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## Toward a Social Theory of Law: An Essay on the Study of Law and Development\*

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Law is a practical science. It does not ordinarily dwell on fundamental questions about the social, political, and economic functions of the legal order. Satisfied with implicit working assumptions about these matters, legal thought moves rapidly to more tractable questions. But when law's solutions to social problems fail to satisfy, it becomes necessary to examine the basic theory from which they derive.<sup>1</sup> This is such an era. In a time when men speak casually of a crisis of law, and ask "is law dead?"<sup>2</sup> it is clear that law's role in society has become problematic. Such an age demands a social theory of law.

It is now necessary to frame explicit and concise questions on the relationship between law and social life, and to answer these questions by disciplined inquiry. Since the implicit, a priori conclusions about the role of law are no longer valid, we must turn to systematic efforts to understand the relationships among the legal, social, economic, and political orders. In any such effort, comparative research and cross-cultural generalization will play a major role. This essay examines one area in which such research has begun, the field of "law and develop-

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1. Cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).  
2. For a discussion of recent literature on these themes see, e.g., Mazor, *The Crisis of Liberal Legalism* 81 *YALE L.J.* 1032 (1972).

ment"; there, lawyers and some social scientists have attempted to understand the function of law in the Third World—those nations which have not yet achieved, but generally aspire to, self-sustaining economic growth. Despite its commitment to comparative analysis and the formulation of universal principles, however, this research on law and development has not fulfilled its promise; it has produced few original conceptions or insights, and seems incapable of formulating a satisfactory research program.

While the field has reached something of an impasse, this was not an inevitable result. Rather, it stems from the easy acceptance of certain underlying assumptions which have hampered fruitful inquiry.<sup>3</sup> This essay attempts to analyze these assumptions and their effects, and it suggests that their baneful influence can be avoided if more promising intellectual perspectives are adopted. In so doing, the essay is concerned primarily with clarifying those questions which should be asked, and suggesting methods by which they can be answered. Its primary goals, therefore, are to develop a few concepts and correct some major errors, in order to clear the decks for further inquiry.

As the argument is somewhat complex, I shall briefly summarize its dominant themes. We begin with an attempt to identify the basic features of contemporary thought on law and development, setting forth a synthetic restatement of such thought, termed the "core conception of modern law." The essay then argues that this conception has misdirected the study of law and development by asserting that one type of law—that found in the West—is essential for economic, political, and social development in the Third World. This conclusion, I contend, stems from the core conception's ethnocentric and evolutionist generalization from Western history. The article concludes by developing a preliminary typology which may permit more discriminating study, and suggests its application to some recent developments in the legal life of a major Third World nation.

## I. Contemporary "Law and Development" Thought: The Core Conception

Modern social thought arose to explain the causes and impact of industrialization, nationalism, and urbanization in the West.<sup>4</sup> Con-

3. On the effect of fundamental assumptions in limiting fields of social inquiry, see A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 29-35 (1970).

4. See generally R. NISBET, *THE SOCIOLOGICAL TRADITION* (1966).

## Toward a Social Theory of Law

temporary studies of economic, political and social development carry on this tradition in an effort to understand the Third World. But since development research has not viewed law as a major aspect of society,<sup>5</sup> it has left the study of law and development primarily to the lawyers. Perhaps because legal thought is generally pragmatic and professional,<sup>6</sup> writings on law are, when compared to other development studies, relatively fragmentary and unsystematic. Many are merely offshoots of "law reform" activities, not the result of organized academic endeavors. Accordingly, a significant amount of law and development "theory" is either implicit or unwritten.

This does not mean, however, that such theory is elusive or insignificant. There are a fiercely held set of ideas and beliefs which underlie the major studies on law and development and the legal reform projects carried out by lawyers from the United States and Europe.<sup>7</sup>

5. For example, development economists generally concede that development requires some legal framework, which usually means a minimal provision of law and order. Having said this, they usually drop the issue. *See, e.g.,* H. BURTON, *PRINCIPLES OF DEVELOPMENT ECONOMICS* 359-62 (1965); E. HAGEN, *THE ECONOMICS OF DEVELOPMENT* 480-84 (1968); S. KUZNETS, *MODERN ECONOMIC GROWTH* 451-53 (1966); W.A. LEWIS, *THE THEORY OF ECONOMIC GROWTH* 408-15 (1955).

Development economics normally deals only with two polar situations in analyzing "law." Either a society is completely lacking in the "essential" legal institutions, or those institutions are present in sufficient "amounts" so that there is always "enough" law to meet the current needs of the economy. In the former case, all that theory can say is that "adequate legal institutions" should be created. In the latter, law is simply defined away as a non-problem, and it is assumed that adequate supplies of this factor will always emerge as needed. To paraphrase Sir Arthur Lewis, in the typical economic development model, development proceeds with "unlimited supplies of law." Lewis, *Economic Development With Unlimited Supplies of Labour*, 22 *MANHATTEN SCHOOL* 13a (1954).

Contemporary economic development theorists seem to have forgotten or rejected the 19th century belief in the importance of law. For example, when European colonialists encountered the civilizations of Africa, Latin America, and Asia, they frequently concluded that these societies lacked the "rule of law," which, they held, was a cardinal feature of the West. J. FURNIVALL, *COLONIAL POLICY AND PRACTICE passim* (1956); L. PYE, *ASPECTS OF POLITICAL DEVELOPMENT* 113-25 (1966). Much colonial "economic-development" policy assumed that if the "rule of law" were instituted in traditional societies, economic progress would follow. *See* L. PYE, *supra* at 114-16. Finally, no one has stressed the importance of law in economic progress more than Jeremy Bentham, the founder of utilitarianism, and thus the grandfather of modern economics. J. BENTHAM, *Principles of the Civil Code*, chs. II-V, XVII, in *THEORY OF LEGISLATION* 96-102, 148-57 (R. Hildreth transl. 1871). *See generally* E. STOKES, *THE ENGLISH UTILITARIANS AND INDIA* (1959).

6. Two studies have appraised the resistance of law schools and the legal profession to the introduction of social science techniques and theories. Riesman, *Law and Sociology: Recruitment, Training, and Colleagueship*, in *LAW AND SOCIOLOGY: EXPLORATORY ESSAYS* 12, 24-40 (W.M. Evan ed. 1962); Stevens, *Two Cheers for 1870: The American Law School*, in 5 *PERSPECTIVES IN AMER. HISTORY* 405, 470-548 (D. Fleming & B. Bailyn eds. 1971).

7. *See, e.g.,* Rheinstein, *Problems of Law in the New Nations of Africa*, in *OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA* 220 (C. Geertz ed. 1963) [hereinafter cited as Rheinstein]; David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 *TUL. L. REV.* 187 (1963) [hereinafter cited as David]; Allott, *Legal Development and Economic Growth in Africa*, in *CHANGING LAWS IN DEVELOPING COUNTRIES* (J.N.D. Anderson ed. 1963); Merillat, *Law and Developing Countries*, 60 *AM. J. INT'L L.* 71 (1966) (report of a July, 1965 conference) [hereinafter cited as Merillat]; Galanter, *The Modernization of Law*, in *MODERNIZATION: THE DYNAMICS OF GROWTH* 153 (M. Weiner ed. 1966) [hereinafter cited

These ideas are not less influential for their unsystematic nature. But it would be impossible to study or criticize them without a more complete articulation of their teachings—a synthesis of their views here called “the core conception of modern law.”<sup>8</sup>

### A. *The Nature of Modern Law*

The core conception views modern law as a specific social process emerging from the overall process of development. Modern law has three principal characteristics: It is primarily a system of rules; it is a form of purposive human action; and it is simultaneously part of, yet autonomous from, the nation-state.<sup>9</sup>

All societies, if they are to endure, must contain some system or

as Galanter]; Karst, *Law in Developing Countries*, 60 L. LIBRARY J. 13 (1967) [hereinafter cited as Karst]; Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969); Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969) [hereinafter cited as Friedman]; Könz, *Legal Development in Developing Countries*, 1969 PROCEEDINGS OF THE AM. SOC'Y INT'L L. 91 [hereinafter cited as Könz]; Rosenn, *The Reform of Legal Education in Brazil*, 21 J. LEGAL ED. 251 (1969) [hereinafter cited as Rosenn]; Mendelson, *Law and the Development of Nations*, 32 J. OF POL. 223 (1970) [hereinafter cited as Mendelson]; Steinberg, *Law, Development and Korean Society*, 3 J. COMP. AD. 215 (1971) [hereinafter cited as Steinberg]; Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AM. J. COMP. L. 39 (1971) [hereinafter cited as Steiner]; D. TRUBEK, LAW, PLANNING, AND THE DEVELOPMENT OF THE BRAZILIAN CAPITAL MARKET (Yale Law School Studies in Law and Modernization No. 3) [reprinted from BULL., Nos. 72 & 73 (N.Y. Univ. Grad. School of Business Admin., April, 1971)] [hereinafter cited as Trubek]; D. TRUBEK, J. GOUVEA VIEIRA & P. SA, O MERCADO DE CAPITAIS E OS INCENTIVOS FISCAIS 23-92 (1971) [hereinafter cited as D. TRUBEK, J. GOUVEA VIEIRA, & P. SA]; Kozolchyk, *Toward a Theory of Law in Economic Development: The Costa Rican USAID-ROCAP Project*, 1971 L. & SOCIAL ORDER 681 [hereinafter cited as Kozolchyk]; Seidman, *Law and Development: A General Model*, 6 L. & SOC'Y REV. 311 (1972) [hereinafter cited as Seidman].

8. In constructing and documenting the core conception, I have relied on my own research and experience, studies by others, and private discussions with my colleagues in law and development. Although I may have omitted some of the subtleties of my colleagues' work, my purpose in constructing the core conception is not to condemn anyone (including myself), but rather to illuminate the dominant and implicit assumptions which have misdirected the study of law and development.

The explication of the core conception is intended to show the need for a basic intellectual shift in law and development study. Gouldner has noted that when the background or domain assumptions of a social theory come to operate in new conditions for which they are inapposite, an uncomfortable dissonance is created for the theorist, and a basic intellectual shift impends. A. GOULDNER, *supra* note 3, at 34.

One can see such dissonance in Steiner. While his piece, *supra* note 7, articulates the “core conception” for regulated market economies, it also includes a perceptive critique of it. The article, as a result, appears at times inconsistent. This comes, I believe, from Steiner's awareness that his ideas on law and development were not fully capable of grasping what he perceived in Brazilian legal life. As a result, the piece manifests a dissonance between the received ideas and perceived reality.

Growing awareness of the gap between conventional notions and Third World legal phenomena has generated dissonance in writers like Steiner; at the same time critical analysis of domain assumptions has heightened the dissatisfaction with core conception ideas. A major critique has been articulated by Duncan Kennedy and Roberto Mangabeira Unger; Unger's unpublished essay “The Place of Law in ‘Modern’ Society” (undated, on file in the Yale Law Library) [hereinafter cited as Unger] sets forth this critique systematically.

9. The most concise, systematic statement of the elements of “modern” law, one which conforms exactly to this tripartite outline, is in Galanter, *supra* note 7, at 154-56.

## Toward a Social Theory of Law

process which contains the egoistic tendencies of individuals and controls the conflict of groups. The core conception believes that modern societies achieve order primarily through law, that is, through a system of rules. Since it posits that modern society cannot exist without such rules, the core conception argues that modernization or development necessarily entails the institutionalization of such social control.<sup>10</sup>

The nature of modern law can be seen most clearly when contrasted with the processes of social ordering in traditional societies.<sup>11</sup> There, patterns of conduct are defined and maintained by primary social groups, such as the village, lineage, or tribe. As a result, normative prescription varies with geographic place and social situation: There is a separate "law" for each village or tribe, and the "law" that binds the lord is not the law that binds the serf or burgher. Modern law, on the other hand, consists of general rules applied by specialized agencies universally and uniformly through all regions and to all social strata. Modern law is also relatively autonomous from other sources of normative order. Thus, one unitary and superior social entity—the modern legal system—replaces the village or tribe in social control.

The concept of purposiveness is a third contrast between modern law and traditional social ordering. It is assumed that the prescriptions of traditional society are shaped from history and custom. Modern law, by contrast, is conscious and rational; and since it has been consciously constructed, modern law must necessarily have some self-conscious purpose. But the core conception of purposiveness is broader than that implied by mere conscious design. Modern law is also viewed as an instrument through which a variety of possible social goals may be achieved.<sup>12</sup> Thus, it not only releases man from the grasp of traditional norms and values, it also gives him the means to shape the world in which he lives. The core conception of legal purposiveness is, therefore, highly instrumental: It assumes that social life can be shaped by some social will, for example a modernizing elite, which brings about development through legal enactment and enforcement.

10. See Karst, *supra* note 7, at 16-19; Rosenn, *supra* note 7, at 253; Seidman, *supra* note 7, at 311-16.

11. See Galanter, *supra* note 7, at 154-56; Rheinstein, *supra* note 7, at 225-28, 242-44; Steinberg, *supra* note 7, at 223-27. See also David, *supra* note 7, at 194, 203.

12. Galanter stresses that "the system is rational . . . . Rules are valued for their instrumental utility in producing consciously chosen ends . . . ." Galanter, *supra* note 7, at 155. Friedman observes that legal systems become "modern" only when men perceive law to be an instrument employed "to advance in a rational way toward some knowable goal." Friedman, *supra* note 7, at 30. See also David, *supra* note 7, at 194, 203-04; Kozolchyk, *supra* note 7, at 746, 751; Merillat, *supra* note 7, at 73; Seidman, *supra* note 7, *passim*; Steinberg, *supra* note 7, at 216; Trubek, *supra* note 7, at 10.

Purposiveness and rules, though necessary, are not sufficient conditions for a viable system of modern law: Such law can affect social order only if it also has behind it the organized force of the state. The core conception believes that without a strong, relatively centralized state, the rules of law will not shape and determine social life.<sup>13</sup> They will be mere paper artifacts, incapable of restraining conflict or bringing about purposive goals. Just as law needs a strong state to be "effective," so the existence of law enhances the state's power. The state creates the system of rules and the courts and other institutions which make, apply, and enforce the law; the rise of modern law supplants local, "particularistic," and traditional forces, and is thus the vehicle through which the state replaces communal or traditional authority. As national law grants men rights and immunities, they escape from the hold of village and tribe.<sup>14</sup> Similarly, modern law's rationality and universality strengthens the state: By professing to be the manifestation of reason, and treating all men as equals, modern law legitimates the state, and thus enhances its ability to impose specific substantive norms, rules, or purposes.<sup>15</sup>

#### B. *The Relationship Between Modern Law and Economic Development*

Like a power grid or transportation network, modern law is viewed in the core conception as a functional prerequisite of an industrial economy.<sup>16</sup> While all modern law thinkers share this view, few articulate the relationship between law and economic growth with real clarity. To the extent that such articulation occurs, one can identify different and potentially conflicting tendencies within the core conception.

