Chapter 17
The Trade Offs Between Common Law and Civil Law: Are We in the Right Ball Game?

Albrecht Stockmayer

17.1 Introduction

"We're all lawyer wannabes," Florencio Lopez de Silanes Molina has been reported saying, which might account for some of the criticism he has come in for (Thompson 2005). The following chapter does not adopt an economist's wannabe perspective. It adopts the viewpoint of advisors on governance and law reforms of the German development cooperation organization (GIZ), i.e. advisors trained in a civil law system but dealing with many systems that follow different paths. And in this capacity we have learned quite a bit from the discussion. And we owe legal origins theory (LOT) a debt of gratitude since the discussion has kept the issue of law reform in the limelight.

On the other hand, we are asking ourselves what this discussion is really all about. Since in many areas common law countries have given themselves a great number of statutes and civil law countries have areas of law that are shaped by case law, it is hard to believe that some of the claims that are associated with LOT publications really stand on their own feet and do not refer to another arena. It is an arena described by some actors as battlegrounds, the most prominent being the institutions of economic order and of the judiciary (Luchterhandt 2007). In particular in some areas of the world such as in south eastern Europe or in the Caucasus or parts of Central Asia, some of the more prominent organizations of advisory services have been planting their flags. At times this was done deliberately in

This chapter is an amalgamation of two representations, one to the workshop on "Institutional Competition between Common Law and Civil Law in Developing an Transforming Countries", March 10, 2009 and one to the symposium on "Legal Origins and Access to Justice in Developing and Transforming Countries" February 16 and 17, 2012, both at the University of Louvain in Louvain-la-Neuve.

A. Stockmayer (✉)
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Dag Hammarskjöld-Weg 1-5, 65726 Eschborn, Germany
e-mail: albrecht.stockmayer@giz.de

M. Schmiegelow and H. Schmiegelow (eds.), *Institutional Competition between Common Law and Civil Law*, DOI 10.1007/978-3-642-54660-0_17,

order to shut others out. And again in some instances the reasons for shutting other partners out might have to do with the arguments advanced by LOT.

This competition or the fight on the battleground is not an anomaly. In many cases, the battleground shows that institutions do follow different paths. And the incentives and structures that characterize the organizations are of course responsible for the way advice is spread, "how often, with what force, by whom and to whom" (Schauer 2000). LOT's arguments—taken on board by the Doing Business Survey of the World Bank—may have to be understood in this light.

This chapter will therefore not discuss the merits of the argument that legal origin matters. It will reflect on the principles that are shaping our approach to advisory services to strengthen the rule of law. It is based on the experience of long-term advisors in the field of legal cooperation.

17.2 Principles Guiding the GIZ Advisory Work on Legal Development

One of the outstanding advisors, Rolf Knieper, has summarized his experience. He had the good fortune to start his career as an advisor in legal development in Central Africa, which gave him a head start over those advisors that in the late 1990s worked in transformation countries; and later to round up his experience in the Far East. In an account that appears almost to be the "summa" of his advisory work, Knieper discussed, in a somewhat detached but still very much engaged manner many of the questions that are taken up in this chapter (Knieper 2006, 2010). Our current practice has benefitted from his experience.

This chapter starts with some perspectives of legal advice as part of the larger area of development cooperation. It then goes on to deal with some issues around topics related to the teachings of LOT. It ends with lessons we have drawn from this discussion or which have been confirmed in the course of the discussion.

17.2.1 Three Perspectives

For the GIZ, legal advice is part of development cooperation. Hence, the three following perspectives are important to understand our approach to legal origins:

- We never experienced a case where we had to build a system from scratch. We might encounter expressions of an interest to receive advice on a particular legal system. But this is an expression of policy sometimes prompted by a historical experience or an imagined history. So if legal origin matters, they do so only to the extent that they are absorbed by the system in place.
- The legal origins debate has helped us to rethink and refine our approaches. In particular, it was helpful to better understand implicit values and experiences

that influence our work and the necessity to be more transparent in dealing with these principles and values.
- Discussions focusing on legal origins underscore the precarious position of the so-called transplants—and again the importance of a locally defined equilibrium between global trends and systems, and local conditions as well as the ability to manage the difference.

17.2.2 The Playing Field for Rule of Law Advisory Services in Development Cooperation

The horizon of development cooperation is wider, yet different from the objectives of prosperity, wealth creation or straightforward growth that are usually formulated as outcomes of the creation of property rights. Our legal advisory work aims at the three overarching, related tasks of the German Development Cooperation, good governance, sustainable development and the reduction of poverty. To keep these in mind helps to structure advice, the reform context and the overall policies framework within which one has to situate the advisory relation. With these overall goals present it is useful to rethink the link between legal reform and development.

For new institutional economics there is a functional agenda presented very clearly by Richard Posner:

> A modernizing nation's economic prosperity requires at least a modest legal infrastructure centered on the protection of property and contract rights. The essential legal reform required to create that infrastructure may be the adoption of a system of relatively precise legal rules, as distinct from more open-ended standards or a heavy investment in upgrading the nation's judiciary (Posner 1998, p. 1).

This is a clear and unambiguous statement of the link between "relatively precise rules"—on other occasions one finds the recommendations for so called "bright line rules," i.e. rules that prescribe behavior with a kind of mathematical precision—and development. The benefits of having these rules are deemed even greater than the outcomes of an investment in upgrading the countries' judiciary.

A functional relation between the law and the way investors and regulators behave is certainly a given. But is it the only way to link legal development to development in general? And is the relationship "one dimensional" and "one directional"? The latter especially would be hard to believe since development in general must have some repercussions on the way legal development proceeds and the results it provides.

Sen (2000) has offered another way of seeing things. He started with the question of how law and development are connected. He came to the conclusion that there is a rather complex nexus between legal development and development. This might not be surprising since his idea of development is epitomized in the enhancement of people's capabilities—their freedom to exercise the rights and entitlements according to their abilities and wishes.

