the disposition of interests in intellectual property. Yet, it was specifically in industries that rely heavily on such interests like the assembly of electronic components based on technological blueprints and software, that these countries excelled.

More recently, the "newly emerging economies" found predominantly in Latin America and South Asia are being touted as success stories. Yet, the evidence that law, as conventionally defined, has played a significant role in the resuscitation of these economies is at best speculative. The reduction of barriers to foreign ownership of property within these countries, the liberalization of policies on foreign exchange transactions, and the reduction of state ownership of productive assets, have certainly been implemented under recognizable legal regimes. Yet, to the extent that these influences evoked responses from the West, those responses do not appear to be motivated by a perception of increased security from the legal changes. Rather, the nature of the response has been to seek such protection in market structures. For example, the flow of portfolio investments has dwarfed foreign direct investments, and it is the latter type of investments much more than the former that would respond most coherently to legal rules.

The case then for the existence of a direct relationship between law and development is by no means clear. At a minimum, we need to reassess our conception of law to understand its relevance and relationship to economic and political development.

3. The Transplantation of Law

The difficulties inherent in reasoning from the experiences of one society to a prescription for another have long provided some salient critiques of the early modernization and law and development scholarship. The task demands comprehensive understanding of the societies, the capacity to identify and isolate relevant causal factors in the experiences of one and in the future development of the other, and a certain level of

distance from both societies so that the scholar is at once sympathetic and dispassionate. Perhaps most daunting, the scholar who undertakes the task must apply descriptive knowledge gained from the study of one society to endorse the prescriptive aspirations of the other. Whether this task can ever be undertaken successfully in any field of learning is open to question. The likelihood of its success with regard to law is virtually nonexistent.

The usual mode of analysis is to conceptualize those elements of a legal system deemed influential in the development experience of one society, and hypothesize the fit of those elements within a developing society. That the relevant elements can be classified in numerous ways and abstracted in various forms is readily conceded. Nor is the legal scholar particularly dogmatic about the consistency of the fit. Thus, elements of the legal concept can be modified in the process of transplantation to accommodate both the change in environment and time.

No sophisticated lawyer or academic today subscribes to the vulgar view of law as a commodity easily transplanted from one society to another. Yet, the view that legal institutions can, with some modest tinkering, be beneficially and effectively exported from advanced industrial societies to developing countries, continues to exert substantial influence in practice. Whatever lip-service is paid to the peculiar conditions of particular societies, the instrumentalist conception of law invariably exerts its dominance in the routine assumption that material prosperity is tantamount to social stability, which is a product of law. Rarely pausing to explore the causal link among these indicators, practitioners and academics in developing and developed societies alike treat them as bundled agents, differing only as to what minor adjustments ought to be made at the margins.

Now that the globe seems to be marching to one drum beat, that of the free enterprise capitalist system, it follows that the legal institutions and practices that have fostered and sustained the triumph of the capitalist mode of production, accumulation, distribution, and consumption are best suited for other societies, appropriately modified at the margins to account for the peculiar foibles of those societies. Not surprisingly, then, the apostles, priests, and lay missionaries of law, as typically understood and practiced in the industrialized countries, have fanned out to all corners of the globe, preaching the gospel of clear individual title to property rights, a functioning judicial system to adjudicate such rights, transparency of administrative and tax edicts, consistent enforcement of such edicts, the separation of powers, judicial review of administrative and legislative decisions, private ordering and adjudication of rights through arbitration whenever possible, and a minimalist approach to regulation by the state. Although often clothed in the garb of international law, the scripture is

simply one of a particularized global standard to be implemented *within* national territories.¹⁵³

But even when one narrows and restates the transplantation project in this technocratic form, significant problems continue to attend the project. Most clear is the axiomatic fact that prescriptive projects invariably carry normative underpinnings, and technocratic language, however successful in obscuring those implications, does not remove them. Inherent in the process of isolating and transplanting those features of a legal regime deemed critical to the success of a market-based economy are the making of choices as to the appropriate trade-offs between equity and efficiency, distribution and accumulation, consumption and savings, popular participation and technocratic elitism, and similar variables. Those choices may have been made by industrialized societies, but it does not follow that industrializing countries ought to assume them.

Second, even assuming that we can determine the optimal normative preferences of people who have not manifested their choices through their own internal processes, we simply do not know enough about the causal relationship of law to social and economic forces to permit any meaningful effort at calibrating the interaction of these forces to yield the sought-after normative objective.

It is sometimes argued that the response to these difficulties is not the abandonment of the transplantation projects, but an open-mindedness about its efficacy and continuous appraisal and restructuring to accommodate it more readily to the needs of the society it seeks to serve: transplanting legal structures from one society to another ought to be viewed in the nature of experimentation. The counter to this response is how much should be spent in this transplantation process? The price will be paid not by the theorists and laboratory technicians, nor perhaps by those in the upper echelons of the receiving society, but unquestionably by the poor, the disadvantaged, and the excluded in those societies; that is by those who are least insulated from the buffeting winds of change and experimentation.

¹⁵³ Several U.S. General Accounting Office reports prepared for the U.S. Senate in the context of legislation on foreign assistance reviewed the work of the U.S. Agency for International Development, the U.S. Information Agency, the U.S. Department of State, and the U.S. Department of Justice to promote the rule of law as part of the transformations in the changing societies of Latin America and Eastern Europe. See *GAO Report to Congressional Requesters: Foreign Assistance, Promoting Judicial Reform to Strengthen Democracies* (Document B/252458 U.S. GAO-NSIAD Sept. 1, 1993).

4. The Causation Difficulty

The most central but least understood aspect of the relationship between law and development is the extent to which development is predictably responsive to law. It is a central question because proponents of law and development view law in purposive terms. Law's utility lies in its capacity to affect development positively. This means that the idea of a relationship should not be taken on faith, but must be demonstrated. The liberal legalists of the early law and development movement was founded upon this premise. The current movement, on the other hand, buoyed by the collapse of the Soviet Union, the abandonment of the socialist models of production, distribution, and central planning by Communist and post-colonial states alike, together with privatization and other market-based approaches to economic transactions, is content to assert without explanation the correlation of law and development. Aside from the intellectually unsatisfactory consequence of this approach, recent developments demonstrate its shortcomings.

Neither the substantial economic transformations in such diverse environments as Argentina and the People's Republic of China, nor the back-tracking in the economic policies of Sub-Saharan African states, are explained by a self-evident relationship between law and economic success. There is simply no getting around the need to make some sense of the relationship, for integrally central to our occupation as scholars, lawyers, and policy makers is the belief that facts are silent without theory.¹⁵⁴

Making sense of the relationship of law to development involves at least three distinct processes. First, there is the need to articulate one's conception of law. There is nothing static or global about law as a cultural phenomenon. Our understanding of law is contingent upon the Western experience and its effects on development in newly industrializing countries must be equally contextual. Second, there is the need to identify the applicable conception of development; the advancement of which is sought by the invocation of law. Finally, there is the need to articulate the nature of causal linkages. It is highly unlikely that given the contingencies of what constitutes law, and what we define as development, there would be but one set of linkages. Indeed, the central role of law and development studies lies in discriminating among various linkages that ought to be deemed relevant in a particular circumstance.

It may be obvious, but nonetheless essential, to note that the spheres within which we seek to understand the interplay of law and development

¹⁵⁴ See JOHN KEEGAN, *HISTORY OF WARFARE* 6 (1993) (paraphrasing F.A. Hayak).

are not infinite. We do not today inquire into the hierarchies of religious faiths and the relevance of law for the development or furtherance of the preferred faiths.¹⁵⁵ By contrast, we lack a similar deference to the possibility of the existence of differing conceptions of what constitutes the development of the economic and political order of a society. We endow these latter with a universalist cast, and we experience little difficulty speaking of law and development with the unmistakable hierarchical premise that their operation in some societies is superior to their workings in other societies. What explains this difference of treatment? It cannot be because law is ineffectual in its interaction with the one, but instrumental in organizing the other. Surely in both, law operates as a cultural phenomenon, helping to structure, suppress, or promote the hierarchies. The choice then to focus on economic and political issues in the discussion of law and development cannot be explained by the claim that law is instrumental with regard to these, but not in the context of other socio-cultural practices. Nor can the focus on economic and political development be justified by the quantifiable impact of law on these endeavors. The difficulty of quantifying the relationship has formed much of the criticism of the effort to articulate precisely the relationship of law to development.¹⁵⁶

Rather, the focus on law and development embodies a sometimes consciously articulated, but more frequently only implicitly assured conclusion that all people must want development, which by its capacity to generate and sustain material well-being and stable socio-political order has proved its superior mettle. In other words, it is not so much that law demonstrably generates and promotes economic development, as it is that given the success of Western economic and political performance, it must follow that Western legal institutions cannot be inimical to such success. It follows that those seeking but failing thus far to achieve such success, should take the short-cut of embracing the Western legal framework.

¹⁵⁵ The insulation of the substantive validity of religious beliefs from open contestation is itself a temporal and geographical phenomenon contingent on dominant socio-cultural ethos in the West. Neither history nor logic preordains the persistence of this state of affairs, and recent trends of religious fundamentalism in the West, the Islamic world, and the Indian Subcontinent challenge any such foundational sanctity of religious beliefs from challenge by intellectual peasants, social conventions, and government forces. Just as religious beliefs may today be insulated from open contestation, so also have other cultural phenomena in the past including medical practices, politics, philosophy, and law.

¹⁵⁶ Cf. Trubek, *Short Happy Life*, *supra* note 2 (presenting the views of one participant in the early stages of the law and development movement).

This approach must be resisted. The mere juxtaposition of institutions does not establish a causal link among institutions. The failure of Communist societies no more axiomatically proves that socialist law is anathema to the accumulation of capital, than the success of Japan proves that centralized or guided administration is essential to capital accumulation. The recent economic success of some East and Southeast Asian countries undercuts the claim for a presumptive direct link between legal institutions and practices on the one hand, and preferred economic or political outcomes on the other.¹⁵⁷ The conclusion is thus inescapable that the conventionally articulated linkage between law and development is not so much a logically derived causal one, as it is that success justifies all.¹⁵⁸

This raises the issue whether it is meaningful to decipher rational relationships between law and development. The study of law and development can be descriptive. One can assay the cultural, political, social, and economic environment within which particular institutions function. But the undertaking, so construed, will likely circumscribe the observer's latitude and capacity to make prescriptive statements about the interactions of these institutions.¹⁵⁹ This has been the fundamental teaching of the

¹⁵⁷ See generally EAST ASIAN MIRACLE, *supra* note 129.

However, this is not the same as arguing that there are no linkages between social and institutional structures on one hand, and economic and political performance on the other. The point being made is that the mere existence of one does not without more foreshadow the other. Further, and without in any way understating the economic triumph of East Asian economies, the recent revelations of the pervasiveness of corrupt practices within the regimes of the Korean political economy and the relatively untested emergence of political pluralism in Taiwan, Hong Kong, and Malaysia, and its virtual absence in Indonesia and Singapore, should give pause to those who cite the East Asian example as illustrative of the successful transplantation of Western European and North American economic or political paradigms to emerging societies.