One explanation stresses the role of law in market economies. This perspective assumes that market institutions are necessary for economic growth, and sees modern law as essential to the creation and

13. See p. 7 *infra*.

14. Cohn, *Some Notes on Law and Change in North India*, in *LAW & WARFARE* 139, 155-59 (P. Bohannan ed. 1967); Friedman, *supra* note 7, at 47-48; Galanter, *supra* note 7, at 162; Rheinstein, *supra* note 7, at 225, 235. See also David, *supra* note 7, at 202.

15. C. BLACK, *THE DYNAMICS OF MODERNIZATION* 14-15 (1966); Braibanti, *The Role of Law In Political Development*, in *INTERNATIONAL AND COMPARATIVE LAW OF THE COMMONWEALTH* 3 (Wilson ed. 1968); Könz, *supra* note 7, at 91; Mendelson, *supra* note 7, at 224, 229-32; Rheinstein, *supra* note 7, at 225; Seidman, *supra* note 7, at 328-30; Steinberg, *supra* note 7, at 217-18. See also Friedman, *supra* note 7, at 48-49, 52-53.

16. David, *supra* note 7, at 188-89; Könz, *supra* note 7, at 98; Mendelson, *supra* note 7, at 232; Merillat, *supra* note 7, at 74; Parsons, *Evolutionary Universals in Society*, 29 *AM. SOCIOLOGICAL REV.* 339, 350-53 (1964); Rheinstein, *supra* note 7, at 226; Rosenn, *supra* note 7, at 253.

maintenance of markets.<sup>17</sup> The emphasis here is on modern law's predictability as a set of universal rules uniformly applied. As a result of such predictability, modern law encourages men to engage in new forms of economic activity and guarantees that the fruits of this activity will be protected. Law thus frees the individual from "the prescriptive usage of the particularistic group"<sup>18</sup> and assures the individual that his decisions will be enforced by state authority, his acquisitions protected from the depredations of others.<sup>19</sup> Through institutions such as contract and private property rights, modern law promotes the development of markets and hence economic growth.

The second, and perhaps conflicting, explanation of the relationship between law and growth stresses law's purposiveness and power. In this perspective, development is viewed as a consciously willed transformation of economic activity. The state is seen as the chief vehicle through which this conscious design is articulated and imposed upon the population; modern law is the instrument through which such development goals are translated into specific, enforceable norms.<sup>20</sup> The more effectively these norms define and channel behavior, the more likely economic growth will occur.

Because the core conception holds this view of law, it is concerned with maximizing the "effectiveness" and social "penetration" of modern rules. Penetration and effectiveness are the measure of the state's capacity to exert its power. And legal development is often equated with an increase in the state's power to use law for the realization of its economic goals.<sup>21</sup>

Consequently, some writers argue that research on law and economic development should be directed toward questions which identify those variables in legal culture and organization which increase legal "effectiveness."<sup>22</sup> For some these questions have been answered: What is

17. Karst, *supra* note 7, at 15; Kozolchik, *supra* note 7, at 737, 739, 741-42; Mendelson, *supra* note 7, at 226-27, 230-31, 232; Rheinstein, *supra* note 7, at 229-30, 232, 233-40, 243; Steiner, *supra* note 7, at 47-48; Trubek, *supra* note 7, at 10.

18. Galanter, *supra* note 7, at 162. *See also* note 14 *supra*.

19. David, *supra* note 7, at 188-89; Karst, *supra* note 7, at 13-16; Rheinstein, *supra* note 7, at 232; Trubek, *supra* note 7, at 54-55. *See also* Mendelson, *supra* note 7, at 226-27, 230-32.

20. David, *supra* note 7, at 203-04; Friedman, *supra* note 7, at 30; Kozolchik, *supra* note 7, at 746; Rheinstein, *supra* note 7, at 221; Seidman, *supra* note 7, *passim*; Steinberg, *supra* note 7, at 232-33, 245; Trubek, *supra* note 7, at 10.

21. *See* Friedman, *supra* note 7, at 30; Könz, *supra* note 7, at 94-95; *cf.* Kozolchik, *supra* note 7, at 738, 740-41; Trubek, *supra* note 7, at 54-55. Elsewhere, Friedman also stresses the importance of "penetration" and "effectiveness." He notes that both may be linked as much to "participation" as to increased power. Friedman, *Legal Culture and Social Development*, 4 L. & Soc'y REV. 29, 44 (1969).

22. Friedman, *supra* note 7, at 58-61; Könz, *supra* note 7, at 95-96; Kozolchik, *supra* note 7, at 744-45; Seidman, *supra* note 7, *passim*. *See also* Rheinstein, *supra* note 7, *passim*; Trubek, *supra* note 7, at 54-56.

needed is an increase in the instrumental capability of the legal system. The more law becomes a mechanism or an instrument to advance rationally toward specified goals, the more effective it will become. This will be achieved, it is argued, only if the legal culture embraces an instrumental conception of law which fosters the clarification of economic goals and their relationship to the legal system.<sup>23</sup> For those who accept this belief, the problem of legal development is solved: One must merely discover which local changes lead to greater instrumentalism.<sup>24</sup> But as we shall see, this may at times and in certain places prove to be a dangerous formula.

### C. *The Relationship Between Modern Law and Political Development*

Modern law is also viewed as an essential element in political development. In the core conception, such development means not only the creation of a strong, central state, but also the construction of a pluralist, liberal-democratic government.<sup>25</sup> Thus, the core conception also sees law as the primary restraint on arbitrary state action. Care is taken to distinguish law from power: One writer equates law with "principled adjudication";<sup>26</sup> others find it essential to political development because it eliminates arbitrary exercises of state power.<sup>27</sup> In this sense, law is not merely a technique of state control to be applied for any purpose; rather, it is seen as *necessarily* committed to specific values, such as even-handedness and fairness.<sup>28</sup> Some writers even identify law with the liberal society and democracy; for them, development of modern law necessarily means the attainment of such liberal goals as wider participation in the formation of social norms and the guarantee of specific individual rights.<sup>29</sup>

23. Kozolchik, *supra* note 7, at 751; Merillat, *supra* note 7, at 73; Rheinstein, *supra* note 7, at 227-28, 235; Seidman, *supra* note 7, *passim*; Trubek, *supra* note 7, at 9-10, 24-28, 52-53.

24. Freidman, *supra* note 7, *passim*; Kozolchik, *supra* note 7, at 736, 741-42; Rheinstein, *supra* note 7, at 244; Rosenn, *supra* note 7, at 251-55; Seidman, *supra* note 7, at 331-32.

25. Karst, *supra* note 7, at 16-19; Steinberg, *supra* note 7, at 246-47; Trubek, *supra* note 7, at 9, 53. Könz notes that the adoption of foreign legal models "has introduced democratic concepts which are as valid in Africa and Asia as they are in Western countries." Könz, *supra* note 7, at 95.

26. Karst, *supra* note 7, at 18.

27. See, e.g., A. RIVKIN, NATION-BUILDING IN AFRICA; PROBLEMS AND PROSPECTS 112-30 (1969); Braibanti, *Public Bureaucracy and Judiciary in Pakistan*, in BUREAUCRACY AND POLITICAL DEVELOPMENT 360-440 (J. LaPalombara ed. 1963); Karst, *supra* note 7, at 18-19; Steinberg, *supra* note 7, at 230-31, 237, 247-49.

28. Kozolchik, *supra* note 7, at 741-42; Steiner, *supra* note 7, at 48-50, 58.

29. Friedman, *supra* note 7, at 30; Karst, *supra* note 7, at 16-19; Kozolchik, *supra* note 7, at 746; Rheinstein, *supra* note 7, at 245-46; Steinberg, *supra* note 7, at 236-37, 246-48; Trubek, *supra* note 7, at 9, 53.



## Toward a Social Theory of Law

It is apparent that if “law” or “the legal system” is to constrain the state, it must be in some way autonomous.<sup>30</sup> For this reason, the core conception assumes—often implicitly—that an independent judiciary, techniques to curb administrative discretion, constitutionalism, and even judicial review are necessary elements in the development of modern law.<sup>31</sup>

### D. *The Program of Legal Development*

There is considerable consensus on the program of “legal development” that follows from the core conception. Since modern law is a process by which rules governing social life are consciously formulated and consistently applied, the basic goal is to ensure that social life is effectively governed by universal and purposive rules. As the core conception views reality, this goal entails many changes in the legal system of Third World nations. First, law already on the books must be perfected. “Modern” substantive rules, such as those guaranteeing freedom of contract and protecting political association must be adopted,<sup>32</sup> if necessary, by importing foreign codes.<sup>33</sup> These rules must be truly universal; residual particularisms must be suppressed; customary and special law must yield to “rationally” enacted modern law.<sup>34</sup> Rules on paper must become rules in fact; impartial application must become a reality.<sup>35</sup> Legislators in more or less representative bodies must learn to formulate rules that are impartial, yet simultaneously achieve priority developmental goals. Lawyers must learn to argue and judges to reason in terms of these rules and the goals which underlie them.

The centrality of legal purposiveness in the core conception’s legal development program emphasizes the importance of legal education reform.<sup>36</sup> The core conception finds that the legal systems of the Third

30. A. RIVKIN, *supra* note 27, at 112-30; Galanter, *supra* note 7, at 156; Karst, *supra* note 7, at 18-19; Steinberg, *supra* note 7, at 247-49.

31. See generally pp. 8-9 *supra* and notes.

32. A. RIVKIN, *supra* note 27, at 112-30; Karst, *supra* note 7, at 18-19; Kozolchyk, *supra* note 7, at 739; Mendelson, *supra* note 7, at 227-31; Rheinstejn, *supra* note 7, at 226, 232, 236-38 (emancipation of women), 240 (law of inheritance); Steinberg, *supra* note 7, at 246-48; Trubek, *supra* note 7, at 54-55.

33. David, *supra* note 7, *passim*; Kōnz, *supra* note 7, at 95.

34. David, *supra* note 7, at 194, 203; Friedman, *supra* note 7, at 52-53; Galanter, *supra* note 7, at 158-61; Rheinstejn, *supra* note 7, at 226-28, 235; Steinberg, *supra* note 7, at 219-20.

35. Friedman, *supra* note 21, at 29, 43; Trubek, *supra* note 7, at 54.

36. J. MURPHY, LEGAL EDUCATION IN A DEVELOPING NATION: THE KOREA EXPERIENCE 54-60 (Korea Law Study Series No. 1, 1967); Allott, *supra* note 7, at 207; Karst, *supra* note 7, at 19-20; Kōnz, *supra* note 7, at 99-100; Kozolchyk, *supra* note 7, at 751-55; Merillat, *supra* note 7, at 76; Rosenn, *supra* note 7, *passim*; Steinberg, *supra* note 7, at 222, 232-33; Steiner, *supra* note 7, *passim*; Trubek *supra* note 7, at 53; von Mehren, *Law and Legal Education in India: Some Observations*, 78 HARV. L. REV. 1180 (1965).

World are formalistic and traditional.<sup>37</sup> Lawyers who work in such traditions, it is argued, see law as a body of relatively sacred and immutable principles which are applied to social life through highly formal or ritualistic techniques. The core conception argues that legal development must begin by forcing Third World lawyers to redefine their concepts of law and its social function; once this is accomplished, the correct program of legal development will hopefully become apparent. Thus legal education reform is the wedge leading to reform of the entire legal system. And, given the basic assumptions about the economic and political functions of modern law,<sup>38</sup> the core conception promises that this education-spurred reform will stimulate economic development and political democracy.<sup>39</sup>

## II. An Appraisal of the Core Conception

### A. Introduction

The core conception is able to prescribe positive programs for the legal development of the Third World because it believes it has discovered a key to understanding the relationship between law and development. Since economic and political development are thought to require "modern law," efforts to create a modern legal system will necessarily foster development.

There are two elements to this credo. First, there is the implicit concept of development which equates it with gradual evolution in the direction of the advanced, industrial nations of the West.<sup>40</sup> Second, given its definition of development, the core conception quite predictably equates modern law with the legal structures and cultures of the West.<sup>41</sup> The Third World is thus assumed to be doomed to

37. *E.g.*, Kozolchyk, *supra* note 7, at 746; Merillat, *supra* note 7, at 73; Rosenn, *supra* note 7, at 254-57; Steinberg, *supra* note 7, at 240, 244-45, 249; Steiner, *supra* note 7, at 52-55; von Mehren, *supra* note 36, at 1181-82, 1186-87.

38. *See* pp. 6-9 *supra*.

39. *See, e.g.*, Rosenn, *supra* note 7, at 283; Steiner, *supra* note 7, at 70-82. But Steiner hedges considerably on the promise. Steiner, *supra* note 7, at 86-90.

40. This approach is apparent in Mendelson's statement of a universalistic, three-stage model of development which sees every nation evolving from primitive unification to industrialism to welfare statism. Mendelson, *supra* note 7, at 223. A similar monistic theory permeates the literature: Men abandon the traditional social order, and regroup into centralized nation states. *See* pp. 5-6 and notes 11, 14, 15 *supra*. Economic growth is viewed as based exclusively on the market system, p. 7 and note 17 *supra*. *See* C. BLACK, *supra* note 15, for an excursion along the path of modernization—and Westernization—in five areas of human existence.

41. The concepts of pluralism, and individual rights against the state, legal autonomy, and the rule of law are Western in origin. Pp. 8-9 and notes 25-31 *supra*. Thus, deviations from Western traditions are viewed skeptically at best: Galanter sees indigenous legal revivalist movements doomed to failure, *supra* note 7, at 163. Steinberg worries about the encroachment of Japanese legal concepts in Korea, *supra* note 7, at 250-52, and König about the institution of informal conciliation boards in Ceylon, *supra* note 7, at 97-98.

## Toward a Social Theory of Law

underdevelopment until it adopts a modern Western legal system.

Because these beliefs are held to be self-evident, the core conception is not timid about prescribing desired legal reform for nations with a diversity of legal and cultural traditions, economic organizations, or political structures. For example, Western European observers will prescribe rigorous codification of civil law for nations as disparate as Ethiopia<sup>42</sup> and Turkey,<sup>43</sup> while Americans will prescribe a more instrumental form of legal education as the true path to development in Brazil,<sup>44</sup> Korea,<sup>45</sup> and India.<sup>46</sup>

Moreover, since the relationships between law and development are thought to be invariable, the core conception is more concerned with the exportation of Western systems than with efforts to understand the legal life of the Third World. Having answered in cursory fashion the major questions about the relationship between law and development, the core conception concerns itself with implementation.

