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Thomas F. McInerney

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Law and Development as Democratic Practice

Thomas F. McInerney*

ABSTRACT

The importance of law and institutions to development is now widely recognized. Significant amounts of development assistance now target legal and institutional reform. These efforts have generally viewed legal and institutional reform as technical matters. Designing laws and institutions appropriate to local circumstances has been seen as primarily requiring the application of competent expertise. Yet practitioners in this field may gain a different perspective. Reforms that on paper seem wise may not get implemented, and those that are implemented may not achieve their intended aims. In this Article, the Author contends that one reason for this outcome is the failure of those involved to account for the political dimension of the work. Once it is recognized that legal and institutional reform in the development context is just as political as in any other context, the need to come to terms with the political dimension of the work becomes clear. To reconcile the objectives of legal and institutional reform for development with the need for some degree of political legitimacy associated with the activity, a political-theoretical account is needed. As a first attempt at articulating that view, the Author relies on the ideals associated with the discursive theory of law developed by Jurgen Habermas. This view is in turn given more practical grounding by reference to contemporary accounts of empowered participatory governance, which seek to involve citizens directly in defining state policy and practice. Three examples of what this strongly participatory account of legal and institutional reform might look like in practice follow.

* General Counsel, International Development Law Organization, Rome, Italy. The author wishes to thank Aleksander Dardeli, Maria Sara Jijon, Yohannes Kassahun, David Kennedy, Thomas F. McInerney, Jr., and Ewa Westman for helpful comments on an earlier version of the Article.

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I. INTRODUCTION

Despite appreciable gains in the stature of law and development during the past decade, new doubts about the field's viability have surfaced. Recent scholarship seems united in the belief that the promotion of the rule of law and good governance have, until now, failed to deliver either improved rule of law or improved governance.¹

1. See Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 328 (2002) ("Foreign assistance is making little impact in many of these nations because these efforts fail to understand the fundamental reason or reasons that a particularly society is not making lasting and meaningful legal reform."); Elliot Berg et al., *Cote d'Ivoire, in AID AND REFORM IN AFRICA: LESSONS FROM TEN CASE STUDIES* 424 (Shantayanan Devarajan et al. eds., 2001) ("[I]nstitutional change in legal/judicial systems is notoriously difficult. . . . One only has to skim the literature to understand that successful reforms in this area are few."); T.M. Thomas Isaac & Patrick Heller, *Democracy and Development: Decentralized Planning in Kerala, in DEEPENING DEMOCRACY: INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* 77, 82 (Archon Fung & Erik Olin Wright eds., 2003) (noting that "successful and sustainable democratic decentralization has been the exception to the rule"); Peter Evans, *Beyond "Institutional Monocropping": Institutions, Capabilities and Deliberative Development* 9 (Jan. 27, 2002) (working paper) (on file with author) (referring to the failure of donor-

The causes of these alleged failures are not yet well understood.² This Article contends that the problems that critics have identified are principally the product of conceptual and methodological weaknesses of efforts in this area. After identifying some of these foundational problems, this Article attempts to re-conceptualize law and development in terms of a broader process of democratic development. In a departure from the prevailing instrumentalist agenda, this Article contends that rule-of-law promotion activities must respect the internal relation between law and democracy³ in order to bring about the conditions under which legitimate legal orders can emerge.

The recent commitment of the international community to law and development differs in kind from earlier experience.⁴ Law is now generally accepted as a critical development priority. Evidencing the development community's consensus on the central importance of the rule of law, donors have allocated substantial sums for its improvement. Estimates are that approximately U.S.\$3 billion has

imposed governance conditionality to generate positive results). *See generally* THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: THE PROBLEM OF KNOWLEDGE (Carnegie Endowment for Int'l Peace, Working Paper No. 34, Jan. 2003), available at <http://www.carnegieendowment.org/files/wp34.pdf> (citing lack of knowledge or evidence to prove the effectiveness of rule-of-law assistance); YVES DEZELAY & BRYANT GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 221 (2002); U.S. GEN. ACCOUNTING OFFICE, FORMER SOVIET UNION: U.S. RULE OF LAW ASSISTANCE HAS HAD LIMITED IMPACT, GAO-01-354 (Apr. 2001); Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002); Daniel Kaufman, *Rethinking Governance: Empirical Lessons Challenge Orthodoxy* (Mar. 11, 2003), available at http://www.worldbank.org/wbi/governance/pdf/rethink_gov_stanford.pdf (last visited Oct. 15, 2003) (referencing the lack of improvement in governance and the rule of law worldwide).

2. What is clear is that the response of the law and development movement to these emerging pressures will crucially determine its future. *See* David Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future* (2003), available at <http://cale.nomolog.nagoya-u.ac.jp/en/nocache/publications/research/Trubek> (proposing work toward a reconstructed theory of the possibilities that law and development may offer).

3. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 133-51 (William Rehg trans., The MIT Press 1996) (1992).

4. *See* CAROTHERS, *supra* note 1; David Kennedy, *Law and Developments, in* CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21ST CENTURY (Amanda Perry & John Hatchard eds., 2003); Trubek, *supra* note 2. These authors maintain that the new law and development movement merits the name "rule of law" promotion. However, the underlying concepts remain consistent. This Article will use the terms law and development, legal reform, and rule-of-law promotion interchangeably to refer to bilateral and multilateral donor-sponsored legal assistance to developing and transition countries.

been allocated to rule-of-law activities in the past decade.⁵ It is against this backdrop that challenges have emerged.

While the latest law and development movement has settled upon the centrality of law in improving the well-being of citizens in developing countries, the field is, according to one critic, incompletely theorized.⁶ In fact, there appears to be no theoretical apparatus at work in most discussions of the subject. Generalized governance truisms, combined with instrumentalist agendas, have spawned orthodox technocratic prescriptions. This state of affairs stands in stark contrast to legal thought in other contexts. Legal and political theories play little, if any, role in informing the approach to law and development. One significant consequence of the field's weak conceptual foundations is the rigid analytical distinction maintained between concepts such as the rule of law and democracy.

An examination of law and development through the lens of political and legal theory can generate new insights into the purposes and processes legal reform should take. One crucial insight is the interdependence of democracy and the rule of law. One normative conclusion this Article draws from these premises is the need to democratize governance and rule-of-law promotion activities. Honest observers recognize that much legal and judicial reform implemented to date has lacked the involvement of the public beyond the legal community.⁷ Despite the acknowledgement by some of the need for more inclusive practices,⁸ it is not clear that the lesson has been absorbed in practice. Owing to the highly technical and specialized nature of the field, rule-of-law and good governance promotion has

5. Trubek, *supra* note 2, at 2.

6. CAROTHERS, *supra* note 1, at 6.

7. See LINN HAMMERGREN, U.S. AGENCY FOR INT'L DEV., POLITICAL WILL, CONSTITUENCY BUILDING, AND PUBLIC SUPPORT IN RULE OF LAW PROGRAMS 4 (1998) ("most justice reforms have been negotiated and initiated without public involvement"); INT'L COUNCIL ON HUM. RTS. POL'Y, LOCAL PERSPECTIVES: FOREIGN AID TO THE JUSTICE SECTOR 53 (2001), available at www.ichrp.org (study noting that beneficiaries of legal reform surveyed generally felt that their views, experiences, and needs were given too little weight by donors); Berg et al., *supra* note 1, at 427 (noting that labor market reforms in Côte d'Ivoire involved only the World Bank and government, excluding trade unions); Trubek, *supra* note 2, at 12 (citing "faith that the needed reforms could be imposed from the top" in the 1990s); Jennifer Widner, *Reflections on Judicial Reform* 14, available at <http://www1.worldbank.org/publicsector/legal/amjudref.doc> (last visited Oct. 25, 2003) ("developing country reform initiatives usually give no heed to the problem of centralizing responsibility in a single person, usually the chief justice, and his or her small staff"). Berg et al. offer a wide-ranging critique of legal-reform programs in Côte d'Ivoire, but emphasize the non-inclusive nature of the process. They note that with respect to general law and justice reforms, the Ministry of Justice action plans were drawn up at the urging of Cooperacion Francaise and the World Bank, and that their main elements reflected the agendas of these donors. Berg et al., *supra* note 1, at 427.

8. Trubek, *supra* note 2, at 16.

generally been insulated from the prevailing move toward participatory development.