¹⁵⁸ Professor Crawford Young has pointed out that in the 1960s there was a similar despair about the economic prospects of many East Asian economies as there is today about Africa.

[T]he international development community had regarded South Korea as hopelessly corrupt and singularly unpromising. The Pierson Committee Report had concluded that it seemed doomed to permanent dependence on foreign aid with no possibility of achieving a high growth rate from its own resources. Critics could point to almost every abuse in the catalogue: there was serious corruption; there was inflation; the aid dialogue was most acrimonious; and export of the country's own products were low.

Young, *supra* note 50, at 7.

¹⁵⁹ This incapacity does not obviate the need for the interpreter to articulate normative goals. The interpretive process is impossible without the existence of such a mindset. See Chibundu, *supra* note 2, at 1445. Similarly, this is not an argument against theory. Rather, it is an argument against certain types of theory, essentially those of a heuristic character.

work of even highly renowned observers and analysts like Max Weber.¹⁶⁰

The point is not that there is no connection between law and development, but rather that there are numerous and varied connections not easily pigeonholed into existing classifications.¹⁶¹ Equally important, these relationships are generally dynamic.¹⁶² The argument is not against trying to understand and influence these connections, nor is it an argument for unbounded eclecticism; it is an argument against insisting in the wake of the quest for predictability and certainty that square pegs fit into round holes. Understanding the relationship of law in development requires not so much embarking on a predestined voyage of discovery framed in the classical scientific mode of hypothesis formation and demonstration of causal linkages, as much as it embraces the classical

¹⁶⁰ See Trubek, *Max Weber on Law*, *supra* note 146 (providing a brief synopsis of Max Weber's work).

¹⁶¹ This argument is different from the liberal paradigm which, while recognizing the interplay of several forces, invariably seeks to dichotomize them, and spends much energy seeking to explain how those two intersect or interact. Cf. APTER, *supra* note 23, at 24 (discussing the concept of the "double market" in political economy, where the idea of choice is said to work systematically on the basis of information available through intersecting and mutually compensating systems, but which are nonetheless classifiable as economic or political).

¹⁶² It might be argued that there are core elemental legal concepts such as the protection of rights to private property that are essential to development. See, e.g., Epstein, *supra* note 148, at 562-63. Such a broad framing of the issue is not helpful. No contemporary society completely denies protection to private property ownership, and it is doubtful whether any can. On the other hand, there is no indication that the level of development in a given society can be correlated to the level of protection afforded private property. Many developing African, Latin American, and Asian countries afford at least as much protection to private ownership and property control as do many developed countries of Western Europe. Nor is the lack of enforcement of the laws on the books a satisfying distinction. Aside from the difficulty of quantifying enforcement and compliance, there is no evidence that rigid enforcement is any more conducive to development than flexibility of administration. Indeed, many have suggested that Japanese success reflects precisely the willingness of the bureaucracy and the society to implement policies notwithstanding formal laws. See, e.g., Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 1995 COLUM. L. REV. 923 (1995) (reviewing literature on the use of administrative guidance defined as "when administrators take action of no coercive legal effect that encourages regulated parties to act in a specific way in order to realize some administrative aim"). In this context, it is worth noting that some of the most rapid developments in the United States occurred in the last third of the nineteenth century, at a time when it can hardly be said that rigorous enforcement of the laws was the norm.

legal methodology of interpretation.¹⁶³ In this sense, legal methodology has as much to offer to development studies as do economics and political science.

What are the connections? The central point about law and development is that economics and political science are part of the same cultural environment within which persons and institutions interact. Both seek an expansive understanding of those interactions, and similarly attempt to shape those interactions. The starting point of reference must be that the study of the reflexive influences of law on development, the impact of individuals on institutions, the engagements of the state with society, and of society with the state, are not likely to be of much use unless they are undertaken within the living cultural settings of the society under study.

The failure to give effect to this point uniformly was the fundamental shortcoming of liberal legalists, pragmatic internationalists, and dependency theorists. The liberal legalists, for example, saw the derivation of legal principles as exclusively a function of an international legal order, and the conception of development as a shared undertaking in which national aspirations must be molded and translated into international socio-economic constructs. Pragmatic internationalists on the other hand, focused exclusively on the international character of law and development, paying little or no attention to the particular national and sub-national forces that shape the cultural settings within which law, politics, and economics interact. While the dependency theorists correctly understood the relevance of internal cleavages to economic and political development, their analysis fell short because they sought to explain those links almost exclusively in terms of international power structures. Moreover, they did not seek to relate the economic and political structures to any legal order other than raw power. The affirmative argument here is that because the relationship of law to development is culturally determined, any effort to understand that relationship must focus on the internal cultural structures of the society. External influences affect internal cultures, but they are rarely the primary determinants of cultural relationships. Ultimately, the particular day-to-day existence of people, their struggles for scarce resources, the availability and abundance of social distractions, and the internecine quest for power and dominance, motivate and channel the structure and principles of a legal order, as well as socio-economic and

¹⁶³ Cf. APTER, *supra* note 23, at 14 (reconceptualizing development studies with an emphasis on transdisciplinary rather than interdisciplinary studies, and a focus on interpretation rather than science); *id.* at 22 (describing the phenomenal approach in social and linguistic discourse that "the way actions are interpreted, described to other people, used to think past current predicaments, to project solutions, is itself 'action'").

political development. It is these considerations that ought to dictate the nature and direction of future inquiries into law and development.

B. Reconceptualizing the State: Law and Development in Sub-Saharan Africa

It is clear that understanding the nature of the contemporary African state is a core task of any revitalized law and development discipline. While political scientists and international relations scholars in recent years have turned extensive attention to the nature of the state, revealing its essential attribute as in large measure a legal construct, and therefore highly contingent and manipulable,¹⁶⁴ legal scholars have explored it only in the most cursory of fashions. The standard perspectives have been formed in the crucible of ethnic struggles or nationalism. While these no doubt have relevance for law and development studies, they are insufficient pillars for the project.

As a preliminary matter, the international relations scholars' focus on interstate relations means that the understanding of the state is often undertaken in terms of the role domestic actors play in shaping interstate relations. The state is generally taken as a given; it is evaluated in terms of its role vis-à-vis other actors. While this neo-realist approach is certainly an improvement over the traditional realist approach, it forms little basis for a rejuvenated law and development curriculum.¹⁶⁵ It offers little not already encapsulated in the pragmatic internationalist perspective of international business lawyers, which is intellectually unsatisfactory and pragmatically shortsighted.

Political scientists increasingly have undertaken to explore the nature of the state by diagnosing the power relationships among the component parts. Under this approach, the state is viewed as the product of

¹⁶⁴ See, e.g., Young, *supra* note 50; THE PRECARIOUS BALANCE, *supra* note 151; THE AFRICAN STATE IN TRANSITION (Zaki Ergas ed., 1987); John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139 (1993). The return to the understanding of state craft or neo-realism in international relations studies represents acknowledgement of the limitations of regime or institutional cooperation analysis for understanding international relations. See, e.g., ROBERT D. KEOHANE, AFTER HEGEMONY 7-11 (1984); Friedrich Kratochwil, *Of Systems, Boundaries and Territoriality*, 39 WORLD POL. 27 (1986); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993); Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law Historiography*, 10 AM. U. J. INT'L L. & POL'Y 717, 717 (1995).

¹⁶⁵ Cf. John Gerard Ruggie, *The False Premise of Realism*, 20 INT'L SECURITY 62 (1995) (criticizing the neo-realist approach from an anti-institutionalist standpoint).

pluralistic competition among various groups. In many ways, this approach is the liberalizing of the radical dependency school approach, shunned of its particularistic ideological underpinnings. Best represented in mainstream legal scholarship by public choice theory, the approach may prove to be of some use to law and development scholarship, but it clearly suffers from significant shortcomings.¹⁶⁶ This theory assumes that social interaction is motivated by the desire to obtain control over the state. This proposition, at least in the context of developing societies and especially of contemporary Sub-Saharan Africa, is questionable, and to accept it at face value evades a necessary inquiry.

What is the nature of the post-colonial Sub-Saharan African state? It is certainly in part a geographical expression that mediates between the interests of people and institutions living within specified territorial boundaries and those who live without. How well it performs this task may be subject to debate, but the parameters of this outward facing task are well-defined, and the obligations and rights that it entails are reasonably well-acknowledged.¹⁶⁷ Thus, there is virtually no doubt as to the capacity and competence of the African state to determine issues of naturalization: to raise and maintain a standing army; to regulate external trade and tariffs; to license and control foreign investment and immigration; to levy and collect taxes on trades and manufactures; to regulate money supply and credit; and to enter into foreign or international agreements, treaties, and conventions with foreign governments, institutions, individuals, and international bodies. In short, the African state is a potent arbiter of external relations and those aspects of the domestic economy that are directly related to external relations. These are the so-called formal or modern sectors of the post-colonial state.¹⁶⁸ Not surprisingly, the institutions underpinning these sectors of society were either directly bequeathed to the independent African states by former colonizers or have been fashioned to maintain cooperative relationships with other states and

¹⁶⁶ Public choice theory reflects the belief that the economic theory of rational consumer choice can be used to explain political behavior in a pluralist society, especially with regard to legislative and administrative processes. For the underlying theories and their application to emerging issues in international political economy, see Enrico Colombatto & Jonathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia*, 4 CORNELL J. L. & PUB. POL'Y 379 (1995).

¹⁶⁷ See, e.g., Jackson, *supra* note 75. The seeming internal disintegration of states such as Liberia, Somalia, Rwanda, and Zaire has popularized the notion of the failed state. See generally Jennifer A. Widner, *States and Statelessness in Late Twentieth-Century Africa*, DAEDALUS Summer 1995, at 129 (distinguishing between failed and collapsed states and proposing remedies for the former).

¹⁶⁸ But see Young, *supra* note 50, at 4-5 (citing some African scholars who contend that the state has failed to discharge its tasks internally and externally).

international bodies. They appear to be instances of successful transplantation, and their legitimation is derived less from their functional effectiveness or broad internal acceptance, as from their recognition by the foreigners with whom they deal.

But the capacity to participate in interstate relations or to regulate economic activities have never been considered to exhaust the scope of state activity nor to define the boundaries of its sphere. Indeed, the idea of the state as articulated by its earliest Western proponents found its mainstay in the relationship of the individual or subject to the state or sovereign.¹⁶⁹ It is the form and character of that relationship within the contemporary Sub-Saharan African society, and how it relates to the role of other institutions within the society which have begun to take on theoretical significance under the nomenclature of civil society that law and development must come to grips. That relationship is neither clear nor straightforward, but it is precisely the ambiguity that makes the understanding critical both to the discipline of law and development and to the maturation of the African state. While a conclusive exploration of the issue is beyond the scope of this Article, what follows sketches some possible ramifications.

