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# THE IMPORTANCE OF COMMERCIAL LAW IN THE LEGAL ARCHITECTURE OF POST-CONFLICT “NEW” STATES

*Michael J. Stepek*

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## THE IMPORTANCE OF COMMERCIAL LAW IN THE LEGAL ARCHITECTURE OF POST-CONFLICT “NEW” STATES

*Michael J. Stepek\**

### I. INTRODUCTION

In the era of international relations ushered in by the end of the Cold War, nation-building has become all the rage. In a burst of Wilsonian optimism, Western countries have sought to recreate failed states in their own image, fashioning new governmental institutions from the ashes of violent conflict or civil collapse. These projects became possible in a fresh environment of international consensus that has prevailed since the middle of the 1990s. Developing improved legal institutions has been considered a particularly important component of any state-building project and has been a primary focus of almost all such efforts. A new label has been created to describe exercises in developing legal institutions, with the general rubric describing them alternately as “rule of law” or “legal and judicial reform” projects.<sup>1</sup> The aim of these exercises is to fashion the legal system of the target country along principles found in the legal systems of developed Western states, that is, to promote judicial independence, legal transparency, civil rights, and market freedoms.<sup>2</sup> This, it is said, will promote economic development, political stability, and reconciliation. To date, these efforts have been driven by legions of international experts employed by multilateral and bilateral development institutions, from the World Bank and the United States Agency for International Development (USAID) to a myriad array of U.N. agencies and private contractors.

Despite the large number of these projects, there exists a relative paucity of published analysis of what is effective and what is not, particularly in relation to the more sophisticated norms governing commercial relations. Although there is a substantial volume of material addressing both the role of and the need for legal institutions as part of legal and judicial reform projects,<sup>3</sup> much less effort seems to have been devoted to just how one might develop those institutions in practice. To some

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1. See WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM (2004) [hereinafter WORLD BANK, INITIATIVES], available at [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/01/000012009\\_20040301142827/Rendered/PDF/250820040Edition.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/01/000012009_20040301142827/Rendered/PDF/250820040Edition.pdf); see also Livingston Armytage, *Monitoring Performance of Legal and Judicial Reform in International Development Assistance: Early Lessons from Port Moresby & Phnom Penh 2*, in CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION CHICAGO SHOWCASE (Sept. 18, 2006), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MonitoringImpact.pdf>.

2. WORLD BANK, INITIATIVES, *supra* note 1, at 5-6.

3. W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 LAW & BUS. REV. AM. 551, 564 (2002); see also Ibrahim F.I. Shihata, *The Role of Law in Business Development*, 20 FORDHAM INT'L LAW J. 1577, 1581-83 (1997).

extent, the absence of research on the best methodologies to develop an enforceable commercial law in post-conflict “new” states can be attributed to the newness of the issue. The notion that we can build new states, developing fresh new institutions where troubled countries or regions existed before, is a product of global political opportunity. During the Cold War, every trouble zone became a proxy battle between the U.S. and Soviet superpowers. Since its end, there has been a degree of commonality of interests in keeping a region of the world politically stable through international intervention. If the United States decides to actively influence the affairs of a troubled country like Bosnia or Afghanistan, the Soviet Union no longer exists to provide automatic opposition. Instead, a series of more or less cooperative partners—the European Union, Japan, Russia, and China—may support the intervention politically, financially, and even militarily.<sup>4</sup> These interventions in new states have given rise to a new aspect of the science of development economics because they allow Western countries extraordinary leverage over domestic institutions in a post-conflict *tabula rasa* political environment, in which they can impose their new ideas afresh and free of many domestic political restraints which would otherwise be present.

Yet this does not fully explain the seeming absence of study. Instead, it would appear that two much more prosaic and practical issues have constrained the particular review of this issue. First, such projects would appear to suffer from the very practical limitation of funding. Funding for these legal and judicial reform projects must of course compete with more common infrastructure projects. Infrastructure projects are the most common subject of development loans because politicians can more easily show off major construction as the fruit of their borrowing commitments. Legal and institutional reform projects, in contrast, are by their very nature intangible, and client countries generally do not wish to incur sovereign debt for abstract and long-term goals.<sup>5</sup> The success of the reform projects that do get funded appears to be judged by more tangible goals such as new facilities, cases heard, and other items that are quantifiable.<sup>6</sup> Projects that are measured by the effectiveness of the instituted reform and by the more intangible goals of commercial law in particular are hence at the end of the queue. Therefore, for the most part, these types of projects must be funded by donors rather than loans.<sup>7</sup> Donor funds, however, are in relatively short supply, and

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4. An impetus for such projects under the U.N. mandate may be traced to a 1992 Report by then U.N. Secretary General Boutros Boutros-Ghali in which he called on the United Nations to become more actively involved in what he termed peace-building activities by addressing “the deepest causes of conflict: economic despair, social injustice and political oppression.” The Secretary-General, *Report of the Secretary General, Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, ¶ 15, delivered to the Security Council and the General Assembly, U.N. Doc S/24111, A/47/277 (June 17, 1992). The legal basis for such intervention traces its roots to Chapter VII of the U.N. Charter. See U.N. Charter arts. 39-51.

5. This is not to say that legal and judicial reform projects do not enjoy substantial funding commitments. The World Bank alone financed in excess of six hundred projects relating to legal and judicial reform projects, with other international development agencies contributing more. WORLD BANK, INITIATIVES, *supra* note 1, at 3. Few of these reform projects, however, focus on analyzing the effectiveness of the reform, and fewer still on commercial law in particular. See Armytage, *supra* note 1, at 3; Stephen Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative* 25 (Carnegie Endowment for Int’l Peace, Working Paper No. 41, 2003).

6. Armytage, *supra* note 1, at 6.

7. Golub, *supra* note 5, at 38.

it is hard to compete for those funds against other projects which provide more concrete results. For example, it is much harder for the casual observer to see the immediate benefit to an impoverished nation of spending money on developing what is considered an already elite legal profession than on a more traditional bricks and mortar project.

Moreover, a project designed to create an enforceable commercial law may not necessarily be welcomed by the political leaders in any given state. The level of political accommodation required for international experts to enter a client country and execute legal and judicial reform projects is substantial.<sup>8</sup> More importantly, there are always political interests vested in the status quo of any legal system, and overcoming those interests to pursue root and branch reform is extremely difficult. Any legal reform requires compliance by a client country's political leaders.<sup>9</sup> If a project's reforms threaten their position, these leaders are unlikely to support it. Thus, it is one thing for the World Bank to establish numerous departments to pursue legal, judicial, and public sector administration reform, but it is another thing entirely if those departments cannot find willing political partners prepared to embrace such reforms in good faith. These partners' positions or benefits might be jeopardized if a country's judiciary really became independent or if public sector corruption actually was eliminated. In contrast, capital injections for infrastructure improvements rarely face such problems. A new road network financed by the World Bank is (usually) unlikely to undermine the political hegemony of a ruling class.

The promotion of institutional legal reforms by the international community, however, can be seen as a real threat to a client country's entrenched political elites who may have strong vested interests in preserving an ineffective status quo in which the judiciary is complicit in suppression of political freedoms or exhibits bias towards politically preferred commercial interests.<sup>10</sup> Similarly, those who would be entrusted to enforce any law—judges and lawyers—would also need to commit to the reform. Finally, from a practical perspective, a country's legal system reflects many features of its political institutions and culture, and its features are often heavily ingrained.<sup>11</sup> The idea that a country would abrogate its legal and political traditions to allow foreigners to impose their ideas upon it from the outside is often a very difficult notion for a Minister of Justice to swallow.<sup>12</sup>

For all these reasons, legal and judicial reform projects focused on the implementation or effectiveness of the reform, to say nothing of those focused solely on commercial law, are rare both because they are not domestically politically attractive and because international donors are not easily persuaded of their benefits. Hence, although development economists opine that development of legal institutions

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8. WORLD BANK, INITIATIVES, *supra* note 1, at 12.

9. *Id.*

10. See KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 106-18 (2006) (discussing the importance of an independent judiciary in establishing the rule of law in developing countries).

11. Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262, 265-66 (1995) ("[L]egal practices are very much a reflection of a given culture and of a given legal *mentalité* (in the senses of the interiorised culture).").

12. DAM, *supra* note 10, at 63.

is an imperative component of economic growth in developing and post-conflict countries,<sup>13</sup> it is remarkably hard for the idea to achieve traction.