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

II. CHALLENGING CONCEPTUAL AND METHODOLOGICAL ASSUMPTIONS

As law and development has become more mainstream, many of its underlying assumptions have come to be taken for granted. Strengthening the rule of law has gained widespread recognition, even among the general public, as a development priority. What conventional accounts leave out, however, is any discussion of the endeavor's complexity. Even those who recognize the complexity of advancing the rule of law in difficult post-conflict states, for example, conceive of the problem in roughly instrumental terms.⁹ The rule of law is seen as something tangible and definable; therefore, putting it into practice is just a matter of finding the right technocratic package and applying sufficient political muscle.

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

The first problem concerns the frequent adoption of hierarchical and orthodox stances. Such approaches tax the cognitive abilities of

9. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167, 222 (1997).

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

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

A. *Orthodoxy and Hierarchy*

By now, most observers of law and development agree that attempts at legal transplantation and orthodoxy frequently fail.¹³

10. Giandomenico Majone, *From the Positive State to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 139 (1997).

11. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1992).

12. See Thomas F. McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 COLUM. BUS. L. REV. 135 (2004).

13. See Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (citing measurements indicating thirty-three percent lower legality in countries receiving law via transplantation). That many recognize the failure of this approach does not mean that it no longer affects the conduct of legal-reform programs. See W. Paatii Ofosu-Amaah, *Legal and*

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

Unilateral solutions fail for a number of reasons, the primary one being cognitive limitation. In societies of increasing complexity, it is untenable to contend that one person or a select group of persons can steer the social, economic, or political order.¹⁵ Research in the social sciences has contributed to our understanding of the limited ability of humans to make decisions individually.¹⁶ These critiques come from all directions but bring us to similar conclusions. Concepts of bounded rationality and recognition of widespread irrationality in decision-making have undermined the hyperbolic assumptions of rationality in neo-classical economic thought.¹⁷ Similarly, analyses of informational asymmetries that arise in many contexts highlight the difficulty of rendering decisions with incomplete information. The understanding of the information processing function of markets

Judicial Reform in Developing Countries: Reflections on World Bank Experience, 8 NAFTA: LAW & BUS. REV. AM. 551 (2002). The author refers to a review undertaken by the World Bank of the major law-reform exercises in Central and Eastern European countries, which determined that wholesale legal transplantation efforts were "alive and well." *Id.* at 576. Similarly, the author cites the practice in Latin American of using judicial reform projects to promote Anglo-American oral advocacy models to replace traditional inquisitorial approaches to the civil law systems. *Id.* at 577.

14. See, e.g., John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 IOWA J. CORP. L. 1, 3 (1999) (citing Polish and Czech privatization examples).

15. Oliver Gerstenberg & Charles Sabel, *Directly Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289, 292 (Christian Joerges & Renaud Dehousse eds., 2002) ("[I]n a world of radical indeterminacy, or because the costs of exploring the most promising potential solutions would over-burden the most capable actor . . . even the strongest favor some division of investigative labour to incurring the risks of choosing and executing a solution alone.")

16. See generally JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES (1989) (using the social sciences to explain rationality at the individual and group levels, and the constraints on each).

17. *Id.* at 31-41 (referring to indeterminacy and irrationality of decisions in opposition to rational choice theory).

further demonstrates the relative inferiority of individual cognition in directing economic activity.¹⁸ As some observers have noted, rationality constraints become particularly acute when making institutional choices.¹⁹ Unintended consequences associated with such choices, particularly when executed hierarchically, may be considerable.²⁰ From a practical point of view, the failure of centrally planned economies dramatically illustrates the cognitive limitations any hierarchical or centralized governance system faces.

Just as government officials cannot hope to improve upon the calculations of untold numbers of market participants, legal reformers who attempt to impose solutions based on unilateral assessments of what is best for a given society will surely err. It is cognitively impossible for one person, a select group of elites, or international donors to determine *ex ante* appropriate legal solutions for a given country.²¹ Complex socio-economic factors such as competing norms, courses of dealing, vested interests, education, religion, settled expectations, and path dependencies are only some of the factors that must be taken into account in any reform project. Forces such as these challenge the capacity of elite decision-makers fed by foreign advisors to shoehorn solutions at odds with prevailing social structures. Complexity and bounded rationality suggest the need for collective rather than elite-driven reform.

Orthodoxy fails for similar reasons. If cognitive limitations make it impossible for an external party to determine solutions *ex ante*, then no orthodox solution—by definition determined in advance—could generally be expected to work. Although complexity no doubt makes orthodoxy a convenient option, the failure of the preordained blueprint to map reality ultimately cannot be ignored. The inability of many legal transplants to “take” illustrates this phenomenon.²² Likewise, the importance of strong institutions to economic growth creates great temptation simply to install institutions modeled on those of more economically successful countries, despite the fact that

18. See F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519-30 (1945).

19. See JON ELSTER ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 12-13 (1998).

20. *Id.*

21. See *id.* Elster et al. argue that the task of implementing wide-ranging reforms is impossibly complex. No small cadre, let alone an individual, could obtain the knowledge needed to anticipate consequences adequately. See also Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (explaining how decisions in child custody cases are hampered by the inability to obtain the knowledge needed to anticipate which parent would be in the best interest of the child).

22. See generally Kaufman, *supra* note 1 (examining the many challenges to legal orthodoxy and why it has, in part, led to the failure of transplanted legal systems).

the social, political, and economic capital needed to sustain those institutions do not exist.

These conceptual understandings make it all the more curious that the tendency toward legal orthodoxy in law and development has emerged at a time when great advances have been made in the comparative political economy of countries of the Organisation for Economic Co-operation and Development (OECD).²³ Studies in comparative capitalism have advanced new institutional thinking in an important way.²⁴ While acknowledging the centrality of institutions, the varieties-of-capitalism approach examines how economic, social, regulatory, and legal forces affect institutional structures.²⁵ It thus runs contrary to the prevailing view of the inevitability of international convergence and homogenization.²⁶ Rather than inexorable convergence toward the model of Anglo-American market economies, research suggests surprising durability of local models and modes of accommodation characterized by local flavor.²⁷

B. *Money Is the Root of All . . . Politics*

A further problem with conventional approaches to law and development has been a lack of attention to distributive questions—which is to say, politics. Because many of the participants in legal reform are lawyers, the tendency to focus on exclusively legal

23. See STEPHEN GOLUB, BEYOND RULE OF LAW ORTHODOXY: THE LEGAL EMPOWERMENT ALTERNATIVE 4 (Carnegie Endowment for Int'l Peace, Working Paper No. 41, Oct. 2003), available at <http://www.ceip.org/files/pdf/wp41.pdf> (n.d.) (noting that the devotion to legal orthodoxy is curious given its many problematic features).

24. See generally VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) [hereinafter Hall & Soskice]. Similar research can be found in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

25. Hall & Soskice, *supra* note 24.

26. In recent years, there has been a tremendous debate on whether jurisdictions engage in regulatory competition, trying to improve upon the regulatory systems of other states. Some argue that globalization is causing a “race to the top,” with jurisdictions trying to devise rigorous regulatory systems, while others see just the opposite, that is, a “race to the bottom.” Katharina Pistor, *The Standardization of Law and its Effect on Developing Economics*, 50 AM. J. COMP. L. 97, 104 (2000). A third stream, the convergence view, contends that international economic forces are driving states to adopt substantially similar regulatory approaches. All states are thus seen as converging on a single regulatory model, typically considered to be Anglo-American in nature. See John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501, 504 (2000).

27. See, e.g., *A Long, Hard Climb: German and French Economic Reforms*, ECONOMIST, Oct. 18, 2003 (noting that France and Germany are not challenging the social democratic basis of their societies in connection with reforms of the welfare state).

questions is great.²⁸ Legal reform is seen as a technical activity primarily involving legal professionals, yet the best-laid plans for legal change frequently collide with other forces.

Distributive questions are everywhere in this area.²⁹ Something as seemingly innocuous as commercial law reform can affect the channeling of existing economic activity into the official economy, which may hurt the business prospects of someone previously operating in the unofficial economy. For instance, curtailing corruption naturally affects the income of public officials,³⁰ and changing an investment code may reduce or increase the power of unions or employees. A related point deals with systemic changes. Improvements in the quality of services in one area can impede the provision of services elsewhere. Thomas Carothers uses the example of the courts being overwhelmed as a consequence of administrative improvements.³¹ Any of these changes may be advisable, yet they challenge the ability of law to mediate the pressures that arise. It is interesting that some economists fail to deal with the incentive problems of those hurt by the distributional consequences of legal reform but also rattle against the rent-seeking behavior of individuals who benefit from an existing order.³² While legal reform may equip lawyers and judges with cutting-edge legal knowledge or "best practices," countervailing forces that cannot be mediated through the legal system may frustrate efforts to see legal reform put into practice. Distributive questions may arise in any legal-reform project but are, if anything, more acute in developing countries in which incomes and social safety nets are modest.