Legal development—to use that example first—is not just about what the law says and what the judicial system formally accepts and enforces. Legal development must, constitutively, take note of the enhancement of people's capabilities—their freedom—including their freedom to exercise the rights and entitlements that we associate with legal progress. Given this need for conceptual integrity (in this case, the need to see legal development not just in terms of legislation and laws but in terms of effective freedoms and capabilities), all the instruments that causally influence these freedoms must be taken into account in assessing what progress is being made in enhancing the development of a successful legal and judicial system.

17.2.3 Principles Based on General Governance and Development Issues

After having set out the development cooperation playing field let me start with some of the principles we cherish in our work. They have a bearing on the subject of legal development although they are based on general development cooperation advisory work.

17.2.3.1 It's the Process, Stupid . . .

Design (of legal reforms) certainly is an essential element of legal development—and therefore the origin of a legal system may be of importance because it should influence the design. But reforms are determined to an equal measure by the **process**: the process of starting reforms, sharpening the policy and program issues, developing possible designs, understanding the interests and the actors behind the reform, exploring the context of previous provisions and possible new ones, looking for alliances, empowering those that are affected or instrumental in making the reform a success, etc., has turned out to be decisive.

Many have been surprised by the traps and ambushes laid out against reforms or reformers. To the reformers who had their designs ready, most were totally unexpected, as Lopez de Silanes reports of Mexican judges that united against legal reforms (Lopez-de-Silanes Molina 2002). For outsiders, law appears to be a discipline of crystal clear and forthright solutions: you win or lose your case, you have rights or you don't have them, etc. So, to them, the reform track appears clear—you go from lawless situation to the rule of law, from the rule of discretionary power, to the rule of the civil or common law or from a program culture to a (human) rights based culture. Unfortunately, these are circumstances not found elsewhere in development. Reforms and policy making present a rather different picture, and even more so in developing countries. It has been succinctly outlined by Nordic development cooperation practitioners:

> Policy making in LDCs is primarily about mobilization and use of resources in a process characterized by conflicts and bargaining under conditions of constant change, resource scarcity, inadequate knowledge and insufficient capacity. (Therkildsen et al. 1999, p. 12).

17.2.3.2 Taking (Cross-Country) Analyses with a Pinch of Salt

The type of cross-country analysis used by authors of LOT in order to come to meaningful results makes a simplification of inputs and a selective interpretation of the results necessary. In other words they have looked for and presented a reality that cannot be found on the ground. Their initial assumptions and final conclusions seem to depend on too many short cuts: they interpret reality in a way that only allows for clear-cut answers. Their binary method of filtering the presence or absence of political, economic and legal conditions across a great number of countries produces an extremely selective and highly stylized picture of reality. This comes at the cost of losing many finer points or simply stopping further explorations. So, analysts and policy makers involved in legal reforms who are looking for facts—and reality is full of facts, get somewhat exasperated by such methodological shortcuts. Kenneth Dam in his study on the Judiciary and Economic Development compared several of LOT's findings with the more detailed reality he saw as a comparative lawyer:

> The title "Judicial Checks and Balances" leads off what purports to be an analysis of the distinction between French-style "separation of powers", which is concerned with preventing the judiciary from interfering with the sovereignty of the legislature, and US – style "checks and balances," which is concerned with allowing each of the three branches—executive, legislative and judicial—to check and balance the other two branches.
>
> Against that contextual background the legal origin authors find that common law systems do better than civil law in protecting "economic freedom" (though they find no significant difference in protecting "political freedom"). They proceed with their conventional analysis based on private law origins, despite the fact that Britain does not allow the judiciary to check and balance the legislature, which, as seen above, is in Britain considered sovereign, just as was traditionally the case in France. The authors proceed with their conventional analysis based on the origins of private law, despite the fact Britain, the original common law country, does not allow judicial review whereas many civil law systems, in Europe and Latin America, do indeed allow the judiciary to check and balance the legislature through judicial review. (Dam 2006 at p. 31)

What we are reminded of here is that many stories are told in order to make the case for legal system that fulfills the expectations of those looking for clear-cut and precise rules or contracts. These stories usually end with the conclusion that rights and contracts need to be enforced in their terms and written down in considerable detail, as if detail could be any insurance against the risk of unforeseen circumstances. Every so often Max Weber is called upon as a witness for associating the formalization of legal positions, which further development. Informal, oral, opaque and undifferentiated rules and institutions are supposed to hinder development. But then Max Weber himself drew the attention of his readers to the example of nineteenth century Britain that went through an extraordinary period of industrial

development although it had an opaque and, for outsiders, surely incomprehensible system of property rights for land and similar assets.

17.2.3.3 Do Not Rely on Extravagant Assumptions of Causal Development That Have Not Been Proven Historically

Development cooperation from the outset appears to be based on the idea that there is one clear concise and predictable way from the state of underdevelopment—as it has been understood in the Point Four Program of President Truman—to a state of development. Now, for President Truman that state was clear: it was a state where everybody enjoyed democracy, freedom etc., i.e. all those benefits the other side of the cold war bipolar system could not or did not want to deliver. For development cooperation this state may have originally been better presented in macroeconomic terms. But later the aims did change regularly and so did the intermediate milestones that would indicate that one was on the right track. And this works pretty well for the Millennium development goals, which are measurable. Every cent spent translates into progress towards these aims.

For social and political goals, determining the activities, the directions and the milestones to follow, appears to be somewhat more difficult. For many years now, legal development advisors have been trying to find indicators that are more appropriate to show that we are on the right track for the rule of law. We realize that it is exceedingly difficult to develop such a collection of indicators. And we suspect that indicators that satisfy the development cooperation community will be of little interest to our partners. But even if it would be feasible we are still a long way from establishing the intrinsic value of the rule of law for economic development. It will not only be difficult to design a road map between the rule of law and economic development, but we might even run into difficulties to establish the direction. We may find that we first need economic development before we can claim to make progress on the route to the rule of law.