When nation-building is conducted in a post-conflict context, it is easier of course to find a willing client state counterpart with whom to cooperate. If the international community decides to intervene in a failed or new state, then its role is inevitably far more comprehensive than for a project in an otherwise developing economy.<sup>14</sup> It may come into the country after a war or after foreign military intervention. As in Iraq or Afghanistan, the country's new rulers may be hand-picked by the international community. Similarly, compliance with a state-building agenda, including practical application of the lessons of neo-institutional economics, may be a condition of holding office. U.N. agencies may have formal powers in international law (as in Bosnia and Kosovo),<sup>15</sup> and the level of post-war reconstruction funds and tangible foreign military presence might give the international community formidable lobbying powers. These projects have been pursued in the context of peace operations and the construction of new states,<sup>16</sup> and some significant attempts to re-craft commercial law have taken place.<sup>17</sup>

In order to discuss the relative merits of past attempts at legal reform in post-conflict "new" states, it is necessary to understand more generally the relationship between economic development and the rule of law. Accordingly, Part II of this Essay begins in a theoretical vein by summarizing the current thinking about how the rule of law relates to economic development, and what the law must encompass to achieve that goal. Part III then focuses upon the models used in legal and judicial reform projects to build effective systems of commercial law and how they hope to promote domestic commerce, foreign investment, and economic growth. Part IV then turns to a series of generic problems such projects have encountered, and offers some observations as to why the rule of law in a commercial context is so difficult to pursue through international intervention in a post-conflict "new" state. This Essay concludes by setting out some lessons to be learned for future projects. While this Essay is introductory in its scope and does not seek to give exhaustive answers to each of the

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13. See *id.* at 5 ("[T]he idea that institutions and especially legal institutions are crucial to the process of economic development is now broadly accepted in the academies and in the research departments of international financial institutions such as the World Bank."); see also FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 21-22 (2004); SANJEEV GUPTA ET AL., INT'L MONETARY FUND, *REBUILDING FISCAL INSTITUTIONS IN POSTCONFLICT COUNTRIES* 7-8 (2005), available at <http://www.imf.org/external/pubs/nft/op/247/op247.pdf>; WORLD BANK, *INITIATIVES*, *supra* note 1, at 2-3.

14. See IAN BANNON, WORLD BANK, *THE ROLE OF THE WORLD BANK IN CONFLICT AND DEVELOPMENT: AN EVOLVING AGENDA* 3-5 (2004), available at <http://siteresources.worldbank.org/INTCPR/214578-1112884026494/20482669/ConflictAgenda2004.pdf> (discussing the increased role the World Bank plays in post-conflict reconstruction settings).

15. In Bosnia, the office of the High Representative was established by the General Framework Agreement for Peace in Bosnia and Herzegovina, December 14, 1995, Annex 10, 35 I.L.M. 75. The leading U.N. official in Kosovo has similar de facto powers (although the use of such powers has not been sanctioned by the U.N. Security Council), as did the head of the Coalition Provisional Authority in Iraq from 2003 to 2004.

16. See ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* 13-37 (2004).

17. WORLD BANK, *INITIATIVES*, *supra* note 1, at 3-4 (citing examples of attempts at codifying commercial law in new and rebuilding states).

issues raised, it is hoped that the observations offered can spur discussion as to how those involved in future state-building attempts might focus their efforts in order to better ensure success. The overarching theme of this Essay is that state-building in general, and development of an effective commercial law in particular, is a science in its infancy and is one about which we know remarkably little. Vastly more needs to be learned and committed in resources. Until that happens, the exercise of trying to create effective commercial law, and thus promote economic development in new states, will be a tricky and elusive goal.

## II. A MODERN THEORY OF ECONOMIC DEVELOPMENT

The role of commercial law in post-war nation-building is not an issue that can be considered in isolation. It is a comparatively small part of a rich tapestry of research and theory of how to promote economic development in poor countries.<sup>18</sup> This criss-crossing array of academic inquiries is commonly called “development economics,” and one of the principal aims of this Essay is to locate this topic within a set of broader inter-disciplinary themes. The thought that institutional quality is a key component to a country’s political and economic success may seem obvious to the contemporary reader, but that has not always been the case. In order to understand how we reached the current view, it is worth beginning with a brief survey of the recent history of development economics.

Before World War II, the problem of economic underdevelopment was relatively unexplored within international relations literature or practice because the bulk of what we now call the developing world was colonized in one form or another by the European powers. Styles and motives for colonization varied. Some colonies were established for economic purposes and were focused primarily on extracting natural resources or facilitating a trading network.<sup>19</sup> Others had geo-political rationales that focused on keeping the influence of other colonizing powers at bay.<sup>20</sup> In some instances, there was a desire to improve the quality of life of the subject people, often in the name of advancing “civilization.”<sup>21</sup> However, this was rarely the overriding purpose of maintaining colonial possessions. As a result, few questioned why large tracts of the world were much poorer than the West.

The process of decolonization after World War II and the rise of multilateral development agencies cast new light on a relatively unexplored range of development issues.<sup>22</sup> As colonies became independent, many faced social and economic collapse

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18. See, e.g., FUKUYAMA, *supra* note 13 (setting out a clear statement of the “state-building” agenda of which promoting the rule of law is one component).

19. See, e.g., Gerald A. Bunting, Comment, *GATT and the Evolution of the Global Trade System: A Historical Perspective*, 11 ST. JOHN’S J. LEGAL COMMENT. 505, 508 (1996).

20. *Id.* at 507.

21. See, e.g., *England Will Civilize*, N.Y. TIMES, May 3, 1891, available at [http://query.nytimes.com/mem/archive-free/pdf?\\_r=1&res=9C05E1D61239E033A25750C0A9639C94609ED7CF&oref=slogin](http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9C05E1D61239E033A25750C0A9639C94609ED7CF&oref=slogin) (“England and the British South African Company ma[de] [claims] declaring their want to be the establishing of a colony in Mashonaland looking toward ‘the progress of humanity and civilization.’”).

22. See generally Robert F. Meagher, *Introduction to the United Nations Family: Challenges Of Law And Development*, 36 HARV. INT’L L.J. 273, 274 (1995). The first of these institutions were the World Bank and the IMF. They were followed by a plethora of other multinational development banks, including the European Bank for Reconstruction and Development, the African Development Bank, the Asian

and high degrees of poverty. Initially, it was easy to blame these failures on latent problems inherited from their former colonial overlords. However, this explanation became increasingly implausible as a justification for dictatorial systems of government, flat economic growth, and rampant corruption. As Europe's reconstruction was completed, organizations originally established to oversee post-war reconstruction of Europe, such as the World Bank, found themselves in need of broader mandates and shifted their focus to development problems apparent in the rest of the world.<sup>23</sup> Thus, the science of development economics was formed.<sup>24</sup>

Initially, development economics did not focus upon client countries' political or legal institutions. The reason was that, in the midst of decolonization and in the politically polarized environment of the Cold War, any sort of development assistance that might be characterized as political interference or as ideologically driven was unacceptable.<sup>25</sup> The World Bank could not advocate free markets or democracy or else it would have lost the participation of countries under the influence of the Soviet Union and China, and its multilateral status would have been compromised.<sup>26</sup> As a result, the theory developed to fit the practice. The first theory prevalent within development economics was the comparatively simplistic thought that countries are poor because they lack financial capital. With capital injections, their economies would receive a Keynesian boost and development would occur naturally thereafter.<sup>27</sup> This model suited the international development banks' desire to lend money, but it did not work particularly well in spurring development. The money loaned was wasted in many cases, and growth remained negligible. As a result, the theory evolved into one that required capital to be directed into projects that facilitated industrial production. The emphasis was placed on infrastructure, with development agencies funding roads, airports, power stations, hospitals, and railways.<sup>28</sup> Again, the results were mixed.<sup>29</sup>

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Development Bank, and the Inter-American Development Bank. Over time, these banks expanded their activities beyond their traditional arena of physical infrastructure projects to projects under the broader umbrella of nation-building. Additionally, a tradition developed of establishing bilateral development agencies within Western governments, such as USAID, the United Kingdom's DfID, and Sweden's SIDA.

23. Christopher L. Gilbert & David Vines, *The World Bank: An Overview of Some Major Issues*, in *THE WORLD BANK: STRUCTURE AND POLICIES* 10, 14-16 (Christopher L. Gilbert & David Vines eds., 2000).

