

1-10-2010

# Law and Development: The Way Forward or Just Stuck in the Same Place?

D. Daniel Sokol

*University of Florida Levin College of Law, sokold@law.ufl.edu*

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Comparative and Foreign Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), and the [Legal History, Theory and Process Commons](#)

---

## Recommended Citation

D. Daniel Sokol, *Law and Development: The Way Forward or Just Stuck in the Same Place?*, 104 Nw. U. L. Rev. Colloquy 238 (2010), <http://scholarship.law.ufl.edu/facultypub/363>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

## SYMPOSIUM: THE FUTURE OF LAW AND DEVELOPMENT, PART IV

### LAW AND DEVELOPMENT—THE WAY FORWARD OR JUST STUCK IN THE SAME PLACE?

*D. Daniel Sokol\**

This Symposium has been a wonderful forum for identifying a number of challenges that Law and Development will face going forward. Like many of the contributors, I have thought about these issues as both an academic and as a practitioner/government adviser. I have concluded that the Law and Development movement suffers from both an inability to get good results (if we could figure out what “good” results actually are) and a lack of follow up regarding implementation efforts.

As to the former, it is not clear to me that those of us in the field actually know what results we want to achieve—or that we can actually (and accurately) measure them. Mariana Prado noted that in some areas it is easy to gauge success, such as in antitrust or telecoms.<sup>1</sup> If telecom prices go down, Prado suggests, the antitrust suit is successful. I would argue that quantifying success is not so easy, even in these areas. In many cases, looking at easily quantifiable measures such as case counts or the number of successful prosecutions does not in fact measure success. Agencies might bring lots of small but unimportant antitrust cases to raise their number of wins. Moreover, agencies might bring a “winning” case even if the underlying economics behind the case do not mesh with any real consumer loss. For example, in a given developing world country, competitors might push the agency to bring a series of vertical restraints cases against efficient competitors.<sup>2</sup> Finally, even if lower telecom rates result from an antitrust win, is such a win really a success of Law and Development? We have serious endogeneity issues in trying to attribute reduced telecom rates to a

---

\* Assistant Professor of Law, University of Florida Levin College of Law.

<sup>1</sup> Mariana Prado, *Should We Adopt a “What Works” Approach in Law and Development?*, in *Symposium: The Future of Law and Development, Part II*, 104 NW. U. L. REV. COLLOQUY 174, 174 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/38/LRColl2009n38SympLaw&DevPartII.pdf> (link).

<sup>2</sup> See D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081, 1092 (2009) (noting that the second most provided antitrust technical assistance is in the area of vertical restraints) (link). Cf. James C. Cooper, Luke M. Froeb, Dan O’Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639 (2005) (providing a review of the empirical industrial organization literature that suggests that vertical restraints are pro-competitive).

particular technical assistance intervention.<sup>3</sup> It could be that rates would have gone lower regardless of the antitrust case. Foreign entrants, changes in technology across platforms (such as voice over internet or wimax), or a change in tariff policy by the telecom regulator may have affected telecom rates.

More broadly, I would suggest that certain Law and Development goals do not lend themselves to measurement; it may well be impossible to measure the success of these goals. We may want the world to look a certain way, and foreign governments, international lending agencies, and/or academics may act to implement a Law and Development program based on such goals. At what point can we view such efforts as successful? Some programs are long term in nature and the benefits they yield are indirect. Let us investigate, for example, legal training for judges. One concern of the larger business community is the existence of legal predictability and well-reasoned decisions in developing countries. I think that the work that Susan Franck has done on international arbitrations is, ultimately, about businesses choosing an alternative mechanism for dispute resolution because of a lack of confidence in both the process and outcomes of the local legal system.<sup>4</sup> Let us assume that a foreign-sponsored technical assistance program begins training for judges, particularly for those judges that have to deal with issues of economic regulation, commercial and contract law, or are a part of the general court system, such as supreme courts. Let us also assume that pay is high enough in these courts that turnover of judges is not an important issue and hence training is not wasted. If, over time, we think that regardless of a particular decision, overall we are seeing better reasoned and fewer arbitrary decisions, then this is money well spent.

