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## General Theory of Law and Development

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# General Theory of Law and Development

Yong-Shik Lee†

Although scholarship in law and development that explores the relationship between law and social and economic progress has evolved over the last four decades, this area of inquiry remains unfamiliar to many legal scholars, lawyers, and policy makers. Scholars have not yet been able to develop a theory that systematically explains the interrelationship between law and development, which would establish law and development as a robust and coherent academic field. This Article attempts to fill this gap by presenting a general theory that defines the disciplinary parameters of law and development, and explains the mechanisms by which law impacts development. This Article also demonstrates the validity of this general theory by applying it to an empirical case and also by explaining the development process of South Korea (1962-1996) under its analytical framework. The concept of development, which has traditionally been associated with developing countries, may also be extended to address economic problems in developed countries today.

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## Introduction

Law has become the framework and vocabulary for constructing and debating development policies,<sup>1</sup> but law and development, an area of scholarship that explores the relationship between law and economic and social progress,<sup>2</sup> is relatively unknown and underdeveloped as an academic field

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1. Development policies since the 1990s have been conceived and constructed in the notion of legal rights. See David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 167 (David M. Trubek & Alvaro Santos eds., 2006) (discussing the changing roles of law, economics, and politics in the context of development policies).

2. Law and development, as an area of scholarship, is indeterminate and heterogeneous. Reflecting on these characteristics, Scott Newton commented, "It [law and development] does not appear to possess a particular normative armature or notable thematic consistency or much of a unifying logic or set of organizing principles. The most one can say is that the disciplinary range of L&D is constituted by the aggregate of studies pursued by its self-identifying adherents." Scott Kennedy, *The Dialectics of Law and Development*, in *NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 177. The noted indeterminacy, lack of disciplinary clarity, and absence of an underpinning theory that systematically explains the interrelations between law and development have retarded its development as a coherent academic field.

despite decades of research.<sup>3</sup> Leading scholars, such as Trubek and Galanter (1974),<sup>4</sup> Merryman (1977),<sup>5</sup> Snyder (1982),<sup>6</sup> North (1991),<sup>7</sup> Tamanaha (1995),<sup>8</sup> Chibundu (1997),<sup>9</sup> Posner (1998),<sup>10</sup> Chua (1999),<sup>11</sup> Cross (2001),<sup>12</sup> Davis and Trebilcock (2001),<sup>13</sup> Barr and Avi-Yonah, (2005),<sup>14</sup> McInerney (2005),<sup>15</sup> Chodosh (2006),<sup>16</sup> Dam (2006),<sup>17</sup> Chukwumerije (2009),<sup>18</sup> and Prado (2009)<sup>19</sup> have addressed a range of issues in law and development. These scholars have called for, *inter alia*, new approaches, including comparative ones, with references to the local context and conditions, as well as theoretical underpinnings that better explain the dynamics among law, institutions, and the existing political, social, and economic conditions.

In response to these calls, particularly the one requiring the theoretical underpinnings, this Article presents a general theory of law and develop-

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3. For a review of law and development scholarship, see Kevin E. Davis & Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895 (2008); and David M. Trubek, *Law and Development 50 Years On* (University of Wisconsin Legal Studies Research Paper No. 1212, 2012), <http://ssrn.com/abstract=2161899> [<https://perma.cc/ZVK2-3HPP>]; see also Yong-Shik Lee, *Call for a New Analytical Model for Law and Development*, 8 LAW & DEV. REV. 1, 10-27 (2015).

4. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062 (1974).

5. See 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).

6. See Francis G. Snyder, *The Failure of "Law and Development,"* WIS. L. REV. 373 (1982); see also Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC'Y REV. 723 (1980).

7. See Douglas C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991).

8. See Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995).

9. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167 (1997).

10. See Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK OBSERVER 1 (1998).

11. See Amy Chua, *Markets, Democracy, and Ethnicity: Toward A New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

12. See Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2001).

13. See Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. 21 (2001).

14. See Michael S. Barr & Reuven S. Avi-Yonah, *Globalization, Law and Development*, 26 MICH. J. INT'L L. 1 (2004).

15. See Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT'L L. 109 (2005).

16. See HIRAM CHODOSH, *GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY* (2005).

17. See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

18. See Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 EMORY INT'L L. REV. 383 (2009).

19. See Mariana Prado, *Should We Adopt a "What Works" Approach in Law and Development?*, 104 NW. U.L. REV. 174 (2009).

ment (“the general theory”).<sup>20</sup> The general theory is comprised of two parts: the first part of the general theory sets the disciplinary parameters of law and development by clarifying the constituent concepts of “law” and “development”; the second part explains the causal relationship between law and development through “the regulatory impact mechanisms,” *i.e.*, the mechanisms by which law impacts development, with references made to institutional frameworks and socioeconomic conditions.<sup>21</sup>

The clarification of the regulatory impact mechanisms is not only an academic exercise to establish law and development as a coherent and viable academic field, but it also raises important practical implications. International financial institutions and aid agencies have sponsored many law reform projects with development objectives,<sup>22</sup> such as economic growth through the privatization and deregulation of the economy. However, these projects were developed and implemented without a solid understanding of how law impacts development in different institutional, economic, social, and political contexts.<sup>23</sup> As a result, many of the laws and legal practices that were transplanted or adopted through law reform projects did not operate successfully in host countries or deliver their anticipated outcomes.<sup>24</sup> The clarification of these causal mechanisms between law and development in the context of local socioeconomic conditions will assist reformers in improving the effectiveness of law reform projects through better regulatory design and implementation.<sup>25</sup>

These regulatory impact mechanisms are comprised of three categorical elements: “regulatory design,” “regulatory compliance,” and “quality of implementation,” as well as additional sub-elements as summarized below. These elements are conceptually distinct but interrelated and influence one another.

20. It is described as a “general” theory as it sets the general parameters of the discipline by defining the constituent concepts of “law” and “development” and explains the general mechanisms by which law impacts development.

21. Socioeconomic conditions refer to a range of social, political, economic, and cultural conditions that are essential to the successful operation of law.

22. The World Bank is known to have embarked on over 600 such projects by 2004. See Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 221.

23. See *e.g.*, *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., 2006).

24. See Davis & Trebilcock, *supra* note 3, at 916; and Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 254. Alan Watson also discussed the problem associated with the legal transplant. See Alan Watson, *Legal Change: Sources of Law and Legal Change*, 131 U. PA. L. REV. 1121, 1146-47 (1983).

25. In this respect, the general theory would be necessary to solve “the problem of knowledge” as indicated by Thomas Carothers. See Thomas Carothers, *The Problem of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 15, 16 (Thomas Carothers ed., 2006). The regulatory impact mechanisms may be also applied beyond law and development to assess the impact of law (“regulatory impact”) generally. Examples of such general application are also provided. See *infra* notes 173 and 203 (discussing the importance of state capacity concerning crime control).

The first element of the regulatory impact mechanisms, “regulatory design,” concerns how optimally a law is designed to achieve its regulatory objectives.<sup>26</sup> This assessment can be a complex task, and regulatory design is analyzed in the following three categories (sub-elements): anticipated policy outcome; organization of law, legal frameworks, and institutions (“LFIs”); and adaptation to socioeconomic conditions as further explained in Part III.<sup>27</sup> The second element of the mechanisms, “regulatory compliance,” refers to the conduct of the general public in complying with law.<sup>28</sup> Law would not be effective without compliance by the general public. The analysis of regulatory compliance entails the assessment of two sub-elements: general regulatory compliance, which refers to the overall level of compliance with law in any given jurisdiction, and specific regulatory compliance, which pertains to the strength of public compliance with a particular law.<sup>29</sup> The third and final element of the mechanisms is “quality of implementation.”<sup>30</sup> It assesses the degree to which a state<sup>31</sup> meets the requirements of law and undertakes the mandates under the latter to fulfill its objectives.<sup>32</sup> A state implements law through legislation, judicial decisions, and administrative actions. This implementation, when it poses political challenges, also requires a degree of political will. Thus, two outstanding factors, state capacity and political will, determine the quality of implementation.

There is also room for in-depth social analysis pertaining to each of these three elements and sub-elements (*e.g.*, why certain societies produce laws with better regulatory design, secure stronger regulatory compliance, and have governments implementing them more effectively, leading to economic and social development) and also to the concepts of “law” and “development.”<sup>33</sup> This Article discusses some of the key factors, such as state capacity and political will, but does not address all relevant social, political, cultural, and economic issues in sufficient depth. In-depth discussion of these issues is outside the scope of the general theory, but

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26. Law is designed in the process of legislation or, in the cases of customary law and case law, by evolution and adaptation (and in the process of its identification). For further discussion, see Part III A.

27. For further discussion of the three sub-elements, see discussion *infra* Part III A.

28. See discussion *infra* Part III B.

29. *Id.*

30. See discussion *infra* Part III C.

31. A state refers to an organized political community directed by a sovereign government with control over a defined territory. For the purpose of this Article, the concept of “state” includes both formal state, which is recognized by other states under international law, and *de facto* state, which may not be formally recognized but functions as one by the recognition and support of its constituent members. For further discussion of the recognition of states in international law, see Hersch Lauterpacht, *Recognition of States in International Law*, 53 *YALE L.J.* 385 (1944).

32. See discussion *infra* Part III C.

33. The terms, “economic and/or social development” and “economic and/or social progress,” are treated as synonymous and used without distinction throughout this Article.

should be explored in future research.<sup>34</sup>

This Article is structured as follows. Parts I and II review the historical context of law and development shown by its previous “movements” and examine the first part of the theory, the disciplinary parameters of law and development. For the latter, Part I discusses the concepts of “law” and the associated concepts of “legal frameworks” and “institutions.” Part II examines the concept of “development” and addresses issues associated with the identification of “social progress,” as well as the approach adopted to incorporate both economic and social progress in the general theory. Part III examines the second part of the theory, the regulatory impact mechanisms in depth. This part analyzes the general mechanisms by which law impacts development, examining the three categorical elements and sub-elements, with an assessment of how they operate to determine regulatory impact on development. Part IV applies the general theory to an empirical case and adopts its analytical framework to explain one of the most successful development cases in history, the development process of South Korea (“Korea”). Korea is chosen for its unique reference value, as demonstrated by the successful achievement of both economic and social development over a period of three decades from the 1960s to the 1990s.<sup>35</sup>

## I. Law and Development: History and Context

### A. Law and Development “Movements”

The idea that law is relevant to economic and social progress is not new. Adam Smith stated in his *Lectures on Jurisprudence* that “the imperfection of the law and the uncertainty in its application” was a factor that retarded commerce.<sup>36</sup> Max Weber, a lauded sociologist and philosopher of the late nineteenth and the early twentieth century, explained the importance of “rational” law in economy and society.<sup>37</sup> Friedrich Hayek, another prominent philosopher and economist of the twentieth century, also discussed relevant legal concepts to support liberty as the cornerstone of wealth and growth.<sup>38</sup> The term “law and development” emerged and gained significance after the Second World War, when a group of scholars, practitioners, private foundations, and aid agencies in developed countries made efforts to adopt laws and legal practices from developed countries,

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34. I am offering a further discussion in my forthcoming book, *LAW AND DEVELOPMENT: THEORY AND PRACTICE* (Routledge, on file with the author).

35. From 1962 to 1996, the Korean economy grew at an average of 8.75 percent per annum, which was unprecedented economic growth sustained for over three decades, and as a result, the country transformed itself from one in absolute poverty under an authoritarian regime to another with an advanced economy based on the rule of law and elective democracy by the 1990s. See *infra* notes 75 and 215 and discussion *infra* Part IV A.

36. See ADAM SMITH, *LECTURES ON JURISPRUDENCE* 528 (1978).

37. See MAX WEBER, *LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967).

38. For more on Hayek’s discussion on law, liberty, and economic growth, see generally FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) and *LAW, LEGISLATION, AND LIBERTY*, vols. 1-3 (1979).

particularly the United States, in order to assist in the economic and social progress of developing countries in the Third World.<sup>39</sup>

These initial efforts, referred to as the first “law and development movement,”<sup>40</sup> were influenced by modernization theory advanced in the 1950s and the 60s by scholars such as Walt Rostow who argued that the modernization (development) of the Third World would be accomplished by the diffusion of capital, institutions, and values from the First World.<sup>41</sup> “Modern law” was believed to be the “functional prerequisite of an industrial economy,”<sup>42</sup> and law was seen as “a force which can be molded and manipulated to alter human behavior and achieve development.”<sup>43</sup> The first law and development movement was largely unsuccessful due to difficulty implementing laws and legal practices, including reform of legal education, in developing countries where key socioeconomic conditions,<sup>44</sup> which were essential to their successful implementation, did not exist and their absence had been overlooked or ignored.<sup>45</sup>

Law and development was resuscitated in the 1980s and the 90s after the fall of the Soviet bloc, with the proliferation of neoliberal<sup>46</sup> law reform projects that sought to reduce state intervention in the economy by promoting the privatization and deregulation of the economy.<sup>47</sup> This second law and development movement was substantially larger in scale and impact than the first, with significant effects on development projects and policies around the world.<sup>48</sup> The outcome of the second law and development movement was mixed at best, failing to result in successful development for most of the developing world.<sup>49</sup> Moreover, some of these reforms caused serious economic difficulties for large populations, as demonstrated by the

39. See David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 74-75.

40. *Id.* at 74-81.

41. Davis & Trebilcock, *supra* note 3, at 900.

42. David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1, 6 (1972).

43. Elliot M. Berg, *Law and Development: A Review of the Literature and a Critique of “Scholar in Self-Estrangement,”* 25 *AM J. COMP. L.* 492, 505-06 (1977).

44. A series of presumptions or “pillars” on which the first law and development movement proceeded, such as a cultural reform and transplantation strategy, an ad hoc approach to reform based on simplistic theoretical assumptions, faith in spillovers from the economy to democracy and human rights, and a development strategy that stressed state-led import substitution, collapsed by the 1970s. See Trubek, *supra* note 39, at 78-81.

45. See Trubek & Galanter, *supra* note 4.

46. The neoliberal approach is based on neoclassical economics, which emerged in the late nineteenth century and reaffirmed, against Marxism, that the market promotes economic efficiency and fair social distribution. Neoliberalism, which became a dominant political-economic ideology in the 1980s, discouraged positive government interventions in the economy and promoted free market approaches, including privatization and trade liberalization.

47. See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 3.

48. See *id.*

49. See *id.* at 6-7.



devastating economic outcome of the market-shock therapy in Russia, the economic emergency experienced by many Latin American countries adopting neoliberal policy prescriptions in the 80s, and the serious economic recession in Asian countries resulted from the neoliberal measures imposed by international financial institutions to address their financial crisis in the 90s.<sup>50</sup> Reformers in the second movement failed to adopt lessons from the earlier law and development movement.<sup>51</sup>

The reformers' ideological drive, which predominated the funding selection, implementation, and evaluation of development and law reform projects was another cause for their failure.<sup>52</sup> The neoliberal position, as expressed by the Washington Consensus,<sup>53</sup> significantly affected development project funding from the aid agencies of major developed countries, as well as international financial institutions. While some of the most successful development experiences after the Second World War exhibited a policy path that was substantially different from this neoliberal stance, development projects did not incorporate lessons of such successes,<sup>54</sup> even after a substantial number of the projects that followed the neoliberal logic did not deliver their promised outcomes.

Law and development has been undergoing a period of reflection and new approaches, sometimes referred to as the "third movement," since the late 1990s.<sup>55</sup> Although their views are more diverse compared to the preceding two movements, advocates in the third movement have supported a more holistic view of development,<sup>56</sup> chastened the neoliberal approach in the preceding period, and incorporated a range of non-market values as the objectives of development. For example, law (or the rule of law) has

50. These failures indicated that "markets do not create the conditions for their own success." See *id.* For further discussion of the Asian financial crisis, see also HAIDER A. KHAN, *GLOBAL MARKETS AND FINANCIAL CRISES IN ASIA* (2004).

51. See Wade Channel, *Lessons Not Learned About Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 137 (Thomas Carothers ed., 2006).

52. See Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 296-97.

53. "Washington Consensus" refers to a set of policies that represents the lowest common denominator of policy advice that Washington-based institutions advances, such as fiscal discipline, a redirection of public expenditure priorities toward areas offering both high economic returns and the potential to improve income distribution (such as primary health care, primary education, and infrastructure), tax reform to lower marginal rates and broaden the tax base, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit), and protection of property rights. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED* 5, 7-20 (John Williamson ed., 1989).

54. Certain East Asian countries, such as Korea, Taiwan, Singapore, and more recently China, have achieved remarkable economic development, rising from a state of poverty to that of developed economies, by adopting strong state-driven industrial policies and through state involvement in the economy; however, these lessons were not incorporated in the development projects by international development agencies, such as the World Bank. For an account of the success of East Asian economies and the role of the state, see YONG-SHIK LEE, *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* 14-32, 301-33 (2016).

55. See Trubek & Santos, *supra* note 47, at 7-9.

56. For an explanation of the holistic view, see discussion *infra* Part II A.

become a development objective and not just a means to achieve development, which was how it was perceived in the two preceding movements.<sup>57</sup> Another notable development is that intergovernmental organizations like the United Nations initiated global efforts to eradicate poverty in this period, such as the Millennium Development Goals (MDGs: 2000–2015)<sup>58</sup> and the subsequent Sustainable Development Goals (SDGs: 2015–2030).<sup>59</sup> The SDGs include the rule of law among its targets within seventeen economic and social development goals that they have set to achieve by 2030.<sup>60</sup>

## B. “Law” in the Context of Law and Development

This section discusses the disciplinary parameters of law and development, beginning with the concept of “law” in the context of law and development, and two other key concepts associated with law, “legal frameworks” and “institutions.”

### 1. Law

“Law” generally is defined as a “body of rules of action or conduct prescribed by controlling authority, and having binding legal force”<sup>61</sup> or “a specific rule or a set of rules binding on the members of a society.”<sup>62</sup> Examples of law include provisions of statutes adopted by legislatures, including constitutions, regulations adopted by administrative agencies, and ordinances adopted by municipalities. In the law and development context, “law” may be broader than what the term is perceived as based on these formalistic characteristics. For example, binding judicial precedents are referred to as “law” (case law) in common law countries, such as the United States and Britain, even if such precedents are not formally considered “law” in civil law jurisdictions, such as France and Germany.<sup>63</sup> Still, if judicial precedents are followed with *de facto* binding force, then they are

57. See Kennedy, *supra* note 1, at 156–57.

58. For further details of the achievement of the MDGs, see United Nations, *The Millennium Development Goals Report 2015* (2015), [http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf) [https://perma.cc/B54M-TY53].

59. For further information on the SDGs, see United Nations, *Sustainable Development Goals*, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> [https://perma.cc/FZ2B-JG2V].

60. See United Nations, *Goal 16: Promote just, peaceful and inclusive societies, Sustainable Development Goals*, <http://www.un.org/sustainabledevelopment/peace-justice/> [https://perma.cc/4FNJ-TYMT].

