Making the Other Path Efficient. Economic Analysis and Tort Law in Less Developed Countries

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The Law and Economics of Development

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MAKING THE OTHER PATH EFFICIENT: ECONOMIC ANALYSIS AND TORT LAW IN LESS DEVELOPED COUNTRIES

Mauro Bussani and Ugo Mattei

INTRODUCTION

The spread of Law and Economics is one of the most important examples of methodological legal transplants in Western law. From the United States, this approach has reached other common law countries, such as Canada and England, as well as a number of European civil law jurisdictions, including Germany, Holland, and Italy (Cooter and Gordley 1991). The founding of the Latin American Association of Law and Economics is evidence of the continuous appeal of this approach in very different legal systems. Scholars have noticed the spread of the Law and Economics phenomenon and are now trying to explain the reasons for it (Cooter and Gordle, 1991; Mattei 1994a).

The aim of this chapter is to advance our understanding of whether, and to what extent, Law and Economics has a future in addressing, both from a positive and from a normative point of view, legal systems of the so-called "Third World countries" (Dias, Luckham, Lynch and Paul 1981) that are outside the Western legal tradition. The primary purpose of this chapter is twofold. On the one hand, we seek to avoid problems of cultural
imperialism such as those that afflicted the American Law and Development movement in the 1960s and 1970s and eventually led to its decline (Snyder 1982). On the other hand, we attempt to enrich our understanding of Law and Economics by applying it to legal systems very different from those in which it has so far flourished.

Section 1 of part B of this chapter focuses on general issues of comparative Law and Economics. We try to explain from an economic perspective what characteristics make Western law homogeneous, in order to have a clear picture of the legal systems we are considering. Section 2 discusses some of the assumptions of Law and Economics that may limit the possibility of a successful transplantation of this method outside of Western law. Section 3 examines environmental tort law in several African and Latin American countries as a potential application of Law and Economics outside of the Western legal tradition. Finally, section 4 offers some general conclusions regarding the application of Law and Economics to legal analysis of less developed countries.

A SCHEMATIC FRAMEWORK FOR CLASSIFYING THE LEGAL TRADITIONS OF THE WORLD

The Eastern European revolution of 1989 signifies the end of the most widely accepted classification in legal families among comparative law scholars (Schlesinger, Baade, Damaska and Herzog 1988, p. 64). For purposes of general classification, the legal systems in the world were divided into civil law, common law, socialist law, and religious, or traditional, law. Today, socialist law has practically disappeared in Eastern Europe, Africa, and Latin America (with the notable exception of Cuba). In Asia, it remains an important part of the legal systems of China, North Korea, and Vietnam, but the general sense has always been that these legal cultures are better classified within the so-called traditional law families (David and Brierly 1985).

Outside of the fall of socialist law, some methodological revolutions have led to a rethinking of common assumptions. The more sophisticated comparative literature challenges the rigid distinction between common law and civil law, and proposes to group these two families of legal systems together within the so-called Western legal tradition. This proposal is largely justified by the major phenomena of convergence and of legal transplants between civil law and common law countries. Also, comparativists became aware of the fact that legal systems are not monolithic institutions. They are very dynamic entities composed of a plurality of layers that may be influenced by either legal family. Many Latin American countries, for example, are influenced mostly by civil law in the domain
of private law, and more significantly by American law in the domain of public law.

The need to rethink classifications for religious or traditional law is also clear. In this context, it becomes clear that the evolution of legal systems in the growing area of market transactions has limited the role of traditional law to the narrower areas of family law, real property (including successions), and possibly criminal and tort law. Japan is a good illustration of this phenomenon. Yet, at the same time, many Islamic countries have become increasingly aware of, and conservative of, their cultural and religious specificity. Thus, Islamic law may be expected to become increasingly influential in the domain of transnational legal practice.

The community of comparative lawyers is now discussing new possible schemes of classification. For present purposes, it is sufficient to maintain that the Western legal tradition can be considered roughly homogeneous in its economic, political, and legal cultural assumptions. In particular, from an economic perspective, its systems are mixed, with a large, well-developed private sector (market) and a variably sized public sector. Politically speaking, there are multiple-party democracies with important ideological divisions, the most important of which involve the extent of the market and of the public sector. The fundamental mixed nature of the economic systems, however, is not disputed. From a legal point of view, the Western legal tradition shares the assumption that the legal process is (and should remain) different from the political process. The legal process tends to be neutral while the political process is based on parties. Also, in the Western legal tradition, law and religion tend to have different domains: Lawyers and priests have different jobs. The former are concerned with social institutions, while the latter are concerned with the intimate aspects of individual beliefs.

This very schematic picture gives us a rough map of the systems belonging to this family: (most of) Western Europe, the United States, Canada, Australia, and New Zealand. With the exception of Japan, this family includes all of the leading economic powers of the world.

Law and Economics: The Product of a Leading Legal Culture

In the 1950s, the United States supplanted France and Germany as the leading legal system within the Western legal tradition. In other words, the legal solutions, doctrines, and institutions developed in the United States's legal system are today copied and considered for purposes of importation more than those developed in any other legal system in the world. Since the Western legal tradition is the current worldwide leader, American scholars are the most influential in the world today. Such leadership is clear in the process of privatization in Eastern law as well as
in the major role played by American advisors in China. Even outside of organized efforts of legal cooperation, the impact of American law beyond Western law is clear. Japan, once more, illustrates the point.

An explanation in economic terms would be tempting. The United States is the leading economic power in the world, so it is natural that it should also become the leading legal power. Of course, there is some truth in this assumption. It is obvious, and it has been the case in legal history, that economic leadership carries some legal leadership. China and Japan, for example, were “persuaded” to enact Western codes of law late in the nineteenth century, in order to attract investments from Western powers (Chen 1992; Oda 1992, p. 25).

Economic leadership, however, falls short of a persuasive explanation of the dynamic of legal leadership. If such were the case, we should be prepared to argue that more advanced economic powers always exert legal influence on less advanced ones. But Japanese law does not have any influence outside of its geographic region. And English law, even when England was the leading political and economic empire, never influenced the law outside of its (broad) political boundaries. Economic leadership, therefore, is neither necessary nor sufficient for legal leadership. Legal leadership has as much to do with legal culture as with economic power. Intellectual leadership cannot be imposed by means of political or economic influence. It must be willingly accepted by the legal cultures of the influenced countries.

If we focus on less developed countries, this phenomenon may explain why the Law and Development movement was resisted by a Latin American legal culture that did not accept “modernization” by a jurisprudential system foreign to its tradition. More important for our purposes, this phenomenon may become the key to understanding the prestige and the possible future influence of Law and Economics outside of the Western legal tradition.

Most less developed countries do not share one or both of the basic legal assumptions of the rule of law as understood in the more developed countries comprising the Western legal tradition. Many times (as is the case in some of the least developed African and Latin American countries), the political process and the legal process overlap. Other times (as is the case in most African, Islamic and Asian Countries), the domain of law and that of religious beliefs overlap. In section 4, we turn to what possible impact the former phenomenon may have on the reception of Law and Economics.