For another example, consider the link between privatization and property rights. For the former communist countries in transition, the theory was put forward that the process establishing property rights could be expedited by the mass selloff of state enterprises to individuals: Karla Hoff and Joseph Stiglitz in their analysis of the emergence of the rule of law in post-communist societies found that several economists assumed that privatization would create a demand for institutions enforcing property rights and subsequently the rule of law (Hoff and Stiglitz 2004). They assumed that privatization offered an "enormous political benefit for the creation of institutions supporting private property because it creates the very private owners who then begin lobbying the government ... to create market-supporting institutions." The holders of property rights of privatized enterprises would constitute a powerful lobby for institutional reform, which in turn would lead to the emergence of the rule of law. This chain of reform steps was expected to lead to growth and the creation of wealth. And it would both confirm the institutions and the effectiveness of property rights.

As posited by Hoff and Stiglitz there was logic in this theory. But the expected chain of events did not take place. Factors not considered or anticipated derailed the process. And the policy-makers who set out to put the theory into practice, certainly did not take any precautions to manage the risks that could have and in fact did arise on the way. In sum, predictions for this kind of processes, with the countless actors involved, the uncertainty of the initial conditions, and the difficulties of getting reliable information, have a very low degree of validity. And building elaborate strategies based on these predictions turned out to be neither effective nor professionally sound.

17.2.3.4 Do Not Come to Law "in Flight from Political and Economic Complexities"

When foreign legal experts assess the legal needs of developing countries they almost always seem to assume that the problems they have identified can be resolved by the enactment of new legislations.

But do they really look for a just system or are they tempted to use legislation or laws as a substitute for sound policies? They use a law in order to stop discussions that may be cumbersome and politically risky. Particularly in the area of economic policy, solving problems by enacting laws seems prompted by a desire to limit discussion, to avoid dealing with the many consequences an economic policy may have, and the political risks that policy might entail:

> Unfortunately this new interest in law and development is often accompanied by an ambition to leach the politics from the development process and to muddle the economic analysis. They turn to law all too often in flight from economic analysis and political choice (Kennedy 2003).

It is tempting to consider law a benign instrument, compared to policies that are perceived as directly linked to power, to interests and resources. Legal design—and the idea that it expresses an objective state of affairs—likewise is assumed to be immediately applicable. The fact that laws are usually negotiated in Parliament and that the texts are usually an expression of compromise—and most often not the product of a gifted legal scholar—is often overlooked.

The same observation has been made by a Japanese colleague when he concluded that the legal origin proponents have encouraged the hope that choosing law (through some sort of abstract legal 'good' approach) can substitute for the perplexing political and economic choices that have been at the center of development policy-making for half a century (Yamada 2008, p. 15).

17.2.3.5 Be Aware of the Legitimacy Trap

German development cooperation advisors like most of their colleagues in the field of bilateral cooperation do not enter a country for an advisory assignment without

being called to do so by the partner country and without an agreement between this country and the Federal Republic. So, one could conclude that this process of bringing German law into the situation is useful and legitimate. But that would assume that the request is the expression of profound analysis and a coherent thoughtful decision—which cannot be taken for granted. In addition, the executive branch might have other ideas than the judicial arm of government.

Being called in to prepare legislation might even be considered to be a warning sign: foreign lawyers with foreign ideas may replace domestic lawyers that would not want to engage in such risky efforts to prepare a piece of domestic legislation, which may be politically inopportune and technically unfeasible. So finally, foreign legal experts may not only substitute for their domestic colleagues, they may also act as willing helpers of a government unable to persuade its own legal specialists of the soundness of the government's ideas (Stockmayer 1998).

On the other side of the equation, we find a curious attraction for foreign legal experts to come up with rules and legal provisions (Faundez 2000):

- Firstly, simply because legal drafting in an open environment is something that most lawyers enjoy doing,
- secondly, because by training lawyers are attached to closed systems of rules supposedly capable of resolving current and anticipating future problems,
- thirdly, because foreign legal experts often do not have the time or the resources to analyze and enquire as to how the legal systems of recipient countries work before deciding whether prevailing rules and practices are effective or whether new rules are called for.

Foreign legal experts come with the firm belief that law can do the job. They very rarely ask themselves why existing laws are deficient and even less why they were called in and who called them in (Bryde 1986). Often, they do not have much confidence in the legislative process. Like other experts they are convinced of the intrinsic value of the proposals they offer. Neither do they much believe that the proposals could be stopped by the legislature, not least because very few have had any substantial contact with their own legislature at home. So, an unholy alliance can result between local politicians serving their clientele and their foreign, well intentioned, but inexperienced, legal consultants.

17.3 Law and Institutions

17.3.1 Laws and (Weak) Institutions

In countries where the institutional and political systems are weak, legal reform, indeed any major reform, is difficult and at times almost impossible to achieve. In such countries it may be difficult to distinguish the process of law-making from the process of institution building in general: The rule of law cannot be secured where

institutional frameworks are so weak that the laws are simply not accepted. Additionally, if the rule of law is constantly questioned it may be much more difficult to establish a stable institutional framework. In fact, the rules of the game have to be honored by all.

LOT often mentions the institutional environment of property rights. However, there is little if any mention of how institutions need to operate in order to make property rights effective. They pay scant attention to the analysis of local institutions, their constraints and their opportunities.