1. The Social Context of the Post-Colonial African State

If the creation of artificial nation states is the lasting legacy of colonization, the centralization of governmental functions among a narrow cadre of people within a few geographical power centers is the defining feature of the post-colonial African state.¹⁷⁰ This obvious potential for the concentration of coercive power is amplified by the remarkable aggrandizement of the roles this archetypal state has assigned to itself under the guise of promoting national development. The state has not merely purported to regulate economic activities, but has become a direct and dominating participant in all segments of social and economic life, including: the direct provision of primary, secondary, and post-secondary education; culture, including ownership and control of most of the media — in a variety of electronic, wireless, print, and theatrical forums; and ownership and control of economic resources in virtually all industries including mining, manufacturing, agriculture, transportation, insurance, and banking. The state frequently exercised its control in direct competition with and to the displacement of private providers.

¹⁶⁹ See generally FRANCIS HENSLEY, *SOVEREIGNTY* 144-57 (1986).

¹⁷⁰ See, e.g., Wunsch & Olowu, *supra* note 101, at 4-5; Young, *supra* note 50, at 194-95.

The effect might appear to create vigorous competition among groups within these states for control of the levers of state power. There is, however, equally persuasive evidence to the contrary. What is remarkable about most post-colonial African states is not the level of electioneering politics, violence, or political strife expected from vigorous competition, but the relative absence of these elements.¹⁷¹ Nor can the occasional quest for power within the African state be readily explained in standard or institutionalized terms; mechanisms for aggressive peaceful competition are rarely to be found in any systematic study of the African state.

What accounts for this transparent lack of competition for the levers of state power? At its core, this state of affairs challenges the assumption that the character of the relationship between African societies and the African state replicates those relationships as they exist in the West, or that the African existence is simply Western existence gone awry. Is it possible that post-colonial African societies are not simply poor imitations of Western societies? That they are not hybrids of the native and the foreign, but that colonialism created a distinct and independently intelligible society whose interaction with the state cannot be surmised by a simple analogy from Western experience?

Consider one distinction. Whatever else may be said about African states, they are not the product of social revolutions.¹⁷² Unlike most European and two-thirds of the North American states, African states have not emerged as the triumph of a particular ideology about the nature of the individual or the individual's relationship to society, the composition of society, or institutions within society.¹⁷³ Yet, more than in most other regions of the world, the African state stands out as an autonomous entity, and did so even as it absorbed the functions of social organizations

¹⁷¹ Africa's history has been marked by civil wars, but putting aside the wars for succession to the post-colonial state as in Angola and Mozambique — and arguably, the very muddled cases of Chad and Uganda — these wars, prior to the mid-1980s, have not been about who controls the central state, but about the right to secede from the state. Biafra, Katanga, and Southern Sudan are illustrations in point. These should be contrasted with the trend of more recent civil wars such as those in Liberia, Sierra Leone, and Somalia that appear to be genuinely about control of the state itself, not its break-up.

¹⁷² Whether one views the decolonization process as a revolution, the African state was hardly forged by that process. With few exceptions, the post-colonial African state is a direct successor to a colonial administrative unit. With the arguable exception of Cameroon, none was the product of any grassroots social or political movement.

¹⁷³ Compare LIAH GREENFELD, NATIONALISM 2 (1992) with SKOCPOL, *supra* note 71, at 29.

and competing institutions within society.¹⁷⁴ Possible explanations for this relative autonomy are not difficult to embrace.

Colonial in origin, the state lacked any root in the experiences or concerns of the indigenous peoples of the territories over whom it imposed order. Professor Skocpol's memorable assertion could not have rung truer as the definition of the colonized African state than it did for the societies she was analyzing:

The state, properly conceived, is no mere arena in which socio-economic struggles are fought out. It is rather a set of administrative, policing and military organizations headed, and more or less co-ordinated by an executive authority. Any state, first and fundamentally, extracts resources from society and deploys these to create and support coercive and administrative organizations.¹⁷⁵

Nor did political independence substantially change the nature of the state. Although social institutions like trade unions, teachers and students, journalists, and similarly unorganized but self-identifiable groups played significant roles in the decolonization process, they never effectively constituted alternative power centers to the state, nor did they ever vigorously challenge the state for control. These institutions and groups were themselves imports that had penetrated only slightly into the social and cultural fabric of society. They represented the interests of small groups of persons whose allegiance to the new order was at best tentative, but for the most part unformed.

The military was the one institution that made a strong bid for control of the state, and it obtained control without much opposition from other possible power centers. The military then systematically reduced the other social institutions to impotence and undermined any claim of the state as a representation of society. The praetorian state that thus emerged was itself a reflection of the experiences of the society, but it failed to embody its aspirations. Incapable of delivering on those aspirations, the state generated internecine struggles among the very limited circle of people who gained control. Entirely lacking were any conflicts about the identity, nature, or structure of the state itself.

When in the late 1980s there were stirrings of popular uprisings in much of Africa, there seemed to be the potential for genuine social up-

¹⁷⁴ Cf. SKOCPOL, *supra* note 71, at 29 (stating that "state organizations are at least potentially autonomous from direct dominant class control").

¹⁷⁵ *Id.*; but see S. N. SANGMOAN, PSEUDO-CAPITALISM AND THE OVERPOLITICIZED STATE 3 (1994) ("The state is a set of relationships and interactions among social classes and groups that is organized, sustained and regulated by political power.").

heavals, transformations that may well be essential for the establishment of the identity of a state. Whether these represent a new beginning with renewed possibilities is at least subject to debate, but they suggest the possibilities for a quite different relationship of society to the state than that reflected by the movements for independence and the various military coups d'état.¹⁷⁶ Much will depend on the extent to which these new movements reflect efforts by bodies with substantial roots in the society to employ the state as a tool in their daily experience; not to overthrow the state, nor to refrain from interaction with it, but to make use of it. How susceptible to their manipulation the state is will itself depend on how readily the autonomous institutions of the state are capable of adapting to the particularized needs of the societies. If the focus remains external — a high likelihood given the drive for economic growth and the underlining state ideology of capital accumulation — then the chances are fairly small. If these uprisings, on the other hand, reflect an effort by social movements within Africa to employ the state to realize normative visions for their societies (and the willingness to do so notwithstanding short-run hardships) then the prospects would appear to be much brighter. Which of these tendencies the uprisings reflect is beyond the scope of this Article, but as suggested below, they should be the concern of law and development scholars.

If neither the people nor the institutions of a society readily identify with the state, such a failure must have significance for the study of law and development. The effect on our understanding of law is virtually axiomatic; whether we consider law in the narrow sense of the command of the sovereign or in the much broader sense of the norms, standards, and procedures flowing from the experiences of a community.¹⁷⁷ We may expect that if the relationship of the people to the state is passive, law will be manifested as an alien presence, generally benignly ignored, occasionally heeded when to do so imposes no meaningful costs, and adhered to only when to ignore it would be supremely foolish. A passive relationship of the people to the state thus implies that much of life's activities will be organized outside of the formal legal regime; i.e., those norms, standards, and procedures recognized and accorded legitimation by the state. This is precisely the sort of relationship that appears characteris-

¹⁷⁶ Compare Nyang'oro, *supra* note 131, at 23 with Widner, *supra* note 131, at 1-2. See also Jean-Germain Gros, *supra* note 137 (discussing the difficulties of establishing a multiparty institutional structure in Cameroon).

¹⁷⁷ See generally Kuper & Kuper, *supra* note 37 (analyzing the different conceptions of law). Cf. Chibundu, *supra* note 2, at 1445-46 (positing "that the use of structure in interpretive theory permits the functional alignment of fluctuating humanistic values to rules of law").

tic of law and state relations in contemporary African societies. It is also reasonable to expect that an activist involvement of society and the state will generate a distinctly different impact for law on development.¹⁷⁸ In the latter situation, the rule of law becomes not an abstract chant, but a living concept shaped and molded to address the needs of the participatory community.

2. The State, the Rule of Law, and the Law of Rules

The rule of law like free market and democracy has become a talismanic phrase easily brandished as good by advocates of the new law and development creed, but rarely defined. It is assumed to exist and to operate in the successful Western and industrialized societies, and presumably absent but worthy of importation into impoverished societies. Moreover, like democracy and the free market, it would appear that as long as the rule of law is deemed to be present, its specific contours are quite irrelevant to development. It is therefore not the quantity or quality of the rule of law that matters, but its sheer presence. Notwithstanding the likelihood that for most of its proponents, the invocation of the phrase amounts to no more than a rhetorical flourish intended to assert a cultural difference, the term is worth taking seriously because it suggests the possibilities and limitations of a law-based approach to issues of development.¹⁷⁹

Whatever may be its ultimate scope, the rule of law conveys itself as a counter proposition to arbitrary rule or rule by caprice.¹⁸⁰ It is a statement of the supremacy of law over personal rule or expedient politics. As such, the rule of law acts to restrain the exercise of power by imposing the need for accountability on those who employ power in the

¹⁷⁸ Cf. *supra* notes 137-44 and accompanying text (presenting as one model of the relationship of law to development, the views of Hernando de Soto and his Institute for Liberty).

¹⁷⁹ Cf. Bernard J. Hibbitts, *Albert Van Dicey and the Rule of Law*, 1994 *ANGLO-AMERICAN L. REV.* 1, 26 (stating that "the Rule has attained a status in the legal mind more befitting an article of faith than a doctrinal construct . . . less of an *a priori* truth than a reflection of past political considerations").

¹⁸⁰ This definition of the rule of law dismisses the idea that the rule of law should be viewed as synonymous for law and order. See J. B. Ojwang & G. Kamau Kuria, *The Rule of Law in General and Kenyan Perspectives*, 7-9 *ZAMBIA L.J.* 109, 110 (1975-77).

name of the public good.¹⁸¹ The rule of law is thus a particular application of a much broader and ancient concept.¹⁸²

The critical question raised by the concept is not whether power or arbitrariness should be checked, but what makes the rule of law a preferred means for doing so.¹⁸³ Part of the answer lies in the origins of the modern conception of the rule of law, and some part in the means by which we attempt to give the concept concrete reality.

The modern conception of the rule of law derives from the late nineteenth and early twentieth century movements in Anglo-American legal scholarship to convey the operation of law, law-making, and functioning of the legal system as scientific processes governed by ascertainable and predictable rules.¹⁸⁴ The rule of law, as the embodiment of governance by fixed principles rather than the discretion of political expediency, fits into this mode by serving, in the view of its best known exponent of that period, Albert Venn Dicey, three functions.¹⁸⁵

First, it checks the arbitrariness of state officials by subjecting governmental action to scrutiny under "regular law; that is, the legal principles developed by common law courts in common law adjudication rather than by specialized tribunals staffed by governmental functionaries."¹⁸⁶ Second, the conduct of individuals in a society is governed solely by such regular law duly enacted or formally pronounced through these appropriate channels. Third, the rule of law serves to affirm that certain fundamental, individual, or private rights while they may depend on the government for their enforcement, exist beyond transient governmental action, at least once they have been confirmed to exist by the judiciary.