Western Assumptions of Law and Economics and Non-Western Values

Two fundamental assumptions support economic reasoning. The first assumption may be referred to as the “rationality” assumption. Economic theory is concerned with rational maximizing behavior in conditions of
scarcity. The second assumption may be referred to as "the individualistic" assumption: Individuals are the best judges of their own preferences.

These two foundational assumptions, together with an assumption of negligible transaction costs, lead to a consequence that is sometimes defined as the Positive Coase Theorem: individuals tend to bargain out between themselves efficient results (Cooter and Ulen 1996, p. 105). These two basic assumptions seem to be sufficiently unbiased ideologically (Cooter 1989) to allow the economic argument to claim a role also in approaching non-Western legal systems. To be sure, outside of the Western legal tradition we find a larger role for nonindividual-centered perspectives.

As is very well known, markets in conditions of extreme scarcity, such as those in certain less developed countries, usually operate in communities that have homogeneous value systems. In communities in which transactions do take place between close groups of individuals, these shared cultural values constitute the background of the market transaction. In such contexts (e.g., a small rural community marketplace) it may be argued that the Positive Coase Theorem is undermined by the lack of an individual-centered approach and of utility maximizing attitude. Assuming this observation as true, we may however argue that once the small nonindividual-centered approach interacts with the needs of a larger, less homogeneous community, law and economics immediately faces familiar problems.

A well-established line of scholarship offers evidence of the kind of problems that law and economics scholars may help to resolve. It is sufficient to think about some of the work published on slums of cities in less developed countries, from Africa to South America (Ankerl 1983), or to the work of Cooter on Papua New Guinea (1991). We find here a role for Law and Economics as a tool of approaching problems such as the nightmare of mega-communities under immigration pressure, or the transition from a traditional to a modern economy.

Sometimes, the market and its intrinsically individualistic approach is seen as value-corrupting. Law and economics, as well as all Western products, may then be charged with the responsibility for this corruption. Of course, good Law and Economics has nothing to say about these objections based on ethnocentrism. We may only observe that it is not responsible for the (more or less conscious) choice of a community to endorse capitalism as its developing target. Since comparative Law and Economics, like comparative law, is a descriptive rather than a normative discipline, its utility cannot be challenged on these grounds (Mattei 1994). As for the normative ground, let us suspend our judgment until the conclusion of this chapter. We may say very clearly at the outset, however, that it is the responsibility of Law and Economics scholars not to use their expertise as an ideological tool of market-oriented conservative propaganda. Such risks
of abuse, of course, have nothing to do with true scholarship or with the quality of the product.

Law and Economics scholars may learn from legal anthropologists the best tools to understand the nonmarket forces behind the development of each society; Law and Economics, however, claims a role whenever there is a market, regardless of the stage of development of the society of interest.

This last observation also responds to another possible objection to the extension of Law and Economics outside of the Western legal tradition. As is well known among comparative lawyers, a number of legal systems in the world, most notably the Chinese and the Japanese, are based on a set of values rooted in the Confucian tradition in which the idea of obligation is much stronger than that of right (Chen 1992; Oda 1992). Also, in such systems the assumptions of bargaining in one's self-interest may be misplaced. Rather than dwelling on theoretical discussions, we can point out here that Law and Economics is already playing an important role in Japanese legal studies. A number of Japanese scholars are specializing in an increasingly successful method for applying Law and Economics to their own legal system. As for China, the impact of Law and Economics scholarship in the process of privatization is yet to be seen. Judging from the number and the success of translations, it seems to be regarded as a very interesting approach. On top of everything, we may say that, from the individualistic assumption, it is possible to analyze in efficiency terms any kind of legal and social institution, including those that do not share it. How to use the results of this analysis is not a problem that should worry Law and Economics scholars.

Law and Economics of Development: A Change of Paradigm

A huge body of literature, both Anglophone and Francophone, may be found on Law and Development (Adelman and Paliwala 1993; Apter 1987; Brenner 1994; Bryde 1976; Chenery and Srinivasan 1988; Dreze and Sen 1994; Garcia-Amador 1990; Johnson and Lee 1987; Seidman 1978; Sklair 1989). A clear tension can be seen between Law and Development scholarship on one side, and some anthropological literature on the other. From the latter perspective, the very idea of development can be ethnocentric. It assumes the existence of just one path of development, already followed by the so-called developed countries, which the developing countries should follow as well. According to the critics of Law and Development, developing countries may be considered rooted in a different set of values and assumptions, foreign to the idea of development in the tradition of capitalism. A typical example usually given is the inalienability rule that governs land law in a number of non-Western societies. This rule, inefficient from an economic perspective, is explained as protective of future
generations in a direction much more environmentally friendly than an efficient market of land. This line of thought, followed by a number of legal anthropologists, is in turn challenged as conservationist and archeological.

Indeed, reading this debate within a Law and Economics paradigm may suggest that it is somewhat sterile because of its inherently normative ground. In resisting the normative dimension, we are ready to admit a shortcoming of economic efficiency as an instrument of policy analysis: In its technical form it does not have anything to say on the intergenerational ground. The fundamental assumption of economic efficiency requires a living, maximizing market actor. It is, however, true that law and economics has in the course of time somewhat diluted the technical concept of efficiency (Mattei 1995) so that it should not be impossible to introduce the intergenerational dimension in its analysis. Whether it is possible to do so outside of the concerns of paternalism is, indeed, a different question.

The Law and Development debate, however, can still be focused by inserting it within an evolutionary paradigm of a kind that has long been familiar to the Law and Economics literature. Since Law and Economics scholarship is familiar with discussing possible evolutions of law in the direction of economic efficiency, it is very well equipped to assume that a legal system (and more broadly a social order) can never be considered fully developed. Considering certain countries as already developed assumes the possibility of having reached the goal. This static concept of law and society is deeply foreign to the dynamic conception of the legal and social order which is shared both by Law and Economics and by the comparative law literature. All legal and social systems may therefore be considered developing from the efficiency point of view. The distinction is not whether they are "developed" or "developing," but what stage of development they have reached and which pattern of development they are following.

If we follow this line of thought, we may observe without hypocrisy that the capitalistic Western path of development leads in imposing itself on the world. This does not mean that it is the only possible way, nor that it is the best one (Syrquin and Chenery 1975).

Comparative Law and Economics, as a value-skeptical and descriptive line of scholarship, does not assume that a group of systems may teach something to another in a univocal direction. Rather, it puts all its efforts into what systems may learn from each other in an interactive way. Western law has provided a historical experience of problem solving in the complex economic society which, as all human experiences, has its costs and its benefits. If a legal, economic, or social system, for whatever reason (mostly for reasons of worldwide interaction), is called today to face problems that other systems have confronted for years, decades, or centuries, then it benefits from knowing how problems were (or were not) solved in those different
social contexts. This, of course, is independent of whether the society is found in the North or South, East or West. It may be Italy knowing how France efficiently resolved the problem of car accident compensation (faced in France a few years earlier), or the United States knowing how Lesotho efficiently approached the problem of uninsured judgment-proof drivers by including activity levels in a tort system using a tax on the gas to finance a victim compensation fund.