However, such a transformation takes time. If done correctly, I think this sort of judicial training must begin at the university level. Maybe you might think this makes me a throwback to the 1960s and a believer in the money that the Ford Foundation spent on law schools in the developing world.<sup>5</sup> But I think that the issues the Ford Foundation pushed, such as creating more law schools for greater access, may not have been the issues that carried the day. A significant problem in legal education is that law is overly doctrinal and misses important big picture issues that affect how to understand law's role in larger societal change. I think a more interdisciplinary approach to law teaching must be taken in law schools—an approach

---

<sup>3</sup> In fact, it's entirely possible that rates in our hypothetical telecom example would have gone even lower than they did after the antitrust suit absent government intervention.

<sup>4</sup> See Susan D. Franck, *Investment Treaty Arbitration and Law & Development*, in *Symposium: The Future of Law and Development, Part II*, *supra* note 1, at 178.

<sup>5</sup> See, e.g., Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, The Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 474 (2004) (“[The BCI] believed that for too long ordinary Indians lacked access to the legal process, and to remedy this problem, the BCI approved the opening of hundreds of new assembly-line law colleges during the 1960s and 1970s.”).

that incorporates the latest thinking in regulation. Certainly, an economic analysis of both public and private law is important, but so too is an understanding of the broader political economy that looks at both the economics and the larger political and social context of law.

Even were we to rework law school curricula in the developing world, however, I am increasingly convinced that there is no silver bullet that will solve the many factors leading some countries to lower levels of development than others. On days that I feel frustrated, I wonder if we might just be better off packing up and doing nothing; lots of Law and Development interventions have caused more harm than good,<sup>6</sup> or have done good in the short term, but later have proven “unsustainable.”<sup>7</sup> If it is not clear that law-related interventions have done more good than harm, then why continue with such policy interventions? In a world of uncertainty, we continue because we believe that Law and Development *should* matter.<sup>8</sup> As a matter of economics and political science, we have yet to determine that as part of the larger development puzzle that law *does* matter.<sup>9</sup>

If, however, we choose to undertake a policy of Law and Development, we have a fundamental problem: where to begin. Choosing which of the many factors to attack first is the hard part. In this respect, both those who perform quantitative (Kaufmann)<sup>10</sup> and those who perform qualitative (Ohnesorge and Pistor)<sup>11</sup> studies have important contributions to make. The

<sup>6</sup> Cf. Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 937 (2008) (“[S]o long as there is genuine uncertainty about whether law matters there is a distinct possibility that not only will legal reform not have any positive impact on development but that the resources invested in legal reform might have been deployed in some other fashion that would have a greater impact on development.”).

<sup>7</sup> Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53, 85 (2009) (link).

<sup>8</sup> See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 231 (2006) (“Economy policymaking is necessarily carried out under conditions of uncertainty—uncertainty about the facts and about underlying principles and causes. So decisions whether to change legal institutions and substantive law will be taken—if only by inaction—in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions—both the rules of the game and law’s organizations, especially the judiciary—do not matter.”).

<sup>9</sup> Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT’L L. 141 (2004) (explaining the limitations of information that cross-country variables provide); Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 L. & SOC. INQUIRY 1095, 1104–16 (2007) (addressing the limitations of the World Bank’s Doing Business data).

<sup>10</sup> See Daniel Kaufmann, *Rule of Law Matters*, *infra*.