¹⁸¹ This feature has led even a well-known historian of left-wing leanings to term the rule of law an "unqualified good." See E. P. THOMPSON, *WHIGS AND HUNTERS* 266-67 (1975).

¹⁸² Cf. Hibbitts, *supra* note 179, at 26, 26 n.86 (tracing the idea of the rule of law back to Bracton who in 1258 had declared that the King was under "God and law").

¹⁸³ Humankind has developed numerous approaches to checking despotism beyond the rule of law. Others that come to mind include revolutions, appointments, or elections to fixed terms of office, diffusions of power among social institutions such as the religious and the secular, monarchies and oligarchies, and contemporary constitutionalism grounded on the idea of the separation of powers.

¹⁸⁴ See generally Robert W. Gordon, 94 *HARV. L. REV.* 903 (1981) (reviewing G. EDWARD WHITE, *TOWARDS LAW IN AMERICA: AN INTELLECTUAL HISTORY*) (asserting that late nineteenth century legal academics were inspired by the generally prevailing ideal of scientific endeavors). See also J.B. Ojwang & G. Kuria, *supra* note 180.

¹⁸⁵ See Hibbitts, *supra* note 179, at 18.

¹⁸⁶ See *id.* at 24-25 (citing Albert Venn Dicey's teachings).

What is evident from these principles is that the rule of law was defined more by what it opposed than what it created. Hardly surprising, it was a principle rooted in the politics of the day, both societal and professional.¹⁸⁷ In both England and the United States, the last quarter of the nineteenth century witnessed a valiant effort by common law courts to assert the supremacy and legitimacy of judge-made laws over the encroaching law-making functions of legislative and administrative bodies. For Dicey, for example, the rule of law was an argument for judge-made law which in his view was more likely to protect cherished societal interests such as individual freedoms than was the legislature.¹⁸⁸ This, he thought, was more likely to be the case given judicial independence and the logic, symmetry, and certainty that he contended were features of common law adjudication.¹⁸⁹ Furthermore, this claimed virtue of common law adjudication itself reflected the professional contestation taking place among legal educators; the superiority of formal legal education at universities over the practical methodology of legal apprenticeships.¹⁹⁰

How contingent on political expediency our understanding of the concept of the rule of law is, is fully borne by definition of the term as rule by judges rather than by legislators. Surely, none of the current proponents of the concept and its extension to developing societies mean to imply that judge-made law is preferable to legislative or administrative decision-making for being more predictable, more scientifically based, more protective of property interests, or otherwise more likely to spur economic, political, or social development.

What then do current proponents of the rule of law as a necessary component of development mean to suggest? Three possibilities warrant some attention. First, they may mean the existence of specific rules or laws that further development. Second, they may be referring to the values embedded in the procedural aspects of regularized law-making and law-enforcement. Finally, it may be an assertion of the benefits of institutionalizing the mechanisms and processes of law-making, law interpreting, and law-enforcement. Are these objectives consistent, and can they be squared with the reality of development?

Much of the renewed interest in law and development continues to focus on the adoption, enactment, or promulgation of specific statutes or rules as the statement of the relationship of law to development. In the

¹⁸⁷ *Id.* at 23.

¹⁸⁸ *See, e.g., id.* at 27 (contending that Dicey's definition and invocation of the rule of law reflected popular prejudices which gave his principle an added attraction as a statement of valid English law).

¹⁸⁹ *See id.* at 17.

¹⁹⁰ *See id.* at 23.

economic area, for example, laws on title to property, taxation, foreign investment, privatization, and the regulation of securities markets and corporate governance continue to be advocated on highly specific grounds as essential to economic performance and growth in the new world order.¹⁹¹ The advancement of specific constitutional formulae also characterizes proposals on political development. But this approach to law and development is hardly new, and despite claims that the new approach has learned from the past, that the current focus is on constitutive rather than specific rules, or that the new political environment for global capitalism assures success where the old Cold War militated against it, these are illusory claims. Indeed, specific area studies, notably in Central and Eastern Europe as well as in Africa, indicate that persistence in transferring specific substantive rules and processes from the West will not do.¹⁹² Given the lack of uniformity of substantive rules among concededly successful industrial societies, the reality that rules flow from and seek to reproduce the particular temporal and spatial experiences of a given society, and the clear absence of any confirmed understanding of the causal links between legal rules and development, it is fair to say that

¹⁹¹ For a discussion on the law on private property, see Note, *Russian Property Law, Privatization, and the Right of "Full Economic Control,"* 107 HARV. L. REV. 1044 (1994) ("Property law is central to economic, political, and legal reform in post-Soviet Russia. A stable system of private property promotes efficiency and prosperity in a market-based economy and is crucial to the development of a democracy."); see also Im Reisman, Note, *The World Bank and The IMF: At the Forefront of World Transformation,* 60 FORDHAM L. REV. 349 (1992); but see Steven E. Hendrix, *Myths of Property Rights,* 12 ARIZ. J. INT'L & COMP. L. 183 (1995).

For a discussion on taxation, see, e.g., Edward H. Lieberman, *Russia Modernizes Its Tax System, But Ghosts of the U.S.S.R. Still Haunt,* 4 J. INT'L TAX'N 32 (1993).

For information on foreign investment, see, e.g., Gray & Jarosz, *supra* note 148 (discussing foreign investments in Central and Eastern Europe); Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam — A Case Study,* 107 HARV. L. REV. 995 (1994).

For scholarship on privatization, see, e.g., Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective,* 60 FORDHAM L. REV. 23 (1992); J. Robert Brown, Jr., *Order From Disorder: The Development of the Russian Securities Markets,* 15 U. PA. J. INT'L BUS. L. 509, 514-15 (1995); Dariusz M. Budzen & Ania M. Frankowska, *Prohibitions Against Insider Trading in the United States and the European Community: Providing Guidance for Legislatures of Eastern Europe,* 12 B.U. INT'L L.J. 91 (1994); but see Andrei A. Baev, *Civil Law and the Transformation of State Property in Post-Socialist Economies: Alternatives to Privatization,* 12 UCLA PAC. BASIN L. J. 131, 152 (1993).

¹⁹² See, e.g., JOAN M. NELSON ET AL., *INTRICATE LINKS: DEMOCRATIZATION AND MARKET REFORMS IN LATIN AMERICA AND EASTERN EUROPE* 12-16 (1994).

conceiving the rule of law in terms of specific substantive rules of conduct is at best an incomplete undertaking.¹⁹³

But many insightful commentators have gone beyond equating the rule of law and its relevance for development with specific substantive rules, and rather, have suggested that its force lies in the procedural rectitude that the regime brings to bear on the use of power. For such proponents, law in development means promoting those mechanisms that emphasize and assure the channelling of administrative fiat, affording all actors equal opportunity or access to decision-making, routinized processing and adjudication of claims, and judicial independence from the political branches. These abstract propositions may be worthy goals and objectives, although this claim should not be accepted independent of the setting against which they are judged. It is possible that development, defined in terms of economic prosperity and political stability, might well be furthered by legal regimes possessing these attributes. Substantially more difficult, however, is fashioning the implementing doctrines by which these objectives may be realized. Operational rules for administrative agencies and the courts have not been shown to be any more effective in constraining the exercise of discretion than have been substantive rules, nor is it clear why they should be.¹⁹⁴ Indeed, as American experience amply demonstrates, the line between procedural guarantees and substantive rules and norms is elusive.¹⁹⁵

To avoid this difficulty, the tendency among new practitioners of law and development is to focus on the seminal importance of people and institutions in the development process. They contend that procedural rectitude can be built into national development through the education of policy and decision-makers. The legal training of judges, lawyers, and bureaucrats, the provision to courtrooms of equipment, and even the training of administrative staff in mundane administrative tasks, are now viewed as essential elements of the legal transplantation project.

¹⁹³ Although the United States experience is generally advanced as the model of the role of law in capital formation and dissemination, there is little doubt that the model differs significantly from those of other societies such as the French, German, Japanese, and the newly industrialized countries of East Asia. The rules on ownership, planning, corporate governance, credit allocation, capital mobility, and overall government intervention differ markedly among these societies. Nor can the political systems in these countries be said to be in any meaningful sense shared.

¹⁹⁴ See, e.g., Bryde, *supra* note 33, at 180-88 (discussing efficiency problems in administrative law).

¹⁹⁵ See, e.g., Maxwell O. Chibundu, *Delinking Disproportionality from Discrimination: Procedural Burdens as Proxy for Substantive Visions*, 23 N.M.L. REV. 87 (1992).

In focusing on practitioners within the judicial and administrative bureaucracies, a distinction is drawn between the new programs and those that failed in the 1960s and 1970s. The claim is that the latter focused on scholars, lawyers, and theories, while the current approach engages practitioners and administrators in the project of institutionalizing legal practice. A third conception of the rule of law as an instrument of development focuses on law's role in creating and maintaining distinct separation or spheres of power. In particular, the rule of law seeks to constrain the arbitrary exercise of power by maintaining specified functions within specific institutions. The classic triarchy is the judicial, executive, and legislative. There is no reason, however, why the rule of law should operate solely in this context. The phenomenon of the independent agency in the United States, or the even more elementary division between public and private ordering of rules, suggest additional possibilities.¹⁹⁶ Thus, in the African context, the division of power between central and local governments, or between traditional and modern rulers are plausible illustrations. What the rule of law insists is not so

¹⁹⁶ There is no legal definition of the independent administrative agency, and its status in U.S. law is the subject of much commentary. Yet, the United States would be a significantly different society today if independent administrative agencies ceased to exist. *See, e.g.*, Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 (questioning the independence of independent agencies); *cf.* Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause*, 4 YALE J. REG. 363, 364 (1987) (arguing that the legitimacy of the independent agency is ensured by the U.S. Constitution's necessary and proper clause).

The reasoning and significance of the public/private dichotomy is a pervasive issue in all branches of contemporary American legal disciplines, but the issues are perhaps most illuminatingly tackled in the ongoing debate as to the definition of the corporate entity, and therefore, its obligations to the various interests with colorable claims on it. Much of that discussion has focused on the seemingly abstract question of whether or not the corporation is a nexus or network of contracts, and whether the standard rules are simply default or mandatory public rules from which the corporation cannot deviate. *See, e.g.*, Michael Klausner, *Corporations, Corporate Law and Networks of Contracts*, 81 VA. L. REV. 757 (1995); William W. Bratton, Jr., *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U.L. REV. 180 (1992); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989) (arguing that contracts between the actors and not corporate law dictate the arrangements of the firm); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1460 (1989) (arguing that the contract and trust metaphors are each useful in illuminating the weakness of the other, and both point toward the need for mandatory rules for corporations).

much the specific allocation of competencies, as that such allocations be made on principled grounds, and once made, respected and enforced.

The difficulty with this understanding of the rule of law lies not in the conception itself as in the generation of mechanisms for recognizing the appropriate spheres of competencies, and for maintaining the separation of powers. Although it is fashionable to use constitution-drafting for the former purpose, the approach is at best artificial if it does not reflect both the experiences of the society and the dynamic character of those experiences.¹⁹⁷ A workable separation of powers doctrine must be sufficiently elastic to permit shifting power structures to be accommodated, and yet this is itself seemingly antagonistic to the idea of rule of law.