Law and Economics of Development: Avoiding Some Mistakes

It is well known in Economics of Development Theory that the countries belonging to the so-called third world represent different (or very different) social, cultural, and economic realities. They share similar fundamental social and economic problems, however. Such problems are those of poverty (extreme underdevelopment), which scholars tend to analyze using different parameters. Some parameters are economic. A principal one, of course, is the very low internal gross national product. A second is the high level of unequal distribution of wealth. A third is the low, and sometimes insufficient, amount of calories consumed per day.

In the conditions of extreme poverty that are experienced in many countries of the so-called third world, low life expectancy is a consequence of these economic problems and of some of the social ones that are also used to define underdevelopment (Brasseul 1993). Included among these social factors are the very poor level of health care, the high degree of illiteracy, the poor conditions of housing, (e.g., the percentage of people with access to fresh water), and the uncontrolled rate of demographic growth. Solving these problems and satisfying the needs that follow from them is regarded by the Economics of Development literature as desirable, whatever the values of a given society. “If the growth of Western societies may be challenged as too much materialist, the development concerned with these fundamental needs is universally pursued” (Brasseul 1993, p. 15).

According to which kind of parameter is used, of course, we may see that possibly no countries in the world have experienced complete development (e.g., homelessness in the United States and health care in Southern Italy). This confirms the utility of a dynamic approach such as that taken by Law and Economics.

This observation should inject a degree of humility in Law and Economics sufficient to avoid the kind of mistakes that have characterized the American Law and Development movement (Gardner 1980). This movement, meant to facilitate the “modernization” of the legal systems of the Latin American countries, ended up an ethnocentric, ahistorical, and indeed rather clumsy attempt to propagate American concepts of law and jurisprudence in countries unwilling to receive them (Snyder 1982). With
the massive consulting for less developed countries provided by Law and Economics scholars poorly equipped to understand the local diversity, there may be a real risk today of seeing the same pattern repeated. Nonetheless, the worldwide cultural leadership and prestige of the American legal culture can make an important difference. Often times, the supply of legal advice and help works in a relatively competitive market of foreign experts (in which scholars from the European Union are active as well).

If it is true that some problems of development are common in all societies, it is equally true that the differences cannot be disregarded. In our attempt to apply Law and Economics to development problems, we may avoid the simplistic application of its "first generation style," but we should try to develop it according to the context to which it is applied. This approach is also shared by the more sophisticated structuralist economics of development scholars. This line of thought tries to avoid the mechanic application of Western economic models (neoclassical and Marxist), which characterized the growth of the Economics of Development literature from its birth in the late 1940s, and continued through the 1980s.

The idea that there is only one path to development and that this way is traced by Western developed countries has been elaborated in its more famous form by Walter Rostow (1960). According to his manifesto, a society undergoes five steps of development: (1) the traditional society; (2) the preparation to take off; (3) the take off; (4) the path towards ripeness; and (5) the stage of mass consumption.

Such theory has been challenged in many ways. For our purposes, it may be regarded as the worst enemy of a successful application of Law and Economics to development problems. It gives strength to the sort of ideological objections that continue to foreclose the final success of Law and Economics within legal scholarship. Moreover, it is one of those generalizations which, when transferred to the domain of law, ends up disregarding all of the most important structural differences. Legal development should instead be seen as a path moving one legal system in the direction of efficiency; the way to reach efficiency, and the path which is (or which is not) followed, may change and be differentiated from one system to another.

Positive results may be reached by applying Law and Economics to the process of development only by taking full account of the high degree of diversity among the legal systems we wish to analyze. This is true, of course, when we apply economic analysis to the Western legal tradition, but it is even more true when we push our intellectual exploration outside of it. Some analysis in terms of Law and Economics may well be relatively easily transplanted from the common law to the civilian Western legal systems, since the economic and cultural substratum is rather homogeneous. Law and Economics tools are equally useful for the analysis of less developed
legal systems where the social and economic structure is not homogeneous with that of Western countries. Of course, once this effort is made, Law and Economics is enormously enriched by this contact with a different reality that may offer a very interesting ground for testing its theories.

The Economics of Development literature has moved beyond both neoclassical and Marxian analysis (the dependency analysis) by taking into account the "rigidity" of the structure of the so-called third world countries. In so doing, scholars have renounced heavy reliance on price theory and have moved to the paradigms of the New Institutional Economics developed by Douglass North and Oliver Williamson. In this chapter, we hope to move a step forward by challenging the assumption of such rigidity and showing that these societies, if observed from the legal system point of view, rather than being static, are dynamic in a different way. This difference is very clear in the best legal scholarship devoted to Africa, South America, and Asia. It parallels important notions developed by economic development scholarship: dualism, inarticulation and distortion.

Taking Account of the Structure of the Law in Less Developed Countries: A Challenge for Law and Economics

A simple observation is that, in many so-called third world countries, two economic systems coexist. There is a traditional one, typically that of a rural society, and there is a modern one with industries, banks, modern farms and so on (dualism) (Fey and Ranis 1964; Jorgenson 1961; Lewis 1979). These two parallel economies, one of which is scarcely monetarized, have little interaction with each other. The second is sometimes "an enclave controlled by foreign countries" (inarticulation) (Brasseul 1993, p. 16). When the two interact, the modern one, rather than proving beneficial to the traditional one, ends up corrupting it by exporting values and consumption habits (particularly of the rich part of the population) that are disastrous for a less developed country (distortion).

This phenomenon has been observed also by legal scholars since it is particularly clear in the domain of legal (and political) institutions (Winn 1992, pp. 919-920):

In a society with a "soft" state, and a correspondingly underdeveloped legal system, exchange relations are conducted primarily through social institutions, other than competitive markets. Relational principles might apply not just to private ordering such contract, but also to all levels of governmental, legal and personal affairs. These alternative relational "social institutions have been characterized as "multiplex relations," "patron client relations," "customary law" or "folk law," "legal pluralism," "semiautonomous social fields," or "face and favor," to mention just a few.
Another way of putting it is to observe, as has been done in some French and Italian scholarship (Guadagni 1989; Rouland 1988, pp. 72-73; Sacco 1996), the stratified nature of such legal systems, and to analyze the relationship taking place between such different layers of the law. In such analysis, Law and Economics can be an important tool.

We should remember, however, that not all the layers of a stratified legal system are like clothes that can be worn or taken off as we wish. Indeed, very few of them are. Once a layer has been put on, it cannot be completely removed. It would be impossible for the French or the Italian legal system, for instance, to decide overnight to become a common law system. This is because the degree of resistance of the civil law tradition is very strong in France and Italy.