The conception's ideas about the relationship between law and development derive from its interpretation of the fact that the modern legal system, the centralized state, and the industrial economy arose in the West in the same historical period. From this historical observation, the core conception concludes that in some measure legal development caused this associated political and economic transformation. Finally, it believes that this asserted causal relationship will repeat itself in the experience of the Third World.

In this section, these concepts will be analyzed. It will be argued that by fleshing out the core conception's loose imputations of the role for modern law in Western history, its assertion that Western experience is necessarily a guide for the Third World can be refuted.

### B. *The Role of Law in the Development of the West: The Work of Max Weber*<sup>47</sup>

The key to this argument is the work of the German sociologist, Max Weber, who attempted to identify and explain systematically the

42. David, *supra* note 7.

43. Lipstein, *Conclusions, Reception of Foreign Law in Turkey*, 9 INT'L SOC. SCI. BULL. 70, 72, 81 (1957). Lipstein concludes that "a Western system of law can be effectively introduced in a country of a different cultural background if the law is codified . . ." Similarly, Rheinstein suggests that application of the Civil Code requires less of a law library and less time to learn, and is, therefore, more easily extended to Africa than the common law system. He notes that English law was introduced into India and British East Africa in codified form. Rheinstein, *supra* note 7, at 244-45.

44. See Rosenn, *supra* note 7; Steiner, *supra* note 7.

45. MURPHY, *supra* note 36, at 54-60; Steinberg, *supra* note 7, at 222.

46. Von Mehren, *supra* note 36. At least one American prescribed the same reform elixir for legal "hypertension" in as developed and Westernized a country as Israel. Laufer, *Legal Education in Israel: A Visitor's View*, 14 BUFF. L. REV. 232 (1964).

47. See Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720. See also R. BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 385-457 (1962).

role of the modern legal system in the emergence of Western civilization.<sup>48</sup> Weber's explanation went beyond the observation that legal "development" occurred simultaneously with the political and economic transformations that led to the industrial system and the centralized nation-state. Rather, he showed with precision that these changes were mutually causative, supporting his historical conclusions with an analytic explanation of the kind lacking in the core conception.

Weber's major intellectual concern was explaining the rise of capitalism and industrial civilization: Why, he asked, had they first developed in Europe? European law offered a partial explanation. As he believed European law had special characteristics which were conducive to capitalism, Weber had to demonstrate the uniqueness of the legal order of the West.

His research led him to three basic conclusions. First, that the more "rational" a legal system was, the more conducive it would be to the emergence of a capitalist, industrial system. Second, that European legal systems were more rational than those which had emerged in other civilizations. Finally, that this legal rationalism existed in large measure in Europe *before* the full development of the industrial economic system. From these observations Weber concluded that Europe's legal system was one of the factors responsible for the rise of capitalism.

Weber's concept of legal rationality is composed of three sub-variables: autonomy, conscious design, and universality. In Weber's schema, a legal system is said to be rational to the extent that: (i) it is autonomous from other spheres of society; (ii) the norms it formulates and enforces are consciously wrought; and (iii) those norms are consistently applied to all similar cases. Weber noted that in some systems norms are not consciously wrought but rather originate from immutable tradition or the commands of an extraordinary, charismatic leader. Similarly, he found that norms may not be applied by specialized professionals, but rather enforced by religious, political or other elites. Finally, in some systems decisions are not subsumed under general rules or related to prior precedents, but rather are made on an ad-hoc basis.

Weber argued that the European system, on the other hand, combined the three essential elements of legal rationality. As a result, it,

48. Weber's most significant attempt to deal with the interrelationships between law and what we call today "development" or "modernization" is contained in his outline of interpretative sociology, *WIRTSCHAFT UND GESELLSCHAFT. GRUNDRISSE DER VERSTEHENDEN SOZIOLOGIE* (4th ed. J. Winckelmann ed. 1956). In this discussion I have relied primarily on the recent English edition of the complete work, *M. WEBER, ECONOMY AND SOCIETY* (Roth and Wittich eds. 1968) [hereinafter cited as *ECONOMY AND SOCIETY*].

## Toward a Social Theory of Law

and it alone, developed a type of legal thought termed “logically formal rationality”—the decisive indication, for Weber, of a modern system. A “rational” system, therefore, relies on pre-existing rules to resolve social conflict and guarantees that these rules will be (i) elaborated by a specialized profession, using distinctive modes of thought, (ii) consistent with one another, (iii) universal, and (iv) precise. Although the source of these rules is total social life, the system that elaborates and applies them is differentiated from other forms of normative ordering or social control. Its rules are formulated independently of religious or narrowly political considerations. Thus, Weber’s model of a “rational” system is, in large measure, the same one set forth by the core conception as “modern law.”<sup>49</sup>

But while he employed a concept of modern law similar to that of the core conception, Weber carried his analysis of the developmental significance of law much further. In contrast to contemporary analysts, he explained why a rational legal system fostered economic development and a centralized state. In so doing, he made precise the conditions under which “modern law” causes economic and political change.

In his economic sociology, Weber stressed two important relationships between “rational” law and economic development. He found that this type of normative system had formal and substantive characteristics which were essential in the industrial system which emerged in the West. A rational legal system was highly predictable; only such a normative order could generate certain substantive provisions necessary to the industrialized system. These characteristics were essential to the operation of a free market economy. Such markets could not operate if men were subject to traditional prescription; yet they required some normative structure to constrain egoistic tendencies. The system had to be authoritative, that is, capable of effectively constraining behavior which conflicts with its prescriptions. Yet given the nature of economic decision-making in a market system, it also had to be predictable: When one must make rapid decisions based on forecasts of another’s behavior, it is essential that he know which norms constrain others and that those norms will be enforced.

Although his explanation stressed formal characteristics—particu-

49. I believe that most American readers of Weber have been misled by his stress on “legal thought” as an index of legal modernity, and his interpretation of continental legal science as the acme of rational legal thought. They are naturally unwilling to accept his judgment that the common law tradition is an inferior form of “modern law”; indeed, they consider the common law legal process more rational. By focusing on the difference between these ideological pictures of the two legal worlds, they have failed to see that *functionally* the Weberian model and the American or modern law model are similar in many respects.

larly formal predictability—Weber was also concerned with the generation of substantive rules and principles. Chief among these was the complex of rules that allowed freedom of contract and guaranteed the enforcement of individually bargained agreements.

The only system of normative ordering that could meet these formal and substantive requirements was rational law. Only an autonomous, consciously designed set of universal rules could be (i) precise enough to be integrated into economic decision-making, (ii) applied with sufficient consistency to be predictable, and (iii) legitimate enough to be authoritative. Furthermore, in his political sociology Weber explained the political conditions under which such a normative system could emerge: a centralized, bureaucratic state which secured men's loyalties through a claim that its decisions were rational.

Weber identified three "ideal types"<sup>50</sup> of political systems (forms of domination). He classified them according to their basic claim to legitimacy: traditional, charismatic, and legal. According to this trichotomy, members of a social organization will view societal commands as legitimate because they are issued in accordance with immutable custom, are decreed by an individual with extraordinary or exemplary characteristics, or rest on rational, legal enactment. Since legal decisions are part of the total structure of domination, they, like all actions of the rulers, must be legitimized by making some basic claim to men's loyalties.

As a result, the structure of domination and the legal system are mutually determinative: Traditional regimes apply norms thought to be immutable and sacred; charismatic systems claim that their norms are derived from the inspired, exemplary leader. Such ties make it impossible to develop legal structures that meet Weber's criteria of rationality. The very concepts of tradition and charisma are inconsistent with the idea of consciously wrought norms. Moreover, traditional and charismatic regimes have an inherent need to make ad hoc, particularistic decisions and promote specific programs; as a result, they cannot tolerate legal autonomy and are hostile to any insistence on universality.

This is not, however, the case with rational or legal domination. This type of regime finds its legitimacy in its capacity to create and

50. The term "ideal-type" is an intellectual construct employed in the social sciences. It does not denote a normatively desirable situation. Rather, such a concept is "ideal" because it represents an abstraction of certain salient features of social life the scientist wishes to explore. In Weber's work, ideal type was meant to denote a value-neutral scientific instrument. See R. ARON, 2 MAIN CURRENTS IN SOCIOLOGICAL THOUGHT 201-04, 205 (1967).

## Toward a Social Theory of Law

maintain universal rules governing social life. Legal domination leads to the modern bureaucratic state which, far from being hostile to formal rationality, actively requires and encourages it. For these reasons, Weber concluded that the truly bureaucratic state could emerge only in Europe where all the prerequisites for rational law existed. Similarly, he argued that only under such a bureaucratic state could these elements develop into the final model of European law. Thus, Weber answered his original question about the causal relationship between law and capitalism. Rational law fostered the competitive market system; the rise of the market in turn encouraged further rationalization of the law, a rationalization which made possible the development of the centralized nation-state.

Weber's analysis cannot, of course, be accepted as established historical fact. While he adduced substantial evidence to support his thesis, he himself qualified his conclusions and admitted that there was at least one case which it did not explain.<sup>51</sup> Nevertheless, until refuted, his explanation stands as the most convincing and coherent analysis of the causal relationship between law and development in the West.

The nature of Weber's explanation helps to identify a major flaw in the core conception's reasoning—its contention that legal development will in some way cause political and economic development. Modern law thinkers frequently invoke Weber, arguing that his analysis supports their conclusions.<sup>52</sup> Yet in fact just the opposite is true; rather than supporting the core conception, the Weberian thesis suggests that it is, at best, without rational foundation, and, at worst, simply wrong.

Weber's analysis shows that law's relation to development is actually determined by two intervening variables: Modern law does not *produce* economic development; it merely helps structure the free market system. Moreover, modern law does not bring about political development; it merely supports the centralized bureaucratic state which depends for its legitimacy on a belief that its decisions are rational. To the extent, therefore, that economic development in the Third World is not based on free markets Weber's work cannot support any inference that modern law as defined by the core conception

51. That case was England, which was the first nation to develop capitalism, yet which never achieved what Weber would consider true "logically formal rationality." For more complete discussions of Weber's "England Problem" see Trubek, *supra* note 47, at 746-48, and J. Guben, "The England Problem" and the Theory of Economic Development (unpublished Yale Law School Program in Law and Modernization Working Paper No. 9, 1972).

52. See, e.g., Friedman, *supra* note 7, at 29, 50, 51; Kozolchik, *supra* note 7, at 742-43 n.204; Steinberg, *supra* note 7, at 216.

will cause or contribute to economic development.<sup>53</sup> And to the extent that Third World nations do not seek legitimacy through adherence to the rule of law, there is no assurance that strengthening the legal system will enhance the efficacy of the regime.

Thus, if we accept Weber's explanation of the relationship between formal rationality and European industrialization, we must conclude that the core conception is on very weak grounds. We know that few Third World nations have developed competitive markets, and none have primarily market-oriented or laissez-faire economic policies. If modern law contributes to economic growth only under these conditions, as Weber suggests, the core conception's assumption that Western history will repeat itself is probably wrong. Similarly, we know that Third World regimes are legitimated by many things, but that their adherence to the rule of law is not first among them. Thus, a conclusion that enhancing the effectiveness of the legal system as a restraint on the state will enhance the effective power of Third World leaders (as Weber argued it strengthened the European nation-state) is also rather dubious.

### C. *Ethnocentricity and Evolutionism: Dangers and Dilemmas of the Core Conception*

The core conception is clearly ethnocentric in interpreting diverse cultures in terms of Western history. It is evolutionist in viewing history as a series of identical stages repeated in all societies. As a result of these implicit assumptions, the conception cannot deal effectively with the realities of legal life in the Third World. This section identifies some of its errors and inconsistencies, and in so doing, casts further light on both the origins and limitations of the core conception.

#### 1. *The Conflict Between Evolutionism and Reformism*

There is a clear conflict between the core conception's evolutionism and its commitment to legal reform, a conflict which reveals a great deal about the motivations behind the core conception.

History, in the core conception, tends toward a knowable result in uniform stages. Societies are classified as traditional or modern, under-

53. Some writers have defined "modern law" in such sweeping terms that this analysis is inapposite. For example, though he seems at times aware that law is separate and distinct from the state, Friedman defines law as any public process within society. Friedman, *supra* note 7, at 15. Thus if state action can contribute to economic growth, so will "modern law."



developed or developed, static or dynamic,<sup>54</sup> and are viewed as integrated systems in which sub-systems have related characteristics. A "traditional society" will have a "traditional" legal system; "modern" societies have modern law.<sup>55</sup> Change is seen as an organic process: Like the life cycle of the butterfly, "development" proceeds through highly distinct stages to a defined end.<sup>56</sup>

This type of determinism assumes that law merely results from and reflects social and economic phenomena.<sup>57</sup> The core conception cannot accept such a view of the origins of legal development. Rather, it must see legal change as possible without, and as potentially capable of causing, social change. Modern law thought goes to great lengths to make legal development a very problematic matter: Nascent legalism in the Third World is perceived as a very fragile flower requiring hot-house care.

Thus, a paradox is created. While modern law thinking argues that the rest of the world *will* repeat the Western experience of simultaneous legal and socioeconomic development, it also presupposes that legal development is *not* guaranteed and that strenuous efforts must therefore be made to ensure that modern law is adopted.

If one's primary commitment were to the view that economic, social and political change does not necessarily lead to modern law and that conscious legal development is needed if the Third World is to follow the West, one might quite logically abandon the whole structure of evolutionary thought.<sup>58</sup> In such a conception, "modern law" would be seen not as a necessary prerequisite to change in other spheres, nor even as the inevitable result of such change, but as merely something that is *possible* under certain historical conditions.<sup>59</sup> But while the

54. See C. BLACK, *supra* note 15; Friedman, *supra* note 7, at 30; Mendelson, *supra* note 7, *passim*; cf. p. 10 and note 40.

55. See Galanter, *supra* note 7, *passim*; Rheinstein, *supra* note 7, at 222-26. Steinberg seems to accept this view, but notes that colonial administrations may have led to a law "out of phase" with the indigenous culture. Steinberg, *supra* note 7, at 216-19.

56. On the use of organic metaphors in social theory, see R. NISBET, *SOCIAL CHANGE AND HISTORY* (1969).

57. Thus it resembles a model of development with unlimited supplies of law. See note 5 *supra*.

58. That is, one might see society as made up of relatively distinct spheres which are only related to one another in a very loose fashion. This would mean abandoning the idea that there are parallel stages of development of all aspects of society, and the assumption that there are strong forces of social integration that tend to bind separate spheres together.