<sup>11</sup> See John Ohnesorge, “Beijing Consensus,” *Anyone?*, in *Symposium: The Future of Law and Development, Part V*, 104 NW. U. L. REV. COLLOQUY (forthcoming 2010); Katharina Pistor, *There Is No Single Field of Law and Development*, in *Symposium: The Future of Law and Development, Part I*, 104 NW. U. L. REV. COLLOQUY 164, 168 (2009),

beauty of the quantitative approach is that it gives us a series of global benchmarks. However, the models may make faulty assumptions, which impact the potential findings. One limit that I see to the qualitative work is that it is very time intensive, and the academic rewards for doing such work are not great. A qualitative project will not place well in the world of economics or finance journals, and will likely not do well in law journals if it deals with the developing world. On the margins, that will not stop a number of tenured people from undertaking this work. However, it does mean that not enough junior people will be engaging in it because of a fear that it will not lead to career advancement. Moreover, it is not always the case that good data is available, and the inferences that may be drawn from such a research project may be modest.

Now to respond to some of the other participants in this Symposium, I think that Yuka Kaneko overreaches a bit on the success of the U.S. model when exported around the world.<sup>12</sup> Let me again take antitrust, the field that I know best. Although the Chicago School won in the United States, it has lost out in most other jurisdictions. Most jurisdictions have adopted an EU model for their own substantive competition law.<sup>13</sup> If the Chicago view is generally skeptical of intervention based on an error/cost framework,<sup>14</sup> most of the rest of the world has chosen a far more interventionist approach, particularly relating to monopolization.<sup>15</sup> Similarly, I think that there is a split in Anglo-American corporate law, with the British far more uneasy about director supremacy than Americans.<sup>16</sup> Around the world, corporate governance across systems seems to have improved upon, and perhaps converged around, best practices (perhaps because so many systems experienced corporate crises at similar times due to scandals).<sup>17</sup> Significant differences re-

---

<http://www.law.northwestern.edu/lawreview/colloquy/2009/37/LRColl2009n37SympLaw&DevPartI.pdf> (link).

<sup>12</sup> See Yuka Kaneko, *An Asian Perspective on Law and Development, in Symposium: The Future of Law and Development, Part III*, 104 NW. U. L. REV. COLLOQUY 186, 195, 196 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/39/LRColl2009n39SympLaw&DevPartIII.pdf> (link).

<sup>13</sup> See DAVID GERBER, *GLOBAL COMPETITION LAW, MARKETS, AND GLOBALIZATION* (forthcoming 2010) (explaining the imprint of the European Union in most competition laws and that of the European Union and United States in their application).

<sup>14</sup> See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

<sup>15</sup> David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161, 182 (2009) ("Much unilateral conduct analysis is not, indeed, based on sound economic principles in many jurisdictions including the [European Community].").

<sup>16</sup> See, e.g., Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation* (Washington & Lee Legal Studies Research Paper Series, Working Paper No. 2009-08, July 9, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1431952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431952)## (link).

<sup>17</sup> John Armour et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMPIRICAL LEGAL STUD. 343 (2009) (showing a convergence over time of legal standards regarding shareholder protections across legal origins).

main, however, and it is not clear to me that the majority follows an American model.

Finally, we have another problem: governance matters except for when it doesn't. Part of this is due to an issue that we have not yet addressed: size matters. I think that the size of the country and its internal market plays a big role in Law and Development. If China makes a number of mistakes, to a certain extent those mistakes are irrelevant; China is a large country with a huge economy. Foreign direct investment will continue to come in regardless of whether China does well on governance issues. Governance in small- and medium-sized economies, on the other hand, matters. If you are a small country, you are competing with other small- to medium-sized economies around the world. The quality of your legal and regulatory institutions matters, and you need to create the kind of development interventions that attract investment into your country. Of course, what part of this observation is "Law" and Development, I am not sure. In many situations, it is difficult to disentangle the "law" part of the development program.