61. *Law*, BLACK’S LAW DICTIONARY 884 (6th ed. 1997).

62. Lee, *supra* note 3, at 2 n.3.

63. “Common law” refers to the legal system that originated in England based on binding judicial precedents. Common law was adopted in many former British colonies and territories, such as the United States, Canada, India, Australia, and New Zealand. “Civil law” is the legal system that originated in Roman law, which is based on formally legislated “codes.” Civil law is now prevalent in Continental Europe, Latin America, and East and Southeast Asia. See U.C. Berkeley, *The Common Law and Civil Law Traditions*, <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> [https://perma.cc/73RA-JU8A].

considered “law” for law and development studies in both common law and civil law countries. Scholars have recognized the existence and force of norms other than legislation and case law.<sup>64</sup> For the purpose of law and development studies, “law” also includes some of these norms or informal rules, referred to as “customary law,” that are consistently observed with an *opinio juris*.<sup>65</sup>

There is a question as to whether informal norms that practically bind the members of a society, but are not necessarily observed with an *opinio juris*, should be considered “law” in the context of law and development. A good example of such an informal norm is the “administrative guidance”<sup>66</sup> that the Korean and Japanese governments have adopted for businesses and industries during periods of economic development. The people of these countries consistently followed administrative guidance, even though it was not formally a “law” or recognized as such by the public (*i.e.*, no *opinio juris*), because their local and political cultures regarded giving such guidance as a legitimate role of the government.<sup>67</sup> Some suggest that “law” should be understood very broadly, including the basic form of communal normative ordering regardless of the presence of *opinio juris*.<sup>68</sup> Per this more expansive definition, practices such as administrative guidance as well as all fundamental social norms, are understood to be forms of “law.” This expansive definition blurs the distinction between law and non-legal orders.<sup>69</sup>

## 2. Legal Frameworks

Another concept that is closely relevant to the discussion of law in the context of law and development is “legal frameworks.” “Legal frameworks” refers to frameworks in which law is organized, such as regulatory structures and legal systems. Legal frameworks are a determinant of regulatory

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64. For further discussion of informal norms regulating private transactions, see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); and Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

65. The existence of a customary law may be confirmed by a judicial decision. For further discussion of customary law, see AMANDA PERREAU-SAUSSINE & JAMES BERNARD MURPHY, *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* (2009). Customary law includes religious codes, such as Sharia law (Islamic Law) that most Muslim-majority countries have adopted and enforced. See, e.g., SALIM FARRAR & GHENA KRAYEM, *ACCOMMODATING MUSLIMS UNDER COMMON LAW: A COMPARATIVE ANALYSIS* (2016).

66. “Haeng-Jung Ji-Do” (in Korean) or “Gyō-Sei Shi-Dō” (Japan).

67. For a related account of minimum judicial oversight, see Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 594-97 (2001).

68. See, e.g., GARRETT BARDEN & TIM MURPHY, *LAW AND JUSTICE IN COMMUNITY* (2010).

69. In any case, the dividing line between law and non-legal orders is by no means clear. For instance, whether a particular informal norm is observed with an *opinio juris* could be a matter of debate. See also Tim Murphy, *Living Law, Normative Pluralism, and Analytic Jurisprudence*, 3 JURIS. 177 (2012).

impact.<sup>70</sup> For example, the impact of a law may vary depending on whether it is implemented as a stand-alone statute with its own monitoring and enforcement mechanisms or as a part of a regulation subject to the control of a higher-level statute.<sup>71</sup> Legal frameworks may also present challenges for the adoption of laws that originated in another jurisdiction; an adopted law's operative terms may reference legal norms and concepts existing in the originating legal system, but not in the receiving jurisdiction.<sup>72</sup> For example, the adoption of a new statute referencing "fiduciary duty" or "constructive trust," which are legal concepts developed through cases in common law jurisdictions, could pose considerable difficulty in its interpretation and application in a civil law jurisdiction without similar legal development.<sup>73</sup>

Scholars have identified legal systems with different underlying ideologies and cultural traits. According to Paul Mahoney, the ideologies underlying English common law promote individual liberty and freedom from government intervention, and those underlying French civil law promote collective rights and greater government activism, leading to different development outcomes (i.e., common law countries show on average higher economic growth rates over time).<sup>74</sup> This finding, however, does not seem to explain the most successful development cases since the Second World War, including Korea, Taiwan, Hong Kong, Singapore (the Newly Industrialized Countries or "NICs"),<sup>75</sup> Spain, Chile,<sup>76</sup> and, more

70. *See id.*

71. The importance of legal frameworks has also been emphasized by the works of La Porta and others. *See* Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert Vishny (La Porta *et al.*), *Law and Finance*, 106 J. POL. ECON. 1113 (1998). They argued that legal origin, such as common law or civil law legal origins, explains cross-country differences in financial development, and tried to demonstrate that a country's development in the financial market and its laws on property rights, shareholder rights, and creditor rights are affected by its legal origin. *See also* La Porta *et al.*, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000); and La Porta *et al.*, *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002). Their conclusion that common law is superior to civil law in financial development shows certain gaps and has been subjected to the criticism that the cited differences in economic performance among those countries may not be attributed to differences in legal origin, but to other factors, such as differences in macroeconomic policies. *See* DAM, *supra* note 17, at 31-49; and Cross, *supra* note 12.

72. *See* Katherina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002).

73. Hedeki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law* 1, 15-16 (Colum. L. & Econ. Working Paper No. 219, 2003).

74. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

75. Hong Kong became a territory of China in 1997. The NICs have achieved unprecedented sustained economic development for over three decades. Between 1961 and 1996, Korea increased its gross domestic product (GDP) by an average of 8.75 percent per annum, Hong Kong by 7.61 percent, Taiwan by 8.64 percent, and Singapore by 8.61 percent, while the world's average annual GDP increase for the corresponding period was 3.85 percent (the GDP growth figures are calculated with real GDP figures at constant 2005 national prices). *See* Robert C. Feenstra, Robert Inklaar, & Marcel P. Timmer, *Penn World Table Version 8.1*, U. Groningen, <http://www.rug.nl/ggdc/produces>

recently, China. Among this list, only Hong Kong and Singapore are classified as common law systems. Mahoney's research also disregarded variances among common law countries and exaggerated the claimed differences between common law and civil law countries. For example, Singapore, a common law country, showed strong government initiatives and activism in its economic development process.<sup>77</sup> When the authoritarian rule of Pinochet ended in 1990, Chile, which maintained a civil law system, promoted liberal policies that emphasized individual liberty and freedom in both political and economic areas. If there is any relevance between the legal system and its development, it is that a civil law system, based on state-sponsored codes, appears more adoptable than a common law system. Except for countries that were formerly under British rule, most countries have adopted a civil law system.

### 3. Institutions

Lastly, the concept of "institution" is also relevant to law and development discourse. "Institutions," in the context of law and development, refers to organizations, norms, and practices related to the adoption, implementation, and enforcement of law.<sup>78</sup> The impact of law cannot be assessed separately from relevant institutions. For example, the adoption of a statute that imposes a criminal penalty on corruption would lack effectiveness if the essential institutions that enforce it, such as an effective prosecutorial service or an independent judiciary, were absent.<sup>79</sup> Also, laws that attempt to establish formal private property rights ("FPPRs"), with the objective of enhancing economic efficiency by securing citizens' legal rights to their property, may not be effective without the implementa-

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tivity/pwt/pwt-releases/pwt8.1 [https://perma.cc/YA5R-A3PK]; see also World Bank, *GDP Growth (annual %)*, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (noting that the annual GDP increase for low and middle-income countries for the corresponding period was 4.39 percent) [https://perma.cc/MZ8R-QZ9X].

76. Both Spain and Chile were in a state of poverty by the time the Second World War had ended. Spain achieved rapid economic development under General Franco since the 1960s ("the Spanish Miracle") and Chile since the mid-1980s under the rule of Pinochet who, despite the atrocities that he committed, paved a way for the country's economic prosperity by enacting economic reforms during his regime. As a result of successful economic development, both countries achieved the high-income country status as classified by the World Bank (see *infra* note 146) and became elective democracies under the rule of law after the authoritarian regimes of Franco and Pinochet ended in 1975 and 1990, respectively.

77. For an evolution of the industrial policies of Singapore and other successful East Asian developing countries, see Mari Pangestu, *Industrial Policy and Developing Countries*, in *DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK* 149, 153 (Bernard Hoekman, Aaditya Mattoo, & Philip English eds., 2002).

78. Douglas North defined "institutions" more broadly, to mean "the humanly devised constraints that structure political, economic and social interaction" which "consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)." North, *supra* note 7, at 97.

79. See Gerald A. Sumida, *Conditions for Effective Reform*, reprinted in *TAKING ACTION AGAINST CORRUPTION IN ASIA AND THE PACIFIC: PROCEEDINGS OF THE 3RD REGIONAL ANTI-CORRUPTION CONFERENCE* 131-32 (2001).

tion of key institutional elements that support FPPRs, such as an affordable and reliable land registration system operated by non-corrupt and capable government officials.<sup>80</sup>

Institutions have gained a great deal of attention for their role in development. In the 1970s, scholars criticized that ethnocentric assumptions made about the role of institutions, such as the judiciary, ignored local realities and denied the field a functional theory.<sup>81</sup> Douglas North, a Nobel laureate, emphasized the importance of institutions in the context of economic development.<sup>82</sup> Other scholars have argued that the quality of the institutions that administer law, rather than the law *per se*, is more relevant to development.<sup>83</sup> Institutions, particularly those sanctioned by the state, have always been at the center of law and development studies, and there is a rising consensus that getting the right institutions is the key to success.<sup>84</sup> The difficulty, however, is that there is little guidance as to *which* institutions are important<sup>85</sup> and *how to* develop such institutions

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80. For further discussion of FPPRs, see Guangdong Xu, *Property Rights, Law, and Economic Development*, 6 *LAW & DEV. REV.* 117 (2013).

81. See Trubek & Galanter, *supra* note 4, at 1078-79.

82. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990). Comparing the United States' success with its constitution with the lack of success Latin American countries have had with their constitutions that were inspired by the United States, North also argued that the institutions that were previously in place affect the path that an economy takes in the future ("path dependency"). North, *supra* note 7, at 110-11. According to North, institutions provide the incentive structure that directs economic and political growth. See Douglass North, *Big-Bang Transformations of Economic Systems: An Introductory Note*, 156 *J. INSTITUTIONAL & THEORETICAL ECON.* 3, 5 (2000). The evolution of that structure determines whether economies grow, stagnate, or decline. See North, *supra* note 7, at 97.

83. See Davis & Trebilcock, *supra* note 13.

84. Several studies discuss the role of institutions in economic development. Based on empirical evidence, Frank Cross concluded that the necessity of legal institutions for economic growth is unquestionable. See Cross, *supra* note 12, at 1738-39. Kenneth Dam also considered legal institutions to be important for economic development. See DAM, *supra* note 17, at 230-31. Additional empirical cross-country research acknowledges the importance of institutions for development. See Daniel Kaufmann *et al.*, *Governance Matters* (World Bank Policy Research Working Papers No. 2196, 1999); see also Dani Rodrik, Arvind Subramanian, & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 *J. ECON. GROWTH* 131 (2004).

85. Some scholars have advocated for a "cluster of institutions" that are important to encourage investment and growth, such as constraints on government expropriation, independent judiciary, property rights enforcement, and institutions providing equal access to education and civil liberties. See Daron Acemoglu, Simon Johnson, & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 *AM. ECON. REV.* 1369, 1371-72 (2001). By contrast, others have observed that institutions, such as the independent judiciary and formal property rights, are not essential to successful economic growth. See Posner, *supra* note 10, at 2; see also Frank Upham, *The Paradoxical Roles of Property Rights in Growth and Development*, 8 *LAW & DEV. REV.* 253 (2015). Dani Rodrik has enumerated five market-supporting institutions, including property rights, regulatory institutions, institutions for macroeconomic stabilization, institutions for social insurance, and institutions of conflict management. See Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 *STUD. COMP. INT'L DEV.* 3, 6-10 (2000).

under varying socioeconomic conditions affecting them.<sup>86</sup>

## II. The Question of Development

This part continues to examine the disciplinary parameters of law and development, with the concept of “development,” which is another key constituent concept in law and development.<sup>87</sup> In the context of law and development, development is defined as “a progressive transformation of the economy and society”<sup>88</sup> or simply as “economic or social progress,” but there is no clear consensus as to what constitutes such economic and social progress. Section A addresses this inquiry. Following this discussion, Section B examines how both economic and social progress can be incorporated into a coherent theory of law and development. Finally, Section C discusses the changing economic conditions in developed countries which render the concept of “development” and the law and development approach applicable to economic issues in developed countries as well as developing ones.

### A. What Constitutes Development?

The substance of “development” and its focus have changed over time. In the 50s and 60s, development primarily meant economic growth or improvement in national income, reflecting efforts to relieve populations in developing countries<sup>89</sup> of prevalent poverty and to reduce economic gaps between developed and developing countries.<sup>90</sup> The concept of development has become more holistic since then, emphasizing non-economic values believed to enhance human life, such as political participation, right to property, gender equality, access to a clean and safe environment, and the

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86. See Rodrik *et al.*, *supra* note 84, at 157-58.

87. There is no universally accepted definition for “development.” Noting this uncertainty, the U.S. representative to United Nations Human Rights Council, Michael Novak, said in 1981, “[t]he concept of ‘development’ is itself in need of development . . .” (quoted in Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 148 (2004)).

88. Trubek & Galanter considered development to mean “progressive social, political, and economic changes in developing countries.” Trubek & Galanter, *supra* note 4, at 1062. The term “social development” used in this Article includes the notion of progressive political change.

89. The dichotomy between developed and developing countries is not always clear, but the former are normally understood as high-income countries with advanced economic, technological, and industrial capacities. For the income classifications of countries, see World Bank, *infra* note 146. Developed countries are also the members of the OECD (Organisation for Economic Co-operation and Development), although not all of the OECD countries may fit the cited description of developed countries. Many also view that the practice of elective democracy and the rule of law are essential qualifications for “developed countries.”

90. See Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 9-10 (2004); see also David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 1, at 75.

rule of law,<sup>91</sup> as the key elements of development.<sup>92</sup>

This holistic view of development became triumphant and won popular support when the 1998 Nobel laureate Amartya Sen advocated “development as freedom,” meaning that “development” should comprise of political freedom, economic choice, and protection from abject poverty.<sup>93</sup> Before Sen’s work, the United Nations Development Programme (UNDP) had introduced the concept of “human development,”<sup>94</sup> which was in line with the holistic view of development. The UNDP clarified that “human development” consists of elements that directly “enhance human abilities,” such as a “long and healthy life, knowledge, decent standard of living,” and those that create “conditions for human development,” such as participation in “political and community life, environmental sustainability, human security and rights, and gender equality.”<sup>95</sup> The World Bank’s Comprehensive Development Framework (CDF)<sup>96</sup> and the SDGs<sup>97</sup> promoted by the United Nations also encompass this holistic view of development.

The holistic view, although noble in its aspirations, presents some difficulties, as reflected in the criticism raised by Bhupinder Chimni that Sen fails to adequately address the social constraints that inhibit the realization of the holistic goals of development (“development as freedom”).<sup>98</sup> There are also economic constraints: in order to promote non-economic values, such as the rule of law, a society needs trained legal professionals, an efficient court system, and a reliable enforcement mechanism, all of which require considerable economic and technical resources. Access to a clean and safe environment and to education also requires economic resources. Thus, without economic development, which enables a developing country to secure necessary economic resources to promote non-economic values, the effective promotion of these values as constituent elements of development may not be realistic. This explains why many places in poverty that fail to achieve economic development also have not met social development goals.

To achieve development goals effectively, one may have to set priorities among the constituent elements of development. It would be particularly

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91. See Santos, *supra* note 24, at 256–66 (discussing the rule of law); see also BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

92. See Gordon, *supra* note 90, at 13 (stating that the holistic view of development includes some of the social rights that are also relevant to enhance the economic and technological capacity of society, such as access to education, in the ambit of development).

93. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); see also Rittich, *supra* note 22, at 208.

94. UNDP, *What is Human Development?*, <http://hdr.undp.org/en/content/what-human-development> [<https://perma.cc/Y6EK-JR4J>].

95. *Id.*

96. See World Bank, *Comprehensive Development Framework*, [http://www.worldbank.org/en/webarchives/archive?url=httpzxxweb.worldbank.org/archive/website01013/WEB/0\\_PAGEP.HTM&mdk=22201409](http://www.worldbank.org/en/webarchives/archive?url=httpzxxweb.worldbank.org/archive/website01013/WEB/0_PAGEP.HTM&mdk=22201409) [<https://perma.cc/K89F-33RS>].

97. See United Nations, *supra* note 59.

98. Bhupinder Chimni, *The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels*, 1 *LAW & DEV. REV.* 3 (2008).



necessary for developing countries without sufficient resources to promote all of the economic and social development goals simultaneously with equal focus and strength. The successful East Asian countries (NICs)<sup>99</sup> have prioritized economic development. One may characterize this path as “development without freedom,”<sup>100</sup> but the people of these countries secured political freedom by the 1990s, including more equitable and democratic political participation based on the rule of law, after they achieved economic development and secured sufficient resources to meet social development goals.<sup>101</sup>

This does not mean that one should exclude or deemphasize non-economic values from the notion of development. Instead, it means that one should, as a practical matter, give consideration to the resource constraints that developing countries face. Developing countries need to have the opportunity to focus on what they need most so that they may secure necessary resources to promote non-economic values. The holistic view of development creates multiple development goals and necessitates their sequencing to account for resource constraints.<sup>102</sup>

## B. Economic and Social Development

The preceding discussion demonstrates the importance of economic development, but economic development and social development are not completely separate and influence each other. The varied distributive effect of economic development among different groups of populations may raise social issues. For instance, economic development based on industrial promotion and exports would benefit those in the manufacturing and export sectors more than subsistence farmers in rural areas, creating economic gaps between urban and rural areas, and raising social issues, such as the youth deserting rural communities and migrating to cities.<sup>103</sup> Social progress may also influence economic development. For example, improved gender equality in work places, which is considered social progress in many places, can motivate increased female participation in productive economic activities, which, in turn, can contribute to overall economic growth.<sup>104</sup>

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99. For a discussion of the successful development of the NICs, see *supra* note 75.

100. SONGOK HAN THORNTON & WILLIAM H. THORNTON, *DEVELOPMENT WITHOUT FREEDOM: THE POLITICS OF ASIAN GLOBALIZATION* (2008).

101. Kerry Rittich also observed that the most outstanding examples of both economic growth and social progress can be found in the NICs. See Rittich, *supra* note 22, at 239.

102. Prioritizing and sequencing would also be consistent with the objectives of sustainable development, because the advocated approach actually allows developing countries to secure the resources to achieve SDGs.