24. The seminal text on development economics is DEBRAJ RAY, *DEVELOPMENT ECONOMICS* (1998).

25. See PARIS, *supra* note 16, at 13-16.

26. The early apolitical stance of the World Bank, originally called the International Bank for Reconstruction and Development, is evidenced in its own Articles of Agreement, which stated that "[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned" and that "[o]nly economic considerations shall be relevant to their decisions." IBRD Articles of Agreement, art. IV, § 10, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>; see also PARIS, *supra* note 16, at 29-30 (discussing how the World Bank did not impose economic policy conditions on loans until the 1980s and only began to impose requirements of "good governance" on loans following the end of the Cold War, despite its Articles of Agreement).

27. DAM, *supra* note 10, at 4.

28. Meagher, *supra* note 22, at 274.

29. DAM, *supra* note 10, at 22 ("Assistance for industrial development stands indicted in many eyes by monuments of rusting steel mills or underutilized raw materials processing plants . . . . Infrastructure development can help if properly conceived, though toll roads and bridges that no one uses come to the skeptical mind . . . .").



However, projects of these kinds were all that could be realistically achieved in the Cold War world of international relations without courting excessive political controversy.<sup>30</sup>

With the collapse of the Soviet Union and the capitalization of China, however, a more politically ambitious range of development projects could be initiated.<sup>31</sup> Just as businesses need roads, railways, and ports, they likewise need efficient regulation, low and transparent taxes, and fast and effective legal systems. There was no longer a powerful communist ideology to preclude multilateral interventions focusing on advancement of Western economic and political goals. A new discipline within economics emerged, calling itself “neo-institutional economics.”<sup>32</sup> Its central thesis was that the quality of institutions is a direct determinant of a country’s economic growth.<sup>33</sup> Successful businesses are the principal engines of economic development, and they suffocate under the weight of bad government. If government is slow, incompetent, or corrupt, businesses waste their resources interacting with the administration instead of creating jobs and wealth. Additionally, foreign investors are deterred from investing in a country in which they cannot engage effectively with its public institutions.<sup>34</sup>

The most important component of a country’s institutional framework is its legal system<sup>35</sup> for two reasons. First, the law can be used to hold public institutions accountable. Where legal standards are set and there are consequences for violating them, public institutions will have incentives for compliance that may not otherwise exist. Although there may be electoral accountability mechanisms by which governments can be held accountable, “new” countries arising out of violent conflict may have highly imperfect democratic procedures in which voting patterns do not reflect perceptions of administrative competence to any significant degree.

Second, legal institutions enable commercial partners to engage in sophisticated transactions by creating a system of enforceable promises.<sup>36</sup> In such a system, business partners can be confident that a court will enforce the terms of their agreement; in a system where these promises are not enforced, incentives to observe the bargain will

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30. See PARIS, *supra* note 16, at 15-16.

31. See *id.* at 22, 30; John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 244 (2007).

32. The seminal text applying neo-institutional economics to development is DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); see also THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS (1990); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW 130-56 (1997).

33. NORTH, *supra* note 32, at 3-10. It is important to recognize that neo-institutional economics generally defines “institutions” quite broadly, so as to include “any form of constraint that human beings devise to shape human interaction” including both “formal constraints—such as rules that human beings devise—and . . . informal constraints—such as conventions and codes of behaviour.” *Id.* at 4. The focus of this Essay will be the former, specifically political and legal institutions.

34. Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience of Central and Eastern Europe*, 33 COLUM. J. TRANSNAT’L L. 1, 12-14, 17 (1995).

35. Developing effective institutions first is the conclusion from an overview, written by Roland Paris, of fourteen post-war peace-building missions. PARIS, *supra* note 16, at 5-8.

36. DAM, *supra* note 10, at 123.

be greatly diminished.<sup>37</sup> In many developing countries worldwide, this concept of enforceable promises is poorly developed.

There are certain recurring features of economies with poor rule of law. One is the prevalence of “point transactions,” which is to say that economic activity tends to be confined to interactions in which no trust is necessary or where there is the prospect of enforcement by immediate violence.<sup>38</sup> Say, for example, I want to buy a book. You have a book for sale. I can meet you, look at the book in your presence, and pay you money in exchange for it, even where there is no effective legal system. There will never be any need for either of us to sue the other, for I can inspect the book before I accede to the exchange, and if I attempt to abscond without payment, you can take immediate action against me. Without a reliable and independent commercial legal system, however, I would not buy the book from you via mail order because if I send the money before delivery I have no legal recourse against you if you do not send the book back to me. A society without the rule of law cannot fully develop mail order or the like because these are not forms of point transactions.

Another recurring feature of societies with poor commercial law is that people rely on family and personal connections in business transactions. Without enforcement mechanisms, people cannot trust strangers, so they only trust people with whom they have close personal connections in the hope that those personal bonds will keep people to their commercial promises. In much of the developing world, personal relationships are far more important in business than they are in the West. Personal relationships of trust take the place of impartial and enforceable dispute resolution mechanisms.<sup>39</sup> But this is deleterious to the economy because it significantly limits the set of people with whom any one individual can do business. The American consumer thinks nothing of contracting over the Internet to purchase something from a person thousands of miles away and about whom he or she knows nothing. Conversely, a consumer in Cairo may not buy anything unless it is sourced from a shop belonging to his friend or relative because of his or her fear of being defrauded. Because of the existence of an effective right to recourse, the American consumer has far greater choice and pays less for the same goods. Concomitantly, the American entrepreneur has a far greater market for his products because he is not confined to his personal contacts in his marketing efforts.

Yet another component of societies without developed commercial law is the lack of faith in marketing and advertising by either vendor or consumer. In “new” countries, consumers of a product do not generally trust any representations made about the product they are buying at least in part because there are no legal repercussions for a vendor that makes false or misleading statements. As everybody shares this distrust, they do not believe what they are told in the course of a business transaction, except what they can observe for themselves at the “point.” Realizing this,

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37. *Id.* at 124 (“[S]ocial norms sometimes operate to make it unwise for parties in the same community to fail to perform; severe social disapproval, even ostracism, may be the sanction for nonperformance.”). Incentives to observe contractual promises may also be created in “repeat play” situations, in which contractual counterparts may have future opportunities to engage, but will do so only where prior contractual commitments have been honored. *Id.*; see also NORTH, *supra* note 32, at 34, 123-24.

38. See DAM, *supra* note 10, at 70-71, 124; NORTH, *supra* note 32, at 118-24.

39. See DAM, *supra* note 10, at 127; NORTH, *supra* note 32, at 55.

vendors thus spend comparatively little time or money conducting sophisticated advertising to further expand their markets, as it is unlikely to be believed in any event.

The lack of faith in marketing and advertising has very real consequences to the economies of developing countries. The inability of commercial counterparts to rely upon representations they make to one another diminishes the commercial space. Competition is harmed because vendors of products cannot effectively distinguish their competing wares by advertising and marketing. Transactions are further slowed by excessive due diligence because every representation must be individually verified. The provision of professional services is undermined because one cannot trust what one's professional adviser says. The ability to make legally binding and enforceable pre-contractual representations is vital for business. Living in Western societies, we may despair of the ceaseless daily bombardment of our senses with consumer advertising, but we ought not to complain too vociferously. Sophisticated consumer marketing is the badge of our relatively happy economic situation, and when we travel to countries in which advertising is primitive we recognize this as a reliable indicator of a deep undercurrent of economic malaise.

There exists as such a direct relationship between economic activity and commercial law, with economic activity being severely fettered by bad or unenforceable law. Thus, measures to improve commercial law are an imperative component to any plan for economic growth. These measures expand markets, dissolve the restrictions imposed on commercial activity by business cultures based upon personal relationships, open opportunities to strangers and foreigners, and allow for sophisticated temporally-extended transactions using loans, deferred payments, and future commitments.<sup>40</sup> In contrast, all of this is foreclosed for the participant in a commercial culture without rule of law. All a participant can use as a locus for commercial activity is the point transaction, involving immediate cash payments in exchange for immediate goods or services without any future commitment by either party. These are some of the most important reasons why effective commercial law is important in the legal architecture of new states.