Veronica Taylor raises some really interesting points about some of the complexities of what makes something Law *and* Development, and the motivations behind it.<sup>18</sup> In antitrust there has been some exporting of antitrust law and development that plays to larger political goals, in addition to certain technocratic goals.<sup>19</sup> Antitrust agencies, international donors, academics, and private law and economics firms from the United States, Japan, the EU, various EU member states, and OECD all have tried to influence the make-up of the emerging Chinese antitrust regime. Each provider of assistance has its own motives.

These various thoughts lead to a broader set of conclusions. Donors, providers, recipients of Law and Development, and academics who study it do not spend as much time as necessary doing post hoc detailed evaluations of particular projects or broader country and regional studies of development missions that are publicly available. One of the best ways to learn about creating a better set of interventions is the study of previous interventions with an honest assessment of what has gone right and wrong. Many aid organizations set up performance benchmarks that seem divorced from reality in order to get more funds for the next set of interventions, implying that there needs to be greater external review of Law and Development efforts. However, there is one caveat we should consider before we begin such a review: each stakeholder—academic, recipient, donor, and provider—has his, her, or its own motivation in deciding how to frame success and determining whether such success is achieved. This brings me back to

---

<sup>18</sup> Veronica Taylor, *The Militarization of Rule of Law*, in *Symposium: The Future of Law and Development*, Part V, *supra* note 11.

<sup>19</sup> See D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI-KENT L. REV. 231, 272–73 (2008).

my earlier point. Until we have a sense of what “good” results are, we cannot properly evaluate if we have reached them.

## RULE OF LAW MATTERS

*Daniel Kaufmann\**

Let me first briefly reflect upon three disparate circumstances, centuries and worlds apart—institutions in Kenya and in the United States today, and those ruling the mighty seas hundreds of years ago. Although convention may classify these events as disparate, a common thread among them emerges: each challenges established wisdom on Rule of Law at very basic and practical levels. In each case, *de facto* application of rule of law fundamentally departs from the *de jure*.

First, consider Kenya in 2007. The main aid donors, led by the World Bank and the United Kingdom's aid agency, DfID, tended to praise the governance reform efforts of the Kenyan authorities, including those on legal initiatives and anti-corruption.<sup>20</sup> Subsequently, in the run-up to the presidential elections, these top donors, also including the United States, flooded the Kenyan government with funds. Kenya's government was even awarded a special international prize recognizing its good governance efforts.<sup>21</sup>

Elections were held a few short days after the release of the last 2007 World Bank press release in Kenya, which announced yet another project funding approval for the government.<sup>22</sup> The elections were widely regarded as rigged (by external organizations, such as the EU, and by many Kenyans)<sup>23</sup> in what was the culmination of years of systemic political corruption that infiltrated key legal and judicial institutions. Civil strife erupted and the full extent of the breakdown of law and order was exposed at a dire

\* Senior Fellow, Global Economy and Development, Brookings Institution.

<sup>20</sup> The World Bank, *Strengthening World Bank Group Engagement on Governance and Anti-Corruption Consultation Feedback: Kenya*, Jan. 26, 2007, [http://siteresources.worldbank.org/EXTGOVANTICORR/Resources/Kenya\\_UPDATED.pdf](http://siteresources.worldbank.org/EXTGOVANTICORR/Resources/Kenya_UPDATED.pdf) (link).

<sup>21</sup> The World Bank, *Kenya Earns Global Prize for Progress in Governance*, June 26, 2007, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/KENYAEXTN/0,,contentMDK:21401029~menuPK:356529~pagePK:2865066~piPK:2865079~theSitePK:356509,00.html> (link); *Seven Questions: What's the Matter with Kenya?*, FOREIGNPOLICY.COM, Feb. 2008, [http://www.foreignpolicy.com/story/cms.php?story\\_id=4210&page=0](http://www.foreignpolicy.com/story/cms.php?story_id=4210&page=0) (interview with John Githongo, former anti-corruption czar in early years of the administration of Kenyan President Mwai Kibaki) (link).

