Intellectual Property Law: Theory vs. Implementation

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To generate economic prosperity, a rule-of-law state must secure property rights and contractual enforcement while making the exercise of state power more coherent, predictable, and consistent with incentives conducive to growth and investment. Government itself becomes subject to laws. It treats every person with equal rights within a judicial system that is feasibly accessible to all regardless of socioeconomic status, ethnicity, or gender. It enacts, interprets and enforces laws in a coherent, consistent, and predictable manner through effective and efficient judicial processes.1 In short, economic progress requires that legal rules be clearly defined and made public. They must then be interpreted and enforced by a judicial system immune to systemic abuses of discretion.

In many countries, high costs for protecting contracts and property rights are still common. Those countries often have unpredictable regulatory frameworks that apply multiple, high, and unanticipated levels of taxation to the same bundle of property rights. The pernicious effects of these unwieldy systems are sometimes compounded by inconsistent application of laws made worse by an ineffective judiciary and, worse, corrupt practices within the state. As a result, transaction costs in these countries——rise to levels that make investment unprofitable for buyers and sellers of goods and services. Such high costs reflect the difficulties of acquiring information, negotiating complex transactions, and monitoring agreement compliance.

Abundant empirical research has shown significant links between strengthened rule of law and greater economic growth.2 Accordingly, many countries have attempted to reform their legal systems as part of efforts to strengthen democracy,
enhance human rights protections, and foster private investment. Yet an international comparative analysis demonstrates that these reforms have shown mixed results around the world. Failed reforms are usually correlated with poor rules or limited judicial and administrative capacities accorded to the government officers in charge of granting intellectual property rights. These flaws create serious impediments to enhanced public sector governance and block economic growth. This paper provides a short account of the factors explaining these mixed results.

Our framework of analysis comes from the discipline known as “law and economics of growth and development.” This discipline aims at identifying changes in laws, improvements in interpretation, and enforcement mechanisms that, within the socio-legal tradition of a country, enhance sustainable economic development. One key aspect from the law and economics of growth and development literature for this paper is a focus on identifying the characteristics of a legal and judicial system that foster economic growth and social prosperity. Working within this discipline and drawing upon empirical studies performed during the past ten years, the notes below aim to account for the conditions within the lawmaking process and judicial systems’ functioning that need to be present in order to promote social welfare.

SOURCES OF LAWMAKING AND ECONOMIC GROWTH

An emerging line of research in the law and economics of growth and development literature, which will be applied in this article, concentrates on the socioeconomic foundations of those rules that allow the law and its enforcement mechanisms to adapt to a modern economy and, by adapting, foster economic growth.

Cooter explores this topic, arguing that efficiency is enhanced by a bottom-up process of capturing evolutionarily successful social norms that are already informally recognized as relevant in human interaction. This decentralized approach to lawmaking stands in sharp contrast to the centralization proposed by the first law and development movement, which during the 1960s and 1970s called for centralization and modernization of laws through legal transplants. The most important contribution in this first movement can be ascribed to Seidman, who sponsored a comprehensive, centralized, and top-down legislative reform aimed at modernizing the public and private dimensions of the law. The common law or judge-made law sustained by *stare decisis* has suffered from the expansion of centralized administrative law. This administrative law, as the top-down framework establishing the rules to be followed in the relationship between the state and private individuals, is the byproduct of the expansion of the role of government in western
societies.

On the other hand, civil law systems are currently facing a choice between legalizing and enforcing social norms in a bottom-up approach following the policy prescriptions of Hayek, or generating laws and regulations in a centralized top-down manner. For example, the civil code can either capture the norms of local and international business communities or simply impose rules from the top down. Following Hayek, one could argue that the higher information constraints produced by the added social complexity of modern societies require public policy to decentralize lawmaking by capturing norms, therefore reducing market transaction costs. As Cooter states, “efficiency requires the enforcement of customs in business communities to become more important relative to the regulation of business.”

Cooter also argues that “customs arise when external effects align with incentives for signaling.” From this perspective, the irrelevance of the civil and commercial laws enacted by legislatures in many countries must be understood as a reflection of the lack of links between the letter of the law and the social norms that people and businesses follow in their daily lives. This lack of compatibility raises the costs of complying with and enforcing the law.