This completes a brief survey of the latest academic thinking about the role of commercial law and economic development.<sup>41</sup> For the purposes of this Essay, it is important to recognize that this thinking has not developed in a vacuum. It is an academic theory about economic development arising from the political opportunities to practice it and the desires of practitioners of international development to reinvent their jobs when the conventional roles of the U.N. and the international development agencies are under attack in the post-Cold War world. This school of thought is born not of a trial and error process of learning from prior theories, but from a desire to meet a new growth industry of state-building within international relations. Notwithstanding the beguiling simplicity of the theory, the practice of successfully applying it will be far more difficult than one might at first imagine. To investigate just how difficult it is, we shall now turn to the question of what makes a system of commercial

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40. See DAM, *supra* note 10, at 123-28.

41. Kenneth Dam undertakes an analysis of a number of key themes in the rule of law which promote economic development, including contracts, the judiciary, property relations, corporations, and insolvency. See generally *id.*

law a good one. We will then ask how people have so far gone about trying to create such a system within new states.

### III. THE HISTORY OF LEGAL AND JUDICIAL REFORM PROJECTS

Within the practice of development economics, a distinct sub-discipline of “legal and judicial reform” focuses primarily on reforming a country’s legal regime, including commercial law, into an independent and workable system.<sup>42</sup> Once again, the findings of development economists are relevant to this inquiry. The legal problems besetting businesspeople exist to differing degrees in almost every emerging market and are remarkably consistent across the developing world.<sup>43</sup> They tend, however, to be particularly acute in the context of “new” states which have recently emerged from destructive civil conflicts and painful separations from broader unions. Often such countries have inherited a legal system from a prior imperial or federal power. The process of conflict, however, may have left the legal system defunct, as it may have been run by a social or ethnic group or political elite that is no longer dominant within the new state. Expertise and political stability within the system thus may have been lost.<sup>44</sup> Moreover, corruption tends to be particularly rife in post-conflict environments.<sup>45</sup> In the course of a civil war-like conflict, the entire social

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42. See, e.g., WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET 87-97 (1996).

43. These problems have been well documented and include: abnormal litigation delay (even simple cases may take years, involving multiple procedural steps that continue without end); excessive procedural complexity in simple interactions with the government (registering companies and land transfers and procuring urban planning consents are some of the most common problem areas experienced); accompanying corruption in legal transactions (procedural complexity can be overcome only when irregular payments are made); corruption in the courts (both amongst judges, who may take money to decide cases, and amongst lower court staff, who may be persuaded to lose court files or certain papers within them, or place them to the back of the pile for listing hearings); lack of familiarity by judges and lawyers with concepts prevalent in international commercial transactions and lack of experience of complex commercial disputes; excessive legal formalism, entailing a preference by judges to decide cases on the basis of technicalities rather than substance and a habit in legislative drafting of focusing on procedural steps but ignoring declarations on substantive issues of law; judicial bias against foreigners or in favor of those with political connections; poor enforcement of court decisions (the process is often slow and procedurally confusing, giving a debtor ample opportunity to move assets to evade enforcement); immaturity of legislation (laws are often drafted vaguely, being impossible to interpret definitively and making even simple business decisions based upon a clear understanding of the legislation difficult); poor legal training (lawyers are incapable of clear legal analysis or practical advice); corruption or other unethical behavior within the legal profession (a party’s lawyers may be taking payments from other parties to a transaction or a dispute behind the client’s back or may draw a party into a transaction only to create excessive fee demands that the client must satisfy or be left stranded); burdensome business regulation (for example environmental, banking, or employment regulation). See Jonathan R. Hay et al., *Privatization in Transition Economics: Towards a Theory of Legal Reform*, 40 EUR. ECON. REV. 559, 560-62 (1996) (describing many of the characteristics of a dysfunctional legal system, using Russia as a case study). This places a foreign investor at a competitive disadvantage with local companies, who pay bribes to those who would otherwise enforce it. But such evasion techniques may not be available to foreign investors, who may not have the personal contacts to know how to pay the necessary bribes, and may be prohibited by the legislation of their home countries from making corrupt payments.

44. See PARIS, *supra* note 16, at 173-75.

45. See generally EMIL BOLONGAITA, KROC INSTITUTE, CONTROLLING CORRUPTION IN POST-CONFLICT COUNTRIES (2005).

fabric will typically break down. The omnipresent danger in day-to-day life causes people to ignore legal rules, save to the extent that there is immediate enforcement down the barrel of a gun. Legal institutions thus simply collapse, with even the most basic norms of property ownership and civil liberties ignored, let alone the more sophisticated legal principles governing commercial transactions.<sup>46</sup> At the same time, a new political and commercial elite may arise out of the conflict. This class will include militia leaders, profiteers, and warlords who in no way feel bound by the constraints of law and who have no experience in a legal system. Illicit private fortunes are amassed in the course of virtually every conflict.<sup>47</sup> In the end, the position of the educated middle class elites has often been undermined. Many have fled the country, and those who remain have had to compromise with the criminal classes that have taken over. This disease affects the legal system in particular, with corruption and political pressures dominating the courts and other legal institutions.<sup>48</sup> Civil conflict is devastating to the rule of law in general and the orderly conduct of commerce in particular.<sup>49</sup>

It seems that in most cases the evolution from an immature legal system to a developed modern system of legal institutions was a gradual one that accompanied—and to a great extent was driven by—economic growth.<sup>50</sup> This point is worth emphasizing, for it presents a significant theoretical challenge to the legal and judicial reform project advanced by neo-institutional economics. Development economics has identified a correlation between the maturity of legal institutions and economic development.<sup>51</sup> However, in advancing their methodology of improving legal institutions as an engine to economic growth, have development economists correctly placed the relationship of cause and effect? A contrary hypothesis might be that economic growth is the driver of improvements in legal institutions because the growth creates a politically influential business class that has a vested interest in seeing legal institutions improve.<sup>52</sup> If this is the principal determinant of the improvement of a

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46. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), SUSTAINING POST-CONFLICT ECONOMIC RECOVERY: LESSONS AND CHALLENGES 3 (2005) (“[T]here are certain commonalities that can be found to some degree across the different categories of post-conflict states. These include: economic regression, the deterioration of infrastructure, social decay, disintegration of governance mechanisms and processes, and institutional degradation.”); see also BANNON, *supra* note 14, at 33-34.

47. See UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), *supra* note 46, at 3-4.

48. See generally INT’L CRISIS GROUP (ICG), RULE OVER LAW: OBSTACLES TO THE DEVELOPMENT OF AN INDEPENDENT JUDICIARY IN BiH (1999); INT’L CRISIS GROUP (ICG), FINDING THE BALANCE: THE SCALES OF JUSTICE IN KOSOVO (2002); INT’L CRISIS GROUP (ICG), COURTING DISASTER: THE MISRULE OF LAW IN BOSNIA AND HERZEGOVINA (2002) [hereinafter ICG, MISRULE OF LAW].

49. One should also note that many of the same problems exist in the highly developed legal systems associated with the Western world. A foreigner who has experienced the full gamut of satellite and appellate litigation in complex commercial disputes in the U.S. or English legal systems, might have plenty of cause to complain about inordinate delay and unforeseen cost.

50. See generally WILLIAM F. WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW (Fred B. Rothman 1995) (1924).

51. See *supra* Part II.

52. See Daniel Klorman, *Legal Infrastructure, Judicial Independence, and Economic Development* 1, 4 (Univ. of S. Cal. Ctr. in Law, Econ. & Org., Research Paper No. C06-1, 2006), available at <http://ssrn.com/abstract=877490>. At least one econometric analysis also lends some support to this inquiry, demonstrating a high correlation between enforcement of legal codes with per capita GNP. See DANIEL

country's legal system, then is development economics placing the cart before the horse in seeking to create improvements in a country's legal system before the economic growth that will make those improvements sustainable? As with many such paradoxes, the truth may be symbiotic, with the direction of causation flowing both ways. We shall return to this thought a little later in this Essay, but now we shall focus on attempts that have been made previously.