Distributive questions are inherently political. In the legal context, as elsewhere, it is impossible to solve distributive questions based solely on technical criteria.³³ Weighing distributive choices requires judgment,³⁴ and exercising judgment with respect to the distribution of resources under conditions of scarcity is a political

28. CAROTHERS, *supra* note 1, at 8.

29. I owe these observations to David Kennedy. Kennedy, *supra* note 4; see Peter Evans, *supra* note 1, at 6.

30. See, e.g., HARRY BLAIR & GARY HANSEN, U.S. AGENCY FOR INT'L DEV., WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS 7 (1994) ("Resistance to structural change in the courts is particularly unyielding where *rent-seeking opportunities* [of judges and court staff] are endangered."); see also SUSAN ROSE-ACKERMAN, CORRUPTION IN GOVERNMENT: CAUSES, CONSEQUENCES AND REFORMS 27-38 (1999).

31. CAROTHERS, *supra* note 1, at 10.

32. See Isaac & Heller, *supra* note 1, at 82 (noting that mainstream development thinking perceives the world as "largely frictionless and apolitical").

33. Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?* 5, available at http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Sen.pdf (last visited Nov. 1, 2004); see also Evans *supra* note 1; Kennedy, *supra* note 4, at 3.

34. Sen, *supra* note 33, at 3.

affair. While glazed over in mainstream discussions of law and development, practitioners are well aware, sometimes painfully so, that unresolved political battles sometimes make their technical assistance interventions futile.³⁵ In such contexts, the desire to remain a neutral technician dispensing apolitical best-practice advice may require especially strong blinders. Because distributive choices frequently intersect with legal choices, a theory of law and development that does not rest on a prior theory of collective decision-making (i.e., democracy) will leave such paradoxes unresolved and ultimately result in failed assistance.

The very choice of a society to adopt a market economy requires not only political but also ideological backing. Amy Chau has noted that in OECD countries, such support has arisen as a consequence of belief in the possibility of upward mobility, the value of self-reliance, the importance of workers exercising control over the workplace, and the necessity of employer commitment to worker well-being.³⁶ She contends that aspects of these beliefs have contributed to the durability of market economies in most OECD countries.³⁷ No matter how well-intentioned development policies might be, at least a median segment of the population must support market reforms for the intended purpose to be achieved. Given the dramatic disparity in wealth existing in many developing countries, achieving political support will require legal reforms that entail distributive consequences acceptable to a critical mass of the population.

Historical experience suggests that while reform may be pursued for intrinsic reasons, the alignment of reform movements with political movements involving broader distributive concerns can fuel the fire. In the United States, during the period of the late nineteenth century through the early twentieth century, growing dissatisfaction with corruption and inefficiency in the judiciary fed the reformist cause.³⁸ For years this movement was driven primarily by elites who sought to develop greater propriety in the legal profession and the courts generally.³⁹ Yet it was case of *Lochner v. New York*,⁴⁰ in 1905, and the rise of substantive due process jurisprudence by the conservative Hughes Court that broadened and accelerated calls for judicial reform.⁴¹ Notably, the then-powerful labor movement added judicial reform to its agenda, and populist

35. See Heather Marquette, *The Creeping of Politicisation of the World Bank: The Cage of Corruption*, 52 POL. STUD. 413, 420 (2004).

36. Amy Chau, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 301-07 (2000).

37. *Id.* at 306.

38. Widner, *supra* note 7, at 8.

39. *Id.* at 8-9.

40. *Lochner v. New York*, 198 U.S. 45 (1905).

41. Widner, *supra* note 7, at 8.

politicians, like President Theodore Roosevelt, capitalized on this sentiment and proposed radical reforms.⁴² Likewise, the existence of economic and social issues for which citizens sought judicial redress made judicial reform a matter of democratic concern.⁴³ This history suggests that the challenge of gaining popular support for legal and judicial reform hinges in part on the ability to align legal and judicial reform movements with broader political concerns that hold wider distributive consequences.

By arguing that distributive questions must be resolved by political agreement before legal reform can be achieved, a greater role for rule-of-law promotion is not suggested. Instead, the argument here is that in order for effective law reform to occur, mechanisms for mediating conflicting political claims that arise in the process must exist. Put differently, those who would tax law with the burden of solving distributive questions prioritize the right over the good. In reality, the two are determined dialectically and interpenetrate.⁴⁴ Leaving distributive questions, whether involving resources or power, to law and development programs lacking the ability to mediate competing claims democratically is a surefire recipe for failure.

C. Rethinking Agency

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

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

42. *Id.*

43. *Id.* at 13.

44. See Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, 17 CARDOZO L. REV. 1083, 1103-05 (1996) (arguing that legal-political norms and moral norms are dialectically interdependent); see also Jürgen Habermas, *Reply to Symposium Participants, Benjamin Cardozo School of Law*, 17 CARDOZO L. REV. 1477, 1487-88 (1996) (responding to McCarthy).

classical—in legal-reform thinking, calls for an adequate sociological understanding have been drowned out.

Pierre Bourdieu's sociology illustrates the inadequacies of existing conceptions of agency in law and development.⁴⁵ In contrast to traditional structuralist thought, which concentrated principally on objective social structures, Bourdieu offers both an objective and agent-centered sociology.⁴⁶ With respect to the former, he examines the existence of objective social structures in what he calls various "fields" of social practice.⁴⁷ With respect to the latter, rather than treat such structures as having some independent ontological status, he points to their cognitive roots.⁴⁸ In other words, external social structures exist and are replicated at the level of the individual. This cognitive basis, what Bourdieu calls the habitus, consists of historical relations that are implanted in individual bodies to form mental and physical schemata of perception, appreciation, and action.⁴⁹ These cognitive structures, rather than invariant over time, are "historically constituted, institutionally grounded, and thus socially variable, generative matri[ces]."⁵⁰ It is important to understand both the concepts of habitus and field dynamically. Agents, predisposed to a particular habitus, undertake strategic action (or "play" in Bourdieuan terms) within a particular field.⁵¹ Actions that agents take within a particular field are not predetermined but rather are shaped by the habitus to which they are disposed.

Bourdieu's analysis of the extent to which individuals take on cognitive dispositions based on social structures in which they interact conveys the extent to which strategic choices by individuals are to a certain degree conditioned. Applying thinking similar to Bourdieu, Thomas Carothers contends that law is a "normative system that resides in the minds of the citizens of a society."⁵² His

45. For purposes of this paper, I rely on Bourdieu to offer a critique of existing conceptions of law and development. I do not purport to supplant empirically grounded examinations of the law and development field. Impressive empirically grounded work on the topic, which employs Bourdieuan methodology, has recently emerged. See YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (examining the process of globalization in Latin America); Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 306, 307-12 (Yves Dezalay & Bryant G. Garth eds., 2002) (describing Bourdieuan methodology as requiring examination of the "genesis" of rules and institutions).

46. Loïc J.D. Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu's Sociology*, in *AN INVITATION TO REFLEXIVE SOCIOLOGY* 14 (1992).

47. *Id.*

48. *Id.*

49. *Id.* at 16.

50. *Id.* at 19.

51. *Id.* at 19.

52. CAROTHERS, *supra* note 1, at 8.

analysis points to the cognitive basis of the new institutionalist examination of path dependency.⁵³ History may not be destiny,⁵⁴ but it does exert considerable inertial effect on individual actors. Attempts to promote legal reform as a development project must reflect the strong influence of existing structures.

A related point stems from the strong tacit dimension of much legal knowledge. It is a notion not captured by the distinction between procedural and substantive law. Both procedural and substantive law can be codified in the form of rules contained in books. Knowledge of the law on the books is explicit. Someone can ask a question about what the law is by pointing to a page of text, but no lawyer who has practiced for any period of time would say that merely knowing the laws on the books suffices to make one a lawyer. Lawyers exiting law school and passing entrance examinations to the bar may have obtained a large amount of explicit knowledge, but they generally know how to do very little. What they lack, and what experienced lawyers have, is tacit knowledge. As Michael Polyani noted in connection with the transplantation of a light-bulb machine from overseas to his native Hungary, the machine failed to operate notwithstanding the fact that the same machine was in operation in neighboring Austria.⁵⁵ His explanation of what was lacking, tacit knowledge, helps illustrate an important aspect of what it means to be a lawyer. Included in this notion are techniques for writing, research, speaking, advising clients, and—more important—making judgments on the meaning of statutes, the willingness of a given judge to accept one argument over another, and how to draft a contract that will stand up in court.