103. See, e.g., Matleena Kniivilä, *Industrial Development and Economic Growth: Implications for Poverty Reduction and Income Inequality*, in *INDUSTRIAL DEVELOPMENT FOR THE 21ST CENTURY: SUSTAINABLE DEVELOPMENT PERSPECTIVES* 295, 312 (David O'Connor & Mónica Kjollerström eds., 2007) (accounting the rural-urban gap in Indonesia).

104. See Rittich, *supra* note 22, at 207, 216. See also World Bank, *Engendering Development: Through Gender Equality in Rights, Resources and Voice* 88–92 (World Bank Policy Research Report No. 21776, 2001), <http://documents.worldbank.org/curated/en/>

Given this interrelatedness between economic and social development, is the priority for economic development justified? One justification is the compelling contemporary need to overcome the prevalent poverty around the world affecting a majority of the world's population. According to a World Bank report, as of 2012, 14.9 percent of the people in the developing world lived on less than \$1.90 a day.<sup>105</sup> The only permanent solution to the widespread poverty issue is successful economic development, which creates an economy that provides economic resources that can bring a majority of a population out of poverty.<sup>106</sup> As discussed in the preceding section, prioritization and sequencing will also enable developing countries to resolve resource constraints in order to pursue non-economic development goals effectively.<sup>107</sup> The need for prioritization and sequencing, however, does not mean that the social agenda should always be set aside for economic development. The agenda can be included where it is relevant to promote economic development, as discussed above, or where it can be co-promoted without critical resource implications, regardless of whether or not it enhances economic development.

The proposed general theory incorporates both economic and social development. The non-economic values comprising the latter, however, raise complex and multifaceted issues with divergent and often irreconcilable views as to their substance, characterization, constituent elements, and enforceability. Despite the existence of values and priorities claimed as "universal," such as fundamental human rights of a political and civil nature, what is viewed as political and social progress is a much broader question that lacks a cross-cultural consensus.<sup>108</sup> For example, some cultures do not agree that the legalization of same-sex marriages represents social progress.<sup>109</sup> One's subjective value system and preferences of a cultural and ideological nature would be a determinant of this question.

As a result, the development of objective analytical criteria for social progress is extremely complex and controversial. There could also be a question as to what constitutes economic development. Nonetheless, the

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512911468327401785/Engendering-development-through-gender-equality-in-rights-resources-and-voice <https://perma.cc/H587-JUQ2>].

105. World Bank, *Poverty Forecasts*, <http://www.worldbank.org/en/publication/global-monitoring-report/poverty-forecasts-2015> [<https://perma.cc/34RT-J336>]. (The amount in dollars (\$) is in U.S. dollars throughout this Article unless indicated otherwise.) Two seminal books in law and development also focus on economic development. See *THE NEW LAW AND ECONOMIC DEVELOPMENT* (David M. Trubek & Alvaro Santos eds., 2006), *supra* note 1; and *DAM*, *supra* note 17.

106. See World Bank, *Development and Human Rights: The Role of the World Bank 8* (1998), <http://documents.worldbank.org/curated/en/820031468767358922/Development-and-human-rights-the-role-of-the-World-Bank> (discussing the importance of economic development for the enhancement of human rights) [<https://perma.cc/MDJ7-CKYH>].

107. See discussion *supra* Part II A.

108. See Lee, *supra* note 3, at 4.

109. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015) (legalizing marriages between individuals of the same sex ("same-sex marriage") by requiring all States to issue a marriage license to same-sex couples.) However, as of December 2017, the majority of countries have not legally recognized same-sex marriage.

general concept of economic development, which denotes the process of the structural transformation of an economy from one based primarily on the production of primary products (*i.e.*, a product consumed in its unprocessed state), generating low levels of income, to another based on modern industries, generating higher levels of income for the majority of the populations, is more widely accepted than any criteria to identify social development.<sup>110</sup> As to social development,<sup>111</sup> most of the controversy centers on the question of its identification—what should be determined as social progress as demonstrated by the example cited above. This question is not prone to an objective assessment based on a set of criteria agreeable across different cultures and ideologies.

Despite this complexity, it would still be feasible to address the relationship between law and social progress in the proposed general theory once there is an agreement, perhaps among those sharing common cultural and ideological backgrounds, that a certain type of social change is to be considered social progress. In other words, the proposed theory may identify whatever has been agreed upon as social progress, which may well vary from one place to another, and examine regulatory impact on social development identified as such. The general theory does not presume or attempt to prescribe what *has to be* considered “social progress” everywhere.<sup>112</sup> As observed by a commentator, the adopted approach is essentially descriptive and analytical, rather than normative and prescriptive.<sup>113</sup>

### C. Extension of the Concept of Development

The concept of “development,” which is defined as a progressive transformation of the economy and society, has been associated with developing countries.<sup>114</sup> In reality, the transformative nature of the concept may

110. There is, however, no consensus on the measurement of economic development, and no measure captures all the elements of economic development. Subject to this limitation, a possible measure of economic development in a given time period is the rate of growth in Gross Domestic Product (GDP) in the corresponding period.

111. “Social development” or “social progress” could be defined as a transformation of the society that fulfills a particular value or a set of them shared by the majority of the society; however, as discussed above, these values are not identical across societies with varied cultural and ideological orientations. See also Manohar S. Pawar & David R. Cox, *Social Development*, in *SOCIAL DEVELOPMENT: CRITICAL THEMES AND PERSPECTIVES* 13, 15–18, 31 (Manohar S. Pawar & David R. Cox eds., 2010).

112. The existence of diverse positions and viewpoints, however, does not preclude an observation or criticism that what is advocated as social progress in one place is not consistent with what is considered a universal human right, as determined by relevant international conventions, such as the *Universal Declaration of Human Rights*, G.A. Res. 217A (III) (Dec. 10, 1948), the *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) (Dec. 16, 1966), and the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI) (Dec. 16, 1966). However, the consideration of human rights does not automatically inform what should be considered “social progress” everywhere. The determination of social progress is essentially a value judgment, which is not a majority rule.

113. William H.J. Hubbard, Yong-Shik Lee, “Call for a New Analytical Model for Law and Development”: A Comment, 8 *LAW & DEV. REV.* 271, 273–74 (2015).

114. See *supra* note 89 (explaining the distinction between “developing” and “developed” countries).

render it applicable to economic problems in developed countries to the extent that economic and social transformation and the accompanying changes in law are required to address them. Such application may not be an orthodox approach, but the economic environment faced by many developed countries today may justify this extension of the concept for the following reason. The neoliberal economic shifts,<sup>115</sup> which have taken place since the 1980s in many developed countries, such as the United States and Britain, have created substantial income gaps among citizens and regions within developed countries,<sup>116</sup> leading to significant political consequences.<sup>117</sup> Thus the concept of “development” may be relevant to citizens with lower incomes, as well as economically less developed regions within developed countries.<sup>118</sup>

In addition, the structural issues in the economies of developed countries today, including the increasing financial volatility, as demonstrated by the 2008 financial crisis, a persistent low economic growth accompanying significant unemployment, and the institutional incapacity to deal with these issues, are not only cyclical economic issues that were once considered a normality in developed economies but also resemble the chronic problems of the developing world.<sup>119</sup> As such, there is rising necessity for

115. For a discussion of the neoliberal approach, see *supra* note 46.

116. The OECD observed increasing wage gaps and household income inequality in a large majority of OECD countries. See OECD, *DIVIDED WE STAND: WHY INEQUALITY KEEPS RISING* 22 (2011). For example, according to the U.S. Census Bureau, New Orleans and Detroit are among the most impoverished major cities in the United States, with 27.8 percent and 39.3 percent of their populations living below the poverty line (\$24,008 for a family of four), respectively, as of 2014. See Karen Bouffard, *Census Bureau: Detroit Is the Biggest Poor City in the U.S.*, DET. NEWS (Sept. 16, 2015), <http://www.detroitnews.com/story/news/local/michigan/2015/09/16/census-us-uninsured-drops-income-stagnates/32499231> [<https://perma.cc/E3BP-MY2U>]. Both cities also suffer from high crime rates and low public-school rating. See Peter Harkness, *Detroit and New Orleans Have More in Common Than Most Think*, GOVERNING (Jan. 2016), <http://www.governing.com/columns/potomac-chronicle/gov-detroit-new-orleans-resilience.html> [<https://perma.cc/7J7R-X5JE>].

117. Analysts have cited widening income gaps and the resulting poverty as reasons for the result of Britain’s 2016 referendum to exit the European Union and for the outcome of the 2016 U.S. presidential election. See John Harris, *If You Have Got money, You Vote in . . . If You Haven’t, You Vote out*, THE GUARDIAN (June 24, 2016), <https://www.theguardian.com/politics/commentisfree/2016/jun/24/divided-britain-brexit-money-class-inequality-westminster> [<https://perma.cc/4K3T-KZLA>]; and Trip Gabriel, *How Erie Went Red: The Economy Sank, and Trump Rose*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/us/politics/pennsylvania-trump-votes.html> [<https://perma.cc/NH5H-GS6H>].

118. Reflecting this reality, national, regional, and local governments in developed countries have set up offices to foster “economic development.” Examples include Economic Development Administration (EDA) established under the U.S. Department of Commerce, the Georgia Department of Economic Development in the State of Georgia, USA, and the Office of Economic Development in the City of New Orleans. See EDA, U.S. ECON. DEV. AGENCY, <https://www.eda.gov/> [<https://perma.cc/WC7C-CSJT>]; *About Us*, GA. DEP’T ECON. DEV., <http://www.georgia.org/about-us/> [<https://perma.cc/FM2G-UCT6>]; and *Office of Economic Development*, CITY OF NEW ORLEANS, <https://www.nola.gov/economic-development/> (last visited Nov. 17, 2017).

119. See Mohamed A. El-Erian, *Why Advanced Economies Need to Learn from Developing Nations*, BLOOMBERG VIEW (July 11, 2016), <https://www.bloomberg.com/view/arti>

new analytical approaches, such as legal and institutional approaches (*i.e.*, the law and development approach), that are adopted to deal with economic problems in developing countries and facilitate economic development.<sup>120</sup>

The question also turns on political will, *i.e.*, whether the national leaderships of developed countries will have the sufficient political will to reduce the economic gaps which exist in their countries and use their political capital for this purpose, at the risk of causing resistance and losing support from the economic establishment and more prosperous regions that would have to fund this effort. This represents a potential tension between those pushing for more economic equality across the nation and the establishment within society, who may not stand to benefit from assisting the economically-depressed regions. The latter's financial resources and political influence can put considerable pressure on governments promoting a development agenda, although the recent political outcomes in developed countries, such as the 2016 U.S. presidential election outcome and Britain's referendum result to exit the European Union in the same year, may have an effect of weakening such pressure.<sup>121</sup>

The potential applicability of the law and development approach to developed countries will substantially expand the scope of law and development and increase its utility beyond addressing development issues in developing countries. In other words, the general theory advanced in this Article offers an analytical framework through which to examine the effectiveness of relevant laws in developed countries (as well as developing ones) in dealing with the cited economic issues facing developed countries today, with references to their legal frameworks, institutional arrangements, and socioeconomic conditions. For example, developed countries could adopt the general theory to examine the effectiveness of "jobs growth acts" in creating jobs for low-income groups and reducing income gaps within these countries.<sup>122</sup>

With regard to expanding the law and development approach to developed countries, there is also a question as to whether the political and legal traditions of individual developed countries would allow their leadership to promote a development agenda. For example, in the United States, the federal government has not engaged with local economic issues, except those

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cles/2016-07-11/why-advanced-economies-need-to-learn-from-developing-nations [https://perma.cc/J686-DRYE].

120. See *id.* Applied to developed countries, the definition of economic development, introduced in the previous section, could be adjusted to "the process of the structural transformation of an economy to one generating higher productivity and increases in income for the majority of populations" (without the reference to "one based primarily on the production of primary products," because developed countries are not such economies). I also offer a discussion on the possible legal and institutional approaches to address economic problems in the United States in my forthcoming article, *Law and Economic Development in the United States: Toward a New Paradigm* (on file with the author).

121. For a further observation on this point, see *supra* note 117.

122. See, e.g., Full Employment and Balanced Growth Act of 1978, 15 U.S.C. §§ 3101-52; and Jobs and Growth Act, S.C. 2012, c 31 (Can.).

caused by natural catastrophes and other types of emergencies,<sup>123</sup> and has not traditionally provided economic support targeting economically-depressed regions, as regional economic issues are left to be handled by regional and local governments.<sup>124</sup> The problem with this approach is that regional and local governments often lack the resources to implement development-facilitating laws through the provision of sufficient incentives for investment and employment generation.<sup>125</sup> Also, a substantial portion of the general public advocating “small government” in developed countries may not support the idea of the government taking up an active role in economic development by spending public resources. Thus, this also involves the question of the appropriate role of the state in the economy, which is the subject of an on-going debate.<sup>126</sup>

### III. Regulatory Impact Mechanisms

Following the preceding discussions on the constituent concepts of law and development, the next three sections discuss the second part of the general theory, the regulatory impact mechanisms, which denote the causal mechanisms by which law impacts development. These mechanisms comprise three categorical elements: “regulatory design,” “regulatory compliance,” and “quality of implementation.” Section A discusses the first element, “regulatory design” and its three sub-elements: the outcome of a policy that law is anticipated to deliver; the structural organization and dynamics among law, legal frameworks, and institutions; and the adaptability of law to the socioeconomic conditions on the ground. These three sub-elements collectively determine the effectiveness of regulatory design. Section B examines the second element, regulatory compliance, categorized

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123. For example, the U.S. federal government supported \$110.6 billion in aid for relief, recovery and rebuilding efforts in the Gulf Coast of Louisiana following the Hurricane Katrina. See DEP'T ST., *Hurricane Katrina: What Government Is Doing*, <http://www.state.gov/documents/organization/150082.pdf> [https://perma.cc/YC68-TNGE]. By contrast, a relatively modest amount, \$350 million of the federal aid, has been spent on the bankrupt city of Detroit. See Harkness, *supra* note 116.

124. This is generally the case except small-scaled support for “economically depressed areas” provided by the EDA under the authority of Public Works and Economic Development Act (PWEDA). 42 U.S.C. § 3161. In 2016, the EDA supported 649 development projects for the total grant of 261 million, averaging around 400,000 per project. EDA, *2016 Annual Report* (2016), <https://www.eda.gov/annual-reports/fy2016/> [https://perma.cc/GY9G-YWWZ].

125. The local and regional governments may provide incentives in the form of tax reduction or exemptions, but the finances of many regional and local governments may not be strong enough to afford meaningful tax relief and other concessions in lieu of direct subsidy payments. For a relevant discussion on the insufficient state budget, see Lucy Dadayan & Donald J. Boyd, *By The Numbers: 2016: Another Lackluster Year for State Tax Revenue*, ROCKEFELLER INST. GOV'T (May 2017), [http://www.rockinst.org/pdf/government\\_finance/2017-05-08-By-numbers-brief-no9.pdf](http://www.rockinst.org/pdf/government_finance/2017-05-08-By-numbers-brief-no9.pdf) [https://perma.cc/6BUZ-QSVF].

126. See discussion *infra* Part III C. See generally PETER J. BOETTKE & PETER T. LEESON, *THE ECONOMIC ROLE OF THE STATE* (2015); Joseph Stiglitz, *Globalization and the Economic Role of the State in the New Millennium*, 12 *INDUS. & CORP. CHANGE* 3 (2003); and George J. Stigler & Paul A. Samuelson, *A Dialogue on the Proper Role of the State* (Grad. Sch. Bus., U. Chicago Selected Papers No. 7, 1968).

as general and specific regulatory compliances. Section C addresses the third and final element, quality of implementation, determined by two other factors, “state capacity” and “political will.” This section also discusses the relationship between political will and democracy in the context of law and development. The discussion of each element and sub-element inevitably entails a degree of abstract discourse. I will attempt to clarify relevant points with examples. The empirical application of the general theory in Part IV will also assist in clarifying the conceptual aspects of the theoretical elements.

## A. Regulatory Design

The first analytical step in assessing regulatory impact is the analysis of law’s design (regulatory design) with respect to a particular development objective, such as economic growth.<sup>127</sup> The analysis of regulatory design begins with the assessment of anticipated policy outcomes, the first of the three sub-elements as introduced above.

### 1. Anticipated Policy Outcome

Law, whether it is designed by legislation (*e.g.*, statute) or has evolved gradually over a period of time (*e.g.*, customary law and case law), exhibits a policy or policies, which form regulatory objectives.<sup>128</sup> For example, a statute that requires the removal of customs tariffs on products imported from other countries, as a result of a free trade agreement (FTA) between the importing and exporting countries, advances the policies of increasing trade between them and contributing to the economic growth of the participating countries.<sup>129</sup> Additional examples include the policy of improving gender equality in society through the enactment of a statute that prohibits gender-based discrimination in workplaces.<sup>130</sup> In the case of customary law and case law, a regulatory objective is also “found” in the process of identifying relevant rules. A judicial court in the United States identified a

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127. An effective impact analysis would require a clarification and predetermination of a specific development objective. A reviewer may consider an analysis to be inappropriate if the latter focuses on an objective that the reviewer does not consider essentially important for development. For example, for those who value income distribution more than economic growth as a development objective, an analysis focusing on economic growth may not be appropriate. Thus, the controversy surrounding the appropriateness of the analysis will reduce if an analytical task clarifies at the outset a development objective to be focused on.

128. Legislation may have multiple objectives, all of which may not necessarily be agreed by all legislators or be consistent with one another. Even so, most legislators, if not all, could agree on the main purpose of legislation. Customary law and common law are also evolved over a period of time to deliver a policy outcome to meet the changing needs of a society. See, *e.g.*, C.R.M. Dlamini, *The Role of Customary Law in Meeting Social Needs*, ACTA JURIDICA 71 (1991).

129. See, *e.g.*, U.S. INT’L TRADE COMM’N (USITC), Investigation No. TA-2104-24, USITC Publication 3949, *U.S.-Korea Free Trade Agreement: Potential Economy-Wide and Selected Sectoral Effects* (2007), <https://www.usitc.gov/publications/pub3949.pdf> (assessing the economic impact of the United States-Korea Free Trade Agreement) [<https://perma.cc/8UKT-9RZZ>].