<sup>22</sup> Press Release, The World Bank, Kenya: World Bank Approves US \$150 Million Water and Sanitation Project (Dec. 20, 2007), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21594967~menuPK:34466~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (link).

<sup>23</sup> *Kenya's Dubious Election*, BBC.CO.UK, Jan. 8, 2008, <http://news.bbc.co.uk/2/hi/africa/7175694.stm> (link); U.S. DEP'T OF STATE, KENYA: 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2007/100487.htm> (link); Press Release, European Union Election Observation Mission: The Republic of Kenya, Doubts About the Credibility of Presidential Election Results Hamper Kenya's Democratic Progress (Jan. 1, 2008), *available at* [http://www.euomkenya.org/Main/English/PDF/PR\\_01\\_01\\_08.pdf](http://www.euomkenya.org/Main/English/PDF/PR_01_01_08.pdf) (link).

cost—thousands of lives were lost and vast socio-economic damages were inflicted.<sup>24</sup> Yet, the main aid donors appeared to be *shocked* that such corruption and turmoil could take place in Kenya.<sup>25</sup>

Around the same time half the globe away, and worlds apart, some rule-of-law institutions were being quietly undermined inside the world's superpower, the United States. In April 2004, amidst euphoric financial sector growth, a meeting was held in the basement of the Securities and Exchange Commission (SEC).<sup>26</sup> The top executives of the main Wall Street investment banks gathered to weigh in on proposed SEC regulations that would relax restrictions on their investment houses.<sup>27</sup> A scant fifty-five minutes later, the investment bankers emerged with SEC approval; the new regulations exempted the investment groups from the leverage restrictions that apply to commercial banks, allowing the banks to massively expand their debt.<sup>28</sup>

In return for an enormous expansion in indebtedness, the investment banks agreed that the SEC would have more oversight over them, for which a special unit would be formed.<sup>29</sup> In practice, the oversight did not take place. In fact, the head of the SEC never created or staffed any such oversight unit.<sup>30</sup> The resulting financial debacle that followed is now well known. What is insufficiently appreciated is the fact that various manifestations of “soft” and “hard” forms of regulatory and legal *capture* by the elite financials were a factor leading to the crisis.<sup>31</sup>

Let us not merely stay in the present day. Lessons from history do matter. Rewind to over 300 years ago, when it seemed that naval shipping was an effective institution ensuring law and order on the seas. Partly abetted by the industry's own internal organization and tendency to abide by the law,<sup>32</sup> commercial shipping also thrived. These two organizations—naval

<sup>24</sup> See Kenya's Dubious Election, *supra* note 23; U.S. DEP'T OF STATE, *supra* note 23.

<sup>25</sup> Press Release, Joint Statement by the African Development Bank and the World Bank on the Situation in Kenya (Jan. 18, 2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21618245~menuPK:34466~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (link). Note that from the time of the alleged electoral rigging and the resulting eruption of violence took place, it took weeks for the multilateral institutions to come out with such a formal statement.

<sup>26</sup> Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt*, NYTIMES.COM, Oct. 2, 2008, <http://www.nytimes.com/2008/10/03/business/03sec.html?em> (link).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Daniel Kaufmann, *Corruption and the Global Financial Crisis*, FORBES.COM, Jan. 27, 2009, [http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09\\_0127corruption.html](http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html) (link).

<sup>32</sup> For the modern treatises on maritime law that build upon this tradition, see STEVEN F. FRIEDEL, BENEDICT ON ADMIRALTY (7th ed. 1988); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (1987).

and commercial shipping—contrasted sharply with the institution that encapsulated all that was anathema to law and order: piracy. But as it was with both the official (and superficial) assessment of the (“well governed”) Kenyan government and of the (booming) U.S. financial industry, there was much more to the whole industry of overseas shipping than met the eye. Once again, as we shall explore below, excessive focus on the *de jure* and inattentiveness to the *de facto* rule of law and regulatory regime results in formalistic misinterpretation of the actual reality.