In stratified legal systems, not all the layers have a degree of resistance comparable to that of the civil law tradition in France, or of the common law tradition in England. In less developed countries, the modern layer of the legal system (common law or civil law) does not constitute a tradition. Modern layers are not rooted because of the phenomenon of “duality” to which Economics of Development scholars refer. In other words, while a layer of the legal system can be changed (Sudan's shift from common law to civil law and then to Islamic law is a good example), a legal tradition cannot be changed, unless in a very incremental way by means of an “invisible hand” process. In other words, while certain layers of a legal system may be selected by political choice (Mexico’s option to follow certain provisions of the Russian Civil Code is an example), others may not. In particular, a legal tradition is not a choice.

The challenge to less developed countries is to develop a legal tradition adaptable to the needs of modernization, without merely acting on the layers of the law received from more developed countries. In this perspective, Law and Economics may help to solve the legal result of the economic problems of dualism, inarticulation and distortion.

In taking full account of economic dualism, we may observe that at the level of legal institutions we do not face mere dualism, but pluralism (Merry 1988; Symposium 1992). We may also add that legal layers are interdependent and affect each other within an imperfect competitive relationship. This competitive relationship is made imperfect by localized areas of monopoly, whose borders are very fluid. In areas such as family law, for example, nonmodern law may claim a traditional monopoly that is challenged by Western values such as (for example) the role of women in society. In other areas, such as business law, the opposite relationship may hold true. Western conceptions of fair and efficient business organization may be challenged outside of the scope of official legality by traditional, but less efficient, practices. In economic terms, such interdependency creates externalities of a kind possibly closer to the
pecuniary rather than to the technological (Rees 1992, p. 248). The result is that each of the layers of the legal system is transformed by the existence of each of the other layers, either in nature (the process of putting customary law in writing) or in scope (the claimed monopoly of the State in many areas and the consequent reduction of the scope of customary law).

Law and Economics may show the comparative efficiency of each layer to solve a given legal problem. By so doing, it may favor the interaction between different layers and may prevent the distortions that the imposition of the modern layer on more traditional ones may create.

In a market affected by dualism, pecuniary externalities, and very deep disproportions in power relationships, there may be an argument for deep pocket redistributive solutions. The core assumption of most theories of economic development (particularly the Marxian dependency theory) is that the formal market negatively affects the informal. Maintaining this assumption, we can see that the law has a role, so far not implemented, in reversing the direction of externalities. Consequently, to work efficiently, the legal rules governing the formal economy in a third world context should also allow the informal economy to compete and flourish and thus take advantage of the existence of the formal one.

Of course, legal rules that create positive externalities (in favor of the weaker market) are seen as inefficient in traditional economic theory. In less developed countries, however, they may perform a minimal redistributive effect that is indispensable for being able to exploit the benefits of a market economy.

This interdependence effect, whose impact on the legal systems is very visible, allows us to go a step beyond the structuralist approach by observing that, rather than structural immobility, we only face different degrees of resistance to change. Different degrees of resistance introduce different levels of transaction costs that foreclose the incremental evolution of the legal system towards efficiency.

Law and Economics is in the best position to see that, in many areas, the transaction costs of substituting modern solutions for traditional ones are just too high. Scholars might consequently advise that limited or very limited resources are better allocated in alternative ways rather than in trying to solve, by means of enacted (modern) law, cultural problems. A good example from this point of view is the attempt (ethnocentric, hypocritical, and inefficient) to ban the consumption and production of coca leaves in Latin America. Another example would be the ban of polygamy, or even of other practices such as female circumcision in African countries. Law and Economics can show that such problems should be approached within a soft framework, by allowing local culture to ripen and to handle problems in an informed way.
The previous observations also help in approaching problems of inarticulation and distortion in a more sophisticated way. The layered nature of the legal order and the mentioned externality effects help to explain why efficiency would increase by substituting communication (market transactions) for interdependence (externalities). This means that the overall efficiency of the legal system would improve if the different layers were to communicate with each other. Since different layers of legal systems are represented by different decision makers (judges, both modern and traditional, legal scholars, politicians, and religious and moral authorities), an efficient way to allocate resources would be to invest in creating a common legal culture that lowers the transaction costs of communication.

It is clear from Law and Economics, moreover, that the modern layer of the legal system should not act as if there were a legal vacuum whenever a given problem does not find a solution (or at least a provision thereof) in enacted law. Any intervention in the legal order that does not take full account of the plurality of centers of supply of legal rules is bound to fail, just as would a market supplier that established his prices without taking into consideration the existence of market competition.

**EFFICIENT TORT LAW**

Tort law may offer a good ground to test Law and Economics in less developed countries for a number of different reasons. The first is that this area of private law offers a good test of the degree of consistency of the barriers that divide common law and civil law from each other and from the legal systems outside of the Western legal tradition (Catala and Weir 1963, p. 577). Legal scholarship on torts is indeed focused on the same set of problems everywhere: the foundation of liability, the role of negligence and strict liability, causation, justifications, and remoteness of damage. The function of tort law is also approached within a relatively homogeneous framework: compensation (over and under), deterrence (over and under), punishment, and the relationship with other systems of compensation and welfare.

A second reason for the centrality of tort law for understanding the relationship between the market and the institutional framework in a given legal system is that the scope of tort law is broad. It covers the area between property rules (contract) and inalienability (crime). In all social structures, when consent cannot be given and when society does not want to ban a given activity, you will find "tort law." Tort law, therefore, has always faced problems of both punitive justice (typical of criminal law) and contractual justice. Of course, it has also been enriched by this variety of different suggestions, to the point of becoming ripe to be considered, by one of the
founding fathers of Law and Economics, as the law of the mixed society (Calabresi 1978). In other words, no legal system can purely rely on the market, nor can it purely rely on regulation.

Another reason, strictly related to the former one, is that tort law is an area of private law with a potentially high impact on the economic system. A fully fledged system of tort is a powerful means of internalization. Consequently, a market actor receives incentives to operate in a market with poorly developed tort law, rather than in a market in which tort law is well established. In a situation in which parallel markets are available (e.g., different countries, formal and informal markets), the lack of tort law may make one market more attractive than the other. This observation can be confirmed by looking at the harsh debate that preceded the directive on product liability in the European Union. But this also means that tort law may be used to create incentives for investors to operate in one market (e.g., the informal), rather than in the other.

The Western Path of Tort Development

Focusing on tort law in our analysis of less developed legal systems allows us to make an important and usually neglected point: The last two hundred years of the evolution of Western societies has been a story of developing countries. It is a story in which tort law has played a rather important role.