Most of the countries we are active in have weak institutions, and institutional frameworks, be it because they are emerging from periods of strife and unrest, or because they are still in transition; institutions are often still part of the process of regaining stability and capacities. Those familiar with the literature on political development and in particular with World Bank publications on governance, know that this is, and has continued to be an important issue for advisors on the rule of law (i.e. Frischtak 1997). The seminal World Development Report on the "The State in a Changing World" has reminded us, that weak institutions are a problem that cannot easily be resolved and will not go away overnight (World Bank 1997, p. 151). Yet, it appears to be easy to ignore these warnings and the facts behind them. Indicators that tell us that weak institutional structures will have a negative impact on the outcome of reform processes, on policies and on laws resulting from these processes, are brushed away.

On the other hand, if a state and the old order have collapsed, would this situation not provide an opportunity to build a legal order from scratch, from a *tabula rasa*? The idea that a post-conflict or post-regime change situation is the right time to overcome old institutional constraints is a tempting one. But are we allowed to assume that we enter a vacuum, a situation where laws and the supporting institutional environment can be created effectively following foreign precepts? As Knieper has convincingly shown even in situations where advisors came in at a point in time when there was not only a regime-change but also a system-change, we are never allowed to assume that there is a blank slate or that we can ignore what one could consider the remnants of the old order. Even in the former republics of the defunct Soviet Union there was never a justification for starting out with a premise that one could develop laws and legislation without first analyzing the existing institutional context (Wälde and Gunderson 1994). The same is true for so called fragile states, especially for those states that have emerged from a conflict. In both cases, the analysis might be more difficult because people follow rules and patterns that may be informal but may have a stronger normative power than some of the institutions that had been imposed by the old system.

But then how can we speed up institutional development in order to support a new legal order? Are there any natural or constructed sequences between establishing institutions and making laws one has to follow? Or can we assume that laws and institutions follow the same change pattern? Does institutional development follow universally applicable patterns?

Again that would mean that institutions are a technical construct. But experience shows that any change of institutions responds to very different social and political

parameters. Institutions are like laws driven by their local environments. They are driven by efforts to find a balance between a legitimacy based on local priorities and a legitimacy derived from foreign models that often, because of their being new, appeared attractive. Still whether this mixture is appropriate in the end is decided according to local criteria. At some point in the process, new institutions may even use their newly gained power to influence these criteria. Nevertheless, the process is dominated by locally negotiated compromise and by local preferences. Effectiveness, in the sense of optimal goal attainment, plays a secondary role (Andrews 2009).

There are, of course, situations where powerful local actors welcomed foreign influences and in fact based their legitimacy on imitating foreign models of institutional design. They were initially accepted because the design was the opposite of the former order. Unfortunately, many of these changed institutions, not least because they did not correspond to the emergent local environment, had to be replaced at great cost. In times of abrupt changes, there is little time for a profound analysis of the problem. It is tempting to adopt foreign models that correspond to a quick technical fix, all the more so, if these designs come with financial or other assistance or incentives. In such cases, the foreign model may offer borrowed temporary legitimacy at best, but it will seldom remain a lasting legitimate solution.

From institutional development we have learned that there is no short cut for the initial phase of identifying basic problems to be addressed by legislation or institutions. Reproducing laws as a method or a tool of technical engineering might have some attraction, especially if it comes from an environment that is considered "advanced." But to anchor this design in internal preferences requires an extensive process of adaptation.

17.3.2 Law and Its Application and Enforcement

Why do firms that can make use of both contracts and courts, use formal contracts but shy away from court proceedings? We don't know but there is, at the very least, a time lag between the introduction of formal law and its use by the target group. Often it is the result of preferences for informal mechanisms of equivalent value—at least in the eye of those that are supposed to avail themselves of the formal procedures provided by law. This is most obvious in those cases where "modern" and customary law are competing and at times in conflict. These cases can be predicted with some precision. But it would be difficult to predict the preferences of the parties who have acquired information and trust during a long-term relationship and who are not eager to submit this relationship to the scrutiny of a third party not privy to this relationship or to public proceedings. Going to court might be a sign that these parties are not willing to invest trust and reconciliation, but rather risk jeopardizing the relationship (Steer and Sen 2008).

We have encountered many cases where foreign advisors provided legislation, which ran into problems because it could not be enforced. This is the case if courts are not staffed adequately or where paralegals have not been trained in enforcement procedures. It is also the case where enforcement does not command the same attention as a bill of substantive law and there is a presumption of enforcement until the first case has been decided and enforcement turns out to be impossible. This is particularly the case where new substantive legislation has been approved and enforcement procedures need to be extended to be applicable to the new substantive area. Firms acquire information and trust through long term relationships; social and business networks are significant reputation mechanisms. And often there is no guaranty that after the court's verdict the reputation is not lost and the network relations are not broken.

The nature and importance of informal mechanisms and their relations to modern legal institutions appear to have changed somewhat over the time. Social networks—though still by far the most important source of information—seem to have become somewhat less important where court decisions have become more predictable and where the parties can understand the way the court came to its verdict. But this might take a long time. And it may imply a change of behavior not only through policies and legislation but also through the courts or in the case of administrative law through the public administration. As has been observed in the case of Colombia, taxation theory, tax law, and tax administration may be severely out of step. The increasing importance accorded tax administration from the late 1980s was partly the result of the apparent failure of abstract tax theory, so much so, that tax administration reformers drew the conclusion that "in developing countries, tax administration is tax policy" (Casanegra de Jantscher 1991).

17.3.3 Laws, Institutions and Informality

Another source of influence that interferes with the reception of foreign laws and procedures can be the informal mechanisms of solving problems that are supposedly the realm of laws and their enforcement. In many areas, daily exchanges and transactions are not based on law but rather on custom. And custom may permeate even those areas of the economy that, because they are part of the formal sector, are subject to legal proceedings. In this way, one can observe contracts and contracting that are based on patterns and behavior reproducing patterns of the informal economy. The test comes when laws are passed, courts and jurisdictions established and judges trained only to realize that contracting parties are reluctant to use the instruments the law provides or to litigate in a court of law. The same happens in bankruptcy proceedings. All the preconditions are met but creditors do not file applications to the courts.