There exist in particular two thematic situations in which legal and judicial reform projects that include commercial law have been embraced and funded: (1) the case of accession candidates for the European Union and (2) "new" states that have been subject to unusually intensive levels of international intervention. For E.U. accession candidates, the countries have no choice. The European Union requires every candidate country for membership to satisfy the Copenhagen criteria, and, for candidates in the post-conflict western Balkans, to sign an "association agreement" at an early stage of membership negotiations, which is essentially a checklist of institutional reforms that must predate a formal decision on membership.<sup>53</sup> Teams of inspectors will visit the country regularly throughout the accession process, which may take several years. During that time, they will report to the European Commission on the pace of institutional reforms that have been completed. Legal and judicial reforms are thus an integral component of E.U. membership. Members must have a dynamic market economy, secured by adequate legal institutions that enforce the dictates of E.U. law.<sup>54</sup> This requires a domestic legal system with some sophistication because E.U. law is a complex federal system of jurisprudence that cannot sit atop an immature domestic legal system in which judges and lawyers do not have a sound grasp of international, federal, and constitutional legal principles.

So far, the political imperative within the countries of Eastern Europe to join the European Union has been so strong that it has overridden vested interests within the domestic legal systems, and the type of large-scale external interference that legal and judicial reform requires has been tolerated. The funding to do this has generally been provided by E.U. grants. This process has been undertaken everywhere as the European Union has expanded eastward, but the most notable recent examples have been Romania, Macedonia, and Bulgaria, where extraordinary reforms have been made in just a few years.<sup>55</sup> However, these states generally share a commercial law jurisprudential heritage, with foreign concepts grafted on more recently.<sup>56</sup>

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BERKOWITZ ET AL., *ECONOMIC DEVELOPMENT, LEGALITY, AND THE TRANSPLANT EFFECT* (2001), available at <http://www.pitt.edu/~dmberk/Bpreerfinal.pdf>.

53. European Council in Copenhagen, Conclusions of the Presidency, SN 180/1/93 REV 1 (June 21-22, 1993), available at [http://ue.ev.int/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://ue.ev.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf).

54. *Id.* at 13 ("Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.").

55. James H. Anderson & Cheryl W. Gray, *Transforming Judicial Systems in Europe and Central Asia*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 329, 332 (François Bourguignon & Boris Pleskovic eds., 2007).

56. Bulgaria and Romania can be said to share two legal traditions. The first of these traditions is based on the Roman civil law tradition, and the second is that of the socialist-transition legal family that emerged from the Soviet Union and its breakdown. See generally Mathias Siems, *Legal Origins: Reconciling Law*

The other category of countries, more relevant to this Essay, for which substantial legal and judicial reform projects have been implemented is post-conflict countries, or “new” states. These states have been subject to such heavy degrees of international intervention that reform projects have been imposed on them. In Bosnia, for example, large quantities of new domestic legislation have been written by foreigners.<sup>57</sup> International actors have restructured the court system, appointed judges, and changed the legal system radically.<sup>58</sup> One of the goals of doing this was to create a completely new commercial environment within which businesses can operate in order to encourage economic growth in these previously devastated countries.<sup>59</sup> Domestic politicians and judges have had no practical choice but to accept this forced assistance because the client country is awash with foreign troops, foreign money, and forceful diplomatic presence. These exercises in nation-building have been full-blooded in their neo-institutional ambitions.

These projects in “new” countries have typically been structured to identify a series of very practical problems that have made the legal system ineffective at resolving civil disputes between private individuals. The faults perceived are often much the same in whichever country the practitioner operates, and the practice of legal and judicial reform has become somewhat standardized. The usual model consists of the following components:

- (a) Delays are often ascribed to a lack of courts with basic equipment. There may not be enough courthouses or courtrooms. Existing facilities may be inadequate. Thus, projects are conceived to construct courts and equip them adequately.<sup>60</sup>
- (b) Connected with this thought, it has sometimes been proposed to establish a separate commercial court within a country’s legal architecture, with standards of efficiency and independence, and with relatively few connections to the broader judicial system.<sup>61</sup> In this way, the wheels of commerce may be oiled by an effective commercial dispute resolution system, even while the rest of the country’s court structure seeks to catch up.<sup>62</sup>

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& *Finance and Comparative Law* (Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 321, 2006).

57. See DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON 34-65 (1999).

58. See *id.*

59. See, e.g., Warren Coats, *The Central Bank of Bosnia and Herzegovina Ten Years On*, in CTR. FOR INT’L PRIVATE ENTERPRISE, ECON. REFORM FEATURE SERV. 3 (2008), <http://www.cipe.org/publications/fs/pdf/022908.pdf> (“Country-wide commerce and economic growth make an important contribution. [The Central Bank of Bosnia and Herzegovina] has made a very positive contribution to the process of healing and economic growth by providing a stable currency and an efficient payment system throughout the entire country, creating a single economic space that promotes integration.”).

60. See PER BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA: INTERNATIONAL SUPPORT TO LEGAL AND JUDICIAL REFORM IN INTERNATIONAL ADMINISTRATION, TRANSITION AND DEVELOPMENT CO-OPERATION 91 (2006).

61. For example, Tanzania’s commercial court was established in 1999 as a subdivision of its High Court but with distinct procedures and judges. Dory Reiling, *Court Specialization or Special Courts? A Toolkit for Development*, <http://home.hccnet.nl/a.d.reiling/html/court%20specialization.htm>.

62. The establishment of separate commercial courts has been the subject of some criticism. Where one part of a country’s court system is significantly better than other parts, litigants fight to get into that court. In addition to overloading the better court, this situation creates satellite jurisdictional litigation and pressures to distort the jurisdictional rules (something found in the United States with federal diversity jurisdiction). The extraction of the best judges and court staff into a commercial court might also erode the

- (c) Efforts are often made to reform the methods by which case disposal rates are counted. Judges have an interest in appearing busy, and so they typically count their caseloads using metrics such as the number of hearings completed rather than the number of cases concluded. This creates an incentive for repeated adjournments (something to which inquisitorial systems of litigation may in any event be prone) and thus creates delay. Once a more rational data collection system is adopted, these perverse incentives disappear. Benign incentives can also be created by measuring and publishing mean case disposal time (writ to settlement or judgment) per judge.
- (d) Once more rational case management data is available, it often becomes apparent that the organizational structure of the courts is lopsided, with uneven distribution of resources in proportion to demand. One court might have a high concentration of cases, whereas another court in a neighboring administrative division may have very few even though the number of judges and other staff assigned to the court might be the same. The solution put forth in such circumstances is to reorganize the administrative structure of the courts and allow transfer of cases to permit a more even distribution of work.
- (e) Because courts are often beset with time management problems, judicial case management systems are introduced. For example, a case management system might require that a hearing date be listed as soon as a writ or other originating process is issued, or that lawyers be required to introduce time estimates for hearings. Judges might be given clerks to assist them with their caseloads, and case files might be computerized in the form of hearing timetables.
- (f) Judges and other court staff are given training on efficient case management, the salary and incentive structures for judicial staff are analyzed and improved, and judges are taught to undertake management roles. A president of a court should measure the productivity of his or her judges and other court staff using the revised efficiency metrics.
- (g) Often attempts are made to grant judges political independence through reform of the judicial appointment system, introduction of judicial tenure (i.e. providing that judicial appointments are permanent until retirement, and judicial salaries may not be reduced), and insulating the budgets of courts and other legal institutions from the broader political processes of setting public budgets.
- (h) Legal training is introduced for law students, legal practitioners, and parliamentarians. They are taught the skills of legal drafting, professional ethics, and legal analysis, with the aim that legislation becomes clearer, more transparent, and easier to apply.
- (i) Modern commercial legislation is drafted, improving commercial laws, civil procedure rules, and codes of professional ethics.
- (j) Simple bureaucratic tasks are made easier by removing the number of steps required to register a company, open a bank account, or register a transfer of title to real estate. Punitive taxes that are imposed upon certain types of government interaction (particularly transfers of real estate) are reduced or removed.<sup>63</sup>

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quality of the remaining judicial system. *Id.*

63. See BERGLING, *supra* note 60, at 96 (discussing donor-initiated interventions to remedy specific technical problems).



These are the building blocks of legal and judicial reform of the commercial law of developing states. Now we turn to examine the extent to which they have been successful.