These three admittedly idiosyncratic illustrations force us to think again. That these events occurred at all, against expectations, gives rise to questions about many conventional premises held in the Law and Development and Rule of Law fields. For starters, they may illuminate why billions of dollars channeled by donors to countless Law and Development projects have generally not fared well.<sup>33</sup> Yet, they also illustrate that Rule of Law challenges are rife beyond the *development* field. The traditionally sharp divide between developing and developed countries implied in “Law and Development” might not be that helpful any longer.

Building on these three anecdotal illustrations, I make five observations. They are interrelated and thus not mutually exclusive, and are focused on what in my view constitute some shortcomings in the Rule of Law writings from a policy analysis perspective.<sup>34</sup>

First, as hinted, there has been an *excessive legalistic focus on de jure aspects in rule of law, to the detriment of the de facto reality*. Focus on the *de facto* implementation of adopted laws matters because such implementation tends to deviate from what is codified by fiat. *The gap between de jure and de facto is vast in scores of countries*. Practitioners in those countries (and project staff in donor agencies) often know in advance that many donor-mandated legal covenants adopted by fiat are unlikely to be implemented in practice.

This leads to the second concern: the gap between the *de jure* and the *de facto* is in large measure due to the *informality* in the application of the rules of the game in the legal and regulatory institutions. Insufficient attention is paid to the workings of such informal rules of the game. Instead, the formal *de jure* approaches tend to dominate in legal writings. We have found, empirically, that informality, through corruption and other such distortive implementation institutions, is more indicative of how long it takes

---

<sup>33</sup> For a detailed and probing critique of the ineffectiveness of Law and Development foreign aid programs (and on how different the “field” is nowadays than it was forty years ago), see the writings of Thomas Carothers, including PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006). For further critiques, see William Easterly, *Can Foreign Aid Buy Growth?*, 17 J. ECON. PERSP. 23 (Summer 2003); Raghuram G. Rajan & Arvind Subramanian, *Aid and Growth: What Does the Cross-Country Evidence Really Show?* (IMF Working Paper No. WP/05/127, June 2005), available at <http://imf.org/external/pubs/ft/wp/2005/wp05127.pdf> (link).

<sup>34</sup> Of course, there are contributions that are exceptions to my criticisms, including some by the contributors to this Symposium. But, often, exceptions prove the rule.

for a firm to start operating in many emerging economies than the *de jure* legal requirements for business start-up.<sup>35</sup>

Third, the institution of *legal and regulatory capture*, which is a particularly insidious form of informality in the application of rule of law, has also been neglected in the literature. A few years back, based on a worldwide survey of enterprises, I calculated the extent of bribery in over a hundred countries.<sup>36</sup> But I also analyzed specially designed questions about *legal* corruption and capture.<sup>37</sup> I examined the extent to which firms, through legal means such as campaign contributions and connections, exerted undue influence on laws, regulations, and policies for their own private benefit and to the detriment of the rest of society.<sup>38</sup> The United States rated relatively well on the bribery scale, exhibiting relatively low levels of bribery.<sup>39</sup> In sharp contrast, it rated very poorly in the area of legal corruption and capture.<sup>40</sup>

Fourth, the three preceding observations—the gap between *de jure* and *de facto* rules of law, the *informal rules of the game* in general, and the phenomena of *state and regulatory capture* in particular—are all deeply *political* phenomena. Politics (not merely the political economy) ought to feature much more prominently in any diagnosis and action program related to Rule of Law and to Law and Development. Even today, in the United States, we tend to see technocratic knee-jerk approaches to financial regulatory reforms, as if technical regulatory fixes by fiat are the answer. There is limited debate (let alone reform) regarding the distortive role of *money in politics*, or on the need for *campaign finance and lobby reform*.<sup>41</sup>