In the early part of the last two hundred years of Western societies, tort law has been characterized on one hand by its subsidiarity, marginality, and unclear distinction from criminal law (Fifoot 1970, pp. 5-44). On the other hand, tort law has been deeply rooted in the principle that “people generally profit by individual activity. As action cannot be avoided and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.” Hence the conclusion (Holmes 1881, p. 88) that:

the general principle of our law is that loss from accidents must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. Unless my act is of nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, that make me do the same thing if I had fallen upon him in a fit or to compel me to insure him against lightning.

Shifting to the plaintiff the burden (and the risks) of proving negligence, judges (in common law) and legislators (in civil law) were apparently limiting the impact and the extension of tort law in the economic system. The introduction of a negligence system, however, was a big step forward in the direction of internalization of social costs, if we compare it with pre-
nineteenth century law. It was an efficient first step in reducing unequal regimes of liability. Some activities, indeed, were subject to strict liability, while others were sheltered from all liability (Gregory 1951; Isaacs 1918; Wigmore 1894). The discontinuity was clear. So, rather than talking about a shield offered to rising capitalism (subsidy theory) (Horwitz 1977, p. 85), it is more realistic to see how courts, legislators, and professors throughout the Western legal tradition were simply not accustomed to reasoning in terms of allocating losses. They were confined by the rules of property and contract law (based on regimes of strict liability), and they were therefore passing from one extreme to the other (Bussani 1991; Rabin 1969, 1981; Schwartz 1981, 1989).

In tort, the choice was not, as it is today in more developed systems, strict liability versus negligence (the latter supposedly sheltering the rising capitalism), but negligence versus nonliability. In cases of injuries to workmen, created by unsafe products and so on, Fault was the principle upon which to ground a duty to internalize that was unknown before. Until the birth of negligence law, it was never possible to recover "but for" the violation of clearly specified property rights (everywhere protected by rules of strict liability such as trespass in common law and *actio negatoria* in civil law) (Markesinis 1983). In the early period of "modern" tort law (through the nineteenth century), however, even when the decisionmaking was focused on the existence or nonexistence of a negligent behavior, liability arose only when the victim was affected in one of the legal interests which could be deemed worthy of protection in tort law (i.e., life, physical integrity, property) (Zweigert and Koetz 1987, p. 292).

When the economic systems began to rely on massive industrial production and consumption, and on extended motor vehicle circulation, and when the growth of urbanization and the increase of the population became explosive, the occasions to create damages obviously increased at very high rates. The challenges faced by tort law increased as well. A tension arose between the old structure of tort law, sufficient for a less developed society, and the new complex society. The focus of more advanced tort doctrine, both in common law and in civil law, became compensation. The alternative was no longer liability (based on negligence) or nonliability. It was now negligence or strict liability.

Although this development process was common, it followed different paths in different legal cultures. In the common law, the leading agents of tort law development have been the courts, which were particularly sensitive to the pressures that a complex society was throwing on them. In many fields, statutes followed only after decades of the changes imposed by case law. In the civil law, in contrast, the burden of legal change has been carried almost completely by legal scholars who eventually were able to persuade legislators to enact new statutes.  

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In some less developed countries, tort law has so far not been exposed to social and economic pressures comparable to those faced in Western societies. In other developing countries of Africa and Latin America, which are more advanced in introducing a capitalistic economy, the pressure is quite heavy. Everywhere, however, tort law already shows a rather complex evolution.

In the analysis of Africa, we must start from a structural observation of crucial importance: The described phenomenon of legal stratification. This phenomenon can be observed at two different levels.

First, the legal system of an African country is made of legal layers superimposed on one another in the course of history. Religious law (usually the Islamic Sharia) (Anderson 1978) is superimposed on top of the previous layer of local customary law. Colonial law, either rooted in the common law or in the civil law in turn, is superimposed on both of these layers (Gluckmann 1963; Mommsen and De Moor 1991). On top of everything, the law of the modern independent State (sometimes socialist) creates a new layer (Brietzke 1982; Hazard 1965). No legal order has effective power to substitute previous layers.

Second, most of the time even the customary informal legal system is the result of a historical process of superimposition and integration of different components. What is often referred to as the customary layer is usually made up of a large plurality of customs that react with each other in the course of the historical events experienced by the local population. Even if the absence of written sources makes it difficult to know the details of the history of the different ethnic groups, we know that in most of Africa, they have experienced migrations, conquests, and invasions after which the customs of both the victorious and the defeated groups have been changed by mutual influence. This is of course neither a structurally different nor a less complex phenomenon if compared with what happened in Europe with the clash of different legal cultures.

In the process of stratification, the superimposed legal system does not cancel, but instead (officially or unofficially) cohabits with the old legal order. Sometimes it restricts the area of application of the old law; sometimes it modifies and/or is in turn modified by it. This coexistence of different legal orders creates a remarkable legal pluralism which characterizes in different ways the totality of African states.

Sometimes pluralism is recognized and different law is applied according to its respective status (e.g., colonial law). Sometimes the different domain of application depends on the nature of the legal transaction (e.g., family law—customary; business law—modern). Other states, on the other hand, impose a unified option, such as mandating that traditional law be
disregarded or banning it entirely (this approach is typical of Socialist Africa). Even in these systems, however, customary law flourishes de facto as soon as the State does not invest sufficient resources to impose its option (Sacco 1996). The same phenomenon happens with the organization of justice. The judicial system is usually unified but, within it, different tribunals apply different law (state law, customary law, Islamic law). The legal culture of the judge and even the process of selection may change according to the law to be applied.

All of this, of course, is crucially important to an understanding of African tort law, which follows the Western model. Modern tort law, either common law or civil law oriented, even where it is actually applied by courts, has fallen short of undermining the strong power over interpersonal conflicts that is still held in the hands of customary law. And we should not forget that the function of conflict resolution plays a very important role in the social life of the African group.

The resolution of a legal dispute, although clearly belonging to the chief, is a collective enterprise that involves the active participation of the whole community. Everybody has the right and the duty to participate in the process and propose solutions to the conflict. Of course, the last word belongs to the chief and the most authoritative points of view are those of the elderly. Consent of the whole community, however, is still the main legitimation of the decision. Analogously, the general blame of the community for the wrong and the fear of supernatural reaction force the guilty to accept the sanction, even when it could be easily avoided because of the absence of an effective enforcing machinery. Ultimately, the judicial process is aimed at reestablishing the social peace in order to avoid feuds. Consequent to this approach is the high level of flexibility typical of customary law. What may appear as a violation of customary law may sometimes be the establishment of a new rule, accepted and promoted by the community, as more sensible to its present needs.

Particularly interesting are the rules by which the harm is made good. Most of the time, compensation (blood money) is paid to the kinship of the victim from that of the wrongdoer, and not from the latter himself. This shows the function of customary tort law as an instrument of peacekeeping, and offers an efficient tool to spread the loss, which is crucial in a economy of subsistence (Abel 1982a; Rouland 1988).