130. World Bank, *supra* note 104.

common law rule that denies damages for ameliorative waste (an improvement to an estate that changes its character) advancing the policy of encouraging improvements on land and economic development.<sup>131</sup>

Anticipated policy outcomes are the specific outcomes that are anticipated as a result of the implementation of such policies. In the first example, the increase in trade and economic growth would be the anticipated policy outcome,<sup>132</sup> and, in the subsequent examples, the improvement of gender equality and the increased improvements on land would be the anticipated policy outcomes. The explicit regulatory objectives stated in laws do not always identify anticipated policy outcomes nor does the legislature otherwise make them clear.<sup>133</sup> Regardless of pronounced regulatory objectives, objective assessment identifies policy outcomes, often aided by the methods of social sciences as further discussed below. A study has indicated that laws may cause a variety of transformations (anticipated policy outcomes) beyond their explicit purposes (regulatory objectives).<sup>134</sup>

The anticipated policy outcome is analyzed with references made to the theories and analytics of relevant social sciences, which, depending on the type of development objective pursued, may include economics, sociology, political science, anthropology, and development studies. Reference is also made to their methodologies,<sup>135</sup> including those adopted in the Regulatory Impact Analysis (RIA).<sup>136</sup> In adopting a social science analysis, consideration should be given to its imprecise nature; since social sciences

131. *Id.* For further discussion, see Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055 (2011).

132. Following the implementation of the United States-Korea Free Trade Agreement, trade between the United States and Korea increased by \$23.5 billion between 2011 and 2015. See United States Trade Representative (USTR), *Fact Sheet: Four Year Snapshot: The U.S. Korea Free Trade Agreement* (Mar. 2016), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2016/March/Four-Year-Snapshot-KORUS> [<https://perma.cc/CS7L-XEZF>].

133. See Rittich, *supra* note 22, at 212-13.

134. *Id.* at 216.

135. Those methodologies include statistical and econometrical methods. The latter often adopts a regression analysis, which is a statistical process for estimating the relationships among independent and dependent variables. For further discussion, see generally Angus Deaton, *Data and Econometric Tools for Development Analysis*, in 3 HANDBOOK OF DEVELOPMENT ECONOMICS 1785 (J. Behrman & T.N. Srinivasan eds., 1995); and David A. Freedman, *STATISTICAL MODELS: THEORY AND PRACTICE* (2009).

136. An RIA is a process for identifying and assessing the expected effects of regulatory proposals. It adopts relevant analytical methods such as benefit/cost analysis. For further discussion, see generally Organisation for Economic Co-operation and Development [OECD], *INTRODUCTORY HANDBOOK FOR UNDERTAKING REGULATORY IMPACT ANALYSIS (RIA), VERSION 1.0* (Oct. 2008), <http://www.oecd.org/gov/regulatory-policy/44789472.pdf> [<https://perma.cc/MBZ3-EPTW>]. For further discussion of RIAs, see generally Robert W. Hahn, Jason K. Burnett, Yee-Ho I. Chan, Elizabeth A. Mader, & Petrea R. Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000); Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987); Claudio M. Radaelli, *The Diffusion of Regulatory Impact Analysis: Best Practice or Lesson-Drawing?*, 43 EUR. J. POL. RES. 723 (2004); and Jacopo Torriti & Ragnar E. Löfstedt, *The First Five Years of the EU Impact Assessment System: A Risk Economics Perspective on Gaps between Rationale and Practice*, 15 J. RISK RES. 169 (2012).



address human behavior, which involves a degree of uncertainty and unpredictability, an analysis of a possible policy outcome aided by social sciences is inexact, and one needs to interpret its outcome broadly.<sup>137</sup> This imprecise nature is also compounded by multiple layers of causation. This means that a law may affect development, which in turn, may also affect the law, as discussed later in this section, creating an additional layer of causation, and so on. Thus, the impact is not linear but circular, which is another reason for the inexact nature of such an analysis.

In the case of economic development, an assessment will analyze whether the outcome of the anticipated policy is likely to increase economic productivity and, thus, to achieve economic growth objectives or other economic development objectives, or, conversely, whether it would have an adverse effect or no effect at all. Economics is the most relevant social science discipline, subject to its inherent limitations as discussed above. The assessment will adopt economic theories and analytics to evaluate the outcome. Additionally, the assessment will reference other social science research if such research is relevant to the particular economic development objective. For example, if improved income distribution is a key development objective, the assessment will reference relevant sociology and political science research and theories to the extent that they inform how the suggested law would or would not produce a policy outcome that achieves a better income distribution in society.

There is no clear consensus as to what policy leads to successful economic development and no agreement as to what the appropriate role of the state in the economy should be. Economists emphasized the role of the state in economic development in the 1950s and the 60s,<sup>138</sup> but this

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137. For example, using the Global Trade Analysis Project (GTAP) model, the USITC estimated that trade between the United States and Korea would increase after the implementation of the U.S.-Korea FTA. Specifically, the USITC estimated that merchandise exports to Korea would increase by \$9.7 to 10.9 billion once the FTA is fully implemented, merchandise imports from Korea would increase by \$6.4 to 6.9 billion, reducing the U.S. trade deficit against Korea by \$2.8 billion to 4.5 billion. See USITC, *supra* note 129, at xvii. With the implementation of the FTA in March, 2012, U.S.-Korea trade indeed increased by \$12 billion between 2011 and 2015, but the U.S. trade deficit with Korea did not decrease as estimated, but actually increased by \$14.4 billion between 2011 and 2016, showing the inexact nature of the earlier assessment. See USTR, *2017 Trade Policy Agenda and 2016 Annual Report*, <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20III%20-%20Bilateral%20Trade%20Agreements.pdf> [<https://perma.cc/E986-QQDZ>].

138. Development economists, such as Rosenstein-Rodan, Mandelbaum, Lewis, Rostow, Kuznets, Gerschenkron, Hirschman, and Kindleberger, advocated the state-led development strategy as the key to development, although they did not exactly agree on how the state should lead economic growth. For example, Rosenstein-Rodan supported the “big push,” which is a coordinated investment program across the board (“balanced growth theory”). By contrast, Hirschman advocated a policy of promoting a few key sectors with strong linkages to other sectors (“unbalanced growth theory”). See Paul Krugman, *The Rise and Fall of Development Economics*, <http://web.mit.edu/krugman/www/dishpan.html> [<https://perma.cc/ZD5Y-89CQ>]; see also Pranab Bardhan, *Economics of Development and the Development of Economics*, 7 J. ECON. PERS. 129 (1993) (discussing the contribution made by development economists). This period of

emphasis on the state receded in the 70s.<sup>139</sup> The neoliberal approach,<sup>140</sup> which favors economic policies that reduce state involvement in the economy and enhance the market (the private sector), such as the policies of privatization and trade liberalization, became prevalent in the 80s.<sup>141</sup> Chile's successful economic development in recent decades,<sup>142</sup> founded on its liberal economic policies, could support the neoliberal argument.<sup>143</sup> By contrast, the countries that achieved the most successful economic development, such as the NICs, adopted extensive state-led development policies,<sup>144</sup> which were at odds with the neoliberal prescriptions.<sup>145</sup>

This divergence of views and outcomes of these dissimilar development policies may render the analysis of the anticipated policy outcome on economic development complex and challenging. For example, a question may arise as to the anticipated policy outcome of a law that mandates government support of particular industries and their exports through subsidy grants and tax breaks. Those who subscribe to a neoliberal policy stance are likely to oppose this law due to the potential economic inefficiency associated with government distributing resources. Conversely, those who advocate for the state-led industrial development policies are likely to support the law as necessary to stimulate industrial development and economic growth.

The NICs' successful adoption of state-led policies suggests that active government involvement in industrial promotion, accompanied by export promotion to overcome the constraints of small domestic markets, could be

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“development economics” coincides with the first law and development movement. For a discussion of the first law and development movement, see *supra* Part I A.

139. See Newton, *supra* note 2, at 182.

140. For an explanation of the neoliberal approach, see *supra* note 46.

141. See Williamson, *supra* note 53 for an explanation of the “Washington Consensus,” which forms the basis of the neoliberal approach.

142. For a discussion of Chile's economic development, see *supra* note 76.

143. This observation, however, is subject to the criticism that nearly all major sectors of the Chilean economy owe their existence to state intervention under the Pinochet regime. See James M. Cypher, *Is Chile a Neoliberal Success?*, DOLLARS & SENSE: REAL WORLD ECONOMICS (Sept.-Oct. 2004), [<https://perma.cc/D4Q6-GMUB>]. See also Ronald J. Gibson & Curtis J. Milhaupt, *Economically Benevolent Dictators: Lessons for Developing Democracies*, 59 AM. J. COMP. L. 227 (2011).

144. State-led development refers to the development approach adopted by a “developmental state” that assumes the key role for economic development and “creates [economic development] plans, relocate[s] surplus, combat[s] resistance, invest[s] and manage[s] key sectors, and control[s] foreign capital.” Trubek and Santos, *supra* note 47, at 5. Perhaps an exception among the NICs is Hong Kong, which is known to have adopted a laissez-faire economic policy with minimal government involvement. In contrast, Catherine Schenk suggested that this perception was a myth. She argued that the government subsidized industry indirectly through public housing, which restrained rise in the cost of living that would have threatened Hong Kong's labor-cost advantage in manufacturing. See Catherine Schenk, *Economic History of Hong Kong*, EH.NET ENCYCLOPEDIA (Mar. 16, 2008), [<http://eh.net/encyclopedia/economic-history-of-hong-kong/>] [<https://perma.cc/2Q93-J5KM>].

145. For a discussion of the successful economic development of the NICs, see *supra* note 75.

effective in the early stages of economic development<sup>146</sup> if the government devoted to development has political leadership and institutional strength. From a neoliberal point of view, a government “selecting” industries to receive support by way of public funding may appear to invite economic inefficiency and corruption.<sup>147</sup> Still, however, in a developing country where the underdeveloped private sector may only have limited capacity to acquire information and capital, absent a working financial market, the role of government is essential. Supporting this point, a leading scholar has observed that industrial restructuring rarely takes place without significant government assistance.<sup>148</sup>

As the NICs’ economies successfully developed and became more complex and divergent in the 1980s and onwards, with their private sectors acquiring institutional capacity to undertake much of the role previously assumed by the state more efficiently, they shifted policies, reducing government control of the economy and increasing private sector autonomy.<sup>149</sup> One could describe this type of economic development process as the “marriage between state and market”<sup>150</sup> in which the state assumes the role of a “developmental state”<sup>151</sup> in the early stages of economic development, manages the economy, develops economic development plans, and directs investments for key sectors. In this policy, despite the key role of the state, market performance of the promoted industries, particularly in export markets, was the benchmark of success, and private sector autonomy increased over time.

In sum, socioeconomic conditions, such as the stage of economic development and the institutional strength of the government relative to

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146. The early stages of economic development, which should be distinguished from Rostow’s five stages of economic growth, refers to the initial state of economic development with the characteristics of over-dependency on primary industries (non-manufacturing industries), low-level industrialization, and low per-capita income, as compared to the later stages of economic development referring to the more advanced economic state with sustained economic growth, industrialization, and higher (mid-level) per capita income. Per capita income is used to classify economies into different groups; as of November 2017, the World Bank defined low-income economies as those with a gross national income (GNI) per capita of \$1005 or less; lower middle-income economies, a GNI per capita between \$1006 and \$3955; upper middle-income economies, a GNI per capita between \$3956 and \$12,235; and high-income economies, a GNI per capita of \$12,236 or more. World Bank, *Data: Country and Lending Groups*, <http://data.worldbank.org/about/country-and-lending-groups> [<https://perma.cc/DTD7-VSQ6>].

147. The public choice theory and the rent-seeking idea associated with government failures, adopted by the neoliberal policy analytic, would lead to this conclusion.

148. See Dani Rodrik, *Industrial Policy for the Twenty-First Century* 15 (JOHN F. KENNEDY SCH. GOV’T, Harv. U. Faculty Research Working Papers Series, RWP04-047, 2004), <https://www.sss.ias.edu/files/pdfs/Rodrik/Research/industrial-policy-twenty-first-century.pdf> [<https://perma.cc/JU5K-6M49>].

149. See *id.* at 6; see also KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960-1995* (1999).

150. See LEE, *supra* note 54, at 305-09. Several scholars, including Dani Rodrik, Charles Sabel, Sanjay Reddy, and Ricardo Hausmann, also emphasized the importance of public-private partnership to develop strategies and make investment choices for economic development. See also Trubek, *supra* note 3, at 6.

151. See *supra* note 144 (for an explanation of the developmental state).

that of the contemporary private sector, influence policy outcome that law is anticipated to deliver in the context of development. As noted above, a law focusing on the state's facilitation of development can be more effective in the early stages of economic development, when the relative capability and institutional strength of the government is superior to those of the underdeveloped private sector.<sup>152</sup> By contrast, a law focusing on privatization and deregulation could be more effective in the later stages of economic development when the private sector has acquired institutional strength and experiences, as demonstrated by the successful policy transition in the NICs.<sup>153</sup> Economics also began to recognize the complimentary roles of the state and the market, providing support for this type of policy.<sup>154</sup>

## 2. *Organization of Law, Legal Frameworks, and Institutions (LFIs)*

The organization and dynamics among law, legal frameworks, and institutions (LFIs) is the second sub-element determining the effectiveness of regulatory design. Law may not be effective absent a suitable legal framework and an effective institutional arrangement. For example, a statute that aims to promote economic activities by protecting formal private property rights (FPPRs) with a criminal sanction for a violation may not be very effective without an effective institutional arrangement enforcing them, such as a working police force and an efficient and fair prosecution system. As to legal frameworks, one that imposes stringent requirements for the amendment of statutes, thereby making timely regulatory modifications difficult, may reduce their overall regulatory effectiveness on develop-

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152. It may not be the case that the state is more capable than the private sector in all of the countries at the early stages of economic development. Multinational enterprises running businesses in these countries could also be effective, but their contributions to the economic development of the host countries could be limited due to potential inconsistencies between their (global) corporate interests and the long-term development interests of the host countries.

153. See PISTOR & WELLONS, *supra* note 149, at 110–11.

154. Michael Trebilcock observed a changing trend in development economics. He stated,

[b]y the late 1990s, the consensus in development economics had shifted dramatically. The Washington Consensus was agreed to have often been a failure . . . . A more promising approach is represented by the New Development Economics (NDE) which eschews truisms such as “getting institutions right” and represents a break with big-picture paradigms that advance one-size-fits-all solutions . . . . Drawing on the neoclassical paradigm, it recognizes that markets are not nearly as inefficient as the early structuralists believed; rather the fundamental principle of rational responses to incentives continues to organize economic behavior. Further, with the rise of the New Institutional Economics, [which emphasizes legal institutions as a major factor for economic development (see North, *supra* note 7)], the distinction between government and markets has become blurred—each operating via similar fundamental mechanisms. As such, NDE advocates a complementary role for governments and markets, finding both to be susceptible to failures in coordination, imperfect information, and agency problems.

Michael Trebilcock, *Between Theories of Trade and Development: The Future of the World Trading System* 8–9 (University of Toronto Law Working Paper Series No. 2014-10, 2014).

ment under changing socioeconomic conditions.<sup>155</sup> In fact, the impact of law cannot be considered separate from the legal framework in which it is organized and the institutions by which it is adopted and implemented, justifying the use of the term “LFIs” as an inseparable amalgam.<sup>156</sup> The inseparable nature of LFIs explains why many law reform projects promoting an identical set of laws (e.g., those promoting deregulation) have had a limited and inconsistent impact where reformers may not have given due consideration to applicable legal frameworks and institutional arrangements in the design and implementation of these projects.<sup>157</sup>

In the inter-dynamics among the constituent elements of LFIs, the adoption of law also affects relevant legal frameworks and institutions just as it is affected by the latter. For example, a law that mandates additional funding and personnel to an institution that administers the law, such as a government agency in charge, may increase that institution’s capacity to implement the law, provided that the government can secure funding and personnel as the law mandates. The increase in legislation in common law countries has diminished the distinctions in the legal system (legal framework) between common law and civil law countries. The logical consistency and policy compatibility among laws within a legal system also affect the effectiveness of the system as a whole.

An optimal regulatory design, which increases synergies among LFIs and their overall effectiveness, will strengthen regulatory impact on development. By contrast, an ineffective regulatory design will lack supportive synergies and even create conflicts among the constituent elements of LFIs. For example, the enactment of a statute empowering the government to expropriate private land without due process and adequate compensation may not produce synergies with the institutions already in place to protect FPPRs and the other laws in the legal system that aim to do the same. This type of conflict may occur when a law is enacted without due consideration of applicable legal frameworks and institutional arrangements. In particular, consideration should be given to relevant details such as whether there is any potential inconsistency between the promoted law and the existing legal frameworks and institutions, how legislation should be translated into administrative rule making, and how and where in the legislation government discretion should be lodged.<sup>158</sup>

To aid with the assessment of the organization of LFIs and regulatory structure, it would be useful to develop an analytical model by which the impact of LFIs on economic development can be analyzed systematically. I have proposed the development of such a model, entitled “Analytical Law and Development Model” or “ADM.”<sup>159</sup> The ADM is an analytical legislative reference to be developed in several key areas to facilitate economic

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155. For further discussion of legal frameworks as applied in an empirical development case, see *infra* Part IV B.

156. See Lee, *supra* note 3, at 8.

157. See, e.g., *supra* note 23.

158. See Kennedy, *supra* note 1, at 104.

159. See Lee, *supra* note 3, at 8.

development,<sup>160</sup> from the LFIs that are found to be effective, through empirical analysis, in the countries that have recently achieved or are undergoing successful economic development.<sup>161</sup> The ADM is distinguished from previous approaches in that it does not make blind references to the “best practices” of developed countries, which may not be adoptable under different socioeconomic conditions in developing countries seeking legislative guidance. These countries’ socioeconomic conditions, which will be further discussed in the next sub-section, may be closer to those prevailing in other developing countries; thus, law and institutional arrangements from the other successful developing countries in the present or recent past could be more adoptable.<sup>162</sup>

The ADM can be adopted for both diagnostic and implementation purposes. In the former mode, suppose that a country attempts to assess the effectiveness of a law that empowers a government agency to coordinate other government departments and agencies in the implementation of industrial development policies for their effective and consistent implementation. The ADM, by conducting comparative analysis of the LFIs in the successful development cases, can examine whether the applicable legal frameworks and the institutional arrangements adequately support the role that the legislation intends to play. For example, if the authorizing law is subordinate to a higher statute (or does not override another statute) that also grants another government agency a conflicting supervisory role in development policies (inadequate legal frameworks), or, if the authorizing law does not accord the agency a budget control necessary for this coordination (insufficient institutional arrangements), the law may not be that effective. In the implementation mode, the references drawn from the model LFIs could also guide how LFIs should be organized in the host country. These references will examine what legal frameworks and institutions are required and how LFIs should be organized to maximize their

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160. See *id.* at 8 n. 36. These areas include property rights (including intellectual property rights), political governance, the regulatory framework for business transactions, state industrial promotion, public health and the environment, taxation, corporate governance, competition law, banking and financing, labor, corruption, the criminalization of economic offences, and the international legal framework (*i.e.*, international economic law and international development law). In the original article, *id.*, the legal system as well as compliance and enforcement were also included among these areas, but their impact on development is analyzed in this Article under the context of the general theory. An assessment will be made as to whether it is still necessary to perform a separate analysis under the ADM.