Fifth, often the “Rule of Law” focus is overly *narrow, concentrating on law and order* (such as providing training and hardware to the police or study tours and computers to the judiciary), while neglecting the broader

---

<sup>35</sup> The legal requirements I refer to are those codified by the World Bank’s *de jure* Doing Business data collection legal experts. See The World Bank Group, *Doing Business 2010: A Record in Business Regulation Reform*, <http://www.doingbusiness.org/features/Highlights2010.aspx> (last visited Dec. 20, 2009) (link). For a synthesis of the analysis showing the dominance of informality (for example, corruption) over formality (for example, formal legal requirements) in explaining the actual length of time that it takes for an enterprise to start operations, see Daniel Kaufmann, *Corruption, Governance, and Security: Challenges for the Rich Countries and the World*, in WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2004–2005, at 83 (Michael E. Porter et al. eds., 2004).

<sup>36</sup> Kaufmann, *supra* note 35, at 83.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 92.

<sup>40</sup> *Id.* at 91–92. These findings are consistent with the SEC anecdote relayed above, which, like the survey, took place in 2004.

<sup>41</sup> A “technical fix” parallel illustration in development aid has been the fixation of aid donors with funding the creation of anti-corruption commissions following major corruption scandals in recipient countries. This reflects deep misunderstanding about the same corrupt vested interests that undermine the existing formal rule of law institutions and regulatory environment, which are highly likely to also capture these new (donor-funded) institutions.

and more relevant role (for economic growth and social welfare) of the rule of law. A broader strategy would concentrate on key issues, such as increased accountability, checks and balances, and judiciary reform, alongside the narrow law and order concerns, such as those mentioned above.<sup>42</sup>

Coming full circle, these thoughts bring me forward to the past: over 300 years ago, what was the real story on maritime shipping in general and on piracy in particular? Peter Leeson's gem of a paper on the comparative law and economics of shipping modalities is highly relevant.<sup>43</sup> He compares the internal organization of merchant, navy, and pirate ships in the 1700s.<sup>44</sup> Merchant and navy ships were absolute dictatorships, with the captain holding absolute unchallenged authority.<sup>45</sup> Pirate ships, by contrast, had democratic structures and regulations—internal rules of law—dividing authority between the captain and the crew.<sup>46</sup> There were checks and balances on the captain's authority and "pirate constitutions" specified how the spoils of piracy were to be divided.<sup>47</sup>

In essence, pirates devised two institutions to establish a functional internal rule of law system that prevented internal predation and crew conflicts, while maximizing profits: first, checks by the crew constraining the captain ("*not* rule of man"), and, second, their internal democratic constitution that minimized conflict and created piratical law and order.

The bottom line was rather stark, and totally at odds with conventional wisdom: pirate ships were extraordinarily successful at enabling internal rule of law and cooperation among a bunch of bloodthirsty guys with swords. Unlike the commonly mutinous conditions on the authoritarian and strife-torn commercial and navy ships of the day, pirate gangs were very successful enterprises.

Thus, navy and commercial shipping were (failing) organizations that were part of the "official" economy (one governmental and the other not as much) and ostensibly "governed" by official rule of law (with government's heavy hand), while the ("successful") institution of piracy was wholly informal, generating internal rule of law in a manner totally unrelated to any official or governmental organization. In fact, an improved understanding

---

<sup>42</sup> I am not a legal scholar, but an economist (and an admittedly selective student of rule of law). I have not found a definitive, compelling, or all-encompassing definition for rule of law. So I am drawn to the simple old antonym that views the rule of law as *what is not rule of man*. This view encompasses so much more than law and order, forcing one to oppose the tendency to equate the two.

<sup>43</sup> See Peter T. Leeson, *An-aargh-chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON. 1049 (2007).

<sup>44</sup> *Id.* at 1053–76.

<sup>45</sup> *Id.* at 1055–58.

<sup>46</sup> *Id.* at 1064–69.