59. This approach to law-society relationships would entail a number of intellectual shifts and solve certain problems of the core conception. For example, it would better explain how societies can—as they clearly do—go through periods of rapid economic development without a corresponding spurt of "legal development." Moreover, this approach and the abandonment of evolutionary determinism would bring to the surface the fact that the commitment to "modern law," and its export to the Third World, involves a distinct set of value choices. This, in turn, might focus scholarly attention on the nature and implications of these values.

determinism of the evolutionary scheme conflicts with the strongly-held faith in reformist intervention, the core conception adheres to both. It attempts to solve this inherent conflict by positing the possibility of "lags" or "barriers" to "legal development" which, it is asserted, can retard evolutionary change yet be overcome by vigorous reformism.<sup>60</sup> Thus, the modern law thinker can observe that the legal code of country X has "failed to keep up" with economic and social changes, that its lawyers employ "outmoded" ideas about the law, or that its legal education is "antiquated."<sup>61</sup> The idea of lags and barriers maintains the need for conscious efforts to identify and "overcome" them. Yet at the same time these concepts assume that there is some "normal" process of change that is being frustrated.

One reason that modern law thinking clings to both evolutionism and reformism is the utility these perceptions have in justifying the role of the foreigner prescribing law reform measures. Such a reformer, writing a code for a developing nation or advising it on how to reform its legal education, must argue that legal development is problematic—otherwise he has no role. Yet he must also retain evolutionism, as it serves two key functions. First, it tends to remove any suggestion that there are normative questions at stake: Modern law is merely the unfolding of history. Second, the evolutionary concept means that the foreigner from a "developed," "modern" nation has a special expertise to offer the "traditional," "underdeveloped" one: He has seen the future and he knows how it works. Thus, he is indispensable to legal development.

From this perspective, it is possible to understand why modern law thought contains apparently contradictory strands. To legitimize foreign involvement in the legal life of the Third World, it must be simultaneously reformist and evolutionary, voluntaristic and deterministic.

## 2. *An Instance of Ethnocentricity: Legal Instrumentalism versus the Democratic State*

Evolutionism obscures the normative choices necessarily involved in legal development programs. Yet ethnocentricity may increase the difficulty of designing projects which foster consciously held values. Because the modern law thinker's vision is clouded with concepts from

60. See, e.g., David, *supra* note 7, at 194, 203-04; Kozolchyk, *supra* note 7, at 751; Steinberg, *supra* note 7, at 25-52; Könz, *supra* note 7, at 97, 98; Trubek, *supra* note 7, at 24-28, 52-53.

61. David, *supra* note 7, at 203; Karst, *supra* note 7, at 19-20; Könz, *supra* note 7, at 99; Kozolchyk, *supra* note 7, at 746; Rheinstejn, *supra* note 7, at 226; Rosenn, *supra* note 7, at 254-55; Steinberg, *supra* note 7, at 245; Steiner, *supra* note 7, at 70-72.

his own society on the nature of law and its functions, he may actually propose measures counterproductive in the societies of others.

Consider the case of education projects designed to foster purposeful legal thought. American scholars, government agencies, and private foundations promoting such efforts assume that they will strengthen the "rule of Law" and foster democratic values.<sup>62</sup> The core conception refuses to recognize any other possibility and assumes that the resulting shift from a traditional concept of law to an instrumental one will simultaneously increase the state's capacity to guide social behavior and the legal system's capacity to restrain arbitrary executive action.<sup>63</sup> Thus, the core conception argues that measures to increase legal purposiveness will both foster legal autonomy and strengthen liberal and democratic tendencies.<sup>64</sup>

Increasing instrumentalism may, in fact, have quite the opposite effect. Efforts to render legal thinking more instrumental may make the legal order increasingly dependent on state apparatus,<sup>65</sup> and when authoritarian groups seize control of that apparatus, such dependence will strengthen their position.<sup>66</sup> This will occur when instrumentalism erodes the legitimacy of autonomous legal thought, and thus denies judges and lawyers any valid premise for decision-making other than that of implementing state policy. Instrumental thought is a technique of selecting appropriate means for given ends.<sup>67</sup> Thus it is a tool, a means by which specific goals are achieved. But under authoritarian conditions it may be a tool which is dependent in the final analysis on the goals supplied by the state. Since it cannot supply its own goals, increasing instrumentalism in legal thought decreases legal autonomy. As the core conception makes clear, it is the very nature of "modern society" that non-state sources of norms and values are weakened. This tendency can become especially acute in developing nations, where pressures for rapid growth enhance the dominance of the state.

62. This core concept is often hidden from public and published view. *But see* D. TRUBEK, J. GOUVEA VIEIRA & P. SA, *supra* note 7, at 80; Murphy, *supra* note 36, at 57-58; Rosenn, *supra* note 7, at 283; Steiner, *supra* note 7, at 70-82.

63. *See* A. RIVKIN, *supra* note 27; Karst, *supra* note 7, at 18-19; Steinberg, *supra* note 7, at 247-48.

64. *See* Karst, *supra* note 7, at 15-19; Steinberg, *supra* note 7, at 247-48.

65. *See* Unger, *supra* note 8, at sec. 3.51.

66. *See* F. NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22 (1957). Critics of legal positivism have long stressed the debilitating effects which this school's view of law has on the lawyer's ability to resist the inroads of authoritarian and undemocratic forces which have gained control of the instruments of the state. *See* L. FULLER, *THE LAW IN QUEST OF ITSELF* 120-25 (1940); *see also* Auerbach, *Legal Tasks for the Sociologist*, in *LAW AND THE BEHAVIORAL SCIENCES* 18, 19-20 (L. Friedman & S. Macaulay eds. 1969).

67. *See* 1 *ECONOMY AND SOCIETY*, at 24, 26, 30.

Consequently, purposeful legal thought must confront a dilemma which may ultimately destroy its claim to autonomy: If the state is the only valid source of essential goals, legal thought can find no basis for resistance to the state. Shorn of any transcendent premises on which to base its reasoning, the legal system becomes a mere instrument of state power.

Although some European scholars were acutely aware of this problem,<sup>68</sup> contemporary modern law literature has only begun to recognize the possible conflict between legal autonomy and instrumentalism.<sup>69</sup> The core conception's failure to realize fully this potential conflict is further proof of its ethnocentricity. The assumption that instrumentalism is necessary for the effective operation of an autonomous legal system is simply a generalization from American conditions, resting on the fact that American legal thought assumes the existence of a pluralist political system.<sup>70</sup> In American pluralist theory, "the state" is not viewed as an entity distinct, and hierarchically superior to, social life, but rather as a system or process which organizes and guides an ongoing struggle between competing and conflicting groups. "Government," in this view, is both the structure that maintains pluralist competition and the policy output that results from it.<sup>71</sup>

In a pluralist society, "law" can be seen in large measure as the result of this competitive process.<sup>72</sup> The political process resolves (or avoids) potential group conflict, and law is its final and authoritative settlement. It is, in this sense, a contractual manifestation of the compromise of competing forces. Furthermore, in a pluralist society, law is also the set of rules, primarily constitutional, which structure this process of group formation and competition. But pluralism will work only if all legitimate groups have an opportunity to be heard; indeed,

68. Commenting on the decline of natural law and the rise of a view of law as a technical instrument, Weber observed:

This extinction of the metajuristic implications of the law is one of those ideological developments which, while they have increased scepticism towards the dignity of the particular rules of a concrete legal order, have also effectively promoted the actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment. Among the practitioners of the law this attitude has been particularly pronounced.

69. *ECONOMY & SOCIETY*, *supra* note 48, at 875. See also F. NEUMANN, *supra* note 66.

70. See Unger, *supra* note 65. See also Steiner, *supra* note 7, at 50.

71. This point was suggested to me by Lawrence Friedman.

72. See Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections between Law and Political Science*, 20 *STAN. L. REV.* 169, 250-57 (1968).

73. I have in mind here primarily statutory law. The relationship between judge-made law and pluralism is somewhat more complex. A substantial amount of our constitutional law theory, for example, recognizes that our commitment to pluralism and our commitment to a creative role for the judiciary may be in conflict. See, e.g., Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961); Deutsch, *supra* note 71.

## Toward a Social Theory of Law

much of constitutional law is aimed at guaranteeing that groups can be organized, that their views will be recognized and occasionally adopted, and that the compromises reached will be accepted as legitimate.

To the extent that law is viewed as the result of this competitive process of pluralistic interaction, instrumental legal thought becomes not an enemy of democratic values and individual liberty, but rather a necessary way to maintain them. Under the conditions posited by pluralist theory, instrumental legal thought does not expand the power of the “state”; to the contrary, it serves to keep government from exceeding the bounds established by pluralism. To the extent that the only valid goals are those which arise out of, or preserve the pluralist process, instrumentalism limits the government to those measures which further the compromises struck in the legislative arena. Since there is no other value to override such goals, lawyers are properly trained to identify them clearly and to relate them to specific measures. In so doing, they serve to preserve the pluralist system. There is thus no conflict between instrumentalism and democracy.

However, where political pluralism is not institutionalized, the effect of instrumentalism is very different. Indeed, in the absence of pluralism, legal thought relying on formalistic or traditional arguments may be a more effective way to resist authoritarian measures. The core conception with its implicit pluralism is unable to deal with non-pluralist situations—situations which are, of course, the norm, not the exception, in the Third World.

### III. Towards a New Intellectual Perspective: The Challenge and Future of Research on Law and Modernization

#### A. *The Challenge: Learning from the Core Conception*

While the core conception has failed to yield a satisfactory social theory of law, we can learn from it. After all, “law and development” might have been defined merely as the exportation of legal systems or as country-specific social engineering: The core conception at least attempts to formulate valid generalizations about the relationships between law and the major economic, social, and political transformations associated with industrialization. Moreover, it has approached this task through an attempt to delineate key variables and define their relationships. Accordingly, when it posits a distinction between “modern” and “traditional” legal systems, and explains these variations in terms

of the level or stage of social development, the core conception articulates a crude social theory. Although we may question the ethnocentric model employed, and the objectivity of its observation of alleged differences, some form of general classification and some type of explanation of observed differences are essential to any genuine social theory of law.

Moreover, the core conception does articulate certain theoretical generalizations that are beyond question. Most Third World nations are committed to some form of industrialization; and there are undoubtedly universals which will lead to some convergence with industrialized Western societies. Similarly, when modern law thinkers assert that in the transition from traditional to industrial society governmental processes become more purposive and rational, few would take issue.

Unfortunately, these conclusions are so broad that they have little analytic or practical utility. If we wish to develop more precise and concrete ideas about law and development, we must go beyond the core conception. Since its evolutionism contains no coherent idea about the causal relationships between legal and social phenomena, modern law thought is never clear which factor causes the other. The core conception circumvents analysis of the co-variation between legal and other variables and discourages causal enquiry.

#### B. *Beyond the Core Conception: Learning from Weber*

What is needed, then, is an intellectual perspective which will transcend these limits, a paradigm for future work. This must be a social theory capable of formulating and verifying propositions about the relationship between legal and social variables. It should start from the assumption that there are systematic and universal relations between such variables and address itself to the task of uncovering them. So the question becomes: How may law and development be studied in a more systematic way? To answer, we must examine several possible criteria and suggest strategies for movement to a more scientific approach.

First, it is rather clear that the phenomena with which we are concerned cannot be studied experimentally. We obviously cannot manipulate the behavior of nations in order to determine the interaction of social change and law. We can, however, employ a methodology of comparative research to isolate the underlying relationships between

## Toward a Social Theory of Law

legal and social variables.<sup>73</sup> This is, of course, the method Weber employed. His ideal types both define key variables and indicate relationships among them. His typology of law permitted him to differentiate among different legal systems in terms of relative rationality. The ideal types of legal domination and the market economy simultaneously identify important political and economic variables and posit causal relationships between them and the legal order.<sup>74</sup>

Having hypothesized these relationships, Weber conducted comparative studies to prove, for example, that only societies with rational law had bureaucratic staffs, that no society with a traditional or patrimonial form of domination developed rational law, or that no society lacking rational law developed an industrial economy. Such historical evidence that certain variables always occurred together, or never appeared simultaneously, supported his conclusions on causation.<sup>75</sup>

While many of Weber's conceptions and propositions are questionable in light of current knowledge, his approach can be a guide for our own efforts.<sup>76</sup> At its most ambitious, our program should be guided by the following criteria. First, in order to analyze the relationships between law and other variables, we must separate "legal" phenomena from key social variables which interact with them. With these key variables in mind, we must construct ideal types. Further, if comparative study is to determine the relationship between variables, they must be so defined to be both comparable and operational. Thus, legal and social variables should be set forth in terms which guarantee that similar things are observed in all societies and that discrete states or quantities of the variables can be observed and measured. Finally, it must be possible to go beyond the establishment of mere correlations to true causal analysis. That is, it must be possible to posit the dependent and independent variables in our theory of law and development.

The remainder of the essay is primarily concerned with the first of these criteria, developing a set of ideal types which identify relation-

73. See, e.g., *COMPARATIVE METHODS IN SOCIOLOGY: ESSAYS ON TRENDS AND APPLICATIONS* (I. Vallier ed. 1971). This volume includes a comprehensive bibliography on comparative studies.

74. Weber's typology of domination, for example, identifies as key variables the degree of legal rationality, the nature of the regime's claim to legitimacy, and the type of administrative staff associated with the ruler. See Trubek, *supra* note 47.

75. While sociologists may recognize that this is a controversial interpretation of Weber's methodology, the text follows substantially the interpretation of Weber in R. Warner, *The Methodology of Max Weber's Comparative Studies* (unpublished 1972 Ph.D. dissertation on file with the *Yale Law Journal*). But see W. RUNCIMAN, *A CRITIQUE OF MAX WEBER'S PHILOSOPHY OF THE SOCIAL SCIENCES* (1972).

76. Unlike modern law thought, Weber dissected society into component spheres, positing mutual interactions among the spheres of law, polity, social structure, and economy. This scheme enabled him to identify causal relationships with greater specificity than the core conception's two-variable system allows.

ships between legal and other variables in contemporary modernization. In this analysis, I have attempted to provide a preliminary typology of two key sub-systems of any modernizing state, the economy and polity. Their variables are then related to differences in legal structures. Such analysis and concept formulation is a necessary precursor to, but not a substitute for, the future formulation and verification of precise propositions through comparative and empirical research.

The study of law and development is far from producing any systematic theory. The necessary comparative studies must await the accumulation of much more data about legal life in the Third World. The ideal types set forth in the remainder of this essay are meant to help shape such efforts.

#### IV. Economic Organization and Legal Structure: Market vs. Command

What is the relationship between law and the economy in the Third World? To answer, we need a broader perspective than has been heretofore offered. Most analysis of law and development, from Weber to the core conception, stresses the contrast between traditional and industrial economies, but obscures the fact that the traditional economy is largely a thing of the past. All nations now aspire to increase their level of economic well-being through industrialization. What is more crucial today is that there are many roads to such development, and a society can adopt very different means for its industrial drive. This choice, in turn, will significantly affect the structure and function of the nation's legal system.