161. These countries may include the NICs, Chile, Spain, and others undergoing successful economic development in recent decades, such as China, Vietnam, and Rwanda. For a discussion of the successful development of these countries, see LEE, *supra* note 54, chs. 1.4, 10; RICARDO FRENCH DAVIS, *ECONOMIC REFORMS IN CHILE: FROM DICTATORSHIP TO DEMOCRACY* 1-28 (2002); World Bank, *The Economic Development of Spain* (1963), <http://documents.worldbank.org/curated/en/764341468782083806/The-economic-development-of-spain> [https://perma.cc/B8EF-KHD8]; Bui Tat Thang, *After the War: 25 Years of Economic Development in Vietnam*, NIRA REV. (2000), <http://www.nira.or.jp/past/publ/review/2000spring/06thang.pdf> [https://perma.cc/8ZfV-DXZU]; and World Bank, *Rwanda Overview*, <http://www.worldbank.org/en/country/rwanda/overview> [https://perma.cc/G595-NKEP].

162. See Lee, *supra* note 3, at 29-35.

contribution to development. In making these references, reformers must also consider relevant socioeconomic conditions, as discussed below.<sup>163</sup>

### 3. *Adaptability to Socioeconomic Conditions*

Law may not be effective if it does not conform to the socioeconomic conditions on the ground,<sup>164</sup> and law's adaptability to socioeconomic conditions is the third sub-element determining the effectiveness of regulatory design. Socioeconomic conditions are a range of social, political, economic, and cultural conditions that are essential to the successful operation of law, including social or religious norms that may or may not support the law. For example, legislation that authorizes the charging of an interest rate by financial institutions in order to grow the financial industry and facilitate economic development would not be effective where the majority of the population observes a religious code prohibiting it.<sup>165</sup>

The following example further illustrates the importance of socioeconomic conditions. Several developing countries, including Vietnam, Cambodia, Myanmar, and Bangladesh, have shown interest in adopting certain Korea laws, including the *Code of Ethics for Government Officials* and the *Information Disclosure Act*, to improve their governance.<sup>166</sup> The success of this legal adoption would depend on whether the cited laws could operate effectively under the different legal frameworks, institutions, and socioeconomic conditions in those countries.<sup>167</sup> These developing countries may not have strong internal monitoring and surveillance systems within their governments to detect and deal with any improper conduct of public officials and may lack effective infrastructures for accessing and disclosing information in a timely manner, which would be an impediment to the implementation of those laws. Thus, successful implementation requires reinforcement of the necessary socioeconomic conditions, including competent personnel, technical expertise, financial resources, and cultural and political acceptance of their regulatory objectives.

The foregoing examples demonstrate the importance of identifying socioeconomic conditions for the assessment of regulatory impact on development. The essential socioeconomic conditions may vary depending on the particular law to be implemented. They may include economic

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163. The ADM also identifies and analyzes key socioeconomic conditions for the implementation of LFIs. See Lee, *supra* note 3, at 9. The ADM may present different sets of LFIs for a reference, in accordance with the socioeconomic conditions of the host country, including the country's stage of economic development.

164. Practitioners and advisors have cautioned against neglecting these differences on the ground. See, e.g., Thomas W. Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants: A Short-Cut to Social Market Economy Status?*, 43 INT'L & COMP. L.Q. 347, 349 (1994).

165. The Qur'an characterizes charging an interest as unfair, as implied by the use of an Arabic word "zulm" meaning oppression or exploitation. The Qur'an, 2:279. Thus "Islamic banking," a banking practice compliant with the rules of Sharia law, has been developed. For further discussion of Islamic banking, see generally A. ABDUL RAHEEM, *ISLAMIC BANKING: PRINCIPLES, PRACTICES AND PERFORMANCE* (2013).

166. See Lee, *supra* note 3, at 29.

167. *Id.*

conditions such as financial resources, the applicable stages of economic development,<sup>168</sup> technical expertise, political and social support, administrative capacity, and/or cultural and religious acceptance of the particular law.<sup>169</sup> This is a broad categorization, and assessment of socioeconomic conditions relevant to the successful operation of a specific law may require more detailed identification. To perform this task, it would be essential to secure the participation of local experts in the analysis who have detailed knowledge of socioeconomic conditions on the ground.<sup>170</sup>

The need for the adaptation of law to socioeconomic conditions also explains the impact development has on law. Development changes socioeconomic conditions and creates regulatory gaps because of these changes. States and societies then attempt to fill this regulatory gap (“regulatory adjustment”) and reinforce regulatory support for development (“regulatory reinforcement”), which, in turn, causes changes to law. For example, the development of information technology and internet-based commercial transactions necessitated rules that address issues arising from increased online transactions, such as the validity of electronic signatures. In the United States, forty-seven states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands adopted the Uniform Electronic Transactions Act (UETA) in 1999 to harmonize state laws concerning retention of paper records and the validity of electronic signatures.<sup>171</sup>

The growth of the financial industry may also call for the establishment of an institution that oversees the conduct of players in the financial markets, such as banks and companies listed in the stock markets, to prevent the disruption of the financial system and protect the general public from misleading and fraudulent practices. In the United States, the development of the financial industry in the early twentieth century necessitated the enactment of the Securities Act of 1934, which established the Securities and Exchange Commission (“SEC”).<sup>172</sup> The SEC monitors the securities industry and enforces laws and rules governing the latter, e.g., requiring the disclosure of certain information by companies listed in the securities markets.<sup>173</sup>

168. See *supra* note 146 (for an explanation of stages of economic development).

169. As relevant to socioeconomic conditions, Richard Posner opined that precisely written rules, rather than institutions, such as the working judiciary, that are expensive to develop or abstract legal standards that require sophisticated legal technique to apply, are more conducive to economic development in developing countries with limited economic resources and weak legal traditions. See Posner, *supra* note 10, at 2-10.

170. See *id.* at 5-6 (adopting foreign laws).

171. Uniform Electronic Transactions Act (1999).

172. Securities Act of 1934, 15 U.S.C. §§ 1-16 (2012).

173. *Id.* The foregoing analysis of regulatory design is also applicable beyond law and development and explains regulatory impact generally. For example, France has enacted a law that bans face covering in public places, including those practiced in Islam religion such as the burka and the niqab. See Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 banning the covering of one's face in public], Oct. 11, 2010. The stated regulatory objectives are the enhancement of public security and facilitation of minimal social interactions by prohibiting the concealment of face in public places, and these objectives are not directly related to development.



## B. Regulatory Compliance

This section discusses the second element of the regulatory impact mechanisms, “regulatory compliance,” which refers to compliance with law by those who are subject to the application of law. This section also examines the factors influencing regulatory compliance, some of which are associated with historical, economic, cultural, and political conditions that may largely be immune to top-down attempts at reform<sup>174</sup> and some others associated more directly with state action, such as regulatory enforcement.

Regulatory compliance in the context of law and development does not mean only the absence of rule violations, but also the knowledge of law and participation in the processes mandated by law. For example, judicial reform would not be as effective where only a small minority of a population uses the court for dispute resolution.<sup>175</sup> Strong regulatory compliance is an essential precondition to the success of law reform, and a reform that does not take regulatory compliance into consideration may end up a hollow declaration without real impact. For this reason, regulatory compliance is one of the key elements in determining regulatory impact on development.

Regulatory compliance can be classified into general regulatory compliance, which refers to the general level of regulatory compliance in a given jurisdiction, and specific regulatory compliance, which pertains to a particular law. In a place where general regulatory compliance is not strong, regulatory impact on development may generally be weak. But,

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Applying the analysis of regulatory design, the anticipated policy outcomes include the enhancement of public security by facilitating identification of a suspect individual, although the law’s positive effect on the minimal social interactions would be more controversial. The law is also supported by the effective organization of legal frameworks and institutions: the law is in the form of legitimate statutory enactment that is effective throughout France (effective legal framework) and supported by the enforcement of police and public prosecution that effectively imposes a penalty for a violation (effective institution).

The law raises further issues with its adaptability to socioeconomic conditions. Even if the actual number of Muslim population in France wearing full face covering might not be large, millions of Muslims and non-Muslims in French society nevertheless support the freedom to engage in this religious practice, resulting in a conflict and division in French society. See Edward Cody, *Tensions flare in France over veil ban*, WASH. POST (Aug. 9, 2012), [https://www.washingtonpost.com/world/tensions-flare-in-france-over-veil-ban/2012/08/08/67b56fc2-e150-11e1-98e7-89d659f9c106\\_story.html?utm\\_term=.2a15a15b3dea](https://www.washingtonpost.com/world/tensions-flare-in-france-over-veil-ban/2012/08/08/67b56fc2-e150-11e1-98e7-89d659f9c106_story.html?utm_term=.2a15a15b3dea) [https://perma.cc/C76N-HLYC]. The law’s adaptability to the socioeconomic conditions on the ground (i.e., incompatibility to the religious practice and belief) is weakened due to this conflict, diminishing the effectiveness of its regulatory design and regulatory impact. The application of the regulatory design analysis reveals the weakness of the French law, as demonstrated by widespread resistance to the law.

174. See Davis & Trebilcock, *supra* note 3, at 920.

175. This lack of use may be a result of limited access to the court due to the cost of litigation, absence of the knowledge required to use the court, the physical remoteness of the court, or cultural reasons, i.e., local residents may prefer to use informal, traditional venues to resolve disputes. Thus, a recent study indicated the necessity to engage customary dispute resolution processes in developing countries. See Paul Zwier, *Human Rights for Women in Liberia (and West Africa): Integrating Formal and Informal Rule of Law Reforms through the Carter Center’s Community Justice Advisor Project*, 10 LAW & DEV. REV. 187 (2017).

even in a society where general regulatory compliance is strong, a particular law may still have weak compliance or even resistance when it does not conform to the socioeconomic conditions prevailing on the ground. The subsequent discussion examines both general regulatory compliance and specific regulatory compliance.

### 1. *General Regulatory Compliance*

Several elements affect general regulatory compliance.<sup>176</sup> First, legal culture is relevant. Legal culture is defined as “those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system”<sup>177</sup> that may be “reflected in the actions or behaviors of the actors, institutions, and even of the substance of the system.”<sup>178</sup> Legal culture, which may vary significantly according to the country and the jurisdiction, is said to exist “not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system.”<sup>179</sup> Legal culture affects general regulatory compliance by influencing the manner in which the public perceives law and the degree to which they comply with it.

Second, public knowledge and understanding of law influence general regulatory compliance. The public would be more inclined to comply with law in general if they believe, based on their knowledge and appreciation of law, that compliance is in the interest of their communities, families, and themselves.<sup>180</sup> Public education and their confidence in the government that develops and implements law are also essential. Because the government is in charge of developing and administering most laws, except customary law, compliance would, therefore, be less likely where the public does not trust that the government develops and implements law to serve the public interest. Thus, it is not surprising to see weak regulatory compliance in failing states where public confidence in the government is weak. This does not, however, necessarily mean that public confidence exactly correlates with the level of regulatory compliance. As the axiom, “an unjust law is nonetheless a law,” indicates, there is a degree of morality and duty attached to obeying the law, regardless of its content and/or the government that administers it. Thus, it goes back to the question of the legal culture in place.

Yet another element that affects general regulatory compliance is the general quality of law, including its design and implementation. Well-designed and effectively-implemented laws that fulfill the needs of the pub-

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176. H.L.A. Hart also considered that regulatory compliance (“allegiance to the system”) may be based on various elements, such as “calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.” H.L.A. HART, *THE CONCEPT OF LAW* 203 (1994).

177. Colin B. Picker, *International Trade and Development Law: A Legal Cultural Critique*, 4 *LAW & DEV. REV.* 43, 46 (2011).

178. *Id.*

179. *Id.*

180. For a relevant discussion, see Michael Ilg, *Profit, Persuasion, and Fidelity: Why People Follow the Rule of Law*, 10 *LAW & DEV. REV.* 275 (2017).

lic and fit the socioeconomic conditions are more likely to command strong compliance and active participation by the public. Well-designed and implemented LFIs in fact have been spread and complied with beyond their original jurisdictions. For example, the highly-developed Roman law not only laid the foundation for the Roman Empire, but it remained a working reference for the development of modern law in Europe and beyond, centuries after Rome itself perished.<sup>181</sup> Also, a vast number of countries in Asia, Africa, and North America have adopted the modern civil law system, developed by France and Germany, and the common law system, by England. Additionally, a number of countries around the world have adopted and referenced the institutions of the British parliamentary government system and the American presidential system as the standard forms of modern democratic government. These examples illustrate the importance of regulatory design and implementation to induce compliance.

Lastly, the strength of regulatory enforcement also affects general regulatory compliance. The likelihood of regulatory compliance increases where a violation is sanctioned with a real penalty, including financial and penal ones, as a result of regulatory enforcement. Therefore, enforcement induces compliance, with a threat of a penalty, and enforcement is also an evaluative criterion for determining the level of the rule of law.<sup>182</sup> Enforcement also requires considerable resources and capacity on the part of the state, such as efficient monitoring, policing, and the appropriate execution of penalties, which can be an issue for developing countries that lack sufficient personnel, financial resources, and technical expertise. Thus, the enforcement issue goes to the question of state capacity, which will be discussed in the next section.

## 2. Specific Regulatory Compliance

Specific regulatory compliance is associated with the resource constraints that inevitably compel governments to prioritize laws for enforcement. Laws supported by a stronger political will are more likely to be enforced as a priority and, in turn, result in stronger compliance. Some laws may not have real enforcement by a state when an external force imposes on the state to adopt them. For example, where a state is required to legislate a system of “good governance” as a condition for receiving a

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181. For a further discussion of Roman law, see generally Adolf Berger, *Encyclopedic Dictionary of Roman Law* (1953); and H.F. Jolowicz, *Historical Introduction to the Study of Roman Law* (1996). See also Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* 75-78 (1861).

182. See World Justice Project, *Rule of Law Index 2015* (2015), [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) [https://perma.cc/HV68-YJMJ]. For further discussion of compliance theories and relevant literature review, see Julien Étienne, *La Conformation Des Gouvernes*, 60 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 493 (2010), English version available at [http://www.cairn-int.info/article-E\\_RFSP\\_603\\_0493-compliance-theories.htm](http://www.cairn-int.info/article-E_RFSP_603_0493-compliance-theories.htm) [https://perma.cc/TD24-3Z28].

loan from an international financial institution,<sup>183</sup> the state may be reluctant to devote resources and personnel to enforce the imposed system if it does not agree on the need for such a system but nevertheless accepts it for the purpose of obtaining the loan. In this case, the donor development agency could try to ensure enforcement by threatening to discontinue the loan or requiring early repayment upon failure. An interesting question arises as to whether the public will comply with laws that a state adopts, perhaps reluctantly, for a condition imposed externally. The answer depends on whether the public would see the “imposed” laws as justified if they meet their needs or that of the state, although the public may generally not favor this type of external intervention, viewing it as an encroachment on national sovereignty (and their own national pride), regardless of its specific content.<sup>184</sup>

Another key element determining specific regulatory compliance is the consistency between a particular law and the socioeconomic conditions on the ground. Any conflict should be weighed against the regulatory benefit, as perceived by the public, in adopting the law. In the case of the French law banning face covering in public places,<sup>185</sup> French female Muslims under the religious practice of wearing the burka or the niqab may not be inclined to comply with the law, unless they considered the claimed benefits of improved communication through facial recognition and enhanced public security, coupled with the benefit of avoiding the penalty for a violation and potential persecution by non-Muslims who oppose anyone wearing them, to outweigh the conflict with their religious practice.

Specific regulatory compliance can also be classified into “passive compliance” and “active compliance.” Passive compliance refers to a minimal level of compliance with the requirements of law, primarily to avoid a penalty for a violation. Active compliance refers to the type of compliance that exceeds fulfilling the minimum requirements, seeking to assist the state in meeting a regulatory objective by actively participating in the process mandated by law, often with encouragement to others to do the same. A voluntary public campaign against the use of illegally imported products, in compliance with customs law and industrial policy to promote domestic production, is an example. One can expect active compliance when the population identifies the regulatory objective to be in their own interest. In successful developing countries, governments secured active compliance for development-facilitating laws, because the general public considered the regulatory objective of these laws—economic development—as fulfilling their own interest in escaping from poverty.

Finally, a nation could be divided with respect to specific regulatory compliance with a particular law, because the law may result in a net bene-

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183. For a discussion of the emphasis on “good governance” by the international financial institutions, see Rittich, *supra* note 22, at 210.

184. For a discussion of the symbolic effects of law, see John Griffiths, *Do Laws Have Symbolic Effects?*, in *SOCIAL AND SYMBOLIC EFFECTS OF LEGISLATION UNDER THE RULE OF LAW* 147 (Nicolle Zeegers, Willem Witteveen, & Bart van Klink eds., 2005).

185. See *supra* note 173.

fit for a group in a population and cause a net loss for another simultaneously. For example, traders would generally welcome a free trade agreement ("FTA"), as the FTA lowers trade barriers, such as customs tariffs, and their costs in trade. For this reason, they would have an interest in complying with the law necessary for the adoption of the FTA, such as a statute implementing the FTA. In contrast, domestic producers competing with the imported products and domestic laborers whose jobs might be adversely affected by the imports may well oppose the FTA and the domestic law implementing it, as the FTA lowers the cost of imports, thereby making competing domestic products less competitive in the domestic market. To improve specific regulatory compliance in the presence of conflicts of interests among different groups, a government will endeavor to devise the implementation of law in such a way as to reduce the perceived loss and provide compensation to the losing groups.<sup>186</sup> However, the government may not always be "neutral" in this divide, and its ideological orientations and political preferences also affect the divide and its outcome. For example, the government supporting free trade would try to find a way to legislate for the FTA despite the perceived loss to a population group.

### C. Quality of Implementation

#### 1. *Definition and Importance*

The quality of implementation, which includes regulatory enforcement, is the third and final element of the regulatory impact mechanisms. Implementation refers to the act of a state meeting the requirements of law and undertaking mandates under the terms of law to fulfill its objectives. For example, to implement a statute that prohibits gender discrimination in work places, the state will have to monitor its application in work places, review suspect discrimination cases, and impose a penalty for a violation under the terms of the statute. It is the quality of implementation that determines the effectiveness of law, and it is measured by the extent to which a state meets the requirements set forth by the terms of law and fulfills the mandates under these terms, including its enforcement and monitoring terms. Cases of violations (particularly those not responded to by the state), omissions, and incomplete implementation on the part of the state count against the quality of implementation. Factors such as corruption and incapacity of the state adversely affect implementation.

For example, a law that requires the removal of customs tariffs on imports would not be as effective if customs officials at the border undermined the law by requiring an informal payment equivalent to a certain percentage of the value of an imported product as a condition for passing it through customs. A perceived difficulty in the implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agree-

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186. In the cited FTA example, Trade Adjustment Assistance (TAA) Programs under the Trade Expansion Act of 1962 and as defined further under the Trade Act of 1974 serve this purpose. See 19 U.S.C. §§ 1911-1920 and §§ 2341-2356.

ment)<sup>187</sup> in least-developed countries (LDCs) is another example of such implementation issues. According to a study, the cost of implementing the TRIPS Agreement, including investments in buildings, equipment, and training, was \$150 million in the 1990s and this amount would have represented a full-year's development budget for many LDCs at the time.<sup>188</sup> In this circumstance, the implementation of TRIPS obligations in LDCs would be difficult due to lack of financial resources.