As described in connection with the limitations on knowledge above, the tacit dimension of the law imposes significant hurdles on those seeking to transform a legal system. Lawyers in any system can, and must, relearn certain practices to keep pace with changes that occur over time. Fundamental change poses greater difficulties, because the wider the legal reform, the more tacit knowledge that is lost. Since tacit knowledge is often what distinguishes a good lawyer from a mediocre one, making existing tacit knowledge irrelevant

53. See, e.g., DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) (developing a theory of institutional change and its role in economic development).

54. ROBERTO MANGABEIRA UNGER, *POLITICS: THE CENTRAL TEXTS* (1997).

55. MICHAEL POLYANI, *TACIT DIMENSION* (1966); see also Richard Langlois & Nicholai Foss, *Capabilities and Governance: The Rebirth of Production in the Theory of Economic Organization* (DRUID, Working Paper, 1997), available at <http://ideas.repec.org/plaal/abswp/97-2.html> (last visited Nov. 4, 2004) (surveying “capabilities” view that complements incentive-based views of economic organization).

carries certain hazards.⁵⁶ Here too, distributive consequences play a role. Only infinite faith in the altruistic tendencies of lawyers could support the view that change that threatens their livelihoods will be willingly accepted solely because it will improve the general welfare.

D. State-Level Incentives

The limited progress of legal reform in many transitioning and developing economies contrasts sharply with the recent experience of some states proceeding toward economic integration. The power of incentives in motivating states to undertake broad legal reforms holds significant explanatory potential in this regard. Some of the most dramatic examples of widespread legal reform in the past fifteen years can be attributed to the power of international integration, notably in connection with EU and WTO accession. The high-power, state-level incentives that opportunities for economic integration offer have driven countries like the Czech Republic, Poland, Hungary, and other EU accession states to undertake significant reforms.⁵⁷ Likewise, China's efforts to comply with WTO guidelines before joining that organization speak to the tremendous motivation the prospect of WTO membership engendered.⁵⁸ Certainly more work remains in many of these countries. All too often we read these reforms as merely the process of conforming to the guidelines of the international regime in question, yet what this interpretation fails to take into account is the convergence of political forces within a country that is necessary to enable such reforms to take foot. Despite significant opposition in some cases, political forces in these states have consolidated around reform priorities and delivered on a substantial scale.

Indeed, the experience of international integration makes a key argument for state interest in legal reform appear impotent. Vague promises of potential gains in foreign direct investment from legal reform are too intangible to generate the massive mobilization of political and social forces needed to realize far-reaching reform. One need only survey statistics on foreign direct investment concentrated in only a handful of countries to wonder whether those states looking

56. Widner, *supra* note 7, at 6 (“[O]ne of the reasons for the slow response [to judicial reform in the United States] was that some lawyers profited from the archaic procedures others wanted to abolish.”).

57. See, e.g., *Sunny Prospects*, ECONOMIST, Sept. 11, 2004, at 46 (quoting Poland's Prime Minister Marek Belka as saying they had “grossly underestimated the positive effects of accession”). This lesson certainly will not be lost on potential new accession states and suggests that weighing potential economic gains from economic integration is a significant consideration for policymakers.

58. See generally *Out of Puff: A Survey of China: Money Worries*, ECONOMIST, June 15, 2002, at 8-9 (discussing changes to China's financial institutions related to its entry into the WTO).

in from the outside will really be incentivized in the way the law and development movement generally hopes. While the economic literature seems fairly settled on a positive correlation between well-developed legal systems and development (with causation appearing plausible but unproven),⁵⁹ the gains states can expect to experience from general improvements in the rule of law are long-term. Compared with the relatively short-term incentives political and economic integration poses, such long-term promises may be of limited force in mobilizing significant political and social power behind legal reform. Incentives that are more tangible and compelling are necessary. The deliberative approach to law and development described below can explain how equally powerful incentives for legal reform can arise under the right institutional conditions.

III. DELIBERATIVE DEMOCRATIC MODEL OF LEGAL REFORM

Once we depart from orthodoxy and hierarchy, we open ourselves to a range of possibilities. As the varieties-of-capitalism approach suggests, institutional starting points will dictate widely different reform options.⁶⁰ Only a deliberative democratic approach is capable of responding to these factors. While many in the development community express their support for a participatory approach to development, the justification is usually instrumental.⁶¹ This Article contends that the rationale for inclusive law and development goes beyond mere instrumental reasons. Instead, inclusive and deliberative legal reform is a *sine qua non* for the creation of legitimate law and democracy. Rather than simply one of the various options available, the application of a truly deliberative participatory legal-reform process is essential to upholding the very purpose of reform.

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

Habermas' discourse theoretic account of law and democracy provides a basis for considering the preconditions of any law and

59. Kaufman, *supra* note 1, at 17.

60. See Berkowitz et al., *supra* note 13.

61. *Id.*

development program.⁶² With appropriate adjustments, this account of how legitimate law is formed provides a metric against which legal-reform work may be judged. Habermas' call for deliberative democracy resolves both normative and instrumental questions facing the law and development movement.

The root of Habermas' legal theory is his intersubjective theory of truth and morality.⁶³ Writing in response to postmodern critics of traditional rationalism, he contends that truth is determined by virtue of intersubjective discourse.⁶⁴ He extends this argument to develop his moral theory of discourse ethics, according to which morality is determined by virtue of the achievement of a hypothetical unanimous agreement by all concerned persons who engage in a process of moral argumentation and debate.⁶⁵ Translated to the legal context, this theory is used to develop an account of legitimate law creation. Discourse is essential to the creation of legitimate law. Habermas writes that "under post-metaphysical conditions, the only legitimate law is one that emerges from the discursive opinion- and will-formation of equally enfranchised citizens."⁶⁶

Habermas' discursive model of law and democracy is procedural rather than substantive.⁶⁷ He does not posit some transcendent value as the basis for law's legitimacy.⁶⁸ Instead, he views democratic procedures as the basis upon which a legitimate legal order can arise.⁶⁹ As one commentator has stated, in a post-Enlightenment world "legitimacy stems from these procedures and not from the assertions of those who claim, for instance, the divine right of kings."⁷⁰ It is a view that simultaneously avoids the inadequacy of strongly positivist accounts of the rule of law as mere legality⁷¹ while steering clear of expansive substantive criteria for legitimacy, such as natural law.⁷²

62. HABERMAS, *supra* note 3, at 448.

63. *Id.* at 28-41.

64. *Id.* at 34-35.

65. This is a translation of the Kantian principle of never acting in a way that one cannot also will the maxim of the action to become a universal law. See JOHN RAWLS, A THEORY OF JUSTICE 251-57 (1971) (describing the Rawlsian original position as a combination, in part, of Rantian autonomy and Kant's concept of the categorical imperative).

66. HABERMAS, *supra* note 3, at 408.

67. *Id.* at 408-09.

68. *But see* Richard J. Bernstein, *The Retrieval of the Democratic Ethos*, 17 CARDOZO L. REV. 1127, 1130-37 (1996) (arguing that some shared substantive ethical pre-commitment is required before discursive democratic practices can be initiated).

69. HABERMAS, *supra* note 3, at 453 (noting that the discourse-theoretic approach steers between the two pitfalls of positivism and natural law).

70. Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943, 950 (1999).

71. HANS Kelsen, THE PURE THEORY OF LAW (Max Knight trans., Univ. of Cal. Press 1960) (1934).

72. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

Civil society resides at the core of this proceduralist legal theory. Habermas conceives the informal sphere of civil society as the locus of free-wheeling political debate and exchange.⁷³ This informal public sphere involves voluntary associations, media, and religious organizations, among others, which perform the task of feeding the public institutions with democratic input. Formal legal institutions render decisions and produce laws, but they also perform the essential function of taking up input from the public sphere and translating it into binding law. According to this model, legal legitimacy is determined in terms of a “decentered, civil society-based theory that focuses on the forms of communications between the unrestricted, but weak, societal sphere and the necessarily restricted, but relatively strong, public political spheres.”⁷⁴ In a sense, “procedural law becomes, above all law of . . . civil society.”⁷⁵ In the discursive model of democracy, civil society acts as the conduit for transmitting the input of the public to state institutions.