The typical solution to this dilemma is to confer on one branch, usually the judiciary, the capacity and power to decide authoritatively at any given time the proper balance of competencies among the spheres. For this task of judicial review, the judiciary must be endowed with the necessary political legitimation from the polity, deference to it by the other branches, and a high level of politically astute and socially sagacious members.¹⁹⁸ The availability of these resources is highly cultural and time-specific, and whether institutionalization of processes and concepts can respond to these resource demands is an issue the answer to which is in question. It is noteworthy, however, that the tendency today among societies seeking to institutionalize the rule of law is to look to the German and French experiences with constitutional courts and state councils, respectively.

Whatever the result of this last approach, it is clear that the answer to the puzzle of the relevance of law for development lies in the internal structures and politics of the particular society, its resource endowments, its experiences, and its political and social organizations. There are no special rules of law, no abstract principles of economics, no substantive rules of private property foundational to the success of the institutionalization of the rule of law.

To summarize, law possesses a central place in the organization and structure of all societies, not the least being the developing countries of Sub-Saharan Africa. It is not merely that in the quest for legitimation, the post-colonial state seeks to exercise its authority through it, but equally important, the effectiveness and authority of the state in its internal

¹⁹⁷ See, e.g., Chua, *supra* note 79 (discussing experiences in Latin America and Southeast Asia).

¹⁹⁸ Cf. *Judicial Review and the Lusaka Statement*, 38 J. AFR. L. 201, 202-03 (1995) (claiming for judicial review, the virtues of promoting the rule of law, democratic governance, human rights, and administrative fairness).

dealings (that is, the practical existence of the state as contrasted with the intellectual idea of the state) depends on its capacity to weave social conventions, traditional structures, and like civil institutions continually generated in response to defense of state action, into the social legal framework. Thus, understanding and appraising the contemporary role of law in African societies must start with the institutionalization of methods for constructing the appropriate distribution of power among the various players within the society: the state, local authorities, the bourgeoisie, and traditional councils.¹⁹⁹ Procedural and substantive rules can only be formulated against the background of such allocations of competencies. The primary concern of law and development studies at this time must focus to a much greater extent on understanding African societies and promoting sensible constructions of the relevant institutions than on maintaining procedural and substantive rules for protecting particularized property interests.

C. A Proposed Agenda for the Study of Law and Development in Sub-Saharan Africa

Societies do not function as autarchies; they borrow from others and are stimulated by outside exposures. Outside influences, however, are digested as part of the local story, not as the source of or the substitute for local experiences. The nature of the African state remains very poorly understood. The state of necessity anchors many African societies, but it very much remains an alien presence in those societies. It is the unit of analysis not because of any inherent properties it possesses, but because of the illusion that we know what it is. At any rate, it is the one African institution that to those schooled in Western thought appears most graspable.

But this illusion of understanding is perhaps the most serious barrier to the study of law and development. The African state is not an unpolished copy of the European or North American equivalent. Notwithstanding popular contention, its variations from the European and North American models do not merely reflect flaws in the production process.

¹⁹⁹ This Article focuses on state and governmental power. The thesis, however, potentially has a much broader reach: rather than taking African institutions as a given on the ground that they must approximate their Western analogs, anyone who wishes to play a consequential role in the interpretation of African societies needs to analyze African institutions as products of factors distinct from their Western analogs and more than mere reproductions of Western institutions in the tropical belt. Instead, African institutions function to serve the particularized needs, experiences, and aspirations of a dynamic population.

The African state may be an artificial creation springing from outside the society, but like all states, it articulates and represents not only the interests of its component parts vis-à-vis those of other states, but it also mediates the competing internal interests of its members. It is these roles, especially the latter, that structure the state.

To analyze the success of the African state in terms of its capacity to mediate or regulate internal conflicts by employing the same criteria used in analyzing European and North American states is to ignore the relevance of people in structuring the societies that they inhabit. It is notable that analysts have not faulted the failed African states for their incapacity to relate at the international level with other states, but for their incompetence in modulating and regulating issues of internal concern such as ethnic strife, corruption, administrative effectiveness, and electoral politics. But these are failures only when juxtaposed against a background that views the internal structures of Western states as the norm. Shifting the focus, the perception of failure becomes a descriptive statement of the struggles of an institution adapting to a complex environment. Rather than being a failure, the African state becomes an illustration of the dynamic of the process of institutionalization. That dynamic is powerfully illustrated in the developing literature on the relationship between the patrimonial exercise of power in African states and the reciprocity-based organization of exchange characteristic of traditional African societies.²⁰⁰ The change of vantage points suggested by the exploration of the interaction of patrimonialism and reciprocity is offered only as one way by which contemporary study of the relationship of law to development can be enriched. This comparative study would enrich law and development, not as the study of how the rest of the world and Sub-Saharan African

²⁰⁰ Patrimonial is an admittedly awkward term to use in describing a governance regime based on a process of consultation among members of a community. It does, however, accurately reflect the dominance of males within the system and the ultimate benevolent despotism that is the product of the consultative process.

The following discussion should not suggest that all African states share one model of governance because that is clearly not the case. The central theme of this Article is that we can better understand the significance of law for development if we expend more energy and resources seeking to understand the varied structures and forms that governance and social interactions take in African societies.

For a discussion of reciprocal exchange characteristics, see, e.g., Goran Hyden, *in* FAILURE OF THE CENTRALIZED STATE, *supra* note 104, at 245, 256-58. Reciprocity essentially denotes a form of exchange that is not contractual. Entitlement of a quo for a quid is implied, but its enforcement is rarely overt. In a legal culture such as that to which we are accustomed, one may say that the enforcement mechanism, if any, is moral. See *id.* However, the force and potential for communal ostracism belies this distinction between moral sanction and legal coercion.

societies in particular can become developed in the Western sense, but as how appreciation of the internal forces at work in the formation of the state as an integral part of society can further enhance our understanding of law as a social force. The result is a fuller articulation of the process of development, and law's relationship to it.

1. The African State as a Legal Institution

While there have been many internal challenges to the territorial boundaries of some African states, active or revolutionary struggle for control of the levers of power is generally scarce.²⁰¹ This is an especially significant point given how most of these states were crafted. However, the lack of conflict over ideology of the state manifests a more pernicious problem: the passivity of the citizenry is as much a threat to the legitimacy of the African state as would be persistent violence or revolutionary warfare.

The nonparticipation of the general population in electoral politics; the autocratic rule of gerontocratic decolonizers and youthful military men; the apparently unbreakable grip of power by ethnically homogeneous cliques; the control of the dynamic sectors of the economy like cash crop production, mineral extraction, and manufacturing by a handful of trading companies all highlight the irrelevance of much of the population to an institution that dominates their lives. The challenge to legitimacy thus comes from the disconnection, and arguably alienation, of the majority of the population from the state — the *de jure* African state lacks the essence of positive nationalism.

A common response of scholars consists either in self-righteously decrying the persistence of dictatorships in the continent, increasingly accompanied by demands for punitive action against such dictatorships, or in the hypocritical wringing of hands in dismay at the dissipation of the initial promise of decolonization.²⁰² Without disputing the accuracy of the factual underpinnings of these responses, nor endorsing dictatorships and apathy, these responses are inadequate. The ideal they posit is uncritically grounded in contemporary Western society and experience.

²⁰¹ Aside from the wars of national liberation in Southern and Lusophone Africa, and the ethnic conflicts in Burundi and Rwanda, only Uganda and Algeria (and plausibly Ethiopia) come to mind as illustrations of internal struggles over the ideology that should underpin the legitimation and control of state power.

²⁰² Typically, the demand is for the withholding of foreign aid, the ostracism of the nondemocratic or human rights violator governments at international conferences, or economic sanctions against such governments. As of this writing, international movements against Kenya and Nigeria typify these demands.

The analytical framework is entirely Western, and the prism through which the facts are viewed makes only the most grudging of concessions to the demands of day-to-day existence in the social and institutional construction of the African state. We should reject this approach because social institutions remain mired in the contingencies of the environment in which they operate and wishing otherwise is an inadequate substitute for understanding the living environment.

A dictatorship as an unconstrained one-person rule is bad both for functional and ideological reasons. As an ideological matter, it is the ultimate in the deification of the ruler and challenges the idea of the equal dignity of persons. But it is on the functional limitations of dictatorships that the social sciences and law focus.²⁰³ In one word, the problem is that of *accountability*.

Different societies at different times have sought to deal with the desirability of public accountability in a variety of ways. In contemporary industrial societies, electoral politics in some form is the dominant mode for assuring accountability. The approach, highly malleable in form and substance, appears well-suited to the individualist, entrepreneurial, and pluralist ethos and structure of the industrialized market-oriented nation-state.²⁰⁴ But while we may idealize electoral politics, it can hardly be said to exhaust the possibilities for assuring accountability in a society.²⁰⁵ For example, if we posit a society in which rationalistic self-

²⁰³ Although emphasis in the remainder of this section is on the functional argument, the conclusions would be supported equally well with a focus on the ideological grounding of state craft.

²⁰⁴ Although it is now fashionable to speak of liberal democracies as a unitary phenomenon, the form of governance that it represents varies widely, ranging from the republican form of government in the United States to the plebiscitary democracy of Switzerland; from the winner-take-all constituency politics and purported absolute supremacy of the British House of Commons, to the proportional representation and constitutionally regulated sovereignty of the German Bundestag and Bundesrat. These differences are apparently not irrelevant as demonstrated by the readiness of the U.S. President to disavow his nomination of a friend to a high position in administration on the ground that he found unacceptable the friend's proposal that flaws in the U.S. democratic process that resulted in the under-representation of minorities in political office could be corrected by the adoption of cumulative voting or other forms of proportional representation. For classifications of contemporary democratic regimes, see, e.g., Gregory H. Fox & George Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 14-16, 16-17, 69 (1995) (distinguishing between procedural democracy and substantive democracy, and recommending that where they are in conflict, the latter should be preferred even if it means negating the former); ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 108-14 (1982).

²⁰⁵ It would be misleading even in liberal democratic societies to align accountability

interested individualism — the central tenet of neoclassical Western liberal social science teaching — is not taken as the organizing hypothesis of behavior, then not only would accountability not be maximized by individual-oriented electoral politics, but such a structure might well be counterproductive.²⁰⁶

In a society characterized by strong familial or collective ties where production, accumulation, and consumption are based on group rather than individual efforts, accountability may take the form of avoiding ostracism rather than obtaining popular approbation. The framework for institutionalizing this mode of accountability will be quite different from electoral politics. It may, for example, take the form of a deliberative rather than a representative process. The most important virtue may well be the capacity to purvey a sense of trustworthiness, rather than that of efficiency.²⁰⁷ In either case, the mechanism for assuring that power is not arbi-

wholly with the election or democratic regime. Some of the most influential and powerful institutions in these societies are expressly insulated from direct input by the citizenry, and are nonetheless required to be accountable. Two prominent illustrations are federal judges and the Federal Reserve Board in the United States and their equivalents in other societies. Nor is it a tenable argument to suggest that the appointment and removal processes alone explain the means for assuring accountability by these institutions and those who run them.