A question arises as to whether a state is the only entity that implements law. For example, customary law and common law exist without the state act of legislation. As for common law, it is a state (the court) that "finds" its existence, identifies its terms, and enforces them. Thus, it can be said that the role of a state is essential in the implementation of common law. As for customary law, to the extent that it exists by voluntary recognition and compliance by the general public, it may not require state implementation. The state may also be called on to recognize its existence and enforce customary law where there is a dispute, so the state has an implementation role for customary law.<sup>189</sup> A state may also delegate some of its role to another entity in the implementation of law, likely under its own monitoring and supervision.<sup>190</sup>

Finally, the other two elements of the regulatory impact mechanisms discussed in the preceding sections, regulatory design and regulatory compliance, also affect the quality of implementation. Laws that are well designed, congruent with socioeconomic conditions (including other social norms), and commanding strong compliance are more likely to be implemented effectively than those that are not. In addition, the two external factors, state capacity and political will, have a determinative impact on the quality of implementation as further discussed below.

## 2. *State Capacity*

As previously discussed, the state<sup>191</sup> implements laws relevant to development through legislation, judicial decisions, and administrative actions. Thus, the state must have due capacity to implement law. State capacity includes its financial, technological, and administrative capabili-

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187. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

188. See J. Michael Finger, *The WTO's Special Burden on Less Developed Countries*, 19 CATO J. 425, 435 (2000).

189. Traditional community forums, rather than state courts, may hear and adjudicate claims based on customary law, as is the case in many underdeveloped regions. See Zwier, *supra* note 175.

190. A state delegates its role of implementation when, for example, it contracts with a private company to operate a correctional facility. A commentator has also observed a trend of the "third sectorization of law and policy" in which numerous non-state, non-market civil organizations such as voluntary associations, NGOs, and religious groups become independent sources of normative authority. See Rittich, *supra* note 22, at 223.

191. For a definition of a state, see *supra* note 31.

ties, including internal controls against corruption, to implement laws and fulfill regulatory objectives.

State capacity is essential to the implementation of law regardless of the ideological orientation of the development policies. Even in a development model in which the role of the private sector is predominant, the state still has an important role in the functioning of the market economy. For example, freedom of contract<sup>192</sup> is necessary for the market economy to operate. Therefore, a state advocating for the market must enforce contracts in an appropriate legal framework (“contract law”) that ensures the rights and obligations of the parties to the contract. The recognition and enforcement of contractual rights through legislation, judicial decisions, and administrative actions are essentially state activities. The market economy cannot successfully function if the state lacks capacity in one or more of these areas.<sup>193</sup>

Developing countries often lack sufficient financial, technological, and administrative resources to implement all of their laws effectively. Thus, the question arises as to how a developing country with limited resources could secure state capacity to implement the laws necessary for development. Arguably, wealth may not necessarily be a precondition to the development of high-quality laws and institutions (e.g., personnel cost is lower in developing countries).<sup>194</sup> Successful East Asian countries found at least a partial answer to the question in their cultural tradition. They derived considerable state capacity from well-educated public officials and efficient government bureaucracies. Despite financial constraints (i.e., modest government salary), they were able to recruit elite public officials because their Confucian tradition encouraged educated elite individuals to seek government positions with the notion that it is an honor to serve the state as a government official.<sup>195</sup> As a result, these countries were able to recruit and deploy highly disciplined and devoted officials to develop and administer law.<sup>196</sup>

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192. Freedom of contract refers to the freedom of individuals and legal persons (legally recognized entities) including corporations, to form contracts and determine contractual terms. Freedom of contract is essential to the free market economy. See David Bernstein, *Freedom of Contract* (Geo. Mason Univ. Sch. of Law: Law & Econ. Ctr. Research Paper Series No. 08-51, 2008).

193. This explains the initial failure and economic confusion after the unprepared privatization in the former Soviet countries after the fall of communism in the 1980s where the state lacked the capacity to implement LFI necessary for the market economy. For a discussion of the economic difficulty faced by the former Soviet countries, see William W. Hogan, *Economic Reforms in the Sovereign States of the Former Soviet Union* (Brookings Papers on Economic Activity No. 2, 1991), [https://www.brookings.edu/wp-content/uploads/1991/06/1991b\\_bpea\\_hogan.pdf](https://www.brookings.edu/wp-content/uploads/1991/06/1991b_bpea_hogan.pdf) [<https://perma.cc/KH5J-PZXR>].

194. See Davis & Trebilcock, *supra* note 3, at 922-23.

195. For a discussion of the Confucian tradition in East Asia, see generally CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY (Tu Wei-Ming ed., 1996).

196. See generally ROY HOFHEINZ, JR. & KENT E. CALDER, *THE EAST ASIA EDGE: WHY AN ENTIRE REGION IS OVERTAKING THE WEST IN TECHNOLOGY, EXPORTS AND MANAGEMENT* (1982); LUCIAN W. PYE, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF*

State capacity was also a determining factor for other countries that successfully accomplished economic development. Germany achieved remarkable economic development in the late nineteenth century when Otto von Bismarck adopted state-led developmental policies, aided by substantially increased state capacity as a result of Germany's unification.<sup>197</sup> A similar development took place in the United States when President Lincoln led the Union to victory in the Civil War and stopped the Southern States' secession from the Union (an outcome that would have weakened the state capacity of the United States), followed by North-based industrialization and trade protection for industrial development.<sup>198</sup> Generals Franco and Pinochet also implemented strong state-backed economic reforms in Spain and Chile, respectively, which paved the path for their economic development, notwithstanding the authoritarian and repressive nature of their regimes.<sup>199</sup> By contrast, weak states in Africa and Latin America<sup>200</sup> could not successfully implement the LFIs needed for economic development for much of the twentieth century.<sup>201</sup>

State capacity is an overarching factor that is not only essential to the implementation of law, but also influences the two other elements of the regulatory impact mechanisms, regulatory design and regulatory compliance. The state's evaluative and analytical capacity influences regulatory design, particularly legislation. Its capacity to enforce and raise public

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AUTHORITY (1985); and IN SEARCH OF AN EAST ASIAN DEVELOPMENT MODEL (Peter L. Berger & Hsin-Huang Michael Hsiao eds., 1988).

197. See OTTO PFLANZE, BISMARCK AND THE DEVELOPMENT OF GERMANY, VOLUME II: THE PERIOD OF CONSOLIDATION, 1871-1880, at 67-92, 207-45 (1990).

198. Henry Clay, Abraham Lincoln's early mentor, is known to have advocated the "American System" of trade protection in opposition to what he called the "British System" of free trade, which, he argued, was part of the British imperialist system that assigned the United States to the role of primary product exporter. See P. CONKIN, PROPHETS OF PROSPERITY: AMERICA'S FIRST POLITICAL ECONOMISTS 302 (1980).

199. These policies included the 1959 Spanish Stabilization Plan and Pinochet's market-oriented reforms deliberated in 1973-75 and implemented afterwards. See Leandro Prados de la Escosura, Joan Rosés, & Isabel Sanz Villarroya, *Stabilisation and Growth under Dictatorships: Lessons from Franco's Spain*, VOX: CEPR'S POLICY PORTAL (Mar. 22, 2010), <http://voxeu.org/article/stabilisation-and-growth-under-dictatorships-new-lessons-franco-s-spain> [<https://perma.cc/GT28-4M7M>]; and Robert A. Packenham & William Ratliff, *What Pinochet Did for Chile*, HOOVER DIGEST (Jan. 30, 2007), <http://www.hoover.org/research/what-pinochet-did-chile> [<https://perma.cc/2R9J-8QMJ>].

200. For further discussion on weak states, see Robert Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR I (Robert Rotberg ed., 2003); and Susan E. Rice & Stewart Patrick, *Index of State Weakness in the Developing World*, BROOKINGS INST. (Feb. 26, 2008), [https://www.brookings.edu/wp-content/uploads/2016/06/02\\_weak\\_states\\_index.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/02_weak_states_index.pdf) [<https://perma.cc/SZ7W-7N6X>].

201. However, state capacity should not be confused with the state's ability and willingness to use or abuse its power. A state being "weak," lacking the cited key capacities to meet their development objectives, does not mean that it is completely powerless. Some of the weak states, as listed in the Index of State Weakness in the Developing World, were known to use brutal force against their own populations, including torture and summary executions. See Rice & Patrick, *supra* note 200. For another account of the mismatch between "state power" and "state capacity" (in the context of transnational law enforcement), see Mariano-Florentino Cuéllar, *The Mismatch between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15 (2004).



confidence in law influences regulatory compliance, as discussed in the preceding section. Despite this overarching influence, state capacity alone does not determine regulatory impact on development. Although states with sufficient analytical capacity are more likely to make laws, for example, with a better regulatory design than states without such capacity, there are numerous cases in which poorly designed laws, as a result of political compromise or other reasons, are implemented in states that otherwise have high capacities.<sup>202</sup> Likewise, regulatory compliance may also be affected by state capacity, but it is not necessarily controlled by the latter, particularly when a major segment of the general public does not support the objective of the law proposed by the state due to political, economic, cultural, or religious grounds.<sup>203</sup>

### 3. Political Will

Political will is another essential element affecting the implementation of law. In the context of regulatory implementation, political will is defined as the commitment and devotion of a country's political leadership to the implementation of law.<sup>204</sup> Lack of political will can result in effective laws, regardless of state capacity, where the government expects political challenges against the implementation of the laws and is reluctant to implement or enforce them in order to avoid any adverse political ramifications. By contrast, sustained political will instills consistency in regulatory implementation and enforcement.<sup>205</sup>

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202. See, e.g., Frank Holmes, *FATCA: Good Intentions, Poor Design*, U.S. GLOBAL INVESTORS (June 25, 2014), <http://www.usfunds.com/investor-library/frank-talk/fatca-good-intentions-bad-execution/#.V-28rIKQL3g> [<https://perma.cc/246B-QURS>].

203. See, e.g., Cody, *supra* note 173 (reporting religion-based public resistance to the French law that prohibits face covering in public places). A recent study has highlighted the importance of state capacity to regulatory impact concerning crime control. The study has concluded that the suppression of sexual and gender-based violence has not been very effective in Liberia where the government has enacted laws that substantially increase penalties for these crimes, but the state lacks the capacity to implement these laws effectively, due to absence of resources to supply sufficient police force, prosecutorial services, and courts to monitor, prosecute, convict, and punish offenders. See Zwier *supra* note 175. The weak state capacity, prevailing in developing countries, has resulted in poor regulatory impact. See Rotberg, *supra* note 200.

204. For a general definition of political will, see *Political will*, OXFORD LIVING DICTIONARIES, [https://en.oxforddictionaries.com/definition/political\\_will](https://en.oxforddictionaries.com/definition/political_will) [<https://perma.cc/L3G8-R45Q>]. Political will, in the context of development, should be distinguished from a mere interest in development facilitation, which the leadership of almost every developing country would have, given the state of their economies. Political will is more than a mere interest, which may be demonstrated by the continued implementation of consistent development policies for an extended period of time, allocating substantial political and economic capital.

205. Conversely, successful economic development and improved state capacity, such as increased financial resources, may also reinforce political will. Initial success can provide encouragement and motivation for the continuation of a successful development path, and improved state capacity, such as a larger government budget and development funds, as well as a larger staff, can generate better conditions under which to carry out the will.

After the Second World War, many successful developing countries achieved economic development under authoritarian regimes, such as the East Asian countries from the 60s to the 80s (China since the 80s), Spain in the 60s and the 70s, and Chile in the 70s and the 80s.<sup>206</sup> The success of these countries often hinged on the decision to save available resources for future investments, as opposed to immediate consumption. For example, the Korean government, which controlled commercial banks until the 1980s, did not make bank loans available for home mortgages so that the available capital could be used for long-term productive pursuits, such as building factories and social infrastructures. While this was an essential investment for the future that led to the highest sustained economic growth for over three decades, this type of policy is nevertheless unpopular to the general public who are then compelled to save much of their income for many years to purchase homes.<sup>207</sup> Elective democracy tends to cater to voters' immediate concerns, rather than long-term strategic development plans that may require public sacrifice until the development potential materializes.<sup>208</sup>

I do not argue that the political will necessary for sustained growth could never be generated in a democracy.<sup>209</sup> However, its deliberative and elective nature is likely to present considerable challenges when making a long-term development decision that may require voters to make an immediate sacrifice, particularly in the early stages of economic development when resources are limited and difficult choices have to be made.<sup>210</sup> Likewise, a change of regime, which is an inevitable outcome in elective democracies, can also lead to a change in development policy and even in development objectives. Some of these changes are for political reasons rather than for development, and they may be adverse to the development interests, the fulfillment of which necessitates a sustained and consistent development policy over time. A level of development may realistically be necessary before a democratic system of governance operates efficiently and continues to promote development. A working democracy requires economic and social resources,<sup>211</sup> such as public education, access to

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206. For a discussion of the development of Spain under General Franco and of Chile under Pinochet, see *supra* note 76. The East Asian countries also had legendary political leaders devoted to national development, such as Park Jung Hee of Korea (1917-1979), Chang Kai-shek of Taiwan (1885-1975), Lee Kuan Yew of Singapore (1923-2015), and Deng Xiaoping of China (1904-1997).

207. See Daekeun Park & Changyong Rhee, *Saving, growth, and demographic change in Korea*, 19 J. JAPANESE INT'L ECON. 394, 394-95, 410 (2005).

208. See ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD 1950-1990*, at 143 (2000).

209. For instance, India, which is considered a democracy, has shown substantial economic growth in recent decades. Democratized Chile also benefitted from the economic reforms completed during the authoritarian regime of Pinochet. For a further discussion of Chile's development under the Pinochet regime, see *supra* note 143.

210. It took several decades before democratic India could finally embark on sustained economic growth, whereas authoritarian NICs and China achieved much more rapid economic development.

211. See HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* 69-124 (2002).

information, and the rule of law, which may not be achievable without economic development in place.

The inherent difficulty with elective democracy does not mean that dictatorships or authoritarian regimes are the answer; these regimes also do not automatically generate the political commitment and devotion to development. The political will necessary for development is not determined by the length of time when one is in power. Otherwise, a number of authoritarian regimes and dictatorships still existing would have made progress in development, but that is not the case. This reality presents a dilemma—while authoritarian leaders in successful developing countries have led their countries to decades of successful economic development, a system of dictatorship or authoritarian governance does not guarantee the appointment of a “good leader” with the requisite political will.<sup>212</sup> There is no political system that guarantees a leader who will uphold the political will for development, ready to resist popular demand for short-term economic gain in order to meet long-term development objectives. The cited systematic issues with elective democracies and the uncertainty characterizing authoritarian regimes are likely a reason that only a small number of countries have achieved development successfully since the Second World War.

#### IV. Application of the General Theory

##### A. Development of South Korea (1962-1996): An Overview

This part applies the theoretical framework discussed in the earlier sections to an empirical development case, the development process of Korea (1962-1996), a mid-sized country located in Northeast Asia between China and Japan.<sup>213</sup> The application serves two purposes: verify the general theory by applying it to an empirical case and assist readers in clarifying any conceptual ambiguity from the preceding theoretical discussion.

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212. The majority of successful developing countries with “benevolent” or “good” authoritarian leaders have been located in East Asia where the prevailing Confucian tradition emphasized the duty of the elite to their state and people. Such tradition may have been a reason for the production of a higher ratio of leaders devoted to economic development, compared to that in other regions in the world without such tradition. For a discussion of the Confucian tradition in East Asia, see *supra* note 195. Another view has been raised that individuals and groups interested in predation, rather than development, are more likely to capture the government in countries with rich natural resource endowments from which they can easily appropriate large economic rents. See Richard M. Auty, *Natural Resource Endowment, the State, and Development Policy*, 9 J. INT’L DEV. 651 (1997). Note that none of the NICs were resource-rich. Yet another difficulty in forging a united political will towards development could be associated with enduring divisions along ethnic, religious, linguistic, and economic lines within countries. The East Asian countries were relatively homogeneous in ethnicity and culture and did not suffer from the degree of contentious ethnic, religious, and cultural division experienced by many developing countries in other regions.

213. *South Korea*, NATIONS ENCYCLOPEDIA, <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Korea-South.html> [https://perma.cc/BWB8-RS53].

With a long history of over 5000 years,<sup>214</sup> Korea has gone through treacherous modern times, including a period of colonization by Japan (1910–1945), the division of the country into North and South Korea (1945), and a major war (the Korean War, 1950–1953). Despite its arduous path, the country achieved unprecedented success in development from the 1960s to the 1990s.<sup>215</sup> This part examines Korea's development policies and discusses how changes in LFIs affected development in Korea, applying the analytical elements presented in the preceding discussion.

Korea is chosen for its unique reference value as a “model” development case. As of the early 1960s, Korea had much of the characteristics shared by many developing countries today, such as low per-capita income causing prevalent poverty, an economy relying heavily on primary, non-manufacturing industries, low levels of technology and entrepreneurship in society, insufficient capital, poor endowment of natural resources, overpopulation in a relatively small territory, internal political instability, and external threats to its security.<sup>216</sup> Successfully overcoming these unfavorable conditions, Korea's economy progressed from one relying on low-productive primary industries and characterized by absolute poverty in the 1960s to an advanced economy based on large industrial capacity generating high per-capita income by the mid-1990s.<sup>217</sup> The Korean development process exhibits all major stages of economic development in an easily traceable time period of three decades, raising its reference value, and successful social and political development from authoritarian rule to elective democracy based on the rule of law by the 1990s.

The examination of Korean development will also fill the gaps in law and development studies identified by leading scholars. They point out that law reform projects and development studies have not properly referenced and incorporated the successful development experiences of the East Asian countries.<sup>218</sup> Scholars have emphasized the essential importance of studying them in the context of law and development,<sup>219</sup> and this Article

214. For a history of Korea, see KYUNG MOON HWANG, *A HISTORY OF KOREA* (2016); MICHAEL J. SETH, *A HISTORY OF KOREA: FROM ANTIQUITY TO THE PRESENT* (2010); and CARTER J. ECKERT, KI-BAIK LEE, YOUNG ICK LEW, MICHAEL ROBINSON, & EDWARD W. WAGNER, *KOREA OLD AND NEW: A HISTORY* (1991).