#### IV. PROBLEMS WITH LEGAL AND JUDICIAL REFORM PROJECTS

Comprehensive legal and judicial reform projects have generally been unsuccessful in post-conflict states. Although there are some exceptional success stories, research shows that many reform projects have failed.<sup>64</sup> This Essay delineates some overwhelming challenges for legal and judicial reform projects in new states, such as Bosnia and Kosovo, and explains why these projects have not achieved their goals.<sup>65</sup>

The first major challenge reformers face is themselves: they must recognize and attempt to overcome their own limitations. Consider the incentives of the officials who undertake law reform projects. Typically, they are employees of one or more private development contractors specializing in such work, working within a budget set by an international development bank or an international development institution such as USAID. Whereas the desired results of such projects are inevitably long-term, the contracts that are actually executed tend to be relatively short-term, typically with a time frame of one to four years. The contractors therefore work to identify deliverable results by which their performance may be assessed. This context affects the focus of the effort. As a result, the more politically difficult tasks facing any legal and judicial reform project—such as achieving the political consensus necessary to pursue far-ranging reforms, changing the way judges are appointed, addressing corruption and bias, severing the court system from politics, and radically restructuring court procedure and administration—often go unaddressed in favor of those tasks involving infrastructure such as building courthouses.<sup>66</sup>

It is difficult to make international contractors address the underlying political challenges because their results are more difficult to measure, whereas the successful completion of a new court building is a simple, concrete accomplishment that is easy

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64. See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006); PARIS, *supra* note 16; *see generally* Armytage, *supra* note 1 (expressing skepticism about the effectiveness of legal and judicial reform projects and calling for a more thorough review process by which to establish what works in such projects and what does not); Julio Faundez, *Legal Reform in Developing and Transition Countries—Making Haste Slowly*, 1 LAW, SOC. JUST. & GLOBAL DEV. (2000), [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000\\_1/faundez](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez).

65. For more information on legal reform experiences in Bosnia and Kosovo, *see generally* CHANDLER, *supra* note 57; PARIS, *supra* note 16, at 97-107; Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371 (Spring 2001); Timothy Cornell & Lance Salisbury, *The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina*, 35 CORNELL INT'L L.J. 389 (2002); Adam Day, *No Exit Without Judiciary: Learning a Lesson from UNMIK's Transitional Administration in Kosovo*, 23 WIS. INT'L L.J. 183 (2005); Larry J. Eisenhauer, *From Nuremberg to Kosovo—Two Iowa Judges Step Outside Their Jurisdiction to Promote International Law*, 55 DRAKE L. REV. 311 (2007); Johnathan S. Haub, *Justice in Kosovo: Seeking a Return to Law and Order*, 63 OR. ST. B. BULL. 33 (2003); Jetish Jashari, *U.N. Field Missions in the Context of Legal and Judicial Reform: The Kosovo Case*, 1 COLUM. J. E. EUR. L. 76 (2007); Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001).

66. Golub, *supra* note 5, at 23.

to present in an annual contractor's report. Contractors must demonstrate progress to international diplomatic officials, whose opinions might affect whether that contractor can renew his or her mandate or secure a follow-up contract or project in another country. Thus, the emphasis is on constructing and equipping new court buildings, arranging training courses, and drafting legislation, for these results are quicker to achieve and easier to measure.<sup>67</sup>

The incentive problem is compounded in many cases by the fact that donor countries view legal and judicial reform projects as a desirable sign of progress and development of a political agenda.<sup>68</sup> Perceived success of a project then becomes a political imperative irrespective of actual results, and projects that fail because of frustrating political climates are often hailed as successes even when they are not. Bosnia and the Republic of Georgia are telling recent examples of this trend. In Georgia, a major U.S.-sponsored rule of law project continues notwithstanding the near-complete subservience of the judiciary to an authoritarian executive;<sup>69</sup> in Bosnia, a new state court institution was created by the international community, but persists only with enormous injections of foreign manpower (including foreign judges) and capital that are unsustainable in the long term.<sup>70</sup>

Another major challenge for reformers is the lack of effective coordination and management, especially in new states where international intervention is intense. Legal reform projects have been largely successful in Eastern European candidates for E.U. accession because they have been managed by pre-existing national government institutions. Government ministers at the most senior levels want the project to work because they have a direct political interest in securing a positive report from the European Union. But this direct incentive does not apply in the context of wide-ranging international missions of the sort found in Bosnia and Kosovo. In such cases, the domestic officials submit to a government strategy created by international officials such as Bosnia's High Representative or Kosovo's Special Representative of the Secretary General.<sup>71</sup>

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67. *Id.*

68. See generally Kristen E. Boon, "Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law, 39 N.Y.U. J. INT'L L. & POL. 513 (2007) (arguing that the World Bank's and International Monetary Fund's legal and institutional reform projects intrinsically advocate for specific policies concerning ownership rights and the allocation of wealth).

69. INT'L CRISIS GROUP (ICG), GEORGIA: SLIDING TOWARDS AUTHORITARIANISM? 13-25 (2007); see also EU-South Caucasus: Concrete Human Rights Benchmarks Needed, HUM. RTS. WATCH, Dec. 19, 2007, [http://hrw.org/english/docs/2005/12/09/azerba12177\\_txt.htm](http://hrw.org/english/docs/2005/12/09/azerba12177_txt.htm). It is interesting to note that the President of Georgia, Mikheil Saakashvili, is a lawyer and holds an LL.M. from Columbia Law School.

70. CHANDLER, *supra* note 57, at 3, 63-65 (discussing the difficulty of sustaining long-term success in Bosnia absent continued foreign involvement).

71. See generally *id.* In the case of Bosnia, the High Representative was not intended originally to have executive power. In the absence of effective local leadership, the powers were expanded at the Bonn Peace Initiative Conference in 1997. See OFFICE OF THE HIGH REPRESENTATIVE, PEACE IMPLEMENTATION COUNCIL (PIC) BONN CONCLUSIONS (1997), available at [http://www.ohr.int/pic/default.asp?content\\_id=5182#11](http://www.ohr.int/pic/default.asp?content_id=5182#11) (discussing the conclusions of the conference in relation to the powers of the High Representative); see also INT'L CRISIS GROUP (ICG), ENSURING BOSNIA'S FUTURE: A NEW INTERNATIONAL ENGAGEMENT STRATEGY (2007) (suggesting that the European Union take the lead in long-term international efforts to establish reform and self-sustaining institutions). A full collection of the decrees of the Office of the High Representative can be found on its website. See Office of the High

The biggest single problem for international intervention missions is their lack of legal or political accountability. Nobody elects the U.N. officials who run such missions. These officials write their own reports, evaluate their own successes, and rarely ask or face difficult questions. As a result, diplomatic imperatives may take over. A plethora of international organizations competing for the same political space further complicates the scenario.<sup>72</sup>

Bosnia's experience best illustrates the confusion and failures resulting from competing international organizations. Post-war Bosnia underwent probably the most ambitious legal reform efforts ever undertaken. The reform players included the Organization for Security and Cooperation in Europe (OSCE), USAID, the World Bank, the Office of the High Representative (OHR), the U.S., Austrian, German, and Norwegian governments, the European Union, and countless other governmental and non-governmental organizations.<sup>73</sup> Domestic commercial actors and foreign investors were rarely consulted. It is an unfortunate, albeit understandable, fact that international officials generally talk more to one another than to the people who would ostensibly benefit from the reforms. The result is that there are too many people managing the process, creating myriad overlapping and sometimes inconsistent policy initiatives.<sup>74</sup> Because problems of this kind are so prevalent in every state-building attempt, it is tempting to conclude that they are an inevitable externality of employing international organizations.

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Representative-HR Decisions, <http://www.ohr.int/decisions/archive.asp>. In Kosovo, the Special Representative of the Secretary-General (SRSG) is the head of the United Nations Mission in Kosovo (UNMIK). Although he is given no formal legal powers under the U.N. Security Council Resolution which created UNMIK, *see* S.C. Res. 1244, U.N. Doc S/RES/1244 (Jun. 10, 1999), the SRSG has played the lead role in establishing domestic public institutions in Kosovo since 1999 and issues de facto binding decrees that have effect as if they were domestic legislation. A full collection of the regulations and administrative directions of the SRSG can be found online at <http://www.unmikonline.org/regulations/unmikgazette/index.htm>.

72. *See* INT'L CRISIS GROUP (ICG), BOSNIA: RESHAPING THE INTERNATIONAL MACHINERY 2-3 (2001) (outlining the principal international organizations involved in peace implementation in Bosnia and Herzegovina).