Because of the centrality of civil society in contributing to the law-making process, deepening the rule of law from a Habermasian perspective requires strengthening the cultural sphere of the public space.⁷⁶ A fundamental failing of existing legal orders in many liberal democratic states is not at the level of existing law’s content, but rather a result of the inadequate procedures of public communication that inform the justification and adoption of legal norms.⁷⁷ Law, in this theory, is at the heart of democracy; each presupposes the other.

[T]he discourse theory of law conceives constitutional democracy as institutionalizing—by way of legitimate law (and hence by also guaranteeing private autonomy)—the procedures and communicative presuppositions for a discursive opinion- and will-formation that in turn makes it possible (the exercise of political autonomy and) legitimate lawmaking.⁷⁸

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

The codetermination of law and democracy explains why mere grants of formal legal rights or the adoption of formal legal constructs cannot result in legitimate law. For the substance of the rights necessary for a democracy requires democratic input before their

73. William E. Scheuerman, *Between Radicalism and Resignation: Democratic Theory in Habermas’s Between Facts and Norms*, in HABERMAS: A CRITICAL READER 156, 156-58 (Peter Dews ed., 1999).

74. Andrew Arato, *Reflexive Law, Civil Society, and Negative Rights*, 17 CARDOZO L. REV. 785, 787 (1996).

75. *Id.* at 787 (emphasis added).

76. Jacques Lenoble, *Law and Undecidability: A New Vision of the Proceduralization of Law*, 17 CARDOZO L. REV. 935, 947 (1996).

77. *Id.* at 948.

78. HABERMAS, *supra* note 3, at 437.

conferral.⁷⁹ The democratic process itself is necessary to determine the content of rights. Put differently, we cannot even *conceive* of political ends without first having gone through a process of political deliberation.⁸⁰ Likewise, in Habermas' inter-subjective theory of truth, determining how to implement substantive legal commitments must occur discursively. In concrete terms, Habermas faced this issue in connection with the unification of Germany.⁸¹ At that time, he argued that the inclusion of the German Democratic Republic in West Germany should have occurred pursuant to a process of large-scale public debate.⁸² Only such a debate would have both regenerated the autonomous public spheres lacking in the previously totalitarian state and established the requisite normative parameters for the process.⁸³ For Habermas, discursive processes are a *sine qua non* for the creation of a democratic order.

In societies of increasing complexity, creating the conditions under which discourse can occur is difficult. Law itself plays a critical role. Relying on systems theory, Habermas argues that in functionally differentiated societies, law acts as a mediator between autonomous subsystems. Because each subsystem has a unique expert language, referred to in systems theoretic language as a "code," understandable only to participants in that subsystem, some connecting language is needed to integrate the disparate subsystems into a single society. That language is ordinary language. Habermas argues that non-specialized ordinary language roots specific action systems in society (the "lifeworld").⁸⁴ Institutions capable of steering specialized subsystems through ordinary language anchor those subsystems in the broader social world.⁸⁵ The language of law, in turn, transmits ordinary communication from the public and private

79. *Id.* at 449-50.

The *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because individual private rights cannot even be formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs.

80. *Id.* at 450 ("[I]ndividual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs.").

81. Pierre Guibentif, *Communicative Action and Production of Law*, in HABERMAS, MODERNITY AND LAW 59 (Mathieu Deflem ed., 1996).

82. *Id.*

83. *Id.*

84. HABERMAS, *supra* note 3, at 353-54.

85. *Id.* at 354.

spheres and acts as a “transformer,” enabling communication between autonomous subsystems. To the extent that legal language penetrates functional subsystems, it distributes ordinary language throughout society.

Habermas sees law as a source of social integration. Law serves as a mediator between functional subsystems, the state, and civil society rather than as the driver of social and political change. The function of law is to translate the inputs of civil society (communicative power) into a form accessible to the state apparatus (administrative power).⁸⁶ In an attempt to democratize existing institutions, Habermas wishes to prioritize the ordinary language of the public in deliberations on public matters. The challenge for an expert language like law is to make it sufficiently accessible to the public so that a broader discourse that deals with the political, social, and economic effects of legal reform can occur. Law as the medium of discourse, however, does not mean that we can technocratically burden law exclusively with the task of political and economic reform.

There are multiple ways to interpret this call to institutionalize discursive procedures for gathering the “wild” inputs of civil society to feed formal state decision-making.⁸⁷ One could interpret it as a call for simply grafting institutions or mechanisms onto existing state structures. Such an approach would, in Habermas’ words, “substitute facticity for validity.”⁸⁸ In other words, it would be to assume the ineluctable quality of existing state structures. Yet Habermas’ long-standing commitment to revitalized democracy calls for a more adventurous reading. Rather than accept all institutions as given, we must conceive of new institutions capable of performing the necessary function of giving voice to citizens. One cannot reasonably consider the institutional legacies of colonial or authoritarian regimes as necessarily capable of responding to the problem-solving needs of developing economies today.⁸⁹ Imaginative approaches to institutional design, informed by deliberation among all affected participants, may give rise to institutions better aligned with history, culture, and development priorities.

86. Scheurman, *supra* note 73, at 158.

87. Kenneth Baynes, *Democracy and the Rechtstadt: Habermas’ Factizität und Geltung*, in *THE CAMBRIDGE COMPANION TO HABERMAS* 218 (Stephen White ed., 1995).

88. That is, a statement of what *is* for what *should be*.

89. *Introduction to DEMOCRACY UNREALIZED: DOCUMENTA 11_PLATFORM 1* (Enwezor et al. eds., 2002). *But see* Charles F. Sabel & Rory O’Donnell, *Democratic Experimentalism: What to Do About Wicked Problems After Whitehall (And What Scotland May Just Already Be Doing)*, Presented to the OECD Conference on Devolution and Globalization (Feb. 28, 2000), available at <http://www2.law.columbia.edu/sabel/papers/glasPO.html>.

A. *From Civil Society Alongside the State to Empowered Participatory Governance*

Recent studies on institutions that make broad participation an operating principle are consistent with the spirit of Habermasian discursive democracy but deepen its democratic impulse in important ways.⁹⁰ Notions such as empowered participatory governance,⁹¹ directly deliberative polyarchy,⁹² and associational democracy⁹³ have been developed to explain the innovative institutional structures of these new approaches to democratic governance. In contrast to Habermas' strict division between private and public spheres, this school posits the creation of hybrid institutions that mediate public and private institutions in novel ways.⁹⁴ Democratic decision-making, viewed in this manner, is not something that happens exclusively in the confines of state institutions fed by civil society inputs—a more or less pluralistic model—but instead occurs through the engagement of citizens in direct decision-making under the auspices of the state.

Although a relatively new subject of research, initial empirical analysis suggests that the empowered participatory governance model can potentially solve intractable social problems through unorthodox means.⁹⁵ Drawing from a range of examples, Archon Fung and Erik Olin Wright identify the key elements that characterize this model. These elements include “(1) focus on specific, tangible problems, (2) involvement of ordinary people affected by these problems and officials close to them, and (3) the deliberative development of solutions to these problems.”⁹⁶ The variety of examples to which this model has been applied and the open-ended and diverse manner in which institutions satisfying these criteria can be configured makes it clear that something different from a new orthodoxy is at work.

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

90. See Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).

91. See generally Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 3 (2003).

92. Joshua Cohen & Charles Sabel, *Directly Deliberative Polyarchy*, 3 EUR. L.J. 313, 313 (1997).

93. Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393 (1992).

94. See, e.g., *id.*; Cohen & Sabel, *supra* note 92; Fung & Wright, *supra* note 91.

95. See generally Fung & Wright, *supra* note 91.

96. *Id.* at 15.

agreement on problems ranging from community policing to economic development without becoming burdened by political concerns that often undermine cooperative political relations. The grassroots nature of the approach strips experts of their privileges and brings into play the substantial local knowledge that ordinary people hold. The benefits of such an approach are better-informed policies and improved accountability over political principals. Experts are not irrelevant to the process, but they play a supportive rather than dominant role.⁹⁷ Fung and Wright contend that experts serve to “facilitate popular deliberative decision-making and to leverage synergies between professional and citizen insights rather than preempt popular input.”⁹⁸ Finally, the process of deliberation involves participants reciprocally listening to each others’ positions and generating group choices after due consideration.⁹⁹ The process of deliberative decision-making, resulting in consensus, not unanimity, avoids the deficiencies of winner-takes-all voting.