215. In 1962, Korea's GNI per capita was mere \$120, lower than most other developing countries in Asia, Africa, and Latin America at the time. As a result of successful economic development, its GNI increased to \$13,040 in 1996, which was a high-income country category as defined by the World Bank at that time, with income distribution better than some of the most advanced developed countries, including the United States. See *GNI per capita, Atlas method*, WORLD BANK, [http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?end=2014&start=1962&year\\_low\\_desc=false](http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?end=2014&start=1962&year_low_desc=false) [https://perma.cc/BT6X-5Y6T].

216. As a result, Korea's per capital GDP grew at only one percent a year prior to 1962. See KWANG-SUK KIM & JOON-KYUNG PARK, *SOURCES OF ECONOMIC GROWTH IN KOREA: 1963–1982* 6 (1985).

217. See *supra* note 215.

218. See John Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219 (2007); Trubek, *supra* note 3; and Newton, *supra* note 2, at 187.

219. See Ohnesorge, *id.*

references the NICs, as well as other successful developing countries, in the preceding discussions. Further examination of Korea's development process under the proposed theoretical framework will contribute to bridging this gap.

## B. Applying the General Theory

### 1. *Applying the Disciplinary Parameters*

The first part of the general theory sets the disciplinary parameters of law and development. "Law" that is primarily considered in the development case of Korea is legislation. This is because Korea's economic development policies, as further discussed below, centered on the active government promotion of industries and export activities, and the government used legislation and subordinate administrative rules as a primary regulatory means to promote development. There is a potential role for customary law in development process,<sup>220</sup> but in the case of Korea, its role in the development process seems to have been limited. As to the second constituent element of law and development, *i.e.*, "development," this application examines both economic and social development. As discussed in Part II, economic development includes the notions of economic growth, increase in income, and industrial development. Social development includes the development of elective democracy and the rule of law, as recognized to be the substantive elements of social development in Korean society.

The following analysis applies the second part of the general theory, the regulatory impact mechanisms comprised of the three elements: "regulatory design," "regulatory compliance," and "quality of implementation." The last element is assessed by state capacity and political will.

### 2. *Regulatory Design*

The primary objective of Korea's development policies was to relieve the majority of its population from extreme poverty.<sup>221</sup> To meet this objective, the government sought to develop industries that would generate sustainable income for the majority of its population. The government adopted export-led development policies, which were necessary to overcome the constraints of insufficient purchasing power within the domestic market due to prevalent poverty,<sup>222</sup> and focused on developing manufacturing industries that utilized the abundant labor which were both edu-

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220. For the role of customary law for development, see PETER ØREBECH ET AL., *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT* (2005).

221. See *supra* note 215.

222. Empirical studies concluded that exports lead to economic growth under certain conditions and that export promotion policies are effective in increasing exports. See Michael Michaely, *Exports and Growth: An Empirical Investigation*, 4 J. DEV. ECON. 49 (1977); Woo S. Jung & Gyu Lee, *The Effectiveness of Export Promotion Policies: The Case of Korea* 122 WELTWIRTSCHAFTLICHES ARCHIV 340 (1986); and Sae Ran Koh & Jai S. Mah, *The Effect of Export Composition on Economic Growth: The Case of Korea*, 47 J. DEVELOPING AREAS 171 (2013). See also Pangestu, *supra* note 77 (discussing an evolution of industrial policies of the NICs).

cated and inexpensive.<sup>223</sup>

To implement these policies, the Korean government enacted statutes mandating state support for trade and exports, including the Tax Exemption and Reduction Control Act (1961), the Act on Temporary Measures for the Grant of Export Subsidies (1961), and the Export Promotion Act (1962, replaced by the Trade Transactions Act of 1967). The terms of these acts mandated that the government grant tax reductions for the profits generated by exports, ensure timely payment of export subsidies (subsidies contingent upon exports), prioritize allocation of scarce foreign reserves to purchase raw material to produce export products, and permit only traders with export performance to import.

The government also enacted a series of statutes providing direct support for specific industries, including the Act on Temporary Measures for Textile Industrial Facilities (1967); the Acts on Promotion of Mechanical Industries (1967), Shipbuilding Industries (1967), Electronic Industries (1969), Petrochemical Industries (1970), and Steel Industries (1970); the Act on Refining Service of Non-Ferrous Metals (1971); and the Act on the Promotion of the Modernization of Textile Industries (1979).<sup>224</sup> These statutes mandated that the government adopt various supportive measures for the designated industries, such as tax incentives, policy loans (government-backed loans offering more favorable terms than the prevailing commercial terms, such as lower interest rates), subsidy grants, tariff rebates, import control, and loan guarantees (particularly for loans offered by overseas banks).

In the 1980s, as the economy matured into a technology-based one after two decades of successful economic development and as the country became a middle-income country undergoing the later stages of economic development, the legislative focus shifted to supporting the robust private sector as a whole, rather than specific industries, and reducing government control of the economy. To facilitate this policy shift, the government enacted the Manufacturing Industry Development Act in 1986 (later replaced by the Industrial Development Act in 1999), repealed the cited statutes mandating specific industry-wide support, and granted assistance to industries on a more selective basis where there was a need to improve their efficiency by restructuring or reorganization.<sup>225</sup>

Development economics in the 1950s and 60s<sup>226</sup> would have supported Korea's state-led development policies to be implemented by the cited statutes, with the anticipated policy outcomes to be economic growth, industrial development, and relief of poverty. The prospect of success was

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223. The other NICs also adopted this type of export-led, development policies based on building manufacturing industries, with varying details. For an evolution of industrial policies of the NICs, see Pangestu, *supra* note 77.

224. See HISTORY OF ECONOMIC LAWS IN KOREA FROM LIBERATION TO PRESENT, VOLUME I, at 216–27 (Duol Kim ed., 2011).

225. See *id.* at 222–27.

226. For a discussion of development economics in the 50s and the 60s, see *supra* note 138.

initially uncertain. The Korean government did not have sufficient financial and industrial resources to implement these policies, and the United States, the primary aid provider for Korea at the time, reportedly had concerns that its development policies emphasizing the role of the state in economic development might lead to a socialist development model.<sup>227</sup> The latter did not happen, but the government played an essential role in the economic development initiatives. The government developed and executed the Five-Year Economic Development Plans from 1962 to 1996, which stipulated specific economic-development and industrial-promotion goals, including target economic growth and export promotion for each of the five-year terms.<sup>228</sup> It also coordinated and supported private sector activities that were consistent with its development goals through its control of bank loans and grant of government subsidies.<sup>229</sup> The government supported strategically chosen leading industries, which were likely to spur growth in other related industries, through various measures, such as tax incentives, policy loans, favorable exchange rates for exporters, a flexible import tariff regime that supported exporters, and inducement of social support for economic development through extensive public campaigns and education.<sup>230</sup>

Substantial flexibility and adaptability were other key features of Korean development policies. The government set its export expansion and industrial development goals according to what was feasible given the available resources, technology, and industrial experiences at the time. In the 1960s, Korea focused on labor-intensive industries, such as textile and clothing, which did not require large capital or technological resources unavailable then, and promoted exports of these products to generate income. The country subsequently transitioned into more advanced and potentially more profitable industries, such as heavy and chemical industries in the 1970s and electronics in the 1980s, that required larger capital, technology, and industrial knowhow, using the resources and experiences that Korean producers had gained from successful exports.<sup>231</sup>

The market performance of the supported industries, particularly in export markets, was a benchmark of success for economic development efforts. Even if the government took the initiative in economic development, with development planning and regulatory support, private sector

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227. Lee Jong-Seuk, *The Launching of Economic Development Plan (The Half Century of Korean Economy)*, E DAILY (May 5, 2005), [http://www.edaily.co.kr/news/news\\_detail.asp?newsId=01331686576565968&mediaCodeNo=257&OutLnkChk=Y](http://www.edaily.co.kr/news/news_detail.asp?newsId=01331686576565968&mediaCodeNo=257&OutLnkChk=Y) (Kor.) [<https://perma.cc/XMY3-MMTZ>].

228. For further details of the Five-Year Plans, see LEE, *supra* note 54, at 304-05.

229. See *id.* at 305-09. These subsidies had distributive effects, allocating resources to those industries considered at the time that would have the strongest growth effect for the economy, resulting in the high economic growth in the 60s and the 70s. In addition to this policy, other factors, such as pre-war industrial experience, land reform, the rise of national firms, administrative quality, and precision in policy targeting, are known to have contributed to this success. See ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989).

230. See LEE, *supra* note 54, at 305-13.

231. See *id.* at 303-05.

companies played a primary role. The government supported private sector entrepreneurs who successfully developed industries and expanded exports. The world-class Korean industrial brand names, such as Hyundai and Samsung, are as much the outcome of this government support as the result of their own efforts and innovations. In the 1980s, as discussed below, the government discontinued industry-specific support and reduced its control over the economy. This market focus is different from a socialist planned economy favored by dependence theorists.<sup>232</sup> China subsequently adopted this approach by initiating a series of market-oriented reforms since 1978 towards “the socialist market economy.”<sup>233</sup>

As a result of the development policies sustained for over three decades, the anticipated policy outcomes of economic growth, industrial development, and relief of poverty became a reality for Korea. In 1962, when the Korean government implemented the first Five-Year Economic Plan, its per capita GNI was \$120,<sup>234</sup> among the lowest in the world with the majority of its population stricken with poverty. By 1996, when Korea’s seventh and final Five-Year Economic Development Plan was completed, the nation found itself among the advanced developed countries with affluent economies and world-class industries. Its per capita GNI reached \$13,040,<sup>235</sup> classified by the World Bank as a high-income country at that time,<sup>236</sup> and Korea became a major industrial power and leading trader, joining the ranks of the other advanced countries in Europe and North America at the OECD (Organization for Economic Co-operation and Development).<sup>237</sup>

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232. See generally *SOCIALIST MODELS OF DEVELOPMENT* (Charles K. Wilber & Kenneth P. Jameson eds., 1982).

233. For further discussion of the socialist market economy, see *CHINA’S TRANSITION TO A SOCIALIST MARKET ECONOMY* (Osman Suliman ed., 1998).

234. World Bank, *GNI per capita*, *supra* note 215. According to the Bank of Korea, Korea’s GNI per capita in 1962 (nominal USD) was even lower, at \$91. Bank of Korea, *Economic Statistics System*, <http://ecos.bok.or.kr/> [<https://perma.cc/Q7KR-QL6L>].

235. As a result of successful economic development, the Korean economy grew at the remarkable rate of 8.75 percent on average per annum from 1991 to 1996, the highest among the NICs. See Feenstra, Inklaar, & Timmer, *supra* note 75.

236. See World Bank, *GNI per capita (current USD)*, *supra* note 215. The international community recognized Korea’s remarkable economic success, and as a result, Korea became the second Asian country to host the Olympic Games in 1988.

237. The analysis of the anticipated policy outcome also explains the change of economic conditions in Korea after 1996; after a long period of unprecedented economic growth and prosperity, Korea faced a financial crisis in 1997, caused by a short-term shortage of foreign exchanges. Unable to resolve this crisis, Korea requested a bailout from the International Monetary Fund (IMF), and the latter, in return for the bailout, demanded neoliberal changes in policies and law which would reduce the role of the state in the economy, more so than the government had been implementing since the 1980s. Korea was compelled to accept this demand to avoid national default, but the policy outcome that the demanded changes attempted to deliver, such as one to balance the financial market through hikes in interest rates, was not consistent with the decades of economic management and practices in Korea that supported a substantial number of firms with short-term loans on a rolling basis. These abrupt changes demanded by the IMF caused over 3000 companies to fail and millions to lose jobs, reduced industrial investments, and lowered economic growth, which have never recovered to the pre-crisis



As to the organization of LFIs, flexible legal frameworks supported the enactment of the development-facilitating statutes cited above. Korea adopted a civil law system,<sup>238</sup> which was developed by Germany and France and subsequently transplanted by its colonial predecessor, Japan. The Korean legal system is composed of core “codes,” such as the civil code,<sup>239</sup> with elaborate legal structures and embedded legal principles (i.e., not easily amenable to revision), and the state implemented development policies by enacting separate statutes that were not directly controlled by its major codes. In other words, Korea set up a separate legal apparatus, outside its codes, for the adoption and implementation of its development policies. This approach, which other countries have also adopted, enabled expedient implementation of specific development policies through on-point legislation and amendments, without having to revise its codes, which would be a time-consuming process. The provisions of these statutes took precedence over an inconsistent provision in any other statute earlier enacted, including the codes, except the national constitution.

Effective institutions implemented the development-facilitating laws legislated under the flexible legal frameworks. The government set up a large number of institutions both inside and outside the government to support economic development. The most important development-facilitating institution was the Economic Planning Board (EPB), which was established in 1961 as a body within the central government.<sup>240</sup> The EPB coordinated and instructed other government departments on a wide range of policy measures related to economic development until its merger with the Ministry of Finance in 1994.<sup>241</sup> The government also established various financial institutions to support economic development, such as the Korea Development Bank to provide financial support for select industries and the Korea Export-Import Bank to provide export credit, as mandated by the development-facilitating legislation cited above.<sup>242</sup> Korea also set up trade support organizations, such as the Korea Trade Promotion Corporation (KOTRA), which provided support for export companies, including access to overseas market information and business networks, and the Korea International Trade Association (KITA), which promoted the interests of Korean traders.<sup>243</sup>

The adaptation of law to changing socioeconomic conditions has also been essential for sustained development in Korea. As discussed earlier, the government repealed the statutes mandating specific industrial support in response to changed socioeconomic conditions in the later stages

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level. For further discussion of the financial crisis in Korea and in other Asian countries in the 1990s, see KHAN, *supra* note 50.

238. For an explanation of a civil law system, see *supra* note 63.

239. The other major codes include the criminal code, the civil procedure code, the criminal procedure code, and the administrative code.

240. See LEE, *supra* note 54, at 313.

241. See *id.*

242. See *id.* at 307-08.

243. See *id.* at 312.

of economic development. The government consistently monitored the implementation and operation of existing statutes, assessed their effectiveness, and made necessary amendments to increase their adaptability to the changing socioeconomic conditions as a result of rapid development; from 1977 to 1979, the government reviewed 2790 then-existing statutes and made 288 adjustments.<sup>244</sup> Moreover, in the 90s, the government made 604 statutory adjustments.<sup>245</sup> Consistent legislative monitoring and adjustment undertaken by the Ministry of Government Legislation, a separate government ministry devoted to this work, allowed Korea's laws to adapt to the country's changing socioeconomic conditions, resulting in their increased effectiveness for development.<sup>246</sup>

### 3. *Regulatory Compliance*

In 1996, by the time Korea's development era was being ended, Korea marked the percentile rank of 71.4 (0 to 100) for the rule of law assessment by the World Bank.<sup>247</sup> Assuming the validity of this rating, it indicates a relatively high level of general regulatory compliance, without which the rule of law would not be feasible. At least in part, Korea's political and cultural tradition explains its strength of regulatory compliance. In the Confucian tradition shared by Korea and other East Asian countries, the state is responsible for the wellbeing of its subjects, and the citizens, in turn, perceived their compliance with policies and laws that the state set up to meet this obligation, as a political and moral duty.<sup>248</sup> Additionally, the colonial government of Japan (1910-1945) and the subsequent authoritarian regimes, which sought to control the Korean population with strict rules of law, imposed severe penalties for any violation, and thus compelled regulatory compliance,<sup>249</sup> even though it was passive compliance due to fear of penalty.<sup>250</sup>

The Korean government was able to turn this passive compliance into active compliance. Aided by the early success of its initial development policies, the government was able to instill confidence in its citizens that they could escape poverty by trusting the government and cooperating with one another. Specifically, Koreans actively complied with development-facilitating laws and policies, such as encouraging savings by offering high interest rates and promoting strong work ethics which was subsequently compensated by rising wages and increased employment

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244. HISTORY OF ECONOMIC LAWS IN KOREA FROM LIBERATION TO PRESENT, *supra* note 224, at 15. The ruling party supporting the government maintained the majority in the Korean legislature until 1988, and this legislative control enabled the government to make timely legislative adjustments and new enactments.

245. *Id.* at 15-16.

246. *Id.* at 16-17.

247. WORD BANK, *Worldwide Governance Indicators*, <http://info.worldbank.org/governance/wgi/index.aspx#reports> [https://perma.cc/P37N-M5LF].

248. For a discussion of the Confucian tradition in East Asia, see *supra* note 195.

249. Control was tighter in the political area in an effort to prevent direct challenges to the regime. For a relevant discussion, see MARTIN HART-LANDSBERG, *THE RUSH TO DEVELOPMENT: ECONOMIC CHANGE AND POLITICAL STRUGGLE IN KOREA* (1993).

250. See *supra* Part III B.

opportunities. During this period, Koreans' active compliance was evidenced by their longest working hours among industrialized countries and highest savings rate in the world.<sup>251</sup> The low illiteracy rate also assisted with active compliance. Despite the prevalent poverty in the early 1960s, the illiteracy rate was very low,<sup>252</sup> thanks to the cultural emphasis on education and a solid public education system, which enabled Koreans to understand and comply with government policies and the requirements of the law. Korea achieved inclusive growth,<sup>253</sup> and this provided further motivation for Koreans to comply with the development policies and laws promoted by the government. They believed that the growth of the national economy and the prosperity of Korean companies was a prerequisite to higher incomes and better economic lives for themselves.<sup>254</sup>

As to the specific regulatory compliance, the cited statutes, which were enacted to grant direct support for exports and specific industries, stipulated terms and conditions of support, such as the criteria for receiving tax benefits and other types of government subsidies, so it was in the interest of the potential beneficiaries to comply with those terms and receive the support mandated by the statutes. The Korean government chose regulatory incentives, such as subsidy grants, to motivate individuals and companies to comply with laws and policies, rather than imposing inefficient compulsory measures as socialist countries had done. As discussed earlier, Korea's major codes<sup>255</sup> did not provide for direct support for industries, but they did make an essential contribution to development by protecting fundamental economic rights, such as the freedom to contract and right to property guaranteed under the civil code. This protection motivated Koreans to participate in economic activities pursuant to the government development plans by offering legal security for their rights to the economic returns from these activities.

While laws promoting economic development were met with active compliance, laws that the administration enforced in the 70s and the 80s to reinforce its political control over citizens were met with strong resistance. These laws included the constitutional revision in 1972, which consolidated political powers in the presidency and restricted some of the funda-

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251. In 1993, Korea's average annual working hours and savings rate were as high as 2656 hours and 34.0 percent, respectively. OECD, *Hours Worked*, OECD Data, <https://data.oecd.org/emp/hours-worked.htm> [<https://perma.cc/D34D-YQ8C>] and Park Daekeun & Changyong Rhee, *A Study on the Savings Rates in Korea: Synthetic Cohort Analysis*, KOREA INSTITUTE OF PUBLIC FINANCE RESEARCH REPORT (May 1997).

252. The illiteracy rate in Korea was 4.1 percent in 1958. See National Archives of Korea, *The Path that Hangul (Korean Alphabet) Waked on*, <http://theme.archives.go.kr/next/hangeulPolicy/business>. (Kor.) [<https://perma.cc/94VK-GUAE>].