In summary, African tort law shows the following characteristics: stratification; legal pluralism; variations in the Western legal traditions considered; marked differentiation of liability from one sector to the other; absence of dialogue between the different sources of the law (tradition, judges, legislators); and very limited role for legal scholars (Guadagni 1989).
Tort Law in Latin America

In Latin America, the legal tradition is far from being unitary among states (e.g., Brazil and Argentina) and within the same state. This last "modular" tradition is particularly clear in Mexico, where public law is largely influenced by United States law, while private law is rooted in the Romanist tradition (Schlesinger, Baade, Herzog and Wise 1994, p. 500). In private law, however, the common law influences are not absent, as is easy to perceive "with regard to the adoption of the express trust by a number of Central and South American countries" (Schlesinger, Baade, Herzog and Wise 1994, p. 500).

Latin American private law derives in large measure from Spanish and Portuguese law. The conquistadors, aside from their systematic exploitation of the new territories, also transferred their institutions and their legal tradition. The European colonization, however has not completely displaced the legal tradition of the autochthonous populations (Aztecs, Mayas, Incas, etc.).

These customary traditions maintain a certain importance even to the present day, particularly between the people of Incan and of Aztec heritage and between the most marginalized part of the population. Consequently, in the small villages in the internal area of the continent and in the suburbs of the big towns, social life is often organized according to a legal custom that has nothing to do with the formal authoritative and learned law of the State, which is taught in the universities according to the long established civil law tradition. As has been said, a large number of the Latin American population lives according to a "derecho informal que no necesita de abogados ni jueces" (informal law which does not require neither attorneys nor judges). On this customary law the Spaniards, the Portuguese, and other Europeans have established their law and legal institutions. In Latin America we find a phenomenon of legal stratification, with the second layer being the civil law (Spanish and Portuguese) as applied during the colonial experience. The third layer was produced in the course of the nineteenth century when, after defeating the colonial domination, Latin American countries started to codify their laws. In this context, codification has not introduced substantial breaches with the past. It has substantially followed the previous colonial experience based on Justinian law.

The modern Latin American state—within a much longer tradition of independence than in Africa—has enacted a remarkable amount of "political law" (special statutes) following, according to local history, socialist revolutions, or authoritarian involutions. This political layer, which is very variable according to social contingencies and emergencies, possibly constitutes a common characteristic of less developed countries in
Africa, Asia, and Latin America, and of systems in transition to market economy in Eastern Europe.

Another important characteristic of Latin American law is worth mentioning: the weak role of the judicial system in framing the law, particularly in those countries in which express provisions prohibit case law (Schlesinger, Baade, Herzog and Wise 1994, p. 651). Such prohibitions seem to confirm the impatience of the political law in the face of a more stable and incremental framework such as that developed by judicial law. There may, however, be significant obstacles to modifying Latin American legal systems to fit present day needs and conditions (Kozolchyk 1979; de Trazegnies 1988, p. 189). Still, it must be observed that the role of checks on political law and the overall creation of an ordered legal framework is assumed in Latin America by legal scholarship. Among the sources of non-enacted law, this is possibly the most influential.

Sticking to tort law, a first important aspect to be mentioned is the clear distinction of this area from that of criminal law, which is more exposed to political pressure and more useful for political purposes. Tort law, therefore, remains confined to the resolution of less important social conflicts, while criminal law is the only branch concerned with the protection of many interests that in other systems are taken care of by civil liability. This choice of public policy in favor of criminal law sometimes creates overprotection and, in many other cases, underprotection.

Law and Economics Facing the Challenge
of Environmental Protection in Africa and Latin America

Comparative Law and Economics can be seen as a powerful problem solving discipline. It can focus a social problem and evaluate, in terms of economic efficiency, the institutional reactions to it. We therefore apply it out of its familiar Western context to one of the most important problems of this century: environmental harm.

It is often said that one of the most serious problems of the twentieth century is the generation of wastes that spoil our waterways, taint our crops, and cause cancers, birth defects, occupation diseases, and environmental contamination. We all live in a shrinking global environment, and we cannot dismiss environmental problems in foreign countries by assuming that what happens halfway around the world has no impact on us. Environmental problems will eventually affect each and everyone of us.

To the economic analysis of law, the "non-accidental" perspective that characterizes environmental tort law, and the consequent problems of causation and evaluation of the harm, has long been clear (Michelman 1971). Pollution may be an incremental, day-to-day problem involving a multiplicity of actors, rather than being a one-shot accident caused by one
defined wrong doer with one defined victim. Even when pollution follows
a given act, its consequences are likely to be spread out in time and space.

The problem of allocating liability and costs of environmental harm can
be tackled in many different ways. The Western legal tradition offers a
variety of approaches. On one hand, we find an administrative-centered
command and control regulation enforced by criminal sanctions that may
be regarded as an ex ante discipline. On the other hand, tort law is handled
ex post by the court system. A mixture of the two is possibly the most efficient
solution. In particular, the command and control approach is not the best
solution for cases in which causation of damages follows quickly on the
heels of the production of new risks for the environment. It is also sometimes
rigid, and it may be difficult for regulators to differentiate efficiently the
class of different behaviors that it wishes to regulate.

Tort law, on the other hand, if applied alone to environmental harm,
is not able to reach its own goals. Litigation and administrative costs are
usually high, and there may be phenomena of discontinuity in the
anticipated costs faced by the enterprise. In short "where pollution is zero,
liability is zero; but when pollution is infinitesimal, liability may be then
complete" (Murphy 1994, p. 54). When this is not the case because a market
share liability system is adopted, it remains extremely difficult to choose
the efficient course of private behavior. The optimal strategy, which some
enterprises follow, is to save by reducing precaution costs. Here, the savings
that any one enterprise achieves could be substantial and the loss that it
creates will be borne, not exclusively by it, but by other enterprises operating
in that field (Murphy 1994, p. 54). An obvious "tragedy of the commons"
problem is involved. Even relying on insurance can be both inefficient and
unsuited to the goals of tort law. Since the system is based on standard terms,
there is an automatic tendency to make premiums uniform for the various
participants in the same activity. There is therefore no incentive to the single
participant to use more efficient precautions. Consequently, there is a fall
of the deterrence potentiality of the system.27

Law and Economics, grounded as it is in American legal culture, seems
likely to recommend the court system as the best way to approach
environmental problems. From a comparative perspective, however, we
know that the institutional framework of American law is not a variable
independent of the success of its recipes. Outside of American law, Law and
Economics has a good chance to enrich its map of new ways by abandoning
a rather parochial attitude and thinking about the institutional peculiarities
of the system it wishes to analyze.28

Let us then consider African law first. In Africa we frequently find very
weak judicial and other state institutions.29 Such institutions cannot be
constantly effective vis-a-vis the social organization. This is to say, in our
perspective, that the layer of modern law can not govern environmental
problems in an efficient way. If a layer does not tackle a problem efficiently, we may still be able to find the proper solution elsewhere. It may be observed, then, that customary law with its decentralized impact on the territory is a subject of much interest (Kabeberi-Macharia 1994, p. 27; Mohamed 1994, p. 20). Collective property rights are usually structured within an inalienability rule in favor of future generations, and are patrolled by local chiefs (Elias 1977). They appear therefore, to many scholars, as projected in the future and environmentally protective by their own nature. We may add that property rights violations find, on the customary level, remedies focused on reestablishing social order enforced by a high level of social stigma that can ensure their deterrence role. Customary law, therefore, may be suitable to guarantee a rather efficient level of environmental protection, at least against smaller injuries.