Thus, the social theory of law must differentiate between economic structures. To do so, we begin with a crude typology which identifies two radically different approaches to the relationships between state and economic activity. These types are called "market" and "command."<sup>77</sup> To the extent that production priorities are set by autonomous entities based on prices established through exchange, the economic organization is termed "market." To the extent that such decisions are made by the state, it is called "command."<sup>78</sup>

77. The following discussion is based on a number of sources. I found *COMPARATIVE ECONOMIC SYSTEMS* (M. Bornstein ed. rev. ed. 1969) and F. KNIGHT, *THE ECONOMIC ORGANIZATION* (1934) especially useful.

78. The theoretical distinction between "command" and "market" and their related legal phenomena are ideal types used to analyze empirical reality, rather than depict it. In the capitalist world, while markets play a major role, the pure "market" structure of



## Toward a Social Theory of Law

In the pure market system, the economy is clearly separated from the polity. The economic system is perceived as a self-contained sub-system capable of functioning with only the most minimal state intervention. Economic activity is managed by independent units responding to the signals of impersonal markets. The market is theoretically capable of deciding all questions about production and allocation; since consumer decisions determine ultimate production, the system functions to give people "what they want." While the state may provide some services like defense and education which the market either cannot provide or provides inefficiently, all other economic decisions are left to autonomous, presumably private, bodies.<sup>79</sup>

In the command economy, there is no such division between state and economy. In the extreme, the economy completely merges with the state; in other command systems, the market is retained but merely as an instrument of economic policy or measuring rod of desirable state action. What really distinguishes command from market is that in the command economy state decisions are the ultimate arbiters of economic activity, *i.e.*, all matters of production, allocation and distribution.

### A. "Law" in a Pure Market System: Voluntary Commitment

Since the pure market system eschews any role for the state in economic life, it is not immediately apparent why law should have any economic function at all. Of course, public law is necessary to define the limits of state action. But the economic role of private law, that is, the rules which govern relations between individual market actors, is far from clear. Yet the rules of contract, tort, and property do constrain (at least in part) the decisions of economic actors. How is this

competitive, laissez-faire capitalism has been replaced by economies wherein large, often oligopolistic industries predominate, and government regulation of industry is the rule and not the exception. *See, e.g.*, P. SAMUELSON, *ECONOMICS* 487-89, 500-07, 140-41 (8th ed. 1970). In the socialist world, the model of a command economy has had a strong impact. *See generally* COMPARATIVE ECONOMIC SYSTEMS, *supra* note 77. Yet some socialist systems consciously use market structures to achieve certain economic results. *See* Bicanic, *Economics of Socialism in a Developed Country*, *id.* at 222-35; Dirlam, *Problems of Market Power and Public Policy in Yugoslavia*, *id.* at 236-51; Lange, *On the Economic Theory of Socialism*, *id.* at 68-76; Montias, *East European Economic Reforms*, *id.* at 324-36. In the Third World, the idea of economic planning and regulation has spread to even the most market-oriented governments. *See, e.g.*, G. MYRDAL, *AN APPROACH TO THE ASIAN DRAMA* (1970) especially ch. 15. While a more sophisticated typology than the market-command is clearly desirable, the dualistic typology is better than none at all. Yet we must always be cautious in employing such primitive tools; one of the greatest dangers is the tendency to think that our two types encompass all possible relations being charted here, state and economy. No such claim is being made for the two types employed.

<sup>79</sup> In the pure market system, state economic activity, such as anti-trust law, may affect the market, but only to maintain its structure and smooth functioning.

consistent with a market theory which stresses the necessary autonomy of such decisions?

The answer lies in an inherent conflict within the market, a conflict which law alone can resolve. In the pure market system economic actors or units strive to increase *their own resources* under the principle of profit maximization. While increasing profit may result from a net increase in *total resources*, competition also involves a struggle in which each unit seeks to gain at the expense of others. Yet the competing units are simultaneously dependent on one another: Given the division of labor and other complexities of modern economies, the greatest possibilities for economic gain lie in each unit's ability to secure the cooperation of others. For example, unless the unit that controls steel producing equipment can secure the cooperation of those who control iron ore and coal (not to mention those who "control" labor power), no amount of self-seeking activity will avail them in their search for profits.

The instrument that initially resolves this conflict is exchange through markets.<sup>80</sup> But while the initial act of exchange may resolve primary conflict, the matter does not end there. Exchange, rarely instantaneous, often involves promises of future transfers. Thus, each unit's control of resources depends in large measure on the *future behavior of other actors*. The unit's effective control derives from its ability to predict that in specific situations others will act, or refrain from acting, in certain ways.<sup>81</sup>

A fundamental tension thus emerges between the dynamic of profit maximization and the connection of control with predictability. To the extent that each actor seeks to maximize his own position, it makes no sense to honor yesterday's commitment if more is to be gained by repudiating it and assuming another.<sup>82</sup> Yet each autonomous actor needs the assurance of others that *they* will not break *their* commitments, for if past promises yield to present possibilities, the system will be destroyed.

In the pure market model, legal coercion is the only form of social control that can resolve this conflict. Market actors are presumed to

80. "Rationally-oriented exchange is the resolution of a previously open or latent conflict of interests by means of a compromise." 1 *ECONOMY AND SOCIETY*, *supra* note 48, at 72.

81. See *id.* at 67-68. "Economic action," as Weber defines it, requires that actors have the power of control and disposal over economic resources. In a "modern private enterprise economy" this is achieved through "legal protection of such powers held by autonomous and autocephalous economic units." *Id.* at 67.

82. As Lon Fuller has put it, "Before the principle of marginal utility nothing is sacred; all existing arrangements are subject to being reordered in the interest of increased economic return." L. FULLER, *THE MORALITY OF LAW* 28 (1964).

## Toward a Social Theory of Law

be self-interested maximizers, indifferent to either traditional or ethical constraints. Some system which can exercise coercion is essential to them to keep from furthering their self-interest at the cost of others.<sup>83</sup> The argument that this coercion must be applied by the state is based on historical observation. While it may be possible to structure coercion in other ways, this has, by and large, not occurred. In part, this is due to the success of the market itself, which erodes many of the traditional foci of authority which might have substituted for the state.<sup>84</sup> It is also related to the development of the state, which has, for obvious reasons, attempted to monopolize the use of force. As a result, market societies tend to lack sources of coercion outside the state, and the pure market model must, accordingly, rely on state coercion through private law as its chief instrument of social control.

A second justification for legal coercion results from the pace of economic activity and the rational calculations characteristic of a market economy. It is not enough for the capitalist to have a general idea that someone will probably deliver more or less the amount of a good purchased on or about the time stipulated. He must know that specific performance will be forthcoming. But given the potential conflict between self-interest and obligation, this means that the businessman must know that coercion will be applied to the recalcitrant, and that potential contract violators, trespassers, or tort-feasors are similarly aware that such behavior will be held liable.

But it is not enough for the state to provide a coercive framework for economic activity. Given the need for predictability, the state itself must act in a calculable way. State coercion must be "legal," that is, based on general *rules* uniformly applied. For this reason the legal system of a pure market system must be autonomous from the state. To the extent that the legal system is kept free of intermittent political influences, its results will be highly predictable; but when it is

83. This sociological analysis of market behavior in terms of the inevitability of conflicts between self-seeking individuals in market societies, and the need for coercion in market relations, is drawn from Weber and Parsons. See 1 *ECONOMY AND SOCIETY*, *supra* note 48, at 3-62; T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 89 (1968); Parsons, *et al.*, *Some Fundamental Categories of The Theory of Action: A General Statement*, in *TOWARD A GENERAL THEORY OF ACTION* (T. Parsons & E. Shils eds. 1967); Trubek, *supra* note 47. Some contemporary lawyers and economists have assumed that there are no necessary conflicts in market relationships, except those caused by "transaction costs." See Calabresi, *Transaction Costs; Resource Allocation and Liability Rules*, *J. LAW & ECON.* 67 (1968); Coase, *The Problem of Social Cost*, 3 *J. LAW & ECON.* 1 (1960). While it would be ideal to merge these sociological and economic perspectives into one systematic view on the law's role in economic behavior, it seems advisable at this stage for each approach to develop along its own lines, bearing in mind the contributions of complementary fields. Cf. N. SMELSER, *ESSAYS IN SOCIOLOGICAL EXPLANATION* 3-44 (1968).

84. 2 *ECONOMY AND SOCIETY*, *supra* note 48, at 635-40.

subject to interference by those who seek to apply coercion for purposes inconsistent with the rules, it loses its predictability.<sup>85</sup>

This autonomous legal system will have characteristic structures, such as general rules applied to all economic actors similarly situated. It will become highly differentiated from social life and the other aspects of the state apparatus. It will also be associated with characteristic ideas about the nature of law—ideas which seek to legitimate legal coercion. As Weber made clear, no system of order effectively constrains behavior solely by applying force. While coercive systems must be prepared to penalize transgressors, they must also appeal to men to obey their dictates without actual physical force. In a market system, a coercive order must seek legitimacy through an appeal to enlightened self-interest. Thus, law will be presented as mandated by the selfish proclivities of market man, yet it will apply no more constraint than is necessary to allow individuals to maximize their preferences through interdependent economic activity.<sup>86</sup> In such a system, law will not be viewed as coercion applied by external agencies, but rather as immanent in, and arising from, society itself. The constraints of law are accepted by all economic actors in the enlightened pursuit of self-interest; in the market conception, man's commitment to law is voluntary.<sup>87</sup>

#### B. *Law in a Pure Command System: Involuntary Commitment*

While law in the market model can be identified as organized coercion through general rules, one must employ a different concept in a command economy. There, all economic decisions are made at the center by one omnipotence; all economic institutions are part of a single, hierarchical structure. The central organ does not pass *laws* in the sense of general rules; rather, it issues more or less specific

85. The model of law and economics in the text is radically simplified, and must be qualified. First, while it assumes that industrial societies lack any non-legal forms of social control which can restrain egoistical conflicts in market situations, market societies do develop sets of normative ideas which constrain self-interested economic behavior without resort to formal, legal action. See, e.g., Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Second, the "enlightened self-interest" of the rational maximizing economic actor may make conventional or legal coercion unnecessary. *Id.* at 61-65. Finally, as Weber pointed out, a truly "legalistic" system will not always produce results favorable to business interests, which may prefer substantive benefits to formal predictability. 2 ECONOMY AND SOCIETY, *supra* note 48, at 885.

86. This perspective is set forth clearly by Bentham, the quintessential thinker of the market tradition. See J. BENTHAM, PRINCIPLES OF THE CIVIL CODE 93-113. For a more contemporary statement of this perspective, see, e.g., Michelman, *Property, Utility and Fairness: Comments on The Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

87. For a definition of law as a constraint that men "impose upon themselves," see L. FALLERS, LAW WITHOUT PRECEDENT 2 (1969).

*directives* to enterprises telling them how to carry out their economic functions. These are often reflected in a plan, which is typically expressed in terms of the output of physical rather than monetary quantities. In a number of ways, these directives resemble military orders: The issuer is presumed to have authority over the recipient, who is obligated to comply with the directives. The plan is binding on all economic actors, and may be enforced by criminal sanctions, dismissal, or demotion. In the pure command economy, the only thing equivalent to "law" is this system of directives.

In a completely nationalized system, there would be, in theory, none of the conflicts that are hypothesized to be the very nature of the market economy. There would be, therefore, no need for legal coercion as a conflict-resolving mechanism.<sup>88</sup> Moreover, as the very essence of the system is the implementation of state decisions about economic activity, there is absolutely no need to shield economic actors from state intervention. Such action is *ex hypothesi* the most rational form of economic decision, and the problem for "law" is merely guaranteeing that these decisions are faithfully followed.

Since law in a command economy does involve coercion, it too must seek some legitimization. However, the concepts of law associated with command differ markedly from those prevalent in a market system. The command system will have a teleological, instrumental concept of law, viewing it as a means of achieving specific goals set forth in the plan. The ultimate goal which legitimizes all legal coercion is the plan itself. The plan, in turn, may be justified on scientific-technical, or political-historical grounds.

Thus, law in a command system is viewed as something imposed from without. It is expressly recognized to be the exercise of coercion to achieve stated and highly-valued goals. It is not an expression of something natural in society, but rather an instrument by which behavior is to be molded in conformity with new, consciously designed standards. In the command system, one's commitment to law is involuntary.

### C. *Law in the Mixed Economy*

While the ideal types of market and command assist us in analyzing the economic role of law in industrial or industrializing nations, no

88. Of course, in practice, conflicts do arise between the separate economic enterprises of even the most highly centralized economies. Nations like China and the Soviet Union do have contract law, and institutions for resolution of contractual disputes. See generally Loeber, *Plan and Contract Performance in Soviet Law*, 1964 U. OF ILL. LAW FORUM 128; Pfeffer, *The Institution of Contracts in the Chinese People's Republic*, THE CHINA QUARTERLY 153, Apr.-June 1963 (Part I); and 115, July-Sept. 1963 (Part II).

economy is either pure market or pure command. A more sophisticated typology would thus probably specify several "mixed-economy" types, and would accordingly permit a more discriminating comparative analysis of law and development. Moreover it may be possible to imagine systems that involve totally different relations than those suggested in these two types.

Without waiting, however, for the construction of more sophisticated schemes, we may suggest some of the phenomena characteristic of systems involving a mix of command and market. We should begin with an examination of *regulatory law*, a typical form of state economic involvement.

Regulatory law is a hybrid of the universal rules of pure market and the specific directives of pure command: It is more specific than the general rules that establish contract, tort and property rights; yet more general than the specific directives of the command economy. It is thus characteristic of economies where the state is not willing to allow economic priorities to be set exclusively by the market, yet is either unable or unwilling to assume complete control of economic decisions.

Regulatory law consciously attempts to influence the decisions of economic actors who are simultaneously subject to market constraints. In such cases, economic decisions will be basically influenced by price considerations, but such signals will be supplemented by law. A simple example of a regulatory law is the tax credit. The rules that establish credits for certain types of investments do not command that economic units build low-income housing, invest in underdeveloped regions, etc. But the benefits offered through such credits may, when included in a cost-benefit analysis based on market and production data, influence output decisions.<sup>89</sup> Of course, most law in a market system has some such effect.<sup>90</sup> For example, nineteenth-century tort law affected the allocation of resources, even though the judges who established liability rules might not have consciously planned to favor certain industries or activities. The laws of contract and property, even if not consciously designed to influence economic activity, have a similar effect.