²⁰⁶ For a recent elaboration and critique of this being in the guise of the rational utility maximizer in theories of economic development, see John Brohman, *Economism and Critical Silences in Development Thought: A Theoretical Critique of Neoliberalism*, 16 *THIRD WORLD Q.* 297, 298 (1995).

²⁰⁷ The significance of trust in exchange relationships has begun to command attention in social science literature. See, e.g., Bernd Lahno, *Trust, Reputation and Exit in Exchange Relationships*, 39 *J. CONFL. RESOL.* 495 (1995) (explaining how trust rather than direct rational quid pro quo may form the basis for mutually advantageous relationships in social settings). Similarly, Professor Robert Cooter has persuasively argued for a decentralized structural approach to the adjudication of business disputes under which courts genuinely try to ascertain the internalized norms and customs of a business community, and then treat those norms and customs as law. See Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 *INT'L REV. L. & ECON.* 215, 226-27 (1994). Central to his argument is the demonstration that community norms are generated by the maximization of profitability based on long-term relationships. The stability of these relationships over the long-run depend on repeated exchanges among members of the exchange community who come to internalize these norms. See *id.* at 216.

See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995) (arguing that each culture's social institutions and collective level of trust in government and social relationships shape the society's economic framework).

trarily exercised must in some sense reflect the social structures of the society within which authority exists, and in which it is employed.

In our contemporary world, the nation-state constitutes the standard unit of analysis for the legitimate exercise of authority. While this will be no less true for African states in the future than it is for others, that role can only be furthered if it is placed in the context of the African experience. The African state as it has emerged from colonialism is a distinct break from the pre-colonial African experience. It is not simply that colonial conquest and rule shaped the physical frontiers of contemporary African states, but more fundamentally, the method and institutions of governance brought about by colonial rule were entirely unknown in virtually all of the colonized African societies.

While it is specious to suggest that pre-colonial African societies uniformly shared any set of institutions or methods of governance, three elements of classical state-craft with significance for authoritative state control were notably absent.²⁰³ First, there was never a formalized conception of a conclave of entities whose capacity to get along could be regulated by inter-communal law. In other words, there was no shared perspective of a world system of hierarchically related sovereigns. Second, the idea of a bureaucratic form of government did not hold sway. Rather, governance whether in a despotic monarchy or a freewheeling entrepreneurial acephalous society was highly personal, molded more by the capacity of personalities than by rationalized administrative cadres.²⁰⁹ Third, the basic foundation of governance was lineage.²¹⁰ Membership in a society was dictated by perceptions of kinship and familial ties rather than of an administrative unit, vocational calling, or deistic belief systems. Consanguinity, rather than ideology, was thus the decisive organizing pillar of most pre-colonial African societies.

These considerations are important when juxtaposed against the social structures along which African societies, independent of the state, are organized. In recent years, a respectable body of social science research has argued that the mode of relationships within contemporary African societies is better understood in terms of reciprocity rather than market exchange. According to this view, transactions do not go forward on the basis of instantaneous mutual transfers of bargained-for goods and services characteristic of market-based exchange, but instead are grounded on the accumulation of non-simultaneous nor necessarily offsetting exchanges

²⁰³ See generally GEORGE AYITTE, *INDIGENOUS AFRICAN INSTITUTIONS* 71-149 (1991) (describing the various modes and institutions of governance in indigenous African societies).

²⁰⁹ Cf. *id.* at 77 (providing an example of how African groups chose their leaders).

²¹⁰ See *id.*

reflecting ties of social affection rather than purely economic exchange.²¹¹ In such an environment, collective trust within a community of shared expectations forms the currency of exchange and shapes the concept of accountability.

One need not accept the specifics of this argument to endorse its general thrust.²¹² Doing so in the African context is less problematic than in many other situations. Whatever may be the proper mode of production and capital accumulation in Africa today, it can scarcely be doubted that it differs in significant ways from the modern industrial and post-industrial processes of Western Europe and North America. There are, of course, urban centers in African societies whose social structures, political organization, economic activity, and the daily life of inhabitants appear to mimic those of metropolitan centers of Western industrial societies. They look outward across the oceans to Europe and North America, from where they import not only automobiles, food, clothing, building materials, but also health care, education, information, culture, mores, and the technology of production.²¹³ Yet, it should not be forgotten that these urban areas are but small islands in a vast continent dominated by rural existence where the primary mode of transportation is walking, in which food consumption is determined almost exclusively by the quirkiness of seasonal rainfalls, and because the vast majority of the people are unable to read or write, face-to-face contact remains the primary mode of communication.²¹⁴

What is true about the physical dissimilarities between the urban and rural environments of African societies is equally true about behavioral patterns and determinative social institutions. The colonial experience was a momentous one for Africa. It accounts for the current territorial division of the continent, and for the existence and structure of state power. Many of the current institutions through which the post-colonial state functions

²¹¹ See Hyden, *supra* note 200, at 253-55.

²¹² See WEST AFRICA, Nov. 25, 1995, at 1843, 1843 (arguing for the need to probe and inquire into the structure of social relationships in Africa, especially between rulers and their kinsmen, but contending that these social relationships have been detrimental to the securing to Africans of good governance).

²¹³ Cf. Thomas Kamm, *Epidemic of Slums Afflicts Latin America*, WALL ST. J., Aug. 30, 1994, at A6. (describing unstructured and uncontrolled but highly adaptive migration into cities lacking essential infrastructure in Latin America is equally valid for most contemporary African societies).

²¹⁴ For an interesting discussion of the significance of the urban/rural divide in the success of restructuring national societies in contemporary Eastern Europe, see André Liebich, *Nations, States, Minorities: Why is Eastern Europe Different*, 42 DISSENT 313, 315 (1995). Unlike Eastern Europe, the problem in Africa is not one of antagonism but of relative indifference.

have their foundations in the colonial state. Thus, not only are contemporary instruments of direct coercion, such as the police force and the military, organizational, and structural reproductions of their colonial predecessors, but so are other manifestations of state power: the judiciary; the civil service; revenue collection; modes of information gathering, dissemination and control; and issuance of licenses for various activities. Moreover, the active involvement of the state as an owner or manager of the means of production and accumulation in the economic sphere through such entities as marketing boards, parastatals, and public utilities, have their origins in the colonial state.

Notwithstanding these, the colonial state was an orphan state. Having given birth to it, the political brokers in the mother country mainly ignored it.²¹⁵ The colonial office and its cadre of administrative and civil servants were given a free hand in determining and shaping the colonial dependencies. In exchange, the colonial office saw to it that the peoples and politics of the mother country were intruded upon as little as possible by the needs and demands of the colonial dependencies. Colonial rule was thus an insular undertaking, generally shielded from public debate and left in the hands of experts.

In many ways, the formation and institutionalization of the colonial African state constituted no more than an archetypal legal instrument. The standard proceeding consisted of requiring local African chieftains to sign over undefined rights to a representative of a European sovereign in exchange for an equally vague promise of protection. But the significance of this document lay more in the effect accorded it by other European sovereigns than in what it actually said or in the relationship it purported to create between the signatories. Indeed, neither the African chieftain nor the European state on whose behalf it was signed had the full-fledged authority or backing of the subjects and citizens on whose behalf these documents subsequently were to be invoked as establishing legal rights

²¹⁵ See generally Young, *supra* note 51. There were variations among the mother countries and over time in the level and centrality of attention given to the colonies. For example, one classic distinction is that between British indirect and French direct rule. Such differences, however, were more a matter of degree rather than of kind.

Similarly, the contention in the text is not intended to dismiss differences in the level of penetration into the hinterland that occurred from one territory to another, nor to deny that interest within the mother country in events within a particular territory varied with the extent to which European settlements formed part of the local scene within an occupied African territory. Nonetheless, the interest here is in the colonial or territory characteristic of most of Sub-Saharan Africa, not with the incidents of colonization, so that the examples of Algeria, South Africa, Senegal, Kenya, Angola, Namibia, and Zimbabwe do not undercut the assertions in the text.

and disabilities, including, for example, the cession of the independence of the African signatory entity.²¹⁶

The colonization of African territory and the institutions brought with it were not the sum total of the African experience during the period of colonization. For one thing, the colonial experience in most African countries lasted for barely three-quarters of a century, and its penetration into the hinterland was at most spotty.²¹⁷ The colonial state redrew administrative units, and along with its extensive employment of per capita taxation, and the introduction and encouragement of the widespread use of government-backed currencies to facilitate economic exchange, colonial rule had significant impact on even the most isolated of African rural communities. In most spheres of life, however, colonial rule had only marginal effects on the practices and beliefs of the vast majority of the African population living outside the urban centers and their immediate surroundings.²¹⁸

The result was that the African colonial state was sustained by a small but energetic group of interested bureaucrats, economic entrepreneurs, missionaries, and academics from the mother country, and their emerging proteges in the colonized societies. The effects of colonial rule were sometimes harsh, but except in a few population centers, such effects were primarily sporadic, leaving very few lasting influences on the domestic institutions of the vast majority of the African population.

As with colonization, the process of decolonization was also highly formalistic, lacking in those features of broad general participation that unite a people in a cause, create a sense of national identity, and cement a nationalist vision. Thus, while there were the occasional general strikes, the movement for independence again involved a small and select elite on

²¹⁶ See generally Young, *supra* note 50, at 82-83.

²¹⁷ See *id.* at 9 (stating that "[t]he colonial state in Africa lasted in most instances less than a century - a mere moment in historical time"). Although the colonization of Africa by Europe may be traced to the Portuguese occupation of Ceuta in 1415, sustained and meaningful European subjugation of the continent is generally associated with Belgium's decision in 1876 to colonize the Congo, and with the Berlin conference of 1884-1885 that partitioned the continent. See THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA* (1992). The institutionalization of colonial rule occurred over a period of time, but it was basically complete by the beginning of World War I. *But see* Young, *supra* note 50, at 11 (drawing attention to the proposition that the contemporary post-colonial African state bears much of the weight of the colonial experience); *id.* at 218-22 (explaining the difficulty post-colonial Africa is experiencing in creating an African civil society).

²¹⁸ Systems of marriage and divorce, land-ownership, control patterns, lineage, kinship, hereditary rules, and religious beliefs while not entirely unaffected by the colonial experience remained unique expressions of African localism.

both sides of the negotiating table.²¹⁹ The result was that the post-colonial African state took as the norm the administrative and economic structures prefigured by the colonial experience.