Informal patterns of transactions and their purposes play two roles: First, they can substitute for formal legal instruments fulfilling the same role. Commercial relations need not necessarily to be cast in contract form. Second, informal methods

and instruments are deemed more appropriate to create confidence and build trust between parties. Therefore newly created institutional forms of dealing with a conflict may remain underutilized.

If legal proceedings are seen as a way to reconcile the resolution of a case with the law, would parties submit to these proceedings, if the acceptance of law in general is rather marginal and has not stood the test of time, while informal ways of settling conflicts are still held in high esteem? Why should the parties subject themselves to third party judgments discarding traditional informal practices, if they are not sure that their competitors do the same?

These phenomena are not unknown even in developed countries with particularly high rates of litigation in formal courts like Germany (Chap. 5). Deakin and Wilkinson (2000, p. 146) report that while German firms are more likely to have formal contracts than English firms, they are also much less likely to take legal action against a supplier or buyer committing a breach of contract.

17.3.4 Minding the Gap

One reason why legal experts often appear to disregard the features of the local context—and therefore overestimate the effectiveness of law transfers—is because in their own jurisdictions they can take the context for granted. Where institutions are stable, where they have the capacity to adapt to change and where all parts of the legal system are interconnected; legal reform slips into the process of social and political change in a relatively unproblematic way. So, one can hope that the probability of gaps between social reality and formal laws is low. At whatever point one starts with a reform one can assume that the system will absorb the reform.

But what if the institutions are there; they bear all the familiar names but follow a different rational? What if reformers do not realize that the institutions perform differently—because even if resources and objectives are the same, procedures are different, incentives are nonexistent, human resources and other means are different etc.

This may be due to the fact that courts are not (yet) considered an effective and impartial enforcement mechanism. An additional reason may be that courts are not expected to be effective in complex transactions involving specific kinds of investments. One of the basic predictions in the transaction cost literature is that in the presence of specific kinds of investments, courts become less relevant because they have an ‘informational disadvantage’.

17.3.4.1 Law and Information

Contracts are bound to be incomplete and information about complex contracts and relationships may not be ‘verifiable’ (i.e. cannot be proven) in court. Courts cannot

judge whether a breach of contract has occurred if they have no way of verifying whether the circumstances that call for an action have actually occurred. Verifiability depends on the parties being willing to disclose information about their business activities. This may mean an about turn of past practice. Secondly, judges will still lack the experience to handle more complicated cases especially if they don't feel implicated with the parties and the economy but only to the law authorities.

17.3.4.2 Law as an asset

Law cannot be regarded as an endowment, a given, a right, that provides a firm foundation for market activities or on the basis of which one can build an institution or even a political strategy. Governance structures of all types, including law, must adapt and respond to changes in expectations from the social and economic actors. Relationship development is a highly iterative process. Law and institutions or law and markets are best described as enjoying a dynamic relationship, a relationship without clear one-way causal links but in fact more like intermittent links (Milhaupt and Pistor 2008). Moreover these causal links work in both directions. At its best, law is gift, an endowment—but it needs to be recreated permanently.

17.3.4.3 Some Extravagant Assumptions

It is rather tempting to disregard this type of bi-directional and evolutionary relationship between law and institutions at a time when the supposed stability and transparency of law are very much in demand to foster the functioning of markets or to provide a dependable framework for institutions. One would like to take a big modernizing leap ahead with the adoption of "relatively precise rules" that would do wonders for investment and could avoid the hassle of upgrading an independent judiciary. With an "initially modest investment for law reform" one could start a virtuous circle that would help economic growth, which in turn would generate more resources (Posner 1998). Of course, one would need *self-enforcing limits* to interference from "political officials" into the rule of law (Weingast 1997, p. 262).

17.3.5 Designing Laws and Building Other Institutions: Reform Overload?

Reforming substantive law and governance institutions at the same time: would that not result in reform overload? As the agenda of legal reform expands, not least because it is unfeasible to transfer laws and the constitutional settlements of another

legal order, a serious danger has to be acknowledged that the institutional framework of many states may deteriorate as a result of the large number of reforms that have to be processed over a relatively short period of time:

- An overcrowded reform agenda makes it difficult for officials in charge of the reform process to have the time to understand its wider implications.
- An overcrowded agenda also reduces the time for consultation and deliberation.

Hence, apart from weakening the institutional system, an overcrowded reform agenda may unintentionally also undermine the democratic process. Viewing reforms as interrelated and cutting across sectors may entail serious risks:

- First, by trying to address the root causes for bad legislation and finally of poor governance, one may over-load the reform agenda;
- Second, even the most committed reformers may shy away from undertaking a great number of comprehensive and simultaneous reforms.
- Third, overloading the reform agenda can undermine the credibility of genuinely reform-minded governments. The long gestation times for rule of law reforms may overstretch the confidence invested by citizens.
- Finally, who can guarantee minimum standards of knowledge and skill in varied areas in all simultaneous reforms—and who can resist the temptation to use short cuts or to make assumptions that are unrealistic? (Linn 2001)

17.4 Reform Processes Develop Over Time: And We Have to React to Them

- Considering complex institutional arrangements—and the different time frames their reforms require to be operational,
- Considering the necessity to invest in enforcement and implementation in order to meet expectations and to guarantee a minimum degree of coherence,
- Considering the need to investigate and account for informal arrangements including patterns of behavior and possibly also pre-existing rules and standards that have temporarily fallen into disuse,

there is no avoiding long-term context sensitive programs to promote the rule of law that are in line with on-going development activities.