These deficient rules are the so-called “bad laws” mentioned by de Soto. He identifies a deficient rule by comparing the approximate transaction cost of complying with the law against the transaction cost of following the social norm in an informal market. His work reveals that higher transaction costs are rooted in the drive of governments to centralize lawmaking without regard to the true social practices followed by people. Only laws and regulations that reflect these informal practices can decrease the transaction costs of the affected social interactions and facilitate a movement towards efficiency. From de Soto’s perspective, the size of many informal sectors around the globe is a product of the failure of laws and regulations to capture the social practices followed by society. When this occurs, Buscaglia shows that an increasing gap between law in action and law in the books will emerge.

In each branch of the law, public institutions must identify societal norms and transform them into formalized legal rights and obligations. One could extend Cooter’s analysis to state that in order to enhance effectiveness in the application and execution of laws, politics must follow not just market but also non-market social norms. Civil society’s market and non-market rules for social interaction provide a lawmaking guide for the legislature and the judiciary. Making laws familiar to individuals decreases transaction costs and allows society to achieve legal effectiveness and efficiency in both market and non-market activities. The evolu-
tion of intellectual property laws worldwide demonstrates how legal transplants have provided a channel through which national laws began to capture business practices and social norms.

It has become clear that in many countries a centralized and discretionary top-down approach to lawmaking has resulted in formal legal systems that are rejected or, in the best case scenario, irrelevant.15 In these cases, we often find large segments of the population perceiving themselves as divorced from the formal framework of laws generated by legislative bodies in a top-down manner. This institutional divorce reflects a gap between the formal law in the books and the law in action that is frequently found in many countries. In such a case, large segments of the population pursue informal means to interact or to redress their grievances because they lack the information or resources to surmount significant substantive and procedural barriers to accessing formal means of action. For example, the relationship between socioeconomic barriers to accessing court systems and the growth of alternative dispute resolution has been empirically verified in seventeen countries.16 In practice, informal institutions provide an escape valve for certain types of conflicts, in part due to the state’s inability to secure access to formal mechanisms for dispute resolution. In relying on this system of informal institutions, however, many other types of disputes involving fundamental rights and the public interest go unresolved. This state of affairs undermines the legitimacy of the state, hampers economic interactions, and disproportionately burdens the poorest segments of the population.

LEGAL TRANSPLANTS AND ECONOMIC EFFICIENCY

We now turn to the analysis of legal efficacy in cases of international legal transplants. When selecting the source of its laws, a country faces two primary choices. It can adopt a law evolving from its own socio-juridical tradition implemented through its own institutional mechanisms, or it can transplant rules from outside its own purview. The analysis of legal reforms needs to determine a framework for predicting which of the two options most effectively enhances the expected impact of the law.

Watson has shown that most legal reforms arise from legal transplants.17 Therefore, analysis of reforms should also aim to explain why, from an international pool of laws available for transplant, certain rules and institutions are commonly used and enacted by some jurisdictions while others are rejected.

For example, why is it that through the ratification of international conventions, most countries are selective in the rules and standards they adopt to protect
intellectual property, adopting some while rejecting others? In more fundamental terms, why do some countries adopt adversarial judicial systems and oppose inquisitorial systems, or choose separation of powers as opposed to parliamentary systems? One reason could simply be perceived gains in national prestige. But national prestige is not a measurable variable, and it is therefore difficult to verify the hypothesis in a scientific manner.

Economic analysis of the law, on the other hand, can explain and guide legal transplants by applying tests to determine if the transplanted legal rules best enhance efficiency and efficacy. An inter-temporal cost-benefit analysis may provide an explanation of why some legal rules and systems are adopted and others rejected. Eggertson pointed out that the economic efficiency hypothesis proposes that different legal systems may compute the costs and benefits of legal rules differently given the same situation because real economic and legal factors such as national resource endowments or socio-juridical culture are different across different regions and nations.¹⁸

In terms of this economic model of analysis, legal reforms can be viewed as subject to the political supply and demand exercised by interest groups from both within and outside the state. Any profound change in the incumbent legal system may threaten the private interests of the professionals and public officials who have benefited from that system and who determine the successful implementation of any legal reform. In other words, the private interests of both professionals and public officials are partly responsible for the effective legal application, interpretation, and enforcement of new laws.