It is thus hardly surprising that the post-colonial African state has been ineffective in creating and effecting a unified national experience. The recent delegacies or failures of the African state have not only been manifested by the absence of any primordial attachment to the state, but they have been magnified by the resilience of the customary or indigenous African practices and institutions.²²⁰

The task for law and development is understanding and articulating the relevance of these experiences for the formation and institutionalization of viable structures in the contemporary African polity. To this end, the grounds for the practical legitimation of the state, and the means for assuring the responsiveness of the state to the interests and preferences of the population directly implicate our understanding of contemporary African society. If the patrimonial mode of governance constitutes a viable and structurally sound approach to accountability in a culture characterized by collective decision-making and the dominant approach to decision-making in African societies continues to be collective, then it is not an answer simply to argue that African societies must adapt to the dominant mores of the international system by embracing electoral politics.²²¹ We should not accept this answer without further inquiry even if it is justified by such functionalist arguments as that the adoption would encourage capital inflows or the incapacities of Africa's patrimonial systems to check effectively the misuse of power by its leaders. The difficulty with the answer is that it lacks intimate connection with the

²¹⁹ Excepting Algeria, the standard process of decolonization in both Anglophone and Francophone states involved negotiating a constitutional arrangement between the mother country and a handful of elites in the colonial territory. Only in the Portuguese and Spanish colonies, and the unique cases of South Africa, Zimbabwe, and Namibia did the independence process involve active warfare which generally led to the mass mobilization of the subjugated population. In these latter situations, the idea of a nation-state as more than a formal legal institution is more likely to be embedded in the daily life of the ordinary people than it is in the former.

²²⁰ This explains the standard refrain employed by the military to justify their unconstitutional coups d'etat: that the overthrown politicians were disloyal to the state, and that the society was in an undisciplined process.

For a review of customary practices, see Hyden, *supra* note 200, at 247, 252. Cf. Howard W. French, *Does Sharing Wealth Only Promote Poverty?* N. Y. TIMES, Jan. 14, 1995, at A5 (describing the continuing vitality even in urban centers such as Abidjan, Cote d'Ivoire of traditional African patterns of kinship relations).

²²¹ See Hyden, *supra* note 200, at 260-61.

regular experiences of the people. We would be substituting a hypothesized ideal for an admittedly flawed reality.

But these are not the only two choices available. Before opting for one or the other, it is helpful to understand the reasons for the flaw in the one and the costs of transformation entailed by the other. From such an understanding, a third possibility can be constructed; one that takes the experiences of the people as a given, and strives to refashion flawed institutions to enrich those experiences.

In the context of contemporary African societies, the critical issue is why both methods for assuring accountability — the patrimonial and the electoral — are ineffective. The reason for the failure of the electoral system is self-evident. As proposed to and structured for African societies, the electoral system is alien. It embodies at most the aspirations of a small cadre of the population. Although it may be fashionable to embrace rhetorically, its constraint on the practical exercise of power is eternal and illusive.

Electoral politics, at least in the idealized form often posited, demands a quite different society than that which is today most common in Africa. It requires, for example, a self-regarding, individualist orientation to the use of power; an environment that views politics in *quid pro quo* terms; a vision of politics that celebrates problem solving through conflict among interest groups; and a pluralism that welcomes the process of competition as the ultimate statement of the common weal. To make electoral politics the preferred arbiter of institutional life thus would require fundamental shifts in African attitudes that can come about only through a different set of experiences than those to which the vast majority of Africans have been exposed.

But patrimonialism hardly appears to be an acceptable alternative. The shell of the practice may have its origins in the African experience, but in today's African society it routinely fails the functional test of assuring accountability of the ruler. The explanation for this failure is not too hard to discover. Reasonably well-suited to small, similarly minded communities, patrimonialism's acknowledged strength of functioning on the basis of collective consensus is poorly adapted to the needs of a multi-ethnic and poly-centric state. Yet, those who ascend to power in these poly-ethnic states, like those over whom they rule, have had their consciousness molded through this ethos of collective decision-making and reciprocal accountability. When the methodology fails at the state level, it is generally not because the leaders are dictators in the sense of desiring and exercising absolute power, but because there is no institutional mechanism for assuring that the consensual nature of the deliberative process goes beyond those immediately in authority.

In the classical African community, consensual decision-making occurred at various interrelated layers.²²² The family, for example, deliberated as a unit on an issue and reached a decision. That decision was then taken up by the family representatives at the Village Council. Next, the representatives of the Village Council again reviewed the matter at a council of several villages.²²³ Notably, competence was not based on functional differentiation among the various deliberative bodies. Moreover, continuing deliberation within the family and the village council even when the issue had moved out of their direct control assured that the ultimate decision was one that reflected and updated the consensus not simply of the leaders, but of the community. Further, the continuing involvement of the members of the community at large guaranteed that decision-makers remained aware of the existence of the ultimate sanction for non-accountability to popular will: the potential for ostracism.

These features of local governance in many African societies are conspicuously missing in the post-colonial institutionalization of the decision-making process in the modern nation-state and its use of power. The post-colonial African political leader typically begins with a consultative council that genuinely tries to identify and implement policies consonant with popular will. Almost never can such rulers be classified correctly as dictators. However, because their institutional base of power is closed and organized along Western models, consensual politics sooner or later fails. Representing no outside constituencies, members of the inner-circle increasingly represent the narrow interest of the circle itself and their own personal interests. Consensual politics merges into the politics of the ruling group. In turn, it may become sycophantic, removing all constraints on the arbitrary exercise of power by the leader who started out simply as a *primis inter pares*.²²⁴ The ruled are effectively excluded from the process and are powerless to do much about it largely because habituated to a non-conflictual approach to governance occurring at local communities, they are beyond their depths in the centralized interest group orientation of national politics. The result is what appears to the outside observer as apathy.

If this analysis of the failure of accountability in contemporary African societies is accurate, then the relevance of law in the process is manifest. First, it consists in understanding the internal structures and processes of contemporary African societies, especially the ways in which these societies differ from those that have been extensively analyzed and

²²² See Ayitte, *supra* note 208, at 71-149.

²²³ See generally ACHEBE, *supra* note * (providing a fictional account of this process among the Igbo).

²²⁴ See CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* (1981).

against the backdrop of which the dominant models and theories of law and development have been fashioned. Second, law provides a ready and serviceable language for articulating the conceptualization of institutions, ideas, and processes for constraining leadership so that it takes cognizance of and responds to a society's needs and experiences. In this sense, the desire for the rule of law is both universal and particularistic. Law provides a universal language through institutionally mandated impositions of constraints on the exercise of power, and insists that the language be interpreted in the context of local conditions. Law offers a means of regulating the inter-penetration of the state into society and society into the state.

It is worth repeating that the argument here is not that African societies are traditional or that they are split between traditional and modern sectors. The claim being advanced is that they are distinctly different, and that the institution and workings of the post-colonial state reflect that difference. It is one thing for colonial governance to have destroyed the traditional structures and mode of governance within Africa, it is quite another thing to infer from such destruction the creation of a society in the image of the colonial powers. African societies should not be presumed to be traditional, modern, or a hybrid of the two. What is needed is an understanding of the societies that have emerged from and continue to be created by the interaction of African peoples and institutions as they seek to shape their aspirations within available resources and mold those resources to satisfy their needs and desires.

Law has a central role in assuring the organization and functioning of African societies, in particular the state and the economy, and reflects the complex forces at work in an environment that has been subjected to numerous and often contradictory forces. Africans need not ignore their past to achieve economic prosperity, nor can they be sanguine about the discordance of their past institutional developments and contemporary forces. Like their current history, their conception of law must borrow from several sources. It must reflect the distribution of power within their societies at a given time as well as act to constrain the arbitrary use of that power. This can be done only through the institutionalization of processes and ideas that flow from within society itself.

2. Harmonizing Internal Development with External Pressures

The proposition that law and development studies ought to focus primarily on the internal dynamics of the society at issue raises epistemic and practical problems for the student and subject. Is the discipline more than an extension of area studies? What place does it have in a law school curriculum, especially on the faculty of a university located outside the area under study? What remaining attraction does it have for pro-

grams in comparative, international, and economic law? What interest would it hold for those who control institutional research funding?²²⁵ Moreover, what stake does the foreign investor have in a society preoccupied with understanding itself? These are critical questions for which there are no simple and convenient answers. However, the internal focus advocated here is essential to the task of law and development, and that far from precluding the participation of international scholars, practitioners, and their clients, it beckons for their involvement.

Central to the role of law in development is the dialectical understanding of law as a significant and frequently effective force in shaping behavior, embedded within and springing from the institutional structures and social practices of a community. The conventional approach to law and development focuses on one or the other. Because much of that work has been undertaken by Western scholars among whom the instrumentalist and positivist view of law as behavior molding has tended to command broad acceptance, the synthetic balance of the dialectic has been missing. An imperative for law and development is restoring to the field discussion of the nature, structure, and relevance of the social practices of the people and societies whose lives the field purports to seek to understand. The utility of a dialectical methodology lies not in establishing the dominance of one set of relationships, but in its efficacy to illuminate the convergence of the numerous forces always at work even in the simplest of social interactions. The industrial, financial, and commercial successes of the Western world; its technological innovations; the informational hegemony of its epistemic classes; and the drive, ambition, technocratic, and managerial efficiencies displayed in abundance by its professional classes: all of these have lent the aura of incontestable truth and rectitude to the assertive universalist claims being made for what are essentially Western institutions and social practices. To the extent that law and development scholars and practitioners continue to rely predominantly on an unidirectional view of law as the regulation of behavior by the state, or as the imposition or inculcation of well-tried and true successful Western practices and institutions on emerging societies, the chances are that Sub-Saharan African societies will remain an enigma to law and development scholars, mired in their own impoverishment and misery.

As an illustration, consider that the most obvious distinction between societies that are the focus of law and development and those that are not is the significant gap in material welfare. The distinction has generated other claims of superiority or inferiority. An undeniable example of the

²²⁵ The issues raised by these questions were decisive in the waning of interest in law and development studies in the mid-1970s. The triumph of capitalism and the profit motive suggests that twenty years later remain salient considerations.

latter is the claim of economic and technological dependency. It is simply the case that developing societies do not generate from within the economic resources or the technical know-how for self-directed growth. No society, not even continent-sized ones like the United States, is an autarchy, yet the capacity of a country to exploit its resources independently is a measure of that country's development. That capacity has a direct bearing on the policies the country will pursue. For the foreseeable future, relative independence on this sphere will be denied most Sub-Saharan African countries.

Generally speaking, there are two potential catalysts for the involvement of outsiders in the exploitation of the resources of a society: the abundance of exploitable resources and the configuration of political forces. European investments in the Americas in the late nineteenth and early twentieth centuries illustrate the former case, while U.S. investments in Western Europe and East Asia in the post-World War II period illustrate the latter.