In countries with relatively well-established programs and activity streams we can observe these changes—and we can design complementary programs for the rule of law. The following is a typified large-scale program that illustrates the nature and the sequence of steps for a program and our contributions to the process (Ahrens 2004, 2005, 2008; Falke 2010; Jahn 2007; Julius 2008; Reichenbecher 2010).

17.4.1 First Phase

- Preliminary approach to issues of law in relation to the envisaged reforms and to the body of rules governing specified areas of reform e.g. economic development.
- Consequently, the topic of initial discussions would not be the rule of law as such but rather the way that economic, social, and sometimes political reforms could best be framed and promoted, based on a general understanding of law and of the specific legal instruments of the reform area.
- General information on the reform area's law are required, including the concepts and application of the law (e.g. in the area of economic law, corporate law, competition law, law of capital markets, securities law, labor law etc.).
- There is a need for deeper and more focused discussions on specific reform topics, mostly related to the creation and strengthening of an organization implementing new legislation for example, a Competition Office, a Patent Authority, a Consumer Protection Bureau so that laws and regulations on patents and trademarks could be discussed with these emerging or already existing institutions so as to research, classify and solve problems of application of reformed laws.

17.4.2 Second Phase

- Broad based scanning of legislations, procedures, transactions or policy measures currently under discussion or consultation.
- Addressing the issue of Sustainability and Capacity Development

The focus of the second phase should be on methods and instruments to develop legislation and to apply law in a very general sense consistent with the principles of the rule of law. This must be done while keeping any change within the framework defined during the first phase and bearing in mind the interests and preferences expressed through overall economic and social policies.

The confidence built up during this phase usually leads to requests to examine further the legal implications in various areas that were hitherto the sole and exclusive domain of political decisions and programs. In the PR China we started with rules and regulations for the audit office and its activities, from there moved on to the budget and its structure. We concluded by studying the budget and expenditure processes of various institutions having varying affinities to the law and regulation, and in general to the rule of law.

As far as the topics covered are concerned, we found a typical series of topics that was on the menu of the authorities because of international agreements or global constraints; these included trade and trade related law, the principles enshrined in the global trade order and from there moved on to topics somewhat removed from the economy, but in need of rules, standards and models to ensure

some predictability. For example, the growing group of (semi) autonomous entities and state enterprises needed some guidance on their new activities given that a new structuring order for the sector had not materialized. One such area is administrative law, with its objective of safeguarding a system that citizens can trust, that is fair, and can be relied upon.

17.4.3 Third Phase

The third phase needs to bring home the efforts deployed during the two first phases. Here the program moves into a more general dialogue on the evolution of the rule of law. This is done by applying law in many different areas, considering the intrinsic value of law as well as its functional value for particular concerns of the state and the economy, or the rights and duties of citizens. This phase would focus on law as a means to defuse conflict and to institutionalize conflict resolution in court or out-of-court. Furthermore, this phase would deal with institutions and persons that could play a specific rule in implementing the law, conveying its aims or developing them further. This approach would center on locally defined functions or on special forms of economic exchange, such as land, water etc. The aim is to internalizes the principles of law, and bring into the purview of law those issues previously dealt with outside of its scope. What is more, there is a great likelihood that many questions postponed in the earlier phases will emerge. These questions include special enforcement regimes and modalities and their limits, or delegated rule-making power for autonomous entities within the bounds of a legal framework. This phase may also develop assessment criteria and parameters for the legal institutions, and refine some of the first phase solutions to improve coherence and homogeneity of the system and its decisions.

Unfortunately we have had no possibility to analyze, investigate and evaluate this procedure, that is, the interplay between the phases, the institutions and the degree of satisfaction that has been achieved. While the steps have been well documented, we have never been asked to compare our procedure with that of those using legal origin or transplants for legal reforms.

These steps and types of advice are based on a model developed for countries coming from a history where law has had a marginal importance. The sequence of steps for countries with a rule of law tradition, many people trained in law, and a well-defined judicial system, will differ from the above model, but the process, I submit, might well be similar. The same three step sequence, approximation, consolidation, and outreach/problem solving, appears advisable, since the objective is to develop the rule of law based on local contributions.

Based on our experience, we suggest leaving the legal origin issue aside and to emphasize providing development expertise and a subsequently broader discourse on the rule of law. Instead of looking for an optimal selection of legal instruments to be imported, we prefer to proceed in phases in constant interaction with the local

context and the global debate on how to create a sustainable rule of law, while taking advantage of the lessons to be derived from comparative law.

Of course, all this is rather new and the evidence we can call upon to support these ideas is not yet very robust. But as far as our experience goes, we believe that a context-based process and its inclusive nature offer the best guarantee for a rule of law that can withstand external shocks, internal disarray and a more general loss of direction. The type and degree of system change we can aspire to and the comprehensiveness of the phased approach has been most often been positively commented upon in external evaluations of our work and its perceived virtues.

17.5 Some Concluding Remarks

17.5.1 Context of the Law

For advisory work to have a more lasting success the analysis of the *context of the law* is paramount. There are many elements, all part of the context, which shape legal outcomes: from the politics of legal reform, to the culture of lawyers, from the institutional capacities, to the knowledge of how the law works and how to make law work.

The context has additional importance. Even when advice relates "only" to legal texts, only very rarely are we allowed to pass over the fact that the application of the law needs to be considered when drafting a text. Any new law first needs to be published and the text needs to be disseminated. But this is only a beginning. While the texts are of an overriding importance when it comes to spreading the law and its effectiveness, the way it is communicated and is made available to the legal profession and those who seek access to the courts will determine in large measure its acceptance and the acceptance of rule of law principles more generally. Written texts may make all the difference when applying a law, but so does a settled interpretation of the texts and effective judicial practice.