Buscaglia and Ulen apply this cost-benefit approach to the recent, widespread international adoption of intellectual property laws under the GATT umbrella.¹⁹ In order catch up in terms of growth, countries need to expand the size of their domestic savings and human capital pools through the application of clear patent laws and consistent enforcement of these laws. The observed differences in wealth among countries have always captured the attention of scholars in many fields focusing on the powerful effects of technological change and technological learning on the process of economic growth. Yet a catching-up economic growth process depends on much more than just the economics of technological capital.

What needs to be addressed is not just the lack of industrial capacity or technological change, but also the dearth of technological capabilities—the most basic and acute deficiency in many countries. Technological learning requires a deeper transformation in a society than does technological change. Technological learning implies the building of institutions and skills to generate future technological change. It is at this deeper institutional level that the intellectual property
 rights framework affects future technological change.

Now, the permeability of national frontiers to international trade and ideas has increased to such a magnitude that it has forced national authorities to reconsider the legal foundation of intellectual property rights. The Paris and Berne Conventions provided two main doctrines as a legal framework for property rights for more than a century. The doctrine known as “territorality” holds that property rights are to be honored according to each state’s rules. This legal doctrine of “independence” establishes that granting property rights within one state does not force other states to grant the same rights.

These two doctrines have become irrelevant under the order emerging after the Uruguay Round. Under the supervision of the World Trade Organization, the harmony or uniformity of laws has been sought as the ideal way to encourage the international flow of goods and services. This new framework has solidified the view that the justification for granting intellectual property rights, like patents, is based on social norms required by the need to exchange benefits between society and the innovator. The innovator receives a monopolistic return from an investment and society is able to benefit from an incremental diffusion of knowledge that otherwise would have been kept secret.

The drastic evolution in international enforcement of property rights over the past two decades comes after more than a century during which the international intellectual property regime was governed by the Paris and Berne Conventions. These Conventions provided ample scope for cooperation, but at the same time allowed national legislation to define the main aspects of intellectual property rights. After World War II, a concern with the balance between the rights of the inventor or author and the benefits of diffusing knowledge to other countries as fast as possible challenged the previously mentioned norm based on the exchange of benefits between society and the innovator. The need for rapid industrialization and vast improvements in technologies were justifications for many governments to impose requirements limiting the rights and benefits of innovators. Typically, limitations on the rights of innovators occurred in most countries when (a) a patent could only be granted if the intellectual property was worked and exploited within the national frontiers of a country (a working requirement) and (b) the terms and royalties for licenses of intellectual property could be determined by the government in the absence of agreement by the innovator (compulsory licensing). Under these two types of restrictions, governments started to abandon the formula of exchange of monopoly for diffusion and replaced it with an approach based on granting intellectual property rights in exchange for foreign direct investment.
Difficult problems remained, however. Common features of many legal systems left intellectual property rights subject to inconsistent coverage, uncertain terms of protection, arbitrary transferability, compulsory licensing regimes and inadequate enforcement. The national character of this type of legislation, however, was increasingly called into question during the 1980s and 1990s by technologically advanced countries. Buscaglia and Ulen show that the advanced economies’ challenge to the old legal order could be explained by drastic changes in business practices and norms of behavior. More specifically, the need and feasibility of legal reforms were a consequence of the technological breakthroughs of the 1970s and the subsequent revolutionary impact of microelectronics, biological inventions, computer software, and other high technology sectors. These sectors required increasing investments in research and development paid by businesses from those industrialized countries mainly responsible for the production of knowledge-intensive products. As a result of the newly enacted WTO frameworks, international trade of knowledge-intensive products gained relevance as a proportion of most countries’ exports and gross national products.

LEGAL EFFECTIVENESS AND THE JUDICIAL SYSTEM

In order to assess the process of the modernization of judicial capacity to implement laws within any chosen jurisdiction, one needs to provide an objective analysis of the institutional effectiveness of the court and administrative domains. The quality of judicial rulings should not be assessed through subjective indicators, to the extent that one needs the results of this assessment to design specific remedies as part of legislative proposals and policy reforms. Therefore, methodologies currently available and used for the objective analysis of labor, civil, and criminal court effectiveness must be adopted in order to assess the feasibility and impact of newly enacted laws. Although some leeway in judicial discretion must be allowed, there are certain methods that have successfully been used to evaluate the presence of abuses of judicial discretion (i.e., the lack of proper foundation and motivation for court decisions). These methods need to be considered.