The design of institutions that facilitate empowered participatory governance involves three considerations: devolution, centralized supervision and coordination, and a state-centered focus.¹⁰⁰ Devolution is essential to opening up existing political arrangements to democratic participation.¹⁰¹ In contrast to Habermas, who hopes to drive the democratic inputs of civil society into the formal state apparatus, the empowered participatory governance approach devolves power from the state to new deliberative institutions. Simultaneous with the process of devolution, these new institutions come under central supervision.¹⁰² Some coordinating mechanism is required to provide accountability and ensure that innovations that develop locally are shared horizontally. The combination of devolution with enhanced central monitoring constitutes a different governance model than the move to “autonomous decentralization,” or wholesale relinquishment of control over devolved institutions occurring in many countries today.¹⁰³ In addition, while this governance model empowers citizen actors, it is not a mere voluntaristic endeavor.¹⁰⁴ Unlike specialized issue groups seeking to fight state power, the citizens’ groups engaging in empowered participatory governance take a direct role in

97. *Id.* at 17.

98. *Id.*

99. *Id.* This characterization of deliberation is similar to Habermas’ notion of the “unforced force of the better argument.” See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 160 (CHRISTIAN LENHARDT & SHIERRY WEBER NICHOLSEN trans., MIT Press 1990).

100. Fung & Wright, *supra* note 91, at 20.

101. *Id.*

102. *Id.* at 21.

103. *Id.*

104. *Id.* at 22-23.

governance.¹⁰⁵ In contrast to conventional issue-oriented activism that, consistent with the Habermasian model, seeks to influence the state from outside, citizens are, in effect, brought inside the state to the extent that they contribute to the formulation of policy alongside state actors.¹⁰⁶

This model of empowered participatory governance holds great potential for the development, analysis, and application of knowledge. Empowered participatory governance can overcome limitations on cognition described earlier. Through discursive processes, information sharing occurs in a much more vital manner. Therefore, the direct deliberative model offers a convincing response to theorists favoring knowledge-based development assistance.¹⁰⁷ Contrary to David Ellerman's argument, truly open and participatory institutions should be capable of taking advantage of the technical knowledge of foreign experts without succumbing to domination by technocrats.¹⁰⁸ As the examples in Section IV below show, directly deliberative processes can substantially enrich the knowledge base on which development occurs.

B. *Applying the Direct Deliberative Model in Developing Countries*

Before making some observations on what direct discursive democracy means for law and development, some preliminaries must be considered. For simplicity's sake, this Article assumes that there are two categories of states receiving law and democracy assistance. On one side are states with the main institutions of government fully established and functioning to some degree, and on the other are the states with poorly developed administrations and civil society. Included in this second category are states emerging from conflict, whether a civil war or revolution, as well as former autocracies. This latter type of state may have very little civil society from which to draw in conducting discursive legal-reform programs.¹⁰⁹

From this standpoint, the manner in which Habermas' argument is applied will differ depending upon the relevant category into which a state falls. In the former case of a functioning legal order, empowered deliberative governance will work as an outgrowth of existing institutions. Where organized civil society is weak, efforts

105. *Id.*

106. *Id.*

107. David Ellerman, *Knowledge-Based Development Institutions* (Nov. 1998), available at <http://www4.worldbank.org/afr/stats/pdf/8cabusi.pdf> (last visited Mar. 9, 2004).

108. *Id.* at 218.

109. See generally JÜRGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984). This is the situation Habermas referred to in connection with the organization of autonomous civil society actors in the DDR to deliberate on the unification of Germany.

must be made to improve its capacity to participate in the discourse surrounding law reform. For those societies lacking a rich civic life, greater efforts need to be made. In the latter case, creation of new structures, rather than devolution, will be required. From a Habermasian perspective, when working in countries that lack developed constitutional orders through which discourse can be channeled in creating legitimate law, international institutions advancing legal or institutional reform must try to replicate the conditions adhering under well-developed constitutional orders. In those cases, what is required is the creation of some functionally equivalent parallel structure, perhaps on an *ad hoc* basis, to bring public opinion into the process of legal reform. Nevertheless, these situations suggest that the legal-reform programs cannot be expected to rely on the capabilities of a broad range of society in states recovering from intense social and political dislocation. This observation is not meant to discount the democratic imperative in any way.

C. *From Lack of Will to Will-Formation*

In explaining the shortcomings in law and development, those involved frequently speak of the lack of political will to implement reforms. Indeed, it appears that in many cases countries have only come to reform as a result of donor or other external pressure.¹¹⁰ Political will does not form without generative influence of the public. Conceiving law reform as a discursive process requiring the involvement of all affected persons is a more appealing and realistic vision than conventional accounts of those law reformers that cite the need for “buy in,” “local ownership,” or “tailoring solutions to local conditions.” It is not that these notions are wholly erroneous; rather, when compared with a dynamic deliberative democratic model, they appear weak. A proceduralist understanding of the law-reform process that is properly implemented will, by its nature, ensure that solutions do not do violence to local conditions. As illustrated in the work of Bourdieu, time is required for that discourse to generate change and for changes to be internalized by agents.¹¹¹

The role of technical assistance and training for the legal profession is essential to this process. Instead of hoisting “best practices” onto existing legal systems, lawyers should be given the tools with which to advise participatory reform groups and, in the

110. HAMMERGREN, *supra* note 7, at 2; Carnegie Endowment for International Peace, *Making Law Reform Work*, Roundtable on the Rule of Law (Nov. 16, 2001), available at <http://ceip.org/files/events/events.asp?p=1&EventID=429> (referring to the importance of external pressure in improving human rights conditions for homosexuals in Romania).

111. ELSTER ET AL., *supra* note 19, at 27-34.

case of law, steer reform in a way that builds on existing functional institutions and advances alternatives where appropriate. Indeed, the experience of a number of the empowered participatory governance experiments is that training of ordinary citizens is often required to allow them to participate more fully.¹¹² Rather than treating technical complexity as a barrier to exclude citizens, the empowered democratic model attempts to overcome such barriers through capacity building.

Berkowitz et al. are persuasive in showing that the receptiveness of a country to a given legal transplant affects the transplant's success.¹¹³ Demand in a country for legal change will intuitively be more likely to generate a fit with existing systems. The details of the domestic receptivity to the transplant need to be considered. The argument becomes more convincing if receptivity has procedural connotation. Following Berkowitz et al., this Article suggests that receptivity to legal transplants must germinate organically, through directly deliberative processes. Wholesale transplantation that does not involve such processes is likely to run afoul of all four problems discussed in Part II.

D. *After Elites and Technocrats, Citizens*

As Habermas has argued in connection with the role of civil society in conferring democratic legitimacy on expert subsystems,¹¹⁴ the participation of constituencies outside of the legal profession is necessary for legal-reform initiatives to gain legitimacy. Research on empowered participatory governance buttresses this claim.¹¹⁵ This broadened discourse of interested participants is particularly important when issues having distributive consequences are involved. Since, as is argued here, most legal-reform issues entail distributive consequences, participatory processes in legal reform are probably advisable.

Of course, there is a question as to the level of generality referred to here. One can imagine that the more technical the questions involved, the less likely that broadly participatory processes should be employed. Questions of broader significance, particularly those with distributive consequences, merit involvement

112. For instance, this occurred in connection with Chicago Public School reform, which included the participation of persons in local school councils who were given training on technical matters such as budgeting.

113. Berkowitz et al., *supra* note 13, at 2 ("Our basic argument is that for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand.")

114. Habermas, *supra* note 3, at 352.

115. See generally Fung & Wright, *supra* note 91.

of a wider number of citizens. As the earlier remarks about orthodoxy suggest, no categorical commitment to particular processes can be made. Instead, the processes must be aimed at solving the particular societal problems to which legal-reform efforts are directed.

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

In an essay written at the height of postmodern debates on the role of reason, Habermas called for philosophy to change its orientation and self-conception.¹¹⁶ Recalling Kant's universalistic philosophy that sought to find an *a priori* ground for human experience as well as science, Habermas suggested that Kant had been slightly arrogant.¹¹⁷ Who were philosophers to determine for the sciences what the conditions for their validity were? Likening the rationalist philosopher to an usher assigning other disciplines to their assigned seats, he claimed philosophy had taken on too great of a role for itself.¹¹⁸ Rather than the arbiter of all other human sciences, Habermas suggested that philosophy should become "a stand-in and interpreter" for these other disciplines. Philosophy was to be a guardian of rationality, aiding the other human sciences by clarifying and interpreting issues.¹¹⁹

The situation that law and development confronts is similar to the situation Habermas addressed. Technical assistance in the legal sector has been overstretched by taking responsibility for too many matters that have far reaching consequences for the societies concerned. It has come to play a starring role when it should be only a supporting actor. Of course, a strong legal system is, *ceteris paribus*, probably a good thing. Yet we must look at the legal system not as the forum in which distributive questions can be settled, but instead as the source of guidance to inform democratic processes generating political and economic decisions. Like the conception of philosophy Habermas proposed, law can play a supporting role in connection with society's search for appropriate reform options.