17.5.2 Challenge of State Building

The challenge of legal reform in many places is comparable to the *challenge of state building*—creating an order that is based on a negotiated process of rule making and institutions that are able to transform this abstract order into reality, a reality that is acceptable to its citizens and appropriate for how they relate to each other. But does that mean that in order to make civil law type legislation operational we have to import the entire constitutional set up from France or Spain to get things going? Or can we think of a process whereby the order is designed step by step with many errors and reversals but with the help of great variety of tried and tested ideas?

17.5.3 Sustainability

This is one of our essentials when defining successful conditions for the rule of law. This distributes the burden of promoting a functioning state and society on many different shoulders, including institutions, and empowering people to take up their respective responsibilities. Where does this leave the somewhat oversimplified notion that common law is decentralized and community oriented law, while civil law is centralist and statist; does this mean that the French revolution should never have happened, or that people-based legislation based on extensive consultation does not fit into a civil law system?

17.5.4 Informality, Gaps and Misleading Terms

The entrapments of the uninformed are manifolds. One famous German comparatist, Ernst Rabel, experienced this when working in foreign legal systems (Rabel 1951). Here, legislation often is less than effective. It suffers from a mismatch between the three powers: they are sometimes neither independent nor separate. Institutions bear names that have little or nothing to do with their capacities or to their actual activities. The situation is anything but transparent and the outputs are often unexpected, surprising and outright astonishing. Often there is no rhyme or reason to the outcomes, both positive and negative. In this jungle, can we assume that its "legal origins" would protect the design of legal transplant or of a legal reform? Or wouldn't it be affected by its new environment and gradually loose the links to its origin? It would be amazing if the supposed links to its origin could survive these situations.

17.5.5 Asymmetry

At the same time, advisors suffer from *the asymmetry* of what they want and expect to see, what they want to do and what the reality on the ground allows us to. Transposing a piece of legislation from one part of the globe to another is often a source of pride and joy for those involved in the process. They identify with the laws transferred, the institutions that developed them—and possibly with the legal order these laws come from. But, this begs the question whether or not the achievements of other legal systems may not be much more deserving of wider dissemination: well-balanced and equitable social and legal institutions, or a pluralist and, in principle, more comprehensive and inclusive order to name but two possibilities. Negative reactions sometimes pop up when civil law is likened to statist centralized law whereas common law is depicted as decentralized, closer to the people and similar nice sentiments. But it may be difficult at times to distinguish

the issue of the negative reaction from a political attitude. This is particularly the case for judges—especially in systems, where judges are recruited from among politicians or from among slates agreed between the major parliamentary forces (Santiso 2003, p. 122). While they may claim to be part of the independent judiciary, their demands are directed at other branches of government often leaning another way on the political spectrum.

17.5.6 History

Rule of law consultation has not had a long *history*. We were reminded by Thomas Carothers, "What we have been treating as a field is only just starting to become one after 20 years" (Carothers 2007). The reason for this "delay" is the complexity of law reforms. From a policy perspective, the key to remove various bottlenecks requires not merely a top down approach in the change of the legal system but a bottom up approach by the users of these legal systems to overcome the obstacles preventing a better access to law and justice. Over time the civil/common law distinction will lose its interest. Instead we will categorize laws according to their resilience, i.e. whether countries' legal systems can survive shocks and adversity by absorbing aspects of other legal systems.

17.5.7 Impact and Value for Money

What are the continuing challenges for promoting rule of law as part of international cooperation? One obvious, if somewhat conceptually difficult challenge, is the issue of *impact* and *value for money*. We have been reminded over and over that the results of our work are disappointing, mainly because we may have raised unfoundedly high expectations. Disillusion resulted although there were no other alternatives at hand. The rationale for pursuing rule of law objectives is not as robust as it once appeared. The short to medium term outlook is uncertain. In addition its impact is difficult to measure (see Docquier, Chap. 2). There is also a need to reach a deeper understanding of its effects in terms of problems solved rather than, as is usually the case, in terms of institutions established or strengthened.

17.6 Open Questions

If we stop here, a number of questions for the rule of law, the conditions of its emergence and its impact on the market economy, on development and on growth remain unanswered:

- Will the rule of law contribute to the reduction of social injustice, the empowerment of women and the active promotion of human rights, i.e. basic principles of good governance?
- Should the rule of law be a stepping-stone for a better acceptance of markets as a level playing field where participants have a fair chance to test their efforts?

These considerations open the way to more searching questions on the importance and impact of law and the expectations of those who are promoting it:

- Is a system of formal legal rules a necessary and sufficient condition for a working market-economy and a guarantee for economic growth?
- What will the impact of law be on the political process and organization, and in particular does it ensure favorable conditions for executing political programs and strategies within the rule of law?

Depending on the persuasiveness of the speaker, all these questions leveled at rule of law advisory programs could imply that law is a variable dependent on other areas, mostly of the economy and markets. While this may be true, we could as well formulate the contrary: Does law not influence the markets and can it not be said that a stable legal framework promotes economic development? So again, we cannot simply state that law evolves with the economy, as the contrary may also be true.

As far as the relationship between law and development is concerned, we need to consider law as an integral part of development. Amartya Sen claims that we cannot consider development separately from legal development. In his view, the overarching concept of development is a functional relationship that integrates distinct developmental concerns in economic, political, social, legal and other spheres. The integration is more than causal interdependence: it involves a constitutive connection to the concept of development as a whole. Legal development must take note of the enhancement of people's capacity—their freedom—*to exercise the rights and entitlements that we associate with legal progress*.