In Latin America, reflecting the opposite extreme, customary law is weak and today rather marginal. Courts appear weak as well, and not in a condition to affect the long term dynamics of social behavior. In this context, the efficient institutional solution should be looked for in the interplay between scholars and administrative bodies, the two strong agencies of law making. Such interplay may provide a regulatory scheme that balances the needs of present day efficiency with the necessity to preserve unborn market actors. Applying regulatory instruments is sometimes suggested also by Law and Economics scholars whenever—as it often happens in Latin America—the government is in a better position to assess the risk, when private parties may not be able to provide compensation for the full amount of the harm, and when private parties will likely escape suit for the harm they produced (Shavell 1984, p. 357).

In Latin America, as is not the case in Africa, the high level of legal scholarship and its leading role among the framers of the law, as well as its strong appeal on political centers of power, should be considered. Law and Economics offers a method particularly suitable for legal scholars in its dialogue with regulatory agencies. This is particularly important because regulation is traditionally the domain of public law, where American-inspired models are already at work. Latin American Law and Economics scholars may be called to propose solutions at the best institutional level of regulation, by considering the federal level where it exists or in any case the option between the local or the national level.

The Proper Role of Modern Tort Law in Less Developed Countries

Even at the cost of being considered ethnocentric, we would not suggest abandoning Western tort law when tackling environmental problems in less developed countries. The reasons, however, are different in the two realities we have considered.
African customary law, because of its intrinsic localism and because of its limited receptivity in the face of technological expertise, does not seem to be able to approach adequately the macro-problems of environmental externalities. In Latin America, on the other hand, it is likely that an efficiency-centered analysis shows that tort law, rather than regulation, could still be the best solution to micro-environmental problems. There is a problem of effective enforcement of judicial decisions—in Africa much more than in Latin America—but its solution should probably be found in rethinking the allocation of Western aid in favor of legal education for the birth of a local legal culture and consciousness (Bussani 1995).

In developing countries, where the modern layer of the law is not a tradition in itself and can therefore be chosen, Law and Economics recommends bypassing the historical phase that in (developing) Western countries preceded the expansion of negligence. At the time, as we have seen, a vast amount of rising industrial activities were allowed to externalize their costs with appalling consequences on the environment.

Moreover, considering the phenomenon of dualism (with a formal and an informal market), and the massive presence of Western market actors, the efficient solution could probably be based on a dichotomy of tort law models. If the goal is to favor the growth of local enterprises that play their role on the informal market, and not to sterilize the beneficial effects of foreign investment, a balanced tort law must use both strict liability and negligence rules.

In the short and middle run, more friendly negligence law rules focused on a level of care so as to guarantee the efficient level of precaution is probably recommended for damage created by local entrepreneurs. Such levels should consider the foreseeability of the harm for a less equipped market actor.

Strict liability, possibly focused on a market share mechanism, may be the most efficient rule to apply to Western investors and to publicly owned local corporations. It is true that damages are difficult to account for and strict liability is not traditionally recommended in such cases (Cooter and Ulen 1987). It would be sufficient to overestimate rather than underestimate them, thus introducing a subsidy effect on the informal economy. Strict liability may furthermore be justified by the traditional deep pocket argument.

In such a scenario, Law and Economics scholarship should carefully consider an insurance regime able to reflect the needs of weaker market actors. In a context in which the insurance market is not perfectly competitive, local enterprises should be allowed to purchase third party insurance policies with low maximums. This should favor, by means of low premium rates, the diffusion of third party insurances at this level. Stronger market actors may also find incentives to purchase first party
insurance since they may be affected by the low level of compensation for harm created by weaker market actors (insured on the third party) (Kulundu and Bitonye 1990).

An Efficient International Environmental Tort Law?

A different perspective about which Law and Economics may have something to say is the necessity to approach environmental problems in a transnational dimension. At this level, the scarcity of concrete results is bewildering.

The international community has so far adopted around two hundred environmental agreements, covering atmospheric, marine, and land pollution, protection of wildlife, and preservation of shared global resources (UNEP 1991). Most of these agreements were reached after the environmental emergencies of the 1970s. While some have been satisfactory, others remain largely rhetoric.

Law and Economics may give us some insights on the efficient solution of international problems, such as the need to enhance monitoring and verification, more systematic funding, better use of international institutions, creation/incrementation of supplemental regimes such as those related to liability and compensation, and effectiveness of international agreements by means of improving local and international judicial institutions (Murphy 1994, p. 74).

Just to give some of those insights and without pretense whatsoever of being complete, we may mention the following: Law and Economics suggests using incentives rather than authority to reach social goals. Incentives, therefore, should be given to favor local groups (associations, trade unions, agricultural communities) to work as private environmental attorney generals. International organizations should be banned from giving aid to countries that do not respect international standards of environmental protection, or forced to grant aid that directly or indirectly favors sustainable environmental protection. Decentralized enforcement could be given to the aforementioned groups.

More specifically on tort law, the need to obtain fast and sufficient compensation to restore the environment should be pursued by making the international organizations and the local states jointly liable. The residual base of liability (if they cannot be considered liable on other ground) would be the inefficient level of investment in monitoring the environmental quality.33

CONCLUSIONS

This chapter, as most contributions of Law and Economics, has shifted many times from the positive to the normative ground. In conclusion,
therefore, we should say something about what Law and Economics can not (and should not) do in the context of developing countries.

A common feature of the legal systems of less developed countries, as we have seen, is the less clear distinction between the legal process and the political process. In a context like this, of course, the possible ideological biases that are sometimes observed in some of the normative applications of Law and Economics may become particularly dangerous. Law and Economics should not constitute an intellectual cover-up for conservative political programs. This point is crucially important in the Latin American context, in which Chicago-style recipes of political economy sometimes reach sufficient political power to be applied (Palma 1989).

As we have seen, Law and Economics does not recommend unbalanced economic liberalism, nor does it endorse it as a political ideology. It does not abstractly prefer free market to regulation. When it recommends the market, it is for reasons other than political ideology. Although Law and Economics offers a powerful tool of policy analysis, it remains a value-skeptical and politically neutral branch of legal scholarship. This neutrality is the only source of legitimation for lawyers and should be preserved. Given the difficulty of remaining neutral on policy issues, it is usually dangerous to use scholarly arguments in normative analysis. Political choices are never neutral and should not be dressed as if they were. When neutrality is lost, scholarly arguments become hidden value judgments of hidden legislators. The danger increases when such value judgments are able to reach sufficient power to be imposed on all of society.