73. *See* Michael G. Karnavas, *Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries*, 97 AM. J. INT'L L. 111, 113 n.19 (2003) [hereinafter Karnavas, *Legal Framework*] (outlining the international composition of the Steering Board of Bosnia's Peace Implementation Council); Michael G. Karnavas, *Brčko Law Revision Commission: Chairman's Final Report* 26, 57 (Dec. 31, 2001), available at [http://www.esiweb.org/pdf/bridges/bosnia/BLRC\\_ChairmansRep.pdf](http://www.esiweb.org/pdf/bridges/bosnia/BLRC_ChairmansRep.pdf).

74. Karnavas, *Legal Framework*, *supra* note 73, at 131. Karnavas notes:

The lack of an overall strategy, coordination, and cooperation within the OHR is the single greatest contributor to the lack of any meaningful or sustainable legal and judicial reform in Bosnia and Herzegovina. By outsourcing to international organizations or depending on nongovernmental organizations to produce a coherent and consistent body of legislation, the OHR has, in essence, subcontracted its mandate, and, as a result, placed itself at the mercy of these international and nongovernmental organizations, which, far too often, disagree with one another or are engaged in pursuing their own agendas. It should not be surprising that what is often produced is a hodge-podge of drafts that are usually met with skepticism at best and disdain at worst by national experts.

*Id.*

Inevitably, short-term mandates of international officials undermine their incentive and ability to assist stable long-term reform. As discussed, it is normal for international contractors to stay in one country for a relatively short period—a few years at the maximum. The hardships involved in living in a developing country—particularly a post conflict “failed state”—result in a regular turnover of staff. It is often the case that not long after a contractor acquires knowledge of the local political and legal culture, he or she departs the country. This lack of country-specific experience amongst the implementers of legal reform projects inevitably hinders project execution. This can be a crippling problem to the project because if one does not understand the politics of the judiciary, one will never understand the limits of what can be achieved and how to achieve it. Without a comprehensive understanding of the domestic legal culture—including drafting styles, methods of legal argument, legal traditions and hierarchy, the practice and strategy involved in civil procedure, domestic business conventions, relationships between lawyers and their clients, the interaction between business and politics, and the ways commercial people deal with problems of bureaucracy and corruption—one can only achieve limited success in reforming that culture. One can spend a lifetime learning about another culture’s legal system. Efforts at institutional tailoring will be subject to manipulation by domestic actors with their own vested interests because they will understand the complexities of the domestic system far better than the inexperienced international intervener. It is a common experience of international officials that while certain types of reform are easy to push through, others are frustratingly hard, or even impossible, to achieve. Still others, when adopted, are rapidly subverted to preserve the *status quo ante*.<sup>75</sup> This is often because international officials do not understand the underlying political considerations motivating the local actors. The temptation for those executing legal and judicial reform projects is to assume that the problems and the solutions are the same in each country. To a superficial observer, the problems with emerging market legal systems often appear very similar. To a person with detailed knowledge of the particular legal culture, however, the difference appears in the subtly different balance of political powers within which one needs to work to execute effective change.

This lack of detailed local knowledge often encourages off-the-shelf solutions to legal and judicial reform. “Legal transplants” is the label given to using foreign laws as the basis for new legislation. Although much decried in the literature,<sup>76</sup> legal transplantation is a persistent practice because it is human nature for people to default to that with which they are most familiar. In this case, it is entirely natural for one to use legal systems and precedents with which he or she is most familiar. Thus, when

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75. This is a particularly common feature of attempts to redraft civil procedure rules from scratch, with a philosophy very different from that which went before. The new philosophy does not stick, no matter how well drafted the new rules are, and they end up being drastically distorted in their interpretation to mirror the old rules and philosophy. This was particularly evident in the work of the Brčko Law Revision Commission in northern Bosnia that sought to create an adversarial court procedure where an inquisitorial model had existed before. See MATTHEW PARISH, *RECONSTRUCTING A DIVIDED SOCIETY: LEARNING FROM NORTHEAST BOSNIA* (forthcoming 2008).

76. See generally DAM, *supra* note 10, at 63; Eirini Elefthenia Galinou, *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail*, 25 COMP. LAB. L. & POL’Y J. 391 (2004); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994); BERKOWITZ ET AL., *supra* note 52.

international contractors draft domestic legislation, they have a common habit of using models from their home countries. For example, the constitution of Bosnia and Herzegovina was drafted by American lawyers<sup>77</sup> and exhibits a drafting style remarkably similar to that of the U.S. Constitution.<sup>78</sup> When the new criminal procedure code of the Brčko District of Bosnia and Herzegovina<sup>79</sup> was drafted, it was a translation of the State of Alaska Code of Criminal Procedure; not surprisingly, Alaska was the home state of the Chairman and Executive Director of the Brčko Law Revision Commission.<sup>80</sup> There is nothing new to any of this, and it is a tradition as old as colonialism. Probably the most influential French export ever was its Civil Code, adopted in various forms through colonial imposition in Louisiana, Spain, Latin America, Africa, Germany, Prussia, and beyond.<sup>81</sup> The English common law became similarly pervasive throughout the British colonies, replacing pre-existing domestic legal systems in their entirety.<sup>82</sup> Legal transplants are attractive because they require far less effort than getting to know another country's legal system—something that can take a lifetime. Once drafted and adopted, these transplants can be hailed as a quick success.

However, legal transplants either assume a clean legal slate from which to begin, rather than a highly developed pre-existing legal tradition, or require a time period in which the pre-existing legal tradition can be supplanted. In the instance of a pre-existing legal tradition, the new transplant is almost always a poor fit with what went before and often assumes an entirely different system of training and method of practice. Foreign legal officials are often unfamiliar with domestic legislative drafting styles and techniques of interpretation,<sup>83</sup> which, when applied to the transplant draft,

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77. Paul C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 FORDHAM INT'L L.J. 363, 374-76 (1995) (describing the negotiations under U.S. leadership).

78. See generally Sienho Yee, *The New Constitution of Bosnia and Herzegovina*, 7 EUR. J. INT'L L. 176, 180 (1996).

79. Brčko is an autonomous region of northern Bosnia subject to special international oversight after the end of the Bosnian war due to its strategic significance.

80. Gregory Mounier, *ESDP Police Missions: From Security Sector Reform to Externalisation of Internal Security Beyond the Borders* 16 (draft paper presented at the Thirty-First Annual BISA Conference, University of Cork, Dec. 19, 2006), available at <http://www.gregorymounier.eu/resources/Gregory+Mounier+BISA.pdf>. *Contra* Karnavas, *Legal Framework*, *supra* note 73, at 123 (“[T]he primary inspiration for replacing it came from the Swedish system, and, to a lesser extent, the German system. The court/trial procedure was inspired by the criminal procedure used in the International Criminal Tribunal for the Former Yugoslavia.”). It is difficult to reconcile the different accounts as to the source of the Brčko Code of Criminal Procedure except that it appears clear that whatever the source, it contained elements at odds with the legal tradition there. See Dr. iur. Manfred Dauster, Judge, State Court of Bos. and Herz., Address at George C. Marshall Center Conference: Security Sector Reform in Bosnia-Herzegovina and the Western Balkans 3 (June 20, 2007), [http://www.marshallcenter.org/site-graphic/lang-en/page-mc-index-1/xdocs/conf/conferences-current/static/xdocs/conf/static/2007-conferences/0721/0721\\_Dauster\\_Paper.pdf](http://www.marshallcenter.org/site-graphic/lang-en/page-mc-index-1/xdocs/conf/conferences-current/static/xdocs/conf/static/2007-conferences/0721/0721_Dauster_Paper.pdf) (discussing the flaws of the “Anglo-Saxon novelties” in the procedure law).

81. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 10 (2007).

82. *Id.* at 4; JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE*, at xvii (2001).

83. It is common for foreign legal officials to perceive ambiguities in domestically drafted legislation that do not exist in the mind of a domestically trained lawyer. Western legal systems generally have a

may produce a result quite different from that intended. Once international contractors depart and domestic lawyers are left to their own devices, old habits re-emerge and the legal transplants are rapidly rejected by their hosts, often with detrimental consequences that are worse than if the intervention had never occurred. For example, the attempt to introduce adversarial litigation procedures in the Brčko district in Bosnia degenerated shortly after the departure of the scheme's progenitor.<sup>84</sup>

In the worst cases, when domestic traditions of legal interpretation differ significantly from the transplanted traditions, judges and lawyers simply ignore the transplanted legislation or intentionally misinterpret it in order to achieve certain political goals. The Bosnian Constitution has suffered terribly from this malaise, as the conditions of its drafting and implementation have put its overall effectiveness and legitimacy in serious question.<sup>85</sup> The most successful instances of international participation in legislative drafting have been ones in which the process is driven by local experts who invite international guidance on their own terms in an extended consultation process,<sup>86</sup> rather than the transplant models in which legislative reform is driven by outsiders with only cursory participation by domestic parties.