> To use the old analogy again, development seen as a whole - what we may call development tout court - is like a typical summer day, and it requires an integrated consideration of developments in distinct domains such as economic, legal, etc. (much in the way a typical summer day depends on the sun, the temperature, the blue sky, and so on). The claim here is not so much that, say, legal development causally influences 'development tout court, but rather that development as a whole cannot be considered separately from legal development. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a whole. (Sen 2000, at p. 8)

References

Ahrens H (2004) Rechtsstaat und Justiz im Wandel. In: Imbusch P, Messner D, Nolte D (eds) Chile heute. Vervuert, Frankfurt, p 433

Ahrens H (2005) Möglichkeiten und Grenzen externer Unterstützung rechtsstaatlicher Reformen am Beispiel Lateinamerikas. In: Kappel A, Tobler R, Waldmann HW (Hrsg) Rechtsstaatlichkeit im Zeitalter der Globalisierung. Freiburg i.B, Rombach, p 473

Ahrens H (2008) Impulsreferat: Überblick über das Programm Rechtswesen in der VR China, Fachgespräch, Rechtsstaatsberatung in der Entwicklungszusammenarbeit – Möglichkeiten, Grenzen und Perspektiven. Berlin 15.10.2008
Andrews M (2009) Isomorphism and the limits to African public financial management reform. KSG – Faculty Research Working Papers RWP09-012, May
Bryde B-O (1986) Die Rolle des Rechts im Entwicklungsprozess, Arbeiten zur Rechtsvergleichung, Schriftenreihe der Gesellschaft für Rechtsvergleichung Nr. 134, Frankfurt a. M. Metzner
Carothers T (2007) Judicial reform and the rule of law. ODI, 22nd February 2007. http://www.odi.org.uk/events/145-judicial-reform-rule-law. Accessed 14 Mar 2013
Casanegra de Jantscher M (1991) Administering the VAT. In: Gillis M, Shoup C, Sicat G (eds) Value-added tax in developing countries. The World Bank, Washington
Dam K (2006) The judiciary and economic development. The Law School, University of Chicago Law & Economics, Olin Working Paper No. 287, March 2006
Deakin S, Wilkinson F (2000) Contract law and the economics of interorganizational trust. In: Lane C, Bachmann R (eds) Trust within and between organizations conceptual issues and empirical applications. Oxford University Press, Oxford, p 146
Falke M (2010) Kohärenz und Nachhaltigkeit: Die zukünftigen Leitbilder der deutschen internationalen Rechtsstaatsförderung? Recht Politik 3:22
Faundez J (2000) Legal reform in developing and transition countries – making haste slowly. Law, Soc Justice Glob Dev J 1. http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/#en13. Accessed 17 Mar 2013
Frischtak L (1997) Political mandate, institutional change and economic reform. In: Faundez J (ed) Good governance and law: legal and institutional reform in developing countries. St. Martin's Press, New York, p 95
Hoff K, Stiglitz J (2004) After the Big Bang? Obstacles to the emergence of the rule of law in post-communist societies. Am Econ Rev 94(3):753–763
Jahn L (2007) In the eye of good governance: capacity development to implement the rules of just administration in the public service of South Africa. Pretoria, GTZ-South Africa, May 3
Julius H (2008) Institutionalisierte rechtliche Zusammenarbeit: Die Erfahrungen der GTZ. in China. Rabels Z 72:55
Kennedy D (2003) Laws and developments. In: Hatchard J, Kerris A (eds) Law and development, facing complexity in the 21st century. Cavendish, London, p 17
Knieper R (2006) Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht. In: Knieper R (ed) Rechtsreformen entlang der Seidenstrasse. Berliner Wissenschafts-Verlag, Berlin
Knieper R (2010) Pulls and pushes of legal reform in post-communist states. Hague J Rule Law 2 (1):111–126
Linn J (2001) The world bank's new approach to good governance: promises and risks. Transition, April–May–June
Lopez-de-Silanes Molina F (2002) The politics of legal reform. Economica 2:91
Luchterhandt O (2007) Osteuropa; Zwischen Wissenschaft und Politik. In: Böhmer J, Vietor M (eds) Osteuropa heute. Lit Verlag, Berlin, p 39
Milhaupt C, Pistor K (2008) Law and capitalism: what corporate crises reveal about legal systems and economic development around the world. University of Chicago Press, Chicago
Posner R (1998) Creating a legal framework for economic development. World Bank Res Obs 13 (1):1–11
Rabel E (1951) Deutsches und amerikanisches Recht. Rabels Z 16:340
Reichenbecher Z (2010) Rechtsexport oder Rechtsreformberatung im Südkaukasus. DRiZ, September 290
Santiso C (2003) The elusive quest for the rule of law: promoting judicial reform in Latin America. Braz J Pol Econ 23:112
Schauer F (2000) The politics and incentives of legal transplantation. CID Working Paper No. 44, April

Sen A (2000) What is the role of legal and judicial reform in the development process? In: Role of legal and judicial reform in development, World Bank Legal Conference, Washington, June 5. Transcript at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/ 0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html. Accessed 20 Mar 2013

Steer L, Sen K (2008) Informal institutions in transition: how Vietnam's private sector boomed without legal protection. IPPG Discussion Paper Series Number 19, DFID, London

Stockmayer A (1998) Programmatische Vorüberlegungen zur Rechtsberatung als Bestandteil der Technischen Zusammenarbeit. 8th Yearbook of the Society for African Law, Köln 1994 (1996)

Therkildsen O, Engberg-Pedersen P, Boesen J (1999) Sector support: from policy making to implementation processes? Aid policy & practice. An Issue Paper from the CDR, Copenhagen, August 1999

Thompson N (2005) Common denominator. Legal Affairs, January–February

Wälde T, Gunderson J (1994) Legislative reform in transition economies: western transplants-a short-cut to social market economy status? ICLQ 43:347

Weingast B (1997) The political foundations of democracy and the rule of law. Am Pol Sci Rev 91:245–263

World Bank (1997) World development report 1997: the state in a changing world. Oxford University Press, New York

Yamada M (2008) Evolution in the concept of development: how has the World Bank's legal assistance extended its reach? Ide Discussion Paper No. 133, March