In addition to de-privileging lawyers, the discursive model of legal development will require elites to divest themselves of a certain

116. Jürgen Habermas, *Philosophy as Stand-in and Interpreter*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 1* (MIT Press, 1990).

117. *Id.*

118. *Id.*

119. *Id.*

amount of power. This should be a positive development because it will cut down incentives for rent-seeking and clientism that become particularly acute when the value of directing benefits to particular parties is great. As the ability to deliver benefits of legal reform to one party or group declines, so too will the value of state capture. Evidence of the extent to which neo-liberal reforms may have been used to further the elite's plunder of the state during the 1980s and 1990s cautions against placing responsibility for legal and judicial reform in the hands of entrenched public-sector actors.¹²⁰ While it is not self-evident that politically dominant parties will relinquish some of their power to steer reforms, donors can offer incentives that may appear preferable notwithstanding foregone opportunities for private gain.

IV. ILLUSTRATIONS AND APPLICATIONS

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

A. *World Bank Institute Participatory Governance Diagnostics*

The World Bank Institute (WBI) has developed an approach to technical assistance for national anti-corruption programs that

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

entails a high degree of citizen involvement.¹²¹ While the WBI is still experimenting with this approach, its basic contours are clear. The GAC (Governance and Capacity) Diagnostic Cycle is the latest WBI response to the need to build capacity in a country in the area of governance and policy design. The initiative aims to:

- (i) foster local capacity building through the close collaboration between external experts and local counterparts;
- (ii) promote long-term, sustainable partnerships among local stakeholders;
- (iii) obtain an initial benchmark of governance and public sector performance; and
- (iv) monitor on a regular basis governance and public sector performance.¹²²

Before the WBI will provide technical assistance for anti-corruption programs, the state must formally request its assistance. Once engaged, the first step involves the creation of a national steering committee to oversee the development of a national anti-corruption strategy.¹²³ This steering committee is made up of equal shares of government and civil society representatives, such as the media, NGOs, and churches.¹²⁴ According to this methodology, the key partnership is between government and civil society.

The committee then initiates a participatory governance assessment on corruption and governance in the country to inform the development of national anti-corruption strategies.¹²⁵ It allows citizens to both provide raw data used in gaining quantitative and qualitative perspectives and participate in the analysis of that data.¹²⁶ Questions are devised through a process involving citizens and local survey firms, which also rely on assistance from national statistical agencies. Surveys of citizens, businesses, and public officials are then conducted based on the methodology and questions agreed upon.

Once the survey data are compiled and refined, a final diagnostic report is circulated to those participating in national workshops.¹²⁷ Broad national workshops involving all branches of the public sector, political parties, civil society, and professional groups are

121. World Bank Institute, *Governance & Anti-corruption*, available at <http://www.worldbank.org/wbi/governance/> (n.d.).

122. World Bank Institute, *About Governance Diagnostic Capacity Building*, available at <http://www.worldbank.org/wbi/governance/capacitybuild/about.html> (n.d.).

123. World Bank Institute, *Country-specific Technical Assistance to Develop Anticorruption Strategies*, at 1, available at http://www.worldbank.org/wbi/governance/capacitybuild/pdf/guide_coalitions.pdf (last visited Nov. 15, 2003).

124. *Id.* at 7.

125. *Id.* at 1.

126. *Id.*

127. *Id.* at 4.

subsequently held.¹²⁸ At the national workshops, different working groups are established to analyze survey results and develop a consensual anti-corruption strategy.¹²⁹ Out of this process, the government and civil society develop anti-corruption strategy and action plans.¹³⁰ The action plans involve further workshops designed to foster a free press, an environment conducive to private sector investment, and transparency and efficiency of the executive, judiciary, and legislative branches.¹³¹ In Albania, which rates extremely low in terms of corruption indices, the WBI contends that its workshops are providing reason for "cautious hope."¹³² Recently, Albanian authorities have expressed the need to deal with the problem of corruption and have formed relevant task forces with non-governmental entities. According to WBI, Albanian firms claim that corruption has fallen slightly over the past couple of years in the areas of enterprise regulation, registration of ownership of physical or real property, state banking services, and fire and sanitary inspection.¹³³

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

B. Kerala Economic Development Project

Among the states of the Indian subcontinent, and as a result of a fifty-year democratic transformation, the state of Kerala has achieved remarkably high social indicators of development, including infant mortality rate, population growth, literacy, and life expectancy. A

128. *Id.* at 1.

129. *Id.*

130. *Id.* at 2.

131. *Id.*

132. World Bank Institute, *Country Links*, available at http://www.worldbank.org/wbi/governance/pdf/guide_pdfs/albania.pdf (n.d.).

133. *Id.*

beacon of hope in a poverty-stricken country, Kerala could provide lessons in development to other developing states.

After a new government came into office in the Indian state of Kerala in 1996, the ruling party launched a "People's Campaign for Decentralized Planning."¹³⁴ The program is noteworthy for its scale and boldness. It is marked by three main decentralization movements. First, administration was decentralized.¹³⁵ Second, fiscal powers were decentralized through the allocation of approximately forty percent of all development expenditures to local self-governing institutions.¹³⁶ Third, political power was decentralized by providing elected local representatives more authority over development projects and priorities.¹³⁷ The government implemented these programs in an effort to remedy failures of the previous political and bureaucratic institutions to produce economic development.¹³⁸

The program involves a multi-tiered, grassroots deliberative process. New local institutions have arisen to cultivate, gather, and mediate the concerns of "elected representatives, local and higher-level government officials, civil society experts and activists, and ordinary citizens."¹³⁹ The structure and its functions are truly novel.

The process begins in open local assemblies, called grama sabhas, in which participants discuss and identify development priorities. Development seminars formed by the grama sabhas are then tasked with developing more elaborate assessments of local problems and needs. The development seminars give way to multi-stakeholder task forces that design specific projects for various development sectors. These projects are in turn submitted to local elected bodies (municipal councils called panchayats) that formulate and set budgets for local plans. Final plans are presented back to grama sabhas for discussion. These local plans are then integrated into higher-level plans (blocks and districts) during which all projects are vetted for technical and fiscal visibility.¹⁴⁰

The core elements of this program—collection of local information and formulation of a local plan—are common to the other programs discussed in this Article. It is important to understand that this program does not merely devolve power to un-elected local authorities, leaving them to their own devices. Instead, local gathering and analysis of information and strategy development undergoes review by successive governance layers. The system applies technical expertise in the formation of policy at all levels.

134. Isaac & Heller, *supra* note 1, at 78.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 79.

140. *Id.*

One important contributor to the functioning of this system is the existence of a vital civil society, particularly NGOs.¹⁴¹

The People's Plan Campaign (PPC) was a radical program of democratic decentralization to increase public participation in development decision-making, established by the state's Left Democratic Front coalition in the mid 1990s.¹⁴² This new system of political representation and development planning encouraged a massive growth spurt on the part of civil society. In Jenkins' opinion such entities as "user committees," "women's groups," and "neighborhood groups"—voluntary associations that under the People's Plan *had* to be formed in order to obtain certain state benefits—qualify as *bona fide* representatives of civil society.¹⁴³

Nevertheless, Isaac and Heller rightly caution that causation may run in the other direction as well because the degree to which associational life develops is partly a consequence of the institutional environment.¹⁴⁴ Put conversely, top-down governance represents a self-fulfilling prophecy: citizens are deemed incapable because their ability to engage in self-government remains uncultivated.¹⁴⁵

Given the scale of citizen involvement that has occurred in Kerala, citizen involvement has effectively become an important check on the power of elites. To the extent that citizens are working alongside elected officials in designing and executing programs, traditional principal/agent relationships are transformed.¹⁴⁶ Citizens are no longer resigned to the relatively weak accountability voting affords, but instead can express their voices in a more direct manner. The net effect of this system of open deliberative governance is to further entrench democracy through enhanced legitimacy and efficacy. Profound changes are further enhancing civil society: the proliferation of national and international media, including the internet, brings 'national organizing' within the grasp of an ever-increasing number of associations.¹⁴⁷

141. *Id.*

142. Rob Jenkins & David Pool, CIVIL SOCIETY: ACTIVE OR PASSIVE? INDIA AND SAUDI ARABIA, IN POLITICS IN THE DEVELOPING WORLD 8 (Vicky Randall & Peter Burnell eds., forthcoming 2005).