These are necessary, but not sufficient conditions. Relative certainty about the future is a guarantee demanded by all foreign investors. Where the foreign investment is driven by political conditions, predictability depends very much on an evaluation of the commitment of the foreign power guarantor of the political environment in the host country. In the 1950s-1970s, U.S. hegemony in Western Europe and East Asia provided the requisite assurance of stability in those regions. Where, however, the pool of foreign investment is driven by the abundance of resources in the host country, the foreign investor is compelled to look to other sources. One such source is the possible application of external force, a not unusual occurrence with regard to Egypt and especially Latin America in the late nineteenth century.²²⁶ However, this approach is generally frowned on today, and it is in this context that commentators invoke law and the legal order as possible guarantors of predictability and stability.²²⁷

²²⁶ The British colonization of Egypt began with the expedition to Alexandria in 1882 ostensibly to assure that debts incurred by the grandiose building projects of the Khedive were paid off. See P.J. VATEKOTKIS, *A HISTORY OF MODERN EGYPT* (1991).

The Calvo doctrine which required a foreign investor as a condition for investing in a Latin American country to foreswear resort to the assistance of its government in any disputes was a legal response to the history of cultural or threatened military interventions by the European and North American home countries of the foreign investors. This history of interventions has analogies in China, and was the impetus for the colonialization of Africa.

²²⁷ The fundamental shift in approach was confirmed by the response of the United States to the Mexican nationalization of foreign interests in the petroleum industry in

But as demonstrated, if law is defined in terms of substantive or procedural rules, regulations, statutes, and standards, the logic of the claim that predictability flows from its existence is at best unconvincing. Aside from the absence of any historical support for it, the claim is particularly spurious if one focuses on the existence of those codes, rules, and standards that are especially geared to attract the foreign investor.²²⁸ Because such law generally fails to embody internal social conventions, it often amounts to no more than the paper on which it is written. Far from enhancing predictability, it is a source of confusion and invariably a trap for the unwary.²²⁹ If the foreign investor meaningfully is to look to law as a source of protection, she must view law in a broader sense.

The law of foreign investment is not an isolated corpus of international or transnational law, but an integral part of the social conventions of a society that speaks to the structures of that society: dynamic historical relationships, social organizations, economic distributions, apportionment of political power, and the future aspirations of the members of the society. By seeking to understand these forces, the foreign investor and its lawyers can contribute towards the institutionalization and channeling of those productive forces within the society that appear responsive both to the imperatives of the society and to a more predictable future for foreign investment.

Despite recent challenges to the dominant ideas of sovereignty, contemporary jurisprudence looks to the state as the ultimate arbiter of relationships within the territory of the state, whether those relationships are among the inhabitants, or between the inhabitants and outsiders.²³⁰ The outsider tends to focus on the state as if it were the sole actor. But the state is not a standardized entity. It is continually being reproduced through its penetration by the various components of society. Similarly,

1938. See generally Chua, *supra* note 79.

²²⁸ The discussion presented here is in the context of law as a pool for foreign investment, but excludes the factors that push the foreign investor into investing in particular societies. Typically, factors within the investor's own country such as tariff-free imports, diaspora-spawned ethnic solidarity, and the desire to foil political success by a hated or feared ideology have been instrumental in channelling foreign investment by U.S. persons into societies like Israel, Ireland, Korea, and the Caribbean. Many African-Americans increasingly argue for U.S. investments in Africa in these terms. These push factors tend to be discussed unashamedly in political rather than legal terms.

²²⁹ See generally, Gordon, *supra* note 57.

²³⁰ Although these challenges have been most vociferously articulated by those in the human rights industry, the claim that sovereignty as traditionally understood is passe, arose in the context of the global spread of multinational corporations. See, e.g., RAY VERNON, SOVEREIGNTY AT BAY (1968).

the effectiveness of the state as an actor depends in significant measure on its linkages with the society that it seeks to dominate. In Africa, those linkages have been much weaker than in Western Europe or North America. Understanding the level and limitations of such inter-penetration is as important as appreciating the dynamic role that social change plays in the constitution of the state. While law cannot be an independent variable in either process, it can contribute through its interpretive and analytical methods in facilitating the institutionalization of these inter-penetrations through which relevant linkages are formed.

V. CONCLUSION

In 1953, seven years before the *annus mirabili* of modern African history,²³¹ and eight years after the global cataclysm that sped and shaped the events of that year, Amos Tutuola published a modern Black African work of fiction: *The Palm-Wine Drinkard And His Dead Palm-wine Tapster In The Deads' Town*,²³² a work remarkable for prefiguring the post-colonial African experience. From the beginning dramatic assertion

I was a palm-wine drinkard since I was a boy of ten years of age. I had no other work more than to drink palm-wine in my life.

The novel relentlessly unfolds a voyage of discovery that is fantastically realistic, unwavering in purpose but digression-ridden, and prophetic by being anchored entirely in the present.

The Palm-Wine Drinkard is ostensibly the story of the maturation to adulthood of an eponymous narrator through experiences gained in the search for his sole valuable product: the Palm-Wine Tapster. The oldest of eight children in a family of hard workers, the narrator distinguishes himself from them by being an "expert palm-wine drinkard."²³³

"I was drinking palm-wine from morning to night and from night to morning And when my father noticed that I could not do any work more than to drink, he engaged an expert palm-wine tapster for me."²³⁴

²³¹ In 1960, seventeen African countries representing more than half of the continent's population became independent, self-governing states.

²³² AMOS TUTUOLA, *THE PALM-WINE DRINKARD AND HIS DEAD PALM-WINE TAPSTER IN THE DEAD'S TOWN* (1953).

²³³ *Id.* at 7.

²³⁴ *Id.*

Six months after the palm-wine drinkard's father dies, his tapster falls off a palm-wine tree and dies as well. Unable to replace him, and losing his friends who ceased taking notice of him in the absence of any palm-wine to drink, the palm-wine drinkard sets out to find his old tapster.

At the beginning of this trip, he is armed only with the ju-ju belonging to him and his father, and the general knowledge that "old people were saying that the whole people who had died in this world did not go to Heaven directly, but they were living in one place somewhere in this world."²³⁵

Thus equipped, the palm-wine drinkard began his travels to obtain information regarding the location of his tapster, where he is obliged to engage in uneven matches with superhuman beings, all of which he overcomes not by physical strength, but by demonstrations of wit and intellectual acuity. Through it all, the lowly man is on equal footing with gods and death; gods, spirits, and death are shown to be no more honorable in their dealings than is man.²³⁶

The palm-wine drinkard journeys from the idle land of the living to that of the incomprehensible dead and back, encountering the phantasmic kingdoms of myriad animals and plants that inhabit the lush tropical forests and the homes of spirits that populate the mythical and real world. What develops is not the enrichment of the storyteller's individual mind, as the narrator is as averse to work at the end of the story as he is at the beginning. His perceptions of good and evil appear to undergo no change, and his understanding of the human spirit seems no better or worse at the end of the story than it was at its beginning. Moreover, he is rendered immortal and free from physical wants, but not free from fear.²³⁷

The persistence and predictability of the individual psyche, however, contrasts sharply with the rich portrayal of the varying social and organizational structures within which the narrator and the numerous interlopers he encounters in the course of his journeys are required to interact, experiences to which the narrator always remains unflinchingly open. The systematic exploration of the virtues and demerits of diverse systems and institutions; the successes and failures of the adaptation of those institutions to the needs of the inhabitants and communities that they regulate; the coming into being of new institutions as a response to the failures of others: these are the trenchant observations of the palm-wine drinkard.

²³⁵ *Id.* at 9.

²³⁶ *Id.* at 11-58.

²³⁷ *Id.*

No one, perhaps not even Amos Tutuola, can state the extent to which *The Palm-Wine Drinkard* was intended as an allegory. While lauded by many, it evokes quite different forms of admiration that may correlate to the socio-geographic location of the reader. For Western critics, the frequent incorrect usage of the English language, the lack of standardization in the form, syntax, and even content of the story, constitute powerful devices that enrich the allegorical tale. For at least one African critic, these devices are unconscious flaws to be tolerated in an otherwise great story.²³⁸ The strength of the story lies not in its individual recreation, but in its continuity within a well-established line of Yoruba folk-tales, a lineage that it adequately represents.

For a Western-trained African critic, this raises a dilemma. Should the telling of a local story in a foreign language be applauded because the story reaches a wider audience and avoids the possible mortality of the story in a transformed world, or should it be denounced on the ground that the rendition impoverishes the story, rendering it neither the local tale nor the voice of the foreign language? But is it possible to provide even a tentative answer to this question without ascribing some universalist interpretive function for Tutuola's tale beyond the temporal entertainment of the listener? In writing the way that he did, was Amos Tutuola's tale for the barely literate Nigerian with a rudimentary grasp of the English language, or is it a tale that transcends linguistic barriers in the telling of a timeless story?

The place of law in the development process is not unlike that of literature to the aesthetically inclined humanist, and much like that of technological know-how to contemporary societies. At first blush, the image is one of undifferentiated beauty or ugliness. We have a preformed perception of clarity as to what succeeds or fails, and we do not doubt the universal correctness and applicability of our standards of judgment and rectitude. On closer inspection, however, these certainties become less evident. We discover that the strength of law, like that of literature and technology, lies in the capacity of broadly framed ideas to interact with pre-existing conditions, and in the process, to transform those conditions for the purpose of meeting, not transcending, the needs of a people.

The temptation of imposing law from without is great. The short-run costs appear much less than those for law's internal development. Moreover, the imported product appears well-tested and functionally superior to the homegrown variety. Yet, such perceptions are at best superficial,

²³⁸ See Abiola Irele, *Tradition and the Yoruba Writer: D.O. Fagunwa, Amos Tutuola and Wole Soyinka*, in *THE AFRICAN EXPERIENCE IN LITERATURE AND IDEOLOGY* 174, 174-97 (1990).

serving primarily to give the outsider a sense of being needed while disempowering and impoverishing those for whose asserted benefit the outside product is being adopted.

To survive and reproduce itself, law must be generated from within and must serve to transform and enrich pre-existing domestic institutions and practices generated and fostered by those to whose daily lives the institutions and practices are integral. This is essential if law is to serve both the physical necessities and comforts of a people as well as their ideological and social aspirations.

In post-colonial African societies, the essence of law is neither the maintenance of tradition, nor the bringing of modernity to African societies. The future does not require that Africans choose between dualism and Westernization. The difficult but necessary role for law lies in helping Africans decipher and articulate principled mechanisms by which their experiences can be structured and institutionalized. In doing so, borrowing some of the language of legitimation in the Western legal tradition is likely to be unavoidable, but the direct approximation of the practices represented by such language may be solely coincidental. Law reflects and represents the necessity of collective interactions and the subjection of the individual to social constraints. In its articulation and interpretive force, it must remain cognizant of the nature and depth of those interactions and constraints.

For an African interested in the role that law plays in development, the fundamental question is not whether such a role does exist, as one must take it on faith that it does, nor is it whether the experiences of one society are relevant or helpful to other societies. The issue to be investigated, attempted to be made comprehensible, and perhaps in other ways useful, must be the forces that within a given society shape the interactions among the social and political institutions of that society, its people, and the quest by those people for greater security in their well-being. Law, flowing from the experiences of the people, forms an essential backdrop of the social institutions within which the quest is undertaken. Incorporating the understanding of those generally ignored experiences into a field that aims for universality, that equates globalism with Westernization, and economic success with development and humanitarianism, is the challenge for law and development.