Thus, in distinguishing regulatory from all economically relevant

89. For a discussion of this type of law in the context of an economic development program, see D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 23-92.

90. Weber distinguished law as a "formal order" structuring economic activity and as substantive regulation affecting resource allocation. See Trubek, *supra* note 47, at n.47. He recognized, however, that even purely formal rules will have some accidental or unintended effects on resource allocation.

## Toward a Social Theory of Law

law, we must stress two dimensions. The first is explicitness of intent: While general law will affect the allocation and distribution of resources, regulatory law is consciously shaped to achieve relatively precise goals. The second dimension is the specificity of the provisions enacted: Laws enacting tax credits or prescribing detailed rules for the conduct of certain activities (for example, zoning law) will tend to be more detailed and specific in defining acceptable and unacceptable behavior than more general bodies of law, and to entail a more elaborate administrative machinery.

The rise of regulatory law in market systems can generate tensions within the legal profession, since much regulatory law seems inconsistent with the market concept of law. Lawyers wedded to the pure market model of law will see the rise of regulatory law as a threat to law itself. In civil law countries, for example, as vast bodies of administrative regulations come and go, bereft of the coherence and precision of traditional civil codes, scholars contend that regulatory legislation lacks two elements essential to "law"—generality and permanence.<sup>91</sup> One Brazilian observer, reflecting his alarm, has characterized this type of state decree as "legislation that is not yet law."<sup>92</sup> In the United States the tension between regulation and "law" has focused on the New Deal regulatory agencies. While the regulations issued by these agencies were frequently given a quasi-judicial cast, and appeared to represent a merger between traditional law and government economic control, several scholars expressed concern over the threat this control posed for "law."<sup>93</sup> Indeed for some, regulatory "law" was a contradiction in terms; the purpose and process of government economic control, they felt, was totally inconsistent with any commitment to a system of universal rules.<sup>94</sup>

This legal discomfort can be viewed as a reflection of the emergence in capitalist societies of the welfare state, with its broad commitment to control and direction of economic activity. Seen in the context of the polarity of market and command law, such fears reflect the underlying transition from a market to mixed system and the tensions engendered thereby.

91. See, e.g., G. RIPERT, *ASPECTS JURIDIQUES DU CAPITALISME MODERNE* 209-58 (1946).

92. See, e.g., Lamy Filho, *Crise no ensino juridico*, *SINTESE POLITICA, ECONOMICA, SOCIAL*, nos. 37-38 (1968).

93. See Reich, *The Law of The Planned Society*, 75 *YALE L.J.* 1227 (1966), wherein the author observes that by casting government regulation and planning in a legalistic form, the New Deal hid the degree to which planning was actually being conducted. Similarly, Lon Fuller observes that it is wasteful and unwise to adapt the model of legalism to the task of governmental economic allocation. L. FULLER, *supra* note 82, at 170-77.

94. See, e.g., F. HAYEK, *THE ROAD TO SERFDOM* 72-87 (1944).

D. *The Legal Structure of Contract Under Market and Command: Private Right versus Public Policy*

In order to see more precisely the utility of this typology, let us examine the implications of market and command in one specific area. The differences between the two legal systems are rather clear in the economically significant institution of contract. In the pure market system, contract is an institutional device fostering individual goals and decisions. In the pure command system, it is just one more part of the structure implementing state decisions.<sup>95</sup>

A key feature of a market economy is its encouragement and protection of the freedom of contract. The contract system operates to guarantee individual freedom to make production and consumption decisions in response to prices and to ensure that these decisions will be implemented. Underlying contract in market economies is a legal system of private rights. The essence of this system is that the individual is free to invoke (or not to invoke) the coercive power of the state to enforce duties created by legal rules.

The system of private rights reflects a belief that such freedom is essential for optimal economic performance.<sup>96</sup> Initial contracting decisions must be left to the parties, as a contract will foster efficient resource allocation only if it represents voluntary choice. Similarly, individuals must be free to invoke or not to invoke legal sanctions. For example, assume A and B enter into a contract, and B fails to perform. The system of private rights leaves A the option of suing. If the value to A of the damages, discounted by the costs of suit (including the loss of good will in continuing relations with B), is lower than the value of forgetting the whole matter, A must be free to drop the suit.

Thus, the freedoms *not* to contract and *not* to sue are equally essential to a market system. "Private rights," incorporating these "negative" freedoms, function to guarantee that a system of free-market exchange will determine the utility of alternative economic possibili-

95. One of the major shifts in Western legal organization which Weber observed was the movement from the "status contract" to that of the "purposive contract." A status contract, typical of traditional societies, affects the total legal position or social status of the person involved, for example the contract between a serf and his lord. Purposive contracts, as exemplified by the money contract in exchange economics, are "specific, quantitatively delimited, qualityless, abstract and usually economically conditioned." 2 *ECONOMY AND SOCIETY*, *supra* note 48, at 674. While Weber's typology may explain the role of contract in the rise of capitalism, it is not very helpful in an analysis of the economics of contemporary industrializing nations where the distinctions among contracts are more a function of the economic role of the state than the duties imposed on the individual contractors.

96. See Calabresi, *supra* note 83.



ties and the most efficient method of producing the "most desired" package of goods and services.

By contrast, the command contract is a tool of public policy, a device which ensures that the goals of the plan are realized. The original decision that A and B are to contract with one another is made by some state planning agency which determines that an input or output must be transferred from one economic unit to another. Similarly, the state may modify command contracts: Since the agreement between A and B is merely a tool to attain overall plan objectives, a change in economic conditions dictating new ways to achieve those objectives justifies state modifications.

Similarly, while the parties to a command contract may invoke official remedies in the event of a breach, they are not free to decline such intervention if they find it not to be in their best interest. In a command system the state must be able to invoke sanctions for non-performance even if the parties would prefer to forgive and forget.<sup>97</sup>

Finally, while in the market system courts look to a set of general rules to resolve contractual disputes, in the pure command system the dispute is viewed primarily in terms of its relationship to the plan.<sup>98</sup> The correct resolution is that which will most effectively further the plan. This method of resolving contractual disputes about command contracts must be solved according to detailed knowledge about the plan and the relationship between it and the disputed transactions; accordingly the agency that resolves contractual disputes must have access to—or be part of—the planning agency or ministry.

While all systems reflect a mix of command and market,<sup>99</sup> the recent expansion of market principles in one socialist nation demonstrates that major changes in the structure of economic organization will lead to

97. Pfeffer, *The Institution of Contracts in the Chinese People's Republic, Part II*, THE CHINA QUARTERLY, *supra* note 88, at 130.

98. Pfeffer, *Contracts in China Revisited, With a Focus on Agriculture, 1947-1963*, THE CHINA QUARTERLY 106, 114-17, Oct.-Dec. 1966.

99. Pure systems of command or market contracts probably do not exist. Obviously, in centralized economies like China and the Soviet Union, the system more closely approximates the command model. State enterprises are obligated to enter into contracts which are frequently determined by plan instructions. Contract disputes are resolved by "arbitration boards" which resolve conflicts in terms set by the plan. *See* Loeber, *supra* note 88, at 131-34; Pfeffer, *supra* note 98, at 115-16. On the other hand, Western capitalist economies employ market contracts as a rule. Economic relations between private firms are governed by a system of private rights adjudicated in courts, not arbitration boards. But public policy considerations may enter into the decisions of courts resolving contract disputes, and some transactions, like government contracts, or arrangements in regulated industries may also approximate the plan contract system.

shifts in the contract system,<sup>100</sup> and that the ideal types of command and market contract are thus useful in explaining historical phenomena. The nation, Hungary, instituted a broad set of economic reforms designed to reduce the amount of centralized planning and increase the role of the market as an allocative device. Under the previous system of central planning, Hungarian enterprises were under a legal obligation to enter into contracts specified by the plan. Under the reform, the state enterprises are free to enter into any contract they find in their economic interest. While the state arbitration board formerly could order any contract modified, this power has now been substantially reduced. Perhaps most significantly, the entire structure of contract enforcement has changed. Under the prior system, enforcement was handled by the state arbitration board, a de facto arm of the planning ministry. It resolved disputes not by applying general rules of contract law, but rather by determining the best solution in light of the overall plan. Under the new system, independent and autonomous economic courts will resolve contract disputes by applying a general body of civil law. The dispute settlement agency will be freed of its former dependence on the planning ministry and will be part of the career judiciary. Reflecting the shift in the economic functions of dispute settlement, the system is becoming "legalized," relying on general rules articulated and enforced by autonomous legal entities. Such reform, to the extent that it is realized, would reflect movement from command toward market contract.

#### V. Law, Politics, and Development: Authoritarian Modernization

Just as legal structure will vary with the form of economic organization, so it will differ with the form of political system. Research on law and development must be sensitive to the varieties of political systems that emerge in the Third World and their characteristic effects on the legal order. Once we abandon the core conception belief that "modern law" encourages democracy, it becomes necessary to reassess our theories of law and politics and construct a more sophisticated perspective for further research.

Such a complete theory is beyond the scope of this essay: While a full treatment would require an appraisal of the entire range of politi-

100. The following discussion is based on a study by Gyula Eorsi, member of the Hungarian Academy of Sciences, Eorsi, *Law and Economic Reform in Hungary*, in *LAW AND ECONOMIC REFORM IN SOCIALIST COUNTRIES* (G. Eorsi & Harmathy eds. 1971), and on an interview with Dr. Eorsi in New Haven on May 4, 1972.

cal varieties from democratic pluralism to full totalitarianism, authoritarianism is selected for present analysis as it is a theoretically distinct form of political system pervasive in the Third World.<sup>101</sup>

### A. *Authoritarian Regimes*

Authoritarian regimes like Franco's Spain, Vargas' Brazil, Nasser's Egypt, and Salazar's Portugal<sup>102</sup> are not covered by classical concepts of democracy and totalitarianism. Authoritarianism is not merely an arbitrary point in the continuum from democracy to totalitarianism; rather, it is *sui generis*.<sup>103</sup> Unlike totalitarian systems, such regimes permit some line between state and society; but unlike democracy, they tolerate only a very limited degree of pluralism. In contrast to democratic and totalitarian systems, both of which encourage and require high degrees of political participation, authoritarian systems lack the articulated ideology and administrative capacity necessary to mobilize a populace.

Authoritarian regimes seek control of the legal order. One development that may facilitate such effort is the spread of instrumental legal thought. The core conception supports efforts to make legal thought more instrumental partly because it assumes that democracy and increased instrumentalism go hand in hand.<sup>104</sup> But under authoritarian conditions, the spread of legal purposiveness may in fact strengthen, not weaken, authoritarian tendencies.

### B. *The Problem of Legitimacy in Authoritarian Systems*

Many of the political problems of modernization<sup>105</sup> center on the crisis of legitimacy which rapid social and economic change create. Industrialization, urbanization, and rapid communication erode the myths by which traditional authority is legitimated and unleash forces

101. See generally S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968).

102. The classic discussion of this type of regime is Linz, *An Authoritarian Regime: Spain*, in *CLEAVAGES, IDEOLOGIES AND PARTY SYSTEMS* 291 (E. Allardt and Y. Littunen eds. 1964) [hereinafter cited as Linz].

103. For Linz, authoritarian regimes are: political systems with limited, not responsible, political pluralism; without elaborate and guiding ideology (but with distinctive mentalities); without intensive or extensive political mobilization (except at some points in their development); and in which a leader (or occasionally a small group) exercise power within formally ill-defined limits but actually quite predictable ones.

Linz, *supra* note 102, at 297.

104. See pp. 19-20 *supra*. Some have also felt that authoritarian politics can hamper economic development by weakening the legal structures needed to provide a framework for market relations and thus for economic growth. See Steiner, *supra* note 7, at 56; and pp. 43-45 *infra*.

105. See D. APTER, *THE POLITICS OF MODERNIZATION* (1965), and S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) for useful commentary on the politics of modernization.

which it cannot contain.<sup>106</sup> Modernizing nations in the Third World are unable to employ a strategy available to nineteenth-century European states in offering the market as a justification for legal domination.<sup>107</sup> Unlike those older states, contemporary developing societies confront existing models of mature, industrialized nations and are painfully aware that they are "underdeveloped" or "backward." This perception affects political life, creating expectations of instant economic development. The private sectors of such nations are typically backward, disorganized, and inefficient, and governments simply cannot leave economic development to the invisible hand of the private market. As late modernizers, they are inevitably influenced by modern models of economic organization. Today, when *laissez-faire* has been abandoned in the West, and developed command economies exist in the Socialist bloc, contemporary developing nations almost inevitably lean toward a degree of government economic involvement.

As a result, economy and polity must merge to some degree in the contemporary "development state." The state is viewed as the main instrument in overcoming "underdevelopment" and political struggle focuses on reaching the hypothesized state of "development." The developmental state must offer its own positive program of action as one of its legitimating principles. It must convert vague yearnings for change into a coherent set of aspirations for "development," and offer itself as the best method of achieving them.<sup>108</sup>

At some point the developmental state must produce economic progress or lose the support of the population. Consequently, it must not only create a developmental "mentality," but must also assume re-

106. Urbanization and the rapid expansion of mass communications are profoundly secularizing forces which erode traditional bases of legitimacy, and create demands for new forms of government "output" which traditional ruling groups are not equipped to provide. See Huntington, *supra* note 105, at 35. See also J. HABERMAS, TOWARD A RATIONAL SOCIETY 94-96 (1970).

107. In the 19th century, European states may to some degree have been able to proffer the market system itself as a factor legitimating domination. As Weber indicated, nascent market forces pre-existed and helped develop the European nation state, and a "market ideology" emerged that claimed that free market relations will lead to a just and equitable apportionment of social rewards. This market ideology—which eventually led to the *laissez-faire* ideals which took shape in the 19th century—served to legitimate the nation-state, which in turn helped create and then preserve the market system. Since, it was argued, market relations fostered freedom and achieved social justice, and the state nurtured and protected the market, then the state's actions, albeit coercive, led to a free and just society. By thus explaining why state commands should be obeyed, the political market ideology did not so much constrain the state as explain to men why they should accept the constraints imposed by it. See Habermas, *supra* note 106, at 97.

108. In a recent speech, Brazilian President Garrastazu Medici argued that the state's ability to foster "development" justified the extraordinary powers which the government had granted itself. *Jornal do Brasil*, July 4, 1972, at 1, col. 1. These powers included the right to close congress, deny political rights to public officials, and try political prisoners in military courts. For a commentary on these powers, see Carl, *Erosion of Constitutional Rights of Political Offenders in Brazil*, 12 VA. J. INT'L L. 157 (1972).

sponsibility for major allocative and production decisions. At the same time, it must encourage the social and cultural transformations essential for the creation of a rationalized industrial system which alone can satisfy the demand for an increased standard of living. Yet in Third World nations, where traditional cultural ideas and social structures remain strong, such transformations may generate conflict intense enough to threaten the very stability necessary for an industrial economy.