253. Korea's Gini co-efficient, which shows income distribution, was 0.28–0.29 in the 90s (based on the disposable income), which was lower (i.e. better income distribution) than most other countries such as the United States (0.34).

254. However, this sense of partnership has been weakened since the late 1990s because the growth of large corporations ("Chaebols") has not been translated into the growth of national economy, employment, and household income, as was the case from the 60s to the 80s.

255. For a discussion of these codes, see *supra* note 239.

mental rights, such as freedom to speech, and the subsequent “Emergency Decrees” (“Kin-Keup-Jo-Chi”) that further restrained citizens’ political rights.<sup>256</sup> The administration justified these measures as necessary to promote economic development in the uncertain and unstable international environment of the 70s,<sup>257</sup> but many Koreans disagreed and considered them retarding, rather than promoting, social and political progress. The resulting political discontent led to a series of civil unrests towards the end of the 1970s, climaxing in during the “Gwangju Movement for Democracy” in 1980 (also called the “Gwangju Massacre” for the hundreds of casualties caused by the military action against the Movement), and finally, the 1987 civil resistance culminating in another constitutional amendment granting democratic presidential election.<sup>258</sup>

#### 4. *State Capacity and Political Will*

As discussed in the preceding part, state capacity and political will determine the quality of implementation. The remainder of this section discusses them in the context of Korea’s development. In the beginning of economic development, Korea lacked some of the key resources constituting state capacity, such as financial resources, as reflected in the small government budget and the virtual disappearance of foreign reserves as of 1963.<sup>259</sup> The history of Korean development is full of anecdotes and episodes associated with efforts to save scarce resources. For instance, in order to save electricity, President Park Jung Hee refused to use the air conditioner in his office during the summer, except when he met foreign guests, and placed two bricks inside a toilet tank for the purpose of saving water.<sup>260</sup> In the case of Korea, however, the leadership’s strong political will filled the gap created by insufficient resources available to the state, so I will discuss state capacity and political will together with cross references to each other.

Despite insufficient financial resources, Korea had considerable strength in the other constituent elements of state capacity, such as manpower, government organization, and administrative implementation. In 1960, Korea had over 237,400 government officials in its population of 25

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256. See HART-LANDSBERG, *supra* note 249, at 185–87, 197.

257. Facing a hostile communist North Korea at the time, the withdrawal of the United States from Vietnam in 1973 alerted the Korean administration and provided national security justifications for President Park to suspend the constitution and consolidate his powers. See *id.* at 186–87.

258. See *id.*

259. In 1962, the national budget was 74 billion won (after the second amendment), equivalent to \$290 million at the time, which was less than twenty percent of the net income of a single U.S. company, General Motors, in the same year. See EPB, *Government Budget Allocation in 1962*, BA0084326 (National Archives of Korea document call number) (1962) (Kor.).

260. Ahn Sung-mi, *Park Chung-hee biography published in Vietnamese*, KOREA HERALD (Feb 26, 2015), <http://www.koreaherald.com/view.php?ud=20150226000769> [https://perma.cc/MP2Z-GR4P].

million.<sup>261</sup> As discussed earlier, the Confucian tradition that values service to the government and the state, coupled with the lack of employment opportunities in the private sector, motivated the most educated and talented individuals to apply for positions in the government. These elite individuals, who often had academic training in North America and Europe,<sup>262</sup> possessed strong analytical abilities to develop economic development strategies and the supporting LFI, including the numerous development-facilitating statutes and institutions such as the Economic Planning Board.

Furthermore, Korea has had a long tradition of strong central and local government administration. The country was united into a single state in the seventh century, and since then Korea had established a strong central administration with regional territorial reach.<sup>263</sup> Japanese colonial rule in the early twentieth century also reinforced central and local administration, *albeit* for the purpose of exploitation. Building on this existing strength, President Park Jung Hee, who took power in 1961 by a military coup, instilled military discipline and organizational strength in the government. By the time Korea embarked on economic development in the early 1960s, it had the foundation of well-trained central and local administrators ready to serve the state and carry out its development agenda. They effectively implemented and enforced development policies and laws.<sup>264</sup>

Moreover, the political will of the leadership to achieve economic development compensated for the weaker elements of Korea's state capacity, e.g., insufficient financial and natural resources. The Extended Meetings for Export Promotion, presided over by the President himself and attended by a number of government officials and private sector players, demonstrated the strength and consistency of the political will.<sup>265</sup> These meetings were held on a monthly basis and continued for fourteen years from 1965 to 1979 (until President Park's death). They discussed a range of issues associated with export promotion, sought solutions, and reminded the nation consistently that the top national priority was the achievement of economic development through the implementation of

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261. The number increased to over 315,000 in 1965. See National Index System, *Annual Public Official Status*, [http://www.index.go.kr/potal/main/EachDtlPageDetail.do?id\\_idx\\_cd=1016](http://www.index.go.kr/potal/main/EachDtlPageDetail.do?id_idx_cd=1016) (Kor.) [<https://perma.cc/5DTH-X69W>].

262. Dr. Nam Duk Woo, a former Minister of EPB from 1974 to 1978 is a good example of Korea's elite bureaucrat. Dr. Woo was initially an academic with a doctorate training in the United States and subsequently led Korea's economic success after joining the administration under Park.

263. For further discussion of the development of administration in Korea, see *supra* note 214.

264. Korea was not free of corruption of its government officials, just as many other developing countries, during the period of its development. The difference lied in the extent of corruption, rather than its existence, which was not extensive enough to overturn the successful process of development. The situation of corruption improved in Korea when the government was able to offer public officials improved salaries as a result of economic development and the improved government budget. The process of political democratization, which took place in the 90s, also made public officials more accountable to the public and deterred corruption.

265. See LEE, *supra* note 54, at 313.

export-led growth strategies.<sup>266</sup> The focus on the development agenda, sustained throughout the entire period of Korea's development, would not have been possible without this extraordinary political will.

Korea's economic climate, political uncertainty, and growing security issues in the 60s and 70s explain the leadership's will for economic development. While Koreans suffered from crushing poverty in the early 1960s, the new administration was struggling with questions on its legitimacy. Having risen to power through a military coup, the government needed to resolve the poverty problem as a top priority in order to gain political support from the public.<sup>267</sup> The security situation in the Korean peninsula also provided the leadership with strong motivation to strive for economic development. The presence of communist North Korea, which proclaimed its goal to "liberate" Korea, had superior economic and military capacities in the 60s and early 70s. Moreover, decreasing aid from the United States and their suggestion to withdraw U.S. military forces from Korea after its failure in Vietnam in the 70s, spurred a sense of urgency that Korea needed a strong economy to build military forces to protect its security.<sup>268</sup>

Most Koreans shared the sense of this urgency and the desire to overcome prevalent poverty. They supported the leadership's political will with strong compliance with development-facilitating laws and enthusiastic participation in its development agenda. As discussed earlier, it does not mean that Koreans supported all of the legal changes that were made in the name of fostering economic development and protecting national security. Rather, the political will and the administration's endeavor for economic development gained popular support and contributed to the continuing economic development for over three decades.<sup>269</sup>

As to social development, the 1992 election of the nation's new president, Kim Young Sam, who had long been the leader of the opposition to the previous authoritarian regimes, marked a new beginning. He initiated a series of legal reforms to promote a democratic and transparent society.<sup>270</sup> For instance, one reform required the disclosure of personal identity and the use of authentic legal names in all financial transactions, and another reduced the government planning and control of the economy, demonstrated by the merger of the EPB with the Ministry of Finance.<sup>271</sup>

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266. *See id.*

267. *See also* HWANG, *supra* note 214, at 198-99; and SETH, *supra* note 214, at 318, 331-32.

268. *See* HWANG, *id.* at 199.

269. Based on this support, Park Jung Hee won presidential election three times since 1963 until he suspended the constitution in 1972. *See supra* note 214.

270. *See* Kwon Se Jun, *Kim Yong Sam's Drive: His Unique Drive Achieves Political, Economic, and Social Reforms*, CHOSUN MONTHLY (June 2017), <http://pub.chosun.com/client/news/viw.asp?cate=C03&mcate=M1001&nNewsNumb=20170625068&nidx=25069> (Kor.) [<https://perma.cc/7YHJ-PC84>].

271. *See id.* The EPB was the control tower of Korea's economic development since the 1960s. Its authority in budget allocation and control over the adoption and the implementation of economic development policies created tensions and rivalry with other government departments such as the Ministry of Finance. Its 1994 merger with the Ministry of Finance aimed at resolving this issue, and represented the change of

These reforms represented another political will, supported by the general public, for developing civil democracy and the rule of law in Korea. The subsequent election of President Kim Dae Joong, a Nobel Peace Prize winner and a legendary freedom fighter in the 1970s and 1980s, renewed the political will for democracy. Under his presidency, Korea recovered from the 1997 financial crisis and implemented economic reforms, showing that economic and social development agendas were not necessarily in conflict with each other and can be co-promoted successfully.<sup>272</sup>

In conclusion, the preceding application of the general theory to the empirical development case of Korea demonstrates the validity of the theory. This empirical application has shown how the constituent elements of the general theory can be adopted to explain the contribution of law to policy implementation and successful development in Korea.<sup>273</sup> One may also apply the general theory's analytical framework to other empirical cases, including development cases currently in progress, to analyze the impact of relevant laws on development.<sup>274</sup>

### Conclusion: Does Law Matter for Development?

There has long been a call for a working theory in the field of law and development. In response to this call, this Article attempts to set the disciplinary parameters, which have been rather unclear in law and development studies, and explores the "missing links" between law and development; i.e., the mechanisms that explain regulatory impact on development. This Article presents the three categorical elements necessary to

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economic paradigm in Korea to one that emphasizes on the role of the private sector. In contrast, an expert cited that the reduced government oversight in the economy resulted from the dissolution of the EPB was a cause of the 1997 financial crisis. See Lee Tae Hee, *Issues and Solutions at the Time of the IMF*, THE HANKYOREH, Dec. 17, 1997, 3 (Kor.).

272. President Kim Dae Joong continued with neoliberal economic reforms that reduced government's control of the economy and strengthened the private sector's autonomy, including a neoliberal labor reform that relaxed the legal preconditions to dismissal. The IMF required these reforms as a condition for its bailout package for Korea. The package was imperative for Korea to recover from the financial crisis, but after the reforms, Korea's economic growth slowed down to approximately four percent per annum and never returned to its pre-crisis level. For a discussion of Korea's financial crisis and the IMF conditionalities, see KHAN, *supra* note 50, at 60-75.

273. The analysis has also shown how changes in LFI, particularly in the aftermath of the financial crisis in the 1990s, have affected development and economic performance. See *supra* note 237. There is also a contrasting observation that the function served by law was limited in the development of Korea because there were fewer courts, lawyers, and institutions promoting Western-style legal learning during Korea's development periods from the 1960s to the 1980s. Y.H. Jung, *How Did Law Matter for Korean Economic Development?: Evidence from 1970s*, paper prepared for the Korean Economic Association Conference (June 2012). As seen from the preceding discussion, there is a sufficient scope for considering the role of law in Korean economic development in conjunction with its institutional arrangements, since the government meticulously legislated all of the major development policies during the development era and implemented them by legal means.

274. As shown in the preceding part, regulatory impact mechanisms are also applicable beyond law and development and can be adopted to explain regulatory impact generally. See *supra* notes 173 and 203.

analyze the regulatory impact mechanisms: regulatory design, regulatory compliance, and quality of implementation.<sup>275</sup> None of these elements operates in isolation, but, instead, each one interacts with and influences one another. Many of the failed law reform projects have focused on which particular laws and institutions to adopt, rather than on these elements, which are essential to the successful development and implementation of these laws and institutions.

As discussed, state capacity is important for the implementation of law and influences regulatory design and regulatory compliance. Law reform projects, regardless of their specific content or ideological orientation, have not been very successful where the host state lacks the essential capacity to implement the law, which is necessary to meet the projects' objectives. This experience justifies examining the state capacity to implement the proposed law, identifying any gaps in the capacity, and attempting to build on it, when it is found to be insufficient for implementation.

The proposed general theory also indicates that imposing laws and institutions to fulfill the agendas and priorities of donor countries, rather than providing the development needs that the host country identifies, is not effective.<sup>276</sup> Where changes are imposed from the outside without an internal consensus of the host country, the regulatory design may not meet the needs on the ground. Additionally, public support and strong regulatory compliance may not follow, and the state may not be willing to allocate its capacity and political capital toward implementation.

With the emergence of liberal law reforms in the 1980s, law and development projects have become "big business,"<sup>277</sup> but have not been a big success. For these reforms to be more successful, reformers must learn from the successful development experiences of countries in East Asia and elsewhere. These lessons include the successful marriage between state and market, which can overcome the problems associated with the weaknesses of an underdeveloped private sector in the early stages of economic development. The reform projects should also be flexible so as to allow progressive changes in development policies and the law used to implement them, in accordance with the changing socioeconomic conditions over time. In contrast, the inflexible and prescriptive one-size-fits-all type of approach has not been very successful and is unlikely to succeed in the future.

The perceived difficulty in understanding successful development in

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275. Scholars may have known these elements implicitly, but it is necessary to formulate them in a theoretical framework to explain systematically the causal mechanisms between law and development. Regulatory impact ( $I_r$ ) can be described as a function of regulatory design ( $D_r$ ), regulatory compliance ( $C_r$ ), and quality of implementation ( $Q_i$ ):  $I_r = f(D_r, C_r, Q_i)$ . This Article has also discussed the impact of development on law *albeit* briefly and advanced additional elements, such as "regulatory adjustment" and "regulatory reinforcement" to explain this impact. See discussion *supra* Part III A.

276. See also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 25, at 56-59.

277. See Trubek & Santos, *supra* note 47, at 3.



East Asian countries<sup>278</sup> lies in the fact that, throughout much of their development periods from the 1960s to the 1980s, these countries achieved remarkable economic development under authoritarian regimes adopting state-led development. This outcome seems to defy the liberal propositions of Max Weber and Friedrich Hayek<sup>279</sup> as well as the neoliberal market prescriptions. As to the governance issue, what is identified as social development, including democratic governance, varies according to the time and place and is influenced by cultural orientation, tradition, and socioeconomic constraints in place.<sup>280</sup> The resource constraints and poverty issues that still prevail in many developing countries create practical difficulties in fostering both economic and social development simultaneously and with equal strength. Thus, each developing country needs to decide how to sequence and prioritize different development goals in accordance with its own needs, preferences, and available resources.

History has shown that increased individual economic capacity obtained as a result of successful economic development tends to create internal pressure for a more democratic and representative form of government. For example, East Asian countries, such as Korea and Taiwan, prioritized economic development in the 1960s and 1970s. However, once they achieved a substantial level of economic development by the 1980s, they embarked on democratic reforms in response to strong public demand.<sup>281</sup> This process of “democratization” after successful economic development also occurred in other countries, such as Spain and Chile, suggesting that economic development tends to spur social development.<sup>282</sup>

The preceding discussions enable us to address a key question that has been raised and debated for decades: “Does law matter for development?”<sup>283</sup> Classical thinkers such as Weber and Hayek advocated for the relevance and importance of formal and rational laws that afford predict-

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278. See Ohnesorge, *supra* note 218, at 282–83; and Trubek, *supra* note 3, at 4.

279. For further discussion of their propositions, see *supra* Part I A.

280. See discussion *supra* Part II B.

281. For a relevant discussion, see HART-LANDSBERG, *supra* note 249; LIQUIN CAO, LANYING HUANG & IVAN Y. SUN, *POLICING IN TAIWAN: FROM AUTHORITARIANISM TO DEMOCRACY* (2014); and ALAN M. WACHMAN, *TAIWAN: NATIONAL IDENTITY AND DEMOCRATIZATION* (1994). By contrast, the 1989 student protest in China, at a time when the country was still in the early stages of economic development, did not lead to social and political transformation.

282. Trubek recounted that the transition from economic growth to democracy and protection of individual rights did not occur by the 1970s. He described how reformers saw the possibility that legalism, instrumentalism, and authoritarianism might form a stable amalgam so that their efforts to improve economic law and lawyering could strengthen authoritarian rule. See David Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 1, at 79. Still, the transition did occur by the 1990s in successful developing countries, such as the NICs, Spain, and Chile; the length of time before the transition could take place was perhaps longer than the reformers had initially expected.

283. This question is whether or not law affects development. It should be distinguished from an inquiry about whether law should be considered to be an end in itself or an objective of development. See Kennedy, *supra* note 1, at 157. For the latter question, see *supra* Part II B, on the identification of social development.

ability in economic transactions<sup>284</sup> and protect civil liberty for economic prosperity.<sup>285</sup> Yet, the cases of successful development in East Asia seem to indicate otherwise.<sup>286</sup> The role of law or the importance of the (formal) rule of law for economic development may remain controversial, and it seems to depend on other contingencies such as institutional frameworks, relevant capacities, and cultural orientations. There is less controversy on the point that development is not feasible without a degree of internal stability that provides for economic predictability.<sup>287</sup> Measures to secure and sustain such stability may include non-legal forms, particularly in the early stages of economic development, but tend to evolve into formal legal rules over time to secure consistency and transparency. Thus, law is important to the extent that it secures and sustains internal stability and guides the policies that countries should implement throughout the process of development, and it is subject to local variances.

If law matters, subject to local variances, then how is its effectiveness for development determined? The general theory presented by this Article helps to answer this inquiry. The theory indicates that the effectiveness of law in a country's development depends on several elements: its design, including the consistency of its anticipated policy outcome with development objectives; the flexibility and effectiveness of applicable legal frameworks and institutional arrangements; and its adaptability to the prevailing socioeconomic conditions on the ground. The strength of regulatory compliance and the quality of implementation as influenced by state capacity and political will are also determinants of its effectiveness. The successful development history of Korea demonstrates the importance of these elements. I conclude this Article with the hope that the general theory helps to set disciplinary parameters, clarifies the causal mechanisms between law and development, and makes a contribution toward increasing the effectiveness of future law reform projects.

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284. See WEBER, *supra* note 37, at 55-69.

285. For more on Hayek's discussion on law, liberty, and economic prosperity, see generally HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 38.

286. Hayek considered that under the rule of law, individual decisions, rather than the government authority, guide the productive activity. See FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 80-96 (1944). The successful state-led development in East Asia was not consistent with this position. See Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions in East Asia*, in *LAW, CAPITALISM, AND POWER IN ASIA* 1, 7 (Kanishka Jayasuriya ed., 1999); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 *LAW & SOC'Y REV.* 829 (2000); and Amanda J. Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches*, 29 *J.L. & SOC'Y* 282 (2002).

287. An empirical study, based on a survey of 113 countries from 1950 to 1983, concluded that economic growth is negatively correlated with political instability. See Alberto Alesina *et al.*, *Political Instability and Economic Growth* (Nat'l Bureau of Econ. Research Working Paper No. 4173, 1992).