An assessment of effectiveness must use a model capable of providing analysis of the following domains:

1. Institutional-organizational design
2. Abilities, incentives, and capacities of officials
3. Infrastructure compatible with 1 and 2 above
4. The ability of the judicial system to address cases of social relevance and to
provide access to redress grievances in case-types relevant to all socioeconomic, ethnic, and cultural groups in society

5. Processing capacity (e.g., procedural times and caseloads);
6. The legal profession’s abilities and capacities;
7. The quality of judicial decisions as a result of 1 through 6 above (i.e., quality of court rulings); and
8. The legitimacy of public institutions in charge of implementing laws as a result of 7 above.

Components 1 through 8 constitute a model for the analysis of “legal impact effectiveness” in any given jurisdiction.

The impacts of investments made in judicial infrastructure, organizational improvements, and human capital need to be assessed in terms of improved selectivity, better institutional design, better processing capacity, and enhanced geographic access to the courts. In addition, proper methods need to be adopted for the assessment of abuses of substantive and procedural discretion, past and present.

Furthermore, recognizing the lack of proper access to justice is crucial to understanding court systems’ illegitimacy. Any evaluation of court systems must address the causes of lack of access with a clear methodology founded on legal science and interdisciplinary approaches. This is not just theory. These kinds of evaluations are already performed by the United Nations. Within this framework, the following considerations are proposed:

· Any evaluation of legal implementation capacities needs to adopt an implicit or explicit, qualitative or quantitative, model in order to understand and diagnose judicial effectiveness—for example, the model with components 1 through 8 above.
· The interactions among the eight components explaining judicial effectiveness should be identified and analyzed explicitly, including monitoring indicators for each and an explanation of how each of these components interactively affects the quality of judicial services in particular, and judicial effectiveness in general.
· An explicit methodology is needed to assess quality of judicial decisions and judicial services.
· A methodology is needed to assess access to justice, going beyond geographic indicators by also addressing socioeconomic, cultural, and ethnic factors.
Empirical evidence shows that specific factors contribute to a low quality of legal interpretation, enforcement, and execution around the world. Namely, low quality judicial systems are characterized by meritless politicized appointments; lack of case management systems; lack of modern court administrative practices (e.g., a high burden of administrative tasks falling on judges themselves); lack of quality control standards applied to work performed by judges and other judicial system personnel; lack of proper requirements for career promotions; lack of steady funding for capital budgets allocated to training, infrastructure, and technologies; and lack of a practical model against which to assess the character and psychological suitability of those applying for a judicial position. Countries correctly addressing these problem areas have shown relative success in improving judicial performance. For example, Botswana, Chile, Costa Rica, Singapore, and South Africa all stand out as best practice countries. Yet, failures of judicial reforms during the implementation stage abound. Despite huge sums of money spent on higher salaries and additional staff in a majority of the countries sampled in recent studies, the persistence of pernicious incentives faced by judges and court personnel is still at the heart of the problems linked to court ineffectiveness and ineffective legal implementation.

In order to enhance court performance, judicial reforms have been implemented through a mix of national and international efforts focused on areas such as (a) drafting improved codes to better address substantive legal matters (i.e., reforming civil and criminal codes); (b) establishing better systems to hire and train court and administrative personnel within patent offices, linking periodic technical proficiency evaluations of court personnel to merit-based career paths; (c) establishing an improved system to hire more and better judicial and administrative officers in charge of addressing intellectual property law; (d) modernizing judicial infrastructure and administrative management, including the judiciaries’ abilities to install modernized budget and planning systems and up to date case processing and management styles (i.e., reducing the administrative burden imposed on businesses); (e) enhancing the operational role of civil society in fostering improvements in judicial and administrative performances within the executive domain; (f) establishing systems of internal and external controls in order to foster consistent, predictable and unbiased judicial and administrative rulings; and (g) supporting alternative dispute resolution mechanisms. Moreover, intense hiring and continuing training of judicial administrators are needed in all low-performance countries within the industrialized and developing worlds alike. For example, court administrators require competencies such as basic levels of knowledge in areas such as organizational performance of court systems, budget and financial
management, information technology management, quality control techniques, public information, strategic planning, case-flow management, human resources’ training, human resources’ management, financial investigative techniques, and institutional leadership.28

Several empirical studies have measured how these institutional reforms enhance the desirable impact of new statutes within criminal jurisdictions by focusing on clearance rates (i.e., the percentage of cases filed that were subsequently disposed of during a certain period of time), procedural times, and the frequencies of abuses of substantive and procedural discretion exercised by each stage of the judicial system.29 In these empirical studies, indicators of judicial performance also addressed access to justice; equality; fairness; integrity; independence; accountability of the executive, legislatures, and judiciary; the judiciary’s own technical proficiency; and public trust in state institutions.30 Oops- sorry this paragraph is ok the way it was... I like it at the beginning but I think it changes the flow of the argument too much.