This tension between social transformation and industrialization may begin to explain the prevalence of authoritarianism in the Third World, where nations typically lack the ideological and organizational development necessary to sustain full totalitarianism, yet are too riven by class, racial, and cultural cleavages to tolerate democratic pluralism.

Whatever the reasons for the emergence of authoritarianism, such regimes typically reduce and limit political participation, fragment opposition, and coopt powerful groups whenever possible. While they may resort to violence, they normally attempt to discourage political action by making it appear unnecessary. They stifle political mobilization by converting political issues into technical problems and then asserting the regime's monopoly on technical skills. This tactic not only defuses independent political activity, but also increases the legitimacy of state action by cloaking it in the mystique of technology.

### C. *Purposive Legal Thought and the Legitimization of Authoritarianism*

Law is one form of technical discipline employed for legitimizing purposes. Identifying anything as a legal problem denies to a significant extent that it involves any political questions, since an issue is generally termed "legal" if there is some pre-existing norm or standard which will determine the controversy.<sup>109</sup> Once political issues have been "legalized" in this fashion, they can be resolved only by the specialized elite who know the existing rules and the techniques of their application.<sup>110</sup>

109. In his study of authoritarianism in Germany, Ralf Dahrendorf has noted that legalism, through its search for authorities above the conflicts of parties, discourages democratic forms. Observing that a misplaced faith in the "rule of law" was one of the underpinnings of the authoritarian political system of imperial Germany, he concludes that "the exaggerated faith in the rule of law as an institution beyond all conflicts of interest betrays the same aversion to discord, and thus the same evasion of the uncomfortable diversity of uncertainty, that is inherent in the German idea of the state." R. DAHRENDORF, *SOCIETY AND DEMOCRACY IN GERMANY 197* (1969). See also J. SHKLAR, *LEGALISM* (1964).

110. Linz observes: "The persistence of the previous social order that goes with limited pluralism and co-optation means that the legal profession so important in democratic politics and even under traditional rulers, will play a much greater role in au-

But this strategy of legalizing politics can be a two-edged sword: If the legal specialists are hostile to the regime, or if existing law contains rules or principles inconsistent with its goals, legalization will merely produce a new set of conflicts. Thus, it is not enough for the regime to legalize political issues; it must also politicize the legal system by coopting the profession and neutralizing those aspects of the legal tradition antagonistic to authoritarian ends.<sup>111</sup> In this task instrumentalism plays a major role.

The core conception contends that lawyers trained as problem solvers will be likely to ask searching questions about underlying social maladies and thus to formulate solutions which will be more "developmental" and more responsive to popular desires. This may occur. But under conditions of authoritarian modernization, increased legal instrumentalism may also have precisely the opposite effect. Instrumentalism may dampen basic conflicts emerging between the authoritarian regime and the legal profession and thus help the regime to legalize fundamental social and political issues.

There are a number of potential causes of conflict between legal professions and authoritarian states. First, friction may result when a regime suppresses aspects of the legislative process, such as a responsive legislature or interest group formation, which the legal profession may believe are vital. Second, the system of regulation needed for economic growth may be incompatible with the profession's belief in a system of universal rules.<sup>112</sup> Third, regulation often attempts to create new institutions through laws of a utopian character which are impossible to enforce, and which confuse and demoralize the legal

thoritarian regimes than in totalitarian systems. The same is true of civil servants. Their presence may contribute to the strange combination of *Rechtsstaat* and arbitrary power, of slow legalistic procedure and military command style, that characterizes some of these regimes. This preoccupation with procedure ultimately becomes an important factor in the constant expansion of a state of law, with an increase in predictability and opportunities for legal redress of grievances. At the same time it may prevent political problems from being perceived as such, irreducible to administrative problems and not soluble by legislation. Legal procedures are often seen particularly in the continental legal tradition, as an adequate equivalent of more collective, political expressions of interest conflicts." Linz, *supra* note 102, at 327.

111. Certain types of legal thought have long been recognized as especially conducive to the maintenance of authoritarian rule and hostile to democratic pluralism. For example, German lawyers in the 1920's and 1930's had a legalistic or rule-bounded notion of politics: Influenced by Hegelian notions of the state as an entity standing above the individualist struggles of "civil society," they preferred the authoritative invocation of pre-existing rules to pluralistic, competitive conflict as methods of determining social issues. Since they held this orientation, the German lawyers were tied to the status quo—to existing law and to whatever group, including the Nazi regime, which exercised power in the name of the state. Moreover, the lawyers' conceptions of state and society led them to be actively hostile to democratic rule, which challenged their notions of how social life should be governed. This hostility led the German legal class to invoke "natural law" to restrict the actions of the more pluralistic government of the Weimar Republic. R. DAHRENDORF, *supra* note 109, at 232-48.

112. See p. 31.

profession.<sup>113</sup> Negative reactions of the judiciary and the profession may range from overt hostility to feigned indifference,<sup>114</sup> further encouraging the government to by-pass the organized bench and bar in achieving its regulatory goals and thus widening the breach between the regime and the profession.

But once the legal profession adopts a purposive view of law it is far easier for the state to legitimize its system of regulations.<sup>115</sup> Since instrumentalism places a higher value on ends than on legal form or tradition, it is less sensitive to deviations from the model of rules; since it accepts the state as the source of goals, it is less critical of a non-pluralist process of goal formulation. When combined with the belief that all problems can be solved by the state's technocratic apparatus, instrumentalism thus provides the regime with a justification for the demobilization of professional associations and groups. Moreover, as lawyers find that they can define their role and reform their professional activity only by accepting this technical view of social problems, they will find themselves gradually coopted by the technocratic apparatus of the developmental state. Thus, the spread of instrumentalism will erode professional autonomy and forge close links between state structure and the profession.<sup>116</sup>

Finally, the concept of law as a purposive instrument can aid the authoritarian leader who supplants a more democratic regime in defeating challenges based on liberal ideals. The secular, instrumental view of law destroys any sacred quality of the traditional legal restraints that might have been a part of a nation's constitutional law or lore. Since "law" is an instrument to achieve specific goals articulated by the government, any values or principles of an older legal tradition inconsistent with the regime's purposes can easily be discarded.<sup>117</sup>

#### D. *Towards a New Typology for the Comparative Study of Law in the Politics of Development*

As the foregoing demonstrates, the core conception's assumption that instrumentalism has an "elective affinity" with liberal democracy

113. See Steiner, *supra* note 7, at 54-55.

114. For a vivid description of one such reaction by a Brazilian jurist, see M. SEADRA FAGUNDES, *A LEGALIDADE DEMOCRATICA* (1970).

115. To the extent that the legal profession can shift to purposive thought, it will no longer sense a conflict between its skills and the regulatory output of the state. The legal thinker who looks at law purely as a purposive instrument is satisfied with exploring the policy goals set forth in positive legislation and determining the "effectiveness" of concrete measures taken to reach these goals.

116. Unger, *supra* note 8, at sec. 3.8.

117. See note 68 *supra*.

is facile. Nevertheless, instrumentalism and authoritarianism may exist without each other. Obviously, in any comparative study of legal culture our own would rank very high in its commitment to an instrumental view of law. But one would hardly be correct in asserting that we therefore have an authoritarian political system. Although the transition to increased legal purposiveness is in some sense a universal feature of modernization, it is not sufficient by itself to explain the relationship between law and politics in every modernizing nation.

Thus, in constructing a useful typology for further study it is necessary to identify the varying types of purposive legal thought. For example, as the previous discussion suggests, there appears to be a distinction between pluralist and statist forms of legal instrumentalism. While both accept the view that law is an instrument to achieve specific goals, they differ as to how those goals are determined. While statist instrumentalism looks exclusively to the bureaucratic-administrative entities of the state, a pluralist concept would insist that policy goals be determined by a more open, representative, and competitive process. Though this is a somewhat crude distinction, such constant refinement of our concepts will be necessary to develop a truly comparative social theory of law.<sup>118</sup>

## VI. Brazil: A Case Study of Legal, Economic and Political Development in the Third World

Theoretical analysis, conceptual refinement, and the construction of ideal types are not ends in themselves. Rather, such efforts must demonstrate that they enable the observer to order and comprehend empirical and historical data. This section examines recent legal, economic, and political trends in Brazil, and demonstrates the problems of modern law thought and the utility of the broader perspective this essay advocates.

### A. *The Advantages of the "Brazilian Case"*

Brazil, with a population of over one hundred million, is the largest nation in Latin America and one of the most important countries

118. Of course, these ideas must be rendered more concrete and operational if they are to orient comparative study. One criterion that might be employed to distinguish between the types of instrumentalism would be the extent to which that basic legal doctrine incorporates notions of pluralistic process. Such notions as "institutional capacity," deference to legislative decisions, and similar ideas which mark American legal doctrine would, in this view, indicate that our system approximates the pluralist model.



in the Third World. It contains Latin America's most advanced industry and its worst poverty. In recent years, it has experienced one of the higher rates of economic growth in the world, and now aspires to full industrialization.<sup>119</sup> Since in addition to this size and economic progress, Brazil has a rich legal tradition and sizeable profession,<sup>120</sup> it is not surprising that it has been one of the primary targets of "law and development" scholars and activists.<sup>121</sup> Thus, the "Brazil Case" allows us to examine emerging relationships among law, economy, and policy—along with the "law and development" analysis of them.

First, however, some background. The studies to be examined, and the events in Brazilian legal life they analyzed, occurred in the late 1960's and early 1970's, a period marked by four major phenomena: increased and more efficient state economic direction, rapid growth, increased authoritarianism, and tensions between the government and legal profession.<sup>122</sup>

The Brazilian polity prior to 1964 could be characterized as a semi-pluralist, semi-authoritarian system. A liberal democratic constitution, in force since the 1946 overthrow of the truly authoritarian *Estado Novo*, allowed substantial political competition. There were strong residues of the prior authoritarian pattern, but these were counterbalanced by other, more democratic factors. For example, an independent judiciary and liberal constitutional provisions offered guarantees for freedom of association and speech; a multi-party system and direct popular elections led to substantial political mobilization.

This system collapsed in 1964 when, after a series of crises, the armed forces seized power.<sup>123</sup> While promising to "restore democracy," the military regime has since moved toward full authoritarian

119. On Brazilian socio-economic and political history in general, see W. BAER, *INDUSTRIALIZATION AND ECONOMIC DEVELOPMENT IN BRAZIL* (1965); *THE ECONOMY OF BRAZIL* (H. Ellis ed. 1969); C. FURTADO, *THE ECONOMIC GROWTH OF BRAZIL* (1968); N. LEFF, *ECONOMIC POLICY MAKING AND DEVELOPMENT IN BRAZIL 1947-1964* (1968); P. SCHMITTER, *INTEREST CONFLICT AND POLITICAL CHANGE IN BRAZIL* (1971); R. SCHNEIDER, *THE POLITICAL SYSTEM OF BRAZIL: EMERGENCE OF A "MODERNIZING" AUTHORITARIAN REGIME, 1964-1970* (1971); T. SKIDMORE, *POLITICS IN BRAZIL, 1930-1964* (1967); A. STEPAN, *THE MILITARY IN POLITICS: CHANGING PATTERNS IN BRAZIL* (1971); J. WIRTH, *THE POLITICS OF BRAZILIAN DEVELOPMENT: 1930-1954* (1970).

120. See Steiner, *supra* note 7, at 44-46, 62-63.

121. The studies included Rosenn, *supra* note 7; Steiner, *supra* note 7; and Trubek, *supra* note 7. In addition, a lengthy report on Brazilian legal education and its role in development was prepared by Peter Hornbostel for the International Legal Center of New York. P. Hornbostel, *Legal Education in Brazil*, Oct. 1971 (unpublished study for the International Legal Center, 866 United Nations Plaza, N.Y., N.Y.).

122. See generally sources cited in note 120 *supra*.

123. Schmitter, *supra* note 20, sees the 1964 military takeover as a "restorationist" movement. He argues that, since the 1930's of the Vargas *Estado Novo*, the basic political structure of Brazil has been authoritarian. The liberalism and semi-competitive politics introduced by the 1946 constitution partially constituted, in his view, a facade behind which substantial elements of authoritarianism survived.

rule by purging the Brazilian polity of most of its democratic elements. Simultaneously, the regime has assumed more direct control over economic activity. While professing to believe in the free market, it has increased the economic role of the state and has subjected the private sector to a pervasive system of regulatory law. From 1964 to 1970, over ten thousand new laws and decrees were passed, many of major significance.<sup>124</sup> The codification of tax law, for example, transformed a hodge-podge of revenue measures into a conscious instrument of economic development. Similarly, complete new systems of housing finance, banking, and capital markets were enacted. Most of these laws, drafted by planners and technocrats, were issued as executive decrees.

Initially, this "blitzkrieg" of regulatory law caused dismay in the legal profession. Brazil's lawyers found themselves totally incapable of dealing intellectually with the new bodies of regulatory law. Accustomed to thinking of "law" as general rules applied through deductive techniques, they could not grasp the inherent logic of the new legal order which contained few general rules, was not highly systematized, and could be applied only through unfamiliar logical forms.<sup>125</sup>

But while this regulatory blitzkrieg dismayed Brazil's lawyers, it delighted the foreign law and development activists and researchers. In the government's output, we saw the raw material for research, a vast corpus of legal "stuff" designed to bring about "development." In the legal profession's inability to deal with this new law, we saw an outlet for our reformism. These impulses merged in two studies which will provide the focus for the remainder of this analysis. One (which I conducted) examined the role of law in the development of the Brazilian capital market;<sup>126</sup> the other attempted to determine which changes would and should occur in Brazilian legal education as a result of the economic transformations occurring in the nation.<sup>127</sup>

#### B. *Law and Development Research in Brazil: The Basic Assumptions*

In the design of these studies and the interpretation of our "data," we shared many of the core conception's assumptions about law and society. We saw Brazil primarily as a market economy.<sup>128</sup> The state's

124. *The Law Will Rule, BRAZIL*, 1969, at 144 (Center for Inter-American Relations, 1970).

125. Steiner, *supra* note 7, at 70-72.

126. Trubek, *supra* note 7. That article is a condensation of my contribution to the Portuguese language study of the Brazilian capital market, D. TRUBEK, J. GOUVEA VIEIRA, AND P. SA, *supra* note 7, at 23-92.