143. *Id.*

144. Isaac & Heller, *supra* note 1, at 83.

145. Fung & Wright, *supra* note 91, at 28 (arguing that citizens' ability to engage in self-government atrophies if not exercised).

146. *Id.*

147. Jenkins & Pool, *supra* note 143, at 7.

C. Legal Services for Poor Women in Ecuador

In Ecuador, the World Bank sponsored a major Judicial Reform Program beginning in 1995.¹⁴⁸ In addition to traditional case management, alternative dispute resolution, and courthouse modernization, the program involved extensive use of civil society in connection with a law and justice program.¹⁴⁹ Under the law and justice program, a special fund for law and justice overseen by ProLegal was created to support a variety of activities, including legal-services pilot programs for poor women.¹⁵⁰ The program for legal services for poor women was particularly innovative in its use of service providers to gain practical grassroots input on legal-reform topics.¹⁵¹

Before the program was implemented, women needing legal services for matters such as child custody or domestic or sexual violence could only seek services from one of four public defenders serving Quito, a city of two million.¹⁵² The program involved the creation of legal service centers run by NGOs, which coordinate their efforts with governmental and nongovernmental organizations.¹⁵³ The centers provide mediation services, educate women on the law, and provide training and raise awareness on the prevention of domestic violence.¹⁵⁴ In an unorthodox approach to legal services, the centers offer both traditional legal services as well as counseling on psychological issues arising from domestic violence. Given the apparently discriminatory attitudes toward women among many Ecuadoran legal and judicial professionals,¹⁵⁵ the centers have earned the trust of their clients and arguably provide better representation of women's interests than is obtainable elsewhere.¹⁵⁶

The NGOs were required in their agreement with ProLegal to conduct a minimum number of consultations each month. One NGO

148. Maria Dakolias, World Bank Institute, *Ecuador: Legal and Judicial Sector Assessment*, at 6 (2002), available at http://www4.worldbank.org/legal/leglr/publications_ljr.html.

149. World Bank Institute, *World Bank Legal and Judicial Reform Initiatives*, at 31 (2002), available at www1.worldbank.org/publicsector/legal/legalprojects.htm (last visited Nov. 25, 2003).

150. See generally Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 *FORDHAM INT'L L. J.* 26 (2000) (discussing special activities to provide legal aid to poor women).

151. *Id.* at 33.

152. *Id.* at 39.

153. *Id.* at 40.

154. *Id.*

155. Marcela Rodriguez, *Empowering Women: an Assessment of Legal Aid Under Ecuador's Judicial Reform Project*, at 1, 24 (Nov. 2000), available at http://www4.worldbank.org/legal/leglr/publications_ljr.html (last visited Oct. 26, 2003).

156. Dakolias, *supra* note 151, at 41-42.

in particular, the Ecuadorian Center for the Promotion and Action of the Woman (CEPAM), was quite successful in resolving cases.¹⁵⁷ This result was noteworthy because it is contrary to the experience of substantial delays that most Ecuadorian litigants experience.¹⁵⁸ Observations of clients also suggest a possible positive unintended consequence of the program.¹⁵⁹ By injecting organizations capable of providing effective representations of clients into the system, competition between legal professionals could raise the overall standard of representation.

In addition to the legal services provided, CEPAM prepared a study reviewing experience with the law regulating common law marriages and obstacles to compliance with the law's intent.¹⁶⁰ Based in part on knowledge gained through service delivery with the affected population, the report examined the understanding and actual reliance on the law by women in common law marriages.¹⁶¹ The report was distributed in three cities in which workshops were held so that the findings of the report could be discussed.¹⁶² A final national workshop, convened in partnership with a regional Supreme Court Justice, involved further discussion of the report's findings.¹⁶³ The workshops brought together ministers, judges, and lawyers from universities and free legal clinics, personnel from the Commissariat of Women, bar associations, juvenile courts, public defenders, and representatives from grassroots women's organizations.¹⁶⁴ The workshops generated reform recommendations that were communicated directly to the Congress's Commission on Women, Children, Youth and Family for consideration in drafting a Family Code. CEPAM members actively participated in the Commission's meetings on this code.¹⁶⁵

In addition to this law reform activity, CEPAM used its provision of legal services to generate substantial information regarding the population it served.¹⁶⁶ A database compiling the information was created and is used to draw comparisons with other NGO service

157. Rodriguez, *supra* note 152, at 12.

158. *Id.*

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

160. *Id.* at 14-15.

161. *Id.* at 15.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

providers.¹⁶⁷ The information generated is being used to analyze and compare the experience of different local offices. This information will then be published and shared with other NGOs, including other service providers and women's groups.¹⁶⁸

This legal services program was noteworthy for its cultivation of civil society organizations as service delivery agencies. The use of NGOs in this manner ensured that the legal services programs were designed and delivered in a manner responsive to the needs of the women served. In addition, the local orientation of these NGOs made them better able to obtain accurate feedback from clients to improve the program and gain comparative perspectives. Because of the specific focus of the organizations on women's concerns, they were better placed to conduct the analysis and facilitate deliberation on the legal reform of common law marriage. The broad participatory process of deliberation on the report, and the tangible knowledge obtained, likely helped CEPAM gain sufficient stature to enable it to participate in the legislative process. Although sponsored by the World Bank, the legal reforms engendered by these NGOs appear to be organic.

V. CONCLUSION

Law and development stands at a crossroads. At this time it may be useful to recall experience in connection with the creation of new democracies in the decolonization process of the early twentieth century. Writing of the move to establish democracy in former colonies, J.S. Furnivall suggested that there was a need to first create something he called a "democratic environment."¹⁶⁹ In contrast to those who suggested that a culturally specific model of democracy as realized in the West be applied to the new democracies in the East, he argued that the challenge was to create an environment suited to a particular country.¹⁷⁰ Each society would then work to create its own unique democratic "machinery."¹⁷¹ Contrary to prevailing opinion, Furnivall maintained that the colonial powers could not impose democracy on the countries becoming independent, but rather would have to "establish conditions favorable to the conduct of experiments," whereby each country could work out its own solution by trial and error.¹⁷²

167. *Id.*

168. *Id.*

169. J.S. FURNIVALL, *PROGRESS AND WELFARE IN SOUTH EAST ASIA: A COMPOSITION OF COLONIAL POLICY AND PRACTICE* 67 (1941).

170. *Id.*

171. *Id.*

172. *Id.* at 70.

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

As Habermas shows, great changes in existing legal norms without first proceeding through discursive processes hold the allure of improved formal legal structures at great cost. Without deliberative democratic input, legal rights cannot be properly formulated or implemented. The technocratic impulse in rule-of-law promotion correlates to the democracy deficit that occurs on the state level through the dominance of experts and the insulation of domestic governance from popular influence.¹⁷³ If the promotion of the rule of law and democracy is to be taken seriously, then democracy must be taken not only as a starting point, but also as an end goal as well.

The directly deliberative account also provides an answer to the incentive problem discussed at the outset of this Article. Through directly deliberative practices, citizens participate in identifying problems and the definition of both means and ends.¹⁷⁴ Participatory governance assessments help galvanize public opinion around a set of problems citizens recognize as important. Likewise, development of action plans through grassroots dialogue ensures coherence of policy ends and means. Providing services and formulating law reform priorities based on the expressed needs and experience of populations concerned ties macro policy-making to micro experience organically. Out of participation, incentives emerge. Political forces naturally converge around legal-reform options that have been collectively

173. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 36-37 (1975).

174. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 284-86 (1998) (referring to reciprocal determination of means and ends elaborated by pragmatist philosophers).

determined. Organic development of legal-reform programs thus produces its own incentives.

On this model, the role of donors is still important. Rather than defining solutions for society, they use their resources, technical expertise, comparative knowledge, and moral authority to create space in which democratic self-discovery can occur. As John Stuart Mill argued in defense of the freedom of expression, the truth is discernable only through free and open discourse.¹⁷⁵ The deliberative model of law and development may create the space necessary to open our minds to new reform options. If successful, this strategy may not only ensure that law and development achieves its purpose, but may also solidify democratic governance through more just, and therefore more legitimate, states.

175. See JOHN STUART MILL, *ON LIBERTY* (Penguin Ed. 1982) (1869).