**FINAL REMARKS**

Evidence-based results show that a balance between judicial accountability and the independence of judicial institutions from political forces is a necessary condition for achieving success in the effective interpretation, application, and execution of intellectual property laws in particular and other laws in general. Yet this balance between democratic accountability and institutional independence requires a basic prior consensus among the main political forces in countries.31 It would be naïve to think that constitutional provisions prescribing the separation of powers would be enough to guarantee the judicial independence required for the unbiased and transparent implementation of laws. In fact, such constitutional provisions are not even a necessary condition to attaining judicial independence. Countries such as Israel, New Zealand, Sweden, and the United Kingdom of Great Britain and Northern Ireland—all countries with high levels of judicial independence and good records of legal design and implementation—do not possess constitutionally entrenched judicial independence. Examination of international experience shows that the political elements enhancing an independent judicial system’s capacity to effectively implement laws can be identified. For example, the cases of Costa Rica and, to some degree, Italy, show that judicial systems can only enhance their capacity to interpret laws with independence and autonomy when the political concentration of power within the legislative and executive branches tends to be relatively balanced such that alternation in power becomes a likely outcome of peri-
odic elections. To some degree, a balance of power among competing political forces increases willingness among politicians to give up a good part of their political control of court and administrative decisions in order to avoid mutually assured destruction in subsequent electoral periods when the opposition may take over the reins of power. This sequential game among political forces operates as a tacit guarantee of the justice system’s independence from political whims.32

A framework guiding policy makers during legal and judicial reforms must first identify the areas where undue pressures are most likely to hamper the state’s capacity to adjudicate cases. The identification of such areas must focus on the links between judicial systems and other governmental and non-governmental institutions, but should also review factors hampering independence within the judiciaries themselves. Once the previously mentioned political conditions for policy reform are present, technical initiatives must incorporate best practices. Lessons from case studies show that best practices in enhancing judicial independence of courts and administrators include the following:

(a) An improved uniform and comprehensive case management system coupled with transparent and consistent rules for the assignment of cases.

(b) The implementation of uniform and predictable administrative (i.e., personnel- and budget-related) measures founded on rewards and penalties driven by performance-based indicators, with a consequent clarification of the career paths for judicial and law enforcement officers.

(c) Specific reforms of the organizational structure of the justice system, including the introduction of category-specific organizational roles for judicial and administrative officers in charge of granting patents and copyrights, in order to secure their own internal independence.

(d) The enhancement of the capacity of the judiciary to review the consistency of its own decisions in court rulings by improving the effectiveness of judicial (appellate-based) reviews but also by allowing for the monitoring of civil society based social control mechanisms working hand in hand with the media (e.g., non-governmental organizations such as Court Watch in the United States).

(e) Governance-related improvements in the links between the political sphere and the judiciary in accord with the preconditions described above.
By their very nature, the judicial reforms described in the previous section, when applied in best practice countries, have required a background of socio-political consensus that includes the legislative, executive, judicial, and civil society domains with actors all willing and able to design, implement, and support such reforms. The gap between the law on the books and the law in action will not represent a significant constraint to legal implementation whenever the political will to enact legal reforms coexists with the executive capacity to implement the aforementioned judicial reforms.

Failures to fully implement much-needed legal and judicial reforms have been mostly due to the lack of long-term governmental commitment, to political instability, to a lack of participatory stakeholders’ (i.e., civil society-based) supporting reforms, or to the erroneous importation of foreign legal systems that may not be appropriate to the national jurisdictions undertaking judicial reforms. These lessons from experience must be taken into account whenever legislatures design, draft, and enact laws.

Notes

3 Buscaglia and Dakolas, A Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account, 4.
9 Ibid.
11 Ibid., 154.
12 deSoto, “Property Rights and Economic Progress.”
13 Ibid.
15 Ibid., 27-29.
16 Carl Baar, “The Development and Reform of Court Organization and Administration,” Public
Intellectual Property Law

30 Ibid., 2-5.
32 Ibid., 14-16.