127. Steiner, *supra* note 7.

128. *Id.* at 43.

role in economic life was analogized to that of the Welfare State in developed capitalist nations: The market was the primary source of economic allocation; government intervention merely maintained and protected market structures, while supplementing market decisions in a limited sphere.<sup>129</sup> We assumed further that this market economy required an autonomous legal system creating and guaranteeing private rights, through the promulgation of general rules. We therefore reasoned that market growth was impossible without the development of such a legal system.<sup>130</sup> We predicted the emergence of adequate substantive rules of contract and property law, an efficient and autonomous judicial system, and an independent and technically competent legal profession able to advise economic actors on the significance of substantive legal rules.<sup>131</sup> To ensure that these rules would be certain and calculable, we reasoned that the action of the state would have to be constrained by the "rule of law."<sup>132</sup>

While this concept of the "rule of law" was largely implicit, it was extremely broad. Law was a commitment not only to orderly and regular governmental procedure, but also to more specific processes and values (for example, the dignity of the individual or fairness in state action).<sup>133</sup> The rule of law was assumed to involve a social philosophy which accepted diversity and the maintenance of a normative structure that harmonized or compromised conflict.<sup>134</sup>

At the same time, we recognized that the market must be regulated to guarantee that development priorities would be obeyed. It was thus clear that Brazilian economic development would require an effective system of regulation in addition to one of purely private rights.<sup>135</sup> This would require the inculcation of instrumental legal skills.<sup>136</sup> We saw no potential conflict between an autonomous system of rules guaranteeing private rights and increased instrumentalism in legal thought. Accordingly, it was assumed that a legal system combining both could be institutionalized and that the resulting system would be simultaneously liberal, instrumental, and pluralist. We therefore worked

129. *Id.* at 43, 49.

130. *Id.* at 48; Trubek, *supra* note 7, at 54-56; D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 55-59.

131. Steiner, *supra* note 7, at 48; Trubek, *supra* note 7, at 54-56; D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 55-59.

132. Steiner, *supra* note 7, at 48-49, 56.

133. Steiner, *supra* note 7, at 49, 55, 89. D. TRUBEK, J. GOUVEA VIEIRA, AND P. SA, *supra* note 7, at 80.

134. Steiner, *supra* note 7, at 48-49; Trubek, *supra* note 7, at 53, 55.

135. Steiner, *supra* note 7, at 51-52; D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 64-68; Trubek, *supra* note 7, at 10, 52-53.

136. Steiner, *supra* note 7, at 70-72, 86-87; Trubek, *supra* note 7, at 53.

and argued for this form of legal development, selecting legal educational reform as our primary vehicle.

But legal development, defined in these broad and liberal terms, seemed inherently in conflict with authoritarianism. We saw a dilemma emerging, with Brazil's political organization and economic policy on a collision course and "law" the point of impact.

On the one hand, the nation had experienced rapid economic development by adopting a private sector, market-oriented policy with limited government regulation. Our premises about the necessary relationship between market growth and law led us to assume that this course would necessitate an autonomous legal system, enforcing private rights through general rules. Since we believed that the Brazilian legal system was, in these terms, quite "underdeveloped," we reasoned that future market expansion would require the institution of both private rights and regulatory systems. We assumed that in time Brazilian planners would see this need to add "legal development" to their list of priority sectors.

On the other hand, we recognized that the regime's commitment to authoritarianism made it hostile to certain features of Brazilian legal life which we felt were essential to the rule of law. Rather than fostering legal development, the regime was systematically destroying the legal order. The military had abandoned all but the barest pretext of abiding by constitutional norms (or any other check on executive discretion). It had abolished substantive protections of individual rights, including freedom of speech and habeas corpus. It had packed the Supreme Court and purged the lower levels of the judiciary. The Congress had been closed; legislation was promulgated increasingly by executive decree. Military courts had been given jurisdiction over vaguely defined political crimes, and defense counsel who dared take political cases were subjected to increasing harassment, imprisonment, and torture.<sup>137</sup>

Given the premises from which we started, there was thus an inherent conflict between Brazil's model of authoritarian politics and its commitment to market development. Eventually, one would have to succumb to the other. Thus, we speculated that either rapid market growth would strengthen the system of autonomous private rights and thus help restore liberal pluralism,<sup>138</sup> or continued authoritarianism would defeat the attempt to develop a market by undermining

137. See Carl, note 108 *supra*.

138. Trubek, *supra* note 7, at 71; D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 80.

the essential framework which only a private rights system could create.<sup>139</sup> If the former occurred, Brazil would have both economic development *and* democracy; if, however, the latter came to pass, *it could have neither*.

### C. *The Studies*

#### 1. *Law, Planning and the Development of the Capital Market*

The impact of these assumptions and “dilemmas” on thought and action is apparent in several specific studies. The first—my own analysis of the relationship between law and the development of the capital market—included speculation about legal development and financial growth which represented a detailed application of our assumptions about law-market relationships. In this study of the military government’s ambitious capital markets development program, I set forth two related ideas. First, having observed that Brazil’s capital markets had not grown as rapidly as its planners had expected, I speculated that this might be attributed to legal underdevelopment.<sup>140</sup> The planners had provided substantial incentives designed to foster the growth of a new issues market, by encouraging savers to hold stock and debentures in lieu of real estate investments, foreign currency, etc. When these measures failed to elicit the desired behavior, I reasoned that investor reluctance could be explained by the fact that the Brazilian private rights system was underdeveloped.<sup>141</sup> I observed that rules governing creditor and shareholder rights were imperfect, that courts were neither accessible nor efficient, and that sanctions were ineffective. Moreover, investors were unaware of their rights, and the bar was not organized to inform or defend them.<sup>142</sup> Consequently, the system failed to give potential stockholders and creditors sufficient guarantees. In short, the system failed to supply predictability to the economic actors.<sup>143</sup>

Second, I suggested that if those legal barriers were bypassed and market development began, this growth would in turn bring about further legal development.<sup>144</sup> Having observed that after some initial disappointments the capital market program had adopted new forms

139. Steiner, *supra* note 7, at 56.

140. Trubek, *supra* note 7, at 52-56.

141. *Id.* at 55-56.

142. *Id.*

143. *Id.* at 10, 54-56.

144. *Id.* at 71.

of incentives and had succeeded in evoking some desired investor behavior, I reasoned that as the markets boomed they would generate pressure for improvement of the private rights system. The financial sector would demand "modern" substantive codes, a more stable and coherent body of laws, a reduction in government ad hoc decision-making, judicial reform, rationality in legal thought, and a restructuring of professional organization. Accordingly, I praised the new program as a brilliant maneuver which circumvented legal underdevelopment, initiated market growth, and left any remaining legal barriers for a "mopping up" operation by inexorable market pressures.<sup>145</sup> These developments led me to predict that the hypothesized legal development would follow closely on market growth.<sup>146</sup>

Finally, I argued that this legal development—which to my mind implied the full program of liberal, pluralist, instrumental legalism—could be seen as one of the "external benefits" of a development policy that emphasized the private capital market rather than government coercion or inflation as techniques for mobilizing economic surplus.<sup>147</sup> This analysis allowed me to associate the capital market program with liberal political ideals and to suggest that this program would strengthen liberal tendencies in Brazilian political life and thus combat distasteful authoritarian trends.<sup>148</sup>

## 2. *Reform in Legal Education*

The study of legal education reform in Brazil paralleled and complemented my research on the capital market. It hypothesized that while the Brazilian private rights system was relatively developed in a formal sense, it was functionally inefficient. Courts, codes, lawyers, and regulatory agencies existed, indeed abounded; the problem, however, was that they were incapable of effectively performing their tasks.<sup>149</sup> Given the basic core conception assumptions, these inefficiencies jeopardized economic growth. The study examined trends in legal education and concluded that a significant part of this legal "underdevelopment" could be explained by flaws in the nation's method of training its lawyers.<sup>150</sup> It then argued for major reforms in legal education, including the inculcation of more instrumental

145. *Id.*

146. *Id.*

147. Trubek, *supra* note 7, at 69-71; D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 80.

148. D. TRUBEK, J. GOUVEA VIEIRA, & P. SA, *supra* note 7, at 80.

149. Steiner, *supra* note 7, at 51, 55, 56-62.

150. *Id.* at 62-72.

modes of legal thought.<sup>151</sup> It was thought that these reforms would strengthen market institutions, and at the same time it was hoped that they would preserve liberal values which were explicitly identified with the "basic traditions of Brazilian law."<sup>152</sup> This program for improvement of legal education meshed with my concepts of the need for the improvement of the private rights system: The newly trained lawyers and judges would man the new institutions demanded by the growing private market system. Both studies contained the hope that economic planners would grasp the argument and lend active support for this new system, thus, perhaps unwittingly, undermining their own political system.<sup>153</sup>

But for all their lofty ambitions, these hopes, assumptions, and efforts were soon dashed. Contrary to our predictions (or more accurately our hopes), market growth has not engendered an autonomous, pluralist legal system. Market growth seems to have had little effect on legal life; moreover, those legal changes which have occurred have not hindered the government's efforts to dismantle the liberal aspects of Brazil's legal order. The capital market has expanded vastly; yet, while there has been significant improvement in the government's regulatory capacity, there is little evidence that any substantial pressure is being exerted by market operators for the development of full private rights or an autonomous legal system. Nor is there any sign that the lack of such development is impeding market growth.

Recent developments in legal education similarly mock our predictions. It is possible to detect a growing emphasis on instrumental thought in Brazil. But there is some reason to believe that this has taken the form of authoritarian instrumentalism, and has functioned more to resolve previous tensions between the legal profession and the state than to generate new ones.<sup>154</sup> Thus, in the final analysis, liberally motivated efforts to assist educational reform may have actually aided in the consolidation of the authoritarian regime.

151. *Id.* at 77-79.

152. *Id.* at 79.

153. This was another rarely articulated premise. This hope was perhaps more evident in an article on which we collaborated. Steiner and Trubek, *Brazil—All Power to the Generals*, 49 FOREIGN AFFAIRS 464 (1971).

154. Brazilian lawyers and law students are learning the ropes of "legal engineering" and thus are making themselves more valuable to the government in the process of statutory drafting and promulgation. They are cutting out for themselves at least that part of the niche we envisioned them occupying in modern society. But these attitudes may undermine commitment to the traditional values of legal formalism, deference to procedural requisites or to a pluralist view of law making, that is, to those elements of the "rule of law" which had made the legal profession unpopular with the state apparatus but upon which we had placed our hopes for democratizing the modernization program. See p. 39.

#### D. *Towards a New Perspective*

In Brazil we see the tragic implications of reliance on the core conception, and the darker side of law and development research. For, as is often the case in planned social change, the very ideas that prompted reform efforts became obstacles to the realization of the reformers' goals. The concepts failed both as guides to action and as a structure for scholarly investigation.

Where then do we go from here? Perhaps the first step would be a reappraisal of the Brazilian experience. Any such attempt would have to view as problematic many of the relationships the core conception finds invariable. The following are some of the conclusions of such a reappraisal.

First, the structure of economic organization in Brazil, while relying on market forms, is much closer to the paradigm of command than initial studies suggested. The Brazilian regime is more concerned with securing direct administrative control over economic activity than in encouraging the type of autonomous market development we posited. Even the capital market program, which envisioned a market form of organization, is implemented within a highly regulated and controlled environment in which state policy plays a central role.

Second, although many Brazilian economic decisions are in private hands, this system has relatively little need for an autonomous legal order guaranteeing private rights through general rules. The economic functions posited for law in the market paradigm are not particularly appropriate for the actual structure of Brazilian markets. This is certainly true in the financial arena. A private rights system and the rule of law, assumed by Weber and classical political economists to be essential for market development, do guarantee a relative degree of predictability where the actors lack economic power over each other and where government decisions are economically neutral. But the emerging structure of the Brazilian financial market seems to be one in which a very few powerful groups are actively supported by government policy, and where the government, in turn, is just as dependent on the success of these groups. In other words, state intervention in the economy is not pure command, but favors certain economic actors over others, so that predictability for the state and the powerful groups is a consequence of their mutual dependence.

Recently, the government has encouraged consolidation in commercial banking, and in a short time only a few large units may remain. Informal relations of mutual dependence with the government guarantee that policies will be sufficiently "predictable" and substan-



## Toward a Social Theory of Law

tively attractive to these units regardless of how incoherent they may appear to the rest of the nation. In this context, real power over the source of rule-making is more important than any formal, universal quality of predictability. And where these groups exert substantial economic power over other market actors, a private rights system is probably of secondary importance. In this structure, efforts to develop such a system of rights may not have a central role in economic development policy. Thus, an authoritarian regime which fears the political implications of market law may, at no cost, avoid "legal development" measures suggested by modern law thought.

Conversely, we should consider as problematic the relationship between such measures, even if taken, and liberal pluralist political structures. While we originally associated one with the other, it is certainly possible to imagine a form of legal system relating to the market that has little or no pluralist implications. Substantial expansion and improvement of the judiciary, and changes in legal organization could provide an improved legal framework for the Brazilian economy without affecting the political situation. Once we realize that even a highly developed *market legal structure* need not be liberal and pluralist, we leave open for empirical research the relationships that the core conception assumes invariable. In such research, the scholar will be forced to consider the full complexity of legal relationships in development.

Much more careful research must be done on legal life in Brazil and comparable Third World nations before the Brazilians or anyone else can understand the true nature of the complex processes that are at work there today.<sup>155</sup> While no definite conclusions about Brazil can be drawn from this impressionistic reappraisal of earlier studies, one point is clear: To the extent that scholars in the developed world can have any genuine understanding of legal life in Brazil and throughout the Third World, they will attain it only through more careful study, oriented by clear concepts, and an awareness of the preconceptions and normative values affecting the researcher. Only by casting off the ideological baggage of the core conception can they contribute

155. The situation in Brazil today is extremely complex. The government has made some effort both to improve the private rights system and upgrade its regulatory capacity. There has been a tentative commitment to a new civil code, and to new corporation laws. Yet the civil code has not been passed, perhaps partly because such a major, quasi-constitutional event would serve as a dramatic reminder of the unrepresentative quality of law-making in today's Brazil. The regime has moved to curb the independence of the judiciary, and has limited severely the powers of the civilian courts in political crimes. Yet it has not waged full scale war on the courts, and has obviously felt the political importance of maintaining a commitment to the legal order.

to a study of law and development which will be more than the facile export of outworn ideas.

## VII. Conclusion

Legal scholars thus must avoid two major failings of previous efforts. They must keep their value preferences and intellectual preconceptions from blinding them to the actual phenomena of legal life in the Third World. At the same time, they must attempt to construct more precise and universal conceptual categories conducive to realistic generalizations.

Naturally, there is a profound tension between these two goals. We have seen how universal propositions have obscured rather than clarified empirical perception in the past, and we may justifiably fear that a mere search for empirical details will lead to nothing more than the accumulation of unrelated and unrelatable bits of data. Yet if we can maintain this tension, we can make some progress toward a genuine social theory of law.