<sup>47</sup> See *id.* at 1072–75.

of this historical picture may even yield implications to better address the piracy threats in the seas off Somalia today.<sup>48</sup>

Indeed, reality is not always as it seems, or what *de jure* states it is supposed to be. As shown by the episodes in Kenya and the United States in recent years, if only pundits, bankers, and donors had viewed reality through a less conventional lens, the landing may have been softer.

A further implication emerging from these musings relates to the use of data. With exceptions, the treatment of the theme of Law and Development (and Rule of Law) has generally been prose-intensive; many scholars have been reticent to probe deeper into empirical analysis. The fact that empirical measures are imperfect is not an excuse for ignoring the information that is available, particularly nowadays with such a rich plethora of comparable worldwide indicators available.<sup>49</sup> Paying more attention to the data—and not just “official” statistics—would have raised flags about the extent of capture in the U.S. financial sector, as well as on the subpar Rule of Law conditions in Kenya prior to those crises.

In fact, using non-official indicators as measures related to Rule of Law around the world, I and others<sup>50</sup> have found that rule of law does causally impact economic development and growth, particularly in the long term.<sup>51</sup> Still to be determined through further research are what components in rule of law are particularly critical, how such components vary depending on country context and how they interact with one another, and how politics and informal institutions fundamentally affect the application of rule of law.

Probing deeper into these questions may lead to changes in the strategies of donor aid institutions in the rule of law field. But these aid donor institutions are also politically constrained. Often, the imperative to push funds out the door drives allocation, the engine being narrow short-term geo-political considerations unrelated to longer term aid effectiveness.<sup>52</sup>

Thus, I would anticipate that the ongoing muddling through by the aid industry, hoping in vain that “business as usual” somehow delivers the legal

<sup>48</sup> See, e.g., Jeffrey Gettleman, *Somali Pirates Seize Five Ships in 48 Hours*, NYTIMES.COM, Apr. 6, 2009, <http://www.nytimes.com/2009/04/07/world/africa/07pirates.html> (link).

<sup>49</sup> The increasing availability of governance data has been accompanied by increasingly sophisticated statistical techniques to address the existence of margins of error, which exist for any indicator. See [www.govindicators.org](http://www.govindicators.org).

<sup>50</sup> See Daron Acemoglu et al., *Institutions as a Fundamental Cause of Long-Run Growth*, in 1A HANDBOOK OF ECONOMIC GROWTH 385 (Philippe Aghion & Stephen N. Durlauf eds., 2005).

<sup>51</sup> Daniel Kaufmann, *Myth #2: Only Rich Countries Can Afford Good Governance and the Rule of Law? On The Economist's "Order in the Jungle."* THE KAUFMANN GOVERNANCE POST, Mar. 13, 2008, <http://thekaufmannpost.net/myth-2-only-rich-countries-can-afford-good-governance-rule-of-law-on-the-economists-order-in-the-jungle/> (link).

<sup>52</sup> ORG. FOR ECON. CO-OPERATION & DEV., *THE CHALLENGE OF CAPACITY DEVELOPMENT: WORKING TOWARDS GOOD PRACTICE* 7 (2006), available at <http://www.oecd.org/dataoecd/4/36/36326495.pdf> (link); Daniel Kaufmann, *Aid Effectiveness and Governance: The Good, the Bad, and the Ugly*, BROOKINGS, Mar. 17, 2009, [http://www.brookings.edu/opinions/2009/0317\\_aid\\_governance\\_kaufmann.aspx](http://www.brookings.edu/opinions/2009/0317_aid_governance_kaufmann.aspx) (link).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

goods, may continue for some time among the key bilateral and multilateral donor agencies. But I hope that some exceptions among a few donors, perhaps Australia and/or a Nordic country, alongside a far-sighted private donor organization, may buck this ill-advised trend and challenge the conventional approach among the larger aid donors.