Located midway between the normative and the positive ground, Law and Economics may help the legal systems of the less developed countries to become conscious of a similarity of problems and of legal dynamics within the differences of their own local peculiarities. Whether this characteristic of legal pluralism shared by the countries of the south hemisphere is going to become a conscious legal tradition is not for Law and Economics to say. Law and Economics, however, may say that the degree of resistance of a legal system to legal transplants coming from similar traditions is lower. By learning from each other less developed legal systems, it eventually may be able to develop original solutions for an efficient and different path.

To conclude on a positive note, Law and Economics recognizes the continuum-nature of the development process. Less developed countries offer clearer evidence of the composed nature of the legal order. So far, traditional Law and Economics has assumed a unitary legal framework. Such unity does not exist in the United States or anywhere. This is why Law and Economics has so much to gain from being applied to less developed countries, where this phenomenon is usually neglected in economic analysis but is so much clearer. Such countries, indeed, offer an
extraordinary ground for testing efficiency theories. Hopefully, we have shown that Law and Economics may also offer something.

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NOTES

1. For a general discussion of legal transplants, see Watson (1993). For a discussion of the methodological development of legal transplants, see Sacco (1991). For the relationship between legal transplants and Law and Economics, see Mattei (1994a). The Introduction and Part C of this chapter have been written by Mauro Bussani.
2. For a discussion of the characteristics of the Western legal tradition, see Berman (1985).
3. Castan Tobenas (1988) stresses the need to overcome a Eurocentric approach and give more importance to African and Latin American countries.
4. For a classic map of the world legal systems, see Schlesinger, Baade, Damaska and Herzog (1994, p. 315).
5. For references and for a map of the present day influence of American law, see Mattei (1994b).
7. Little (1982) focuses on how, in developing countries, part of the economy operates under paternalist or quasi-feudal regimes. The same point is made by Lewis (1954, pp. 139-191) in his classic model of development, which stresses that in the agricultural sector (crucial for the analysis of property rights) there is no objective of maximizing profits. Distribution is made according to conventional norms rather than marginal products (Rostow 1960).
8. For the kind of problems studied by legal anthropologists, and for some methodological insights that should be kept in mind by Law and Economics scholars, see Nader (1992, p. 3).
9. Upham (1987) shows the degree to which Japan has succeeded by transforming the legal and economic institutions that structured the industrialization in the West. Vogel (1979) argues that determining the relevance of Confucian culture for the process of development is also a central issue for theories of economic development. Moser (1982) argues that, in Taiwan, legal institutions are devalued by traditional Confucian teachings. Kwang-kuo
Hwang (1987) asserts that interpersonal obligations play a more integral role in evaluating Chinese society than do traditional patterns found in Western social science research.

10. The same can hold true as far as Islamic and Hindu law are concerned. For Hinduism’s focus on Karma, in which contentment does not come from the object of desire, see Sen (1984). On Islamic law, with its focus on the notion of sharing, brotherhood, and solidarity, all of which are foreign to the individualistic assumptions of Law and Economics, see Weeramantry (1988). On the role Islam should play in the political and legal order of modern nation states, see Zubaida (1989).

11. Lewellyn and Hoebel (1941) believed that if the law could be flexible enough to conform with merchant customs, then productive economic transactions could be facilitated.

12. Professor Eide has remarked that if a resource is subject to a tragedy of the commons problem and will not last if overexploited, the price system may still reflect the concerns of sensible parents for their children and therefore those of the present generation for the next. Efficiency, then, may have something to say in this perspective.


14. The first generation may be regarded as highly optimistic and working in the neoclassical tradition (Rosenstein Rodan, Albert Hirschman, Gunnar Myrdal, and Walter Rossow are the best known names). The reaction, mostly based on marxian paradigms, is linked to Paul Baran, Samir Amin, André Gunder Frank, and F. H. Cardoso. For a brief introduction, see Bell (1989, p. 1).

15. For the much more complex line of thought that has characterized the so-called dependency school, see Palma (1989). Most notable is the celebrated work of Cardozo and Faletto (1979) in which the notion of dependency is for the first time used as tool of analysis of concrete processes of development. For an application to Africa, see Amin (1972).

16. See, for example, Little (1982).

17. See Brasseul (1993) for the need of an initial redistribution to make the economy start.

18. Resources should then be allocated to favor informed choices (e.g., informing on the risks of female circumcision or on the availability and costs of contraception) and not coercion. The only way to do so outside of ethnocentrism is by investing in local culture.


20. Compare the leading cases that marked the path of products liability in the American and English common law systems—McPherson v. Buitck Motor (1916), Donoghue v. Stevenson (1932), and Escola v. Coca Cola (1944)—with those of European civil law systems. In the latter, the very different and sometimes contradictory path followed by national courts has long been bearable thanks only to scholarly efforts of rationalization.

21. For a country study and for the relationship between the layers, see Mattei (1990).

22. On the weakness of the modern judiciary in Africa, see Abel (1982b), Beckstrom (1973, 1974), and Seidelman (1981). As for the relatively few judges who are lawyers by training, see Rhyne (1978).

23. For rather respectful attitudes in the face of legal scholarship, see Berstein (1985) and Merryman (1985).

24. On the centralist and authoritarian character of Latin American states and for a critique of the control that political institutions have exercised and sometimes still exert on the legal system, see Biles (1976), Cabrera (1957), Macdonald (1986), Palmer (1980), and Veliz (1980). The courts of Brazil, Mexico, and Venezuela are considered stronger than those of other Latin American countries (Herget and Camil 1978).

25. Some countries in Latin America have constitutional or statutory provisions allowing a certain number of successive decisions expressing the same view on the same point of law to have the force of controlling precedent. See Rosen (1986, p. 513) for the Brazilian “Sumula”, Carro (1981, p. 1002) for Argentina, and Wagner (1959, p. 118) for Mexico.

26. For the American experience, see Humphreys (1990).
27. For a discussion of how different institutional mechanisms can be used in this regard, see Shavell (1984) and Viscusi (1989).
29. On the independence of the judiciary from the political regime in Africa, see African Bar Association (1988); Alliot (1972, p. 82); Ammissah (1976, 1981); and Elias (1977, p. 99).
30. Collective property rights are also present in Latin America, but in a less extended form. For example, under Mexican law, collective property known as ejido is constitutionally recognized (Karst and Clement 1969; Simpson 1966).
31. For some examples of local statutes addressing problems of pollution, see Adekunle (1992).
32. For a general survey and/or particular insights, see Clark (1988), de Soto (1989), Jacobson (1994), Portes (1989), and Wallerstein (1979) (arguing that peripheral areas are drawn into modern economic relations with the core, on terms that favor only the core). For a critique of legal centralist ideas, arguing instead that the informal social order need not to be understood as subordinate to or a mere delegation of the State's authority, see Ellickson (1991).

REFERENCES


Making the Other Path Efficient