A more fundamental problem is that most legal and judicial reform projects have a flawed theoretical underpinning. Reform projects usually assume that the main problem is an absence of technical competence. Following from that assumption, reformers might further assume that the reason there are heavy delays in the court system is that judges have not thought about how to properly arrange their case loads; that the reason laws are ambiguous is that teaching in law schools is inadequate; or that the reason judges make poor decisions is that they have bad laws and bad training. Such assumptions are rarely true. "New" states do not emerge from a vacuum. In

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tradition of literalism that leads one to believe that if the answer is not in the text, the text itself is ambiguous. But in many so-called "less developed" legal systems, the answer to an ambiguity is obvious by the political context because the law is a tool to achieve a certain (unstated) political end.

84. See Dauster, *supra* note 80, at 3 ("From my own forensic experience as a judge at the State Court of Bosnia and Herzegovina I found out that in particular procedure legislation of 2003 contains a lot of flaws and inconsistencies, which shall be removed the sooner the better.").

85. Yee, *supra* note 78, at 177-81. Bosnia is perhaps an example of how not to draft a constitution. It was prepared in English by American lawyers and agreed to under extreme military and diplomatic pressure at the Dayton Accord peace negotiations hosted by the United States at Wright-Patterson Air Force Base in Dayton, Ohio in November 1995. It has never been ratified by any of Bosnia's many legislatures. The sense of local ownership was thus nonexistent. See *Opinion of the European Commission for Democracy Through Law on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Council of Europe Doc. No. CDL-AD(2005)004, (adopted Mar. 11, 2005), available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf).

Due to its being part of a peace treaty, the Constitution was drafted and adopted without involving the citizens of BiH and without applying procedures which could have provided democratic legitimacy. . . . [I]t constitutes the unique case of a constitution never officially published in the official languages of the country concerned but agreed and published in a foreign language, English.

*Id.* ¶ 6; see generally CHANDLER, *supra* note 57; RICHARD HOLBROOKE, *TO END A WAR* (1998).

86. See, e.g., Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, Prepared for the Kellogg Institute Conference, Constitutional Design 2000: Institutional Design, Conflict Management, and Democracy in the Late Twentieth Century (Dec. 9-11, 1999), <http://kellogg.nd.edu/events/pdfs/Horowitz.pdf> (providing a narrative of his own participation in a domestic commission charged with preparation of the electoral system for Fiji).

nearly every country, lawyers form an elite class of highly educated and intelligent people. If there is no tradition of legal analysis in a country, it is often because analytical skills matter relatively little in that country's practice of law. In such states, other factors—such as political connections, familial connections, and knowledge of how to work a corrupt system—matter far more. In such a country, ambiguously drafted legislation might be intentional and not the result of any poverty of legal training. Deliberately vague legislation in such a context allows judges and other legal decision makers discretion in applying the rules in order to achieve their goals.

There may be a logic, however, to the dysfunction of developing world court systems. For example, while Western commercial law systems exist to serve the interests of a powerful, independent commercial class which desires to be free of the influence of politics and government, new states lack such a powerful interest group. Such a class might never have existed, or if it had, the commercial class might not have survived the conflict from which the new state arose because commercial resources were captured by a wartime political elite. The legal systems often existed to serve the interests of a powerful political class with strong commercial connections, who used political and legal institutions as a tool to promote their own pursuit of wealth and to prevent the influence of competitors, including foreign investors. In countries where the dividing line between politics and business is far hazier than in the West, particularly where there is a recent history of communism, legal systems have evolved with very different goals in mind. A mere technical effort can never hope to reverse the philosophical differences that have developed within the legal profession in such a country. More than any other type of development assistance, legal and judicial reform is a political project.

#### V. WHERE DO WE GO FROM HERE?

This Essay developed the theme that comprehensive and radical legal reform as part of state-building has been driven by the politics of major powers and has been implemented by uncoordinated international organizations. Most legal reform projects are flawed because their theoretical assumptions are invalid, their local knowledge is minimal, and their project models strive for simplistic measurements of success. International officials in charge of intervention projects usually believe that the domestic legal systems they are reforming are simplistic and deficient, leading them potentially to overlook highly sophisticated systems. Local systems generally serve local interests; they might favor the political and commercial elites rather than the interests of politically neutral businesspeople—a group of minimal size, if it exists at all, in a new post-conflict state.

Though difficult, legal reform projects are not impossible. This Essay began with a brief exposition of neo-institutional economics. The neo-institutionalists remain correct: the accessibility of an impartial legal system is important to economic development. Without an impartial legal system, business will inevitably remain localized, closely associated with politics, and purely national. Foreign investors will not come to a country in large numbers if they cannot rely on the legal system and are

likely to lose their investments should their political connections turn sour.<sup>87</sup> If one wants to develop a country's commercial system, it is important to separate commercial and political interests. Modern commercial systems rely upon a general proposition of equality before the law. Bias within public institutions condemns those without special connections to become second-class citizens and denies a great part of the population the benefits of commercial freedom and economic growth. The proper objective of a legal and judicial reform project is therefore the creation of a judiciary independent of politics and answerable instead to a constituency of independent commercial actors. Contracts must be honored, property rights must be secure, and independent judicial decisions must be enforced.<sup>88</sup> This is more than a purely technical matter of changing rules, laws, and the structure of court administration. Instead, legal and judicial reform requires a sea change in political attitudes, exemplified by the transition from communism to E.U. membership in the accession states of Eastern Europe. There must be a real political will at the highest level to achieve true reform.

This suggests that the wide-ranging legal reforms sought in many post-conflict "new" states, such as Bosnia and Kosovo—not to mention cases such as Iraq, Afghanistan, and Cambodia—may be unrealistic in the short-term. Legal reform is desperately important in a post-conflict country. One of the gravest scars of violent conflict is the absence of almost all rule of law after the society has been ravaged by corruption and its commercial resources have been captured by wartime military and political elite. International contractors cannot hope to come in and renovate the legal system of such a country in just a few years, and thereby rapidly push open the doors to commercial development and foreign investment. As discussed previously, legal transplants in this context almost never work. Legal reform is a project that must be home-grown by lawyers who are trained in the details of the pre-existing system and are familiar with the political complexities of the model one seeks to reform. Moreover, senior politicians with ideological commitment to promoting a sound economy must stand behind the project. They must understand the importance of pursuing these reforms, they must publicly state that they are behind them, and they must get involved in achieving their implementation. Likewise, businesspeople, both domestic and international, should be invited to participate. The process must be undertaken gradually and by those with a long-term interest in the country's economic development.

Part III of this Essay stated that development of commercial law in Western countries was a response to demands made by the existing commercial sector rather than an attempt to create an infrastructure from which commercial law could develop.<sup>89</sup> One overriding lesson about the historical development of the rule of law in Western cultures is that legal systems must adapt to the needs of businessmen in forging free commercial transactions—a true *Lex Mercatoria* philosophy. This lesson is in danger

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87. See *supra* notes 36-37 and accompanying text. This problem has in turn fostered the growth of international investment treaty arbitration, which, at its most basic level, provides an alternative mechanism for the enforcement of obligations owed to foreign investors under international law. See Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 246-48 (2007).

88. DAM, *supra* note 10, at 91-157.

89. See *supra* notes 50-52 and accompanying text.



of being lost. Sustainable legal reform requires drawing long-term domestic political imperatives from the private sector. So far, the operational models necessary for this type of intervention have not been developed, and little progress has been made to this end. There has been relatively little analysis of how best to develop and implement judicial and legal reform, particularly in relation to commercial law, and there is no central repository of information on past attempts from which one could develop a coherent model. As a result, those seeking to implement legal reforms as part of the legal architecture of new states cannot rely on lessons learned from past attempts and do not appear to fully understand how to best achieve their laudable and necessary goals. Instead, each attempt at legal reform starts anew in patchwork fashion with predictable results. Given the importance that the development of commercial law plays in the stabilization and success of post-conflict “new” states, it is important to lay a proper foundation for this development by creating a judiciary independent of politics, and answerable instead to a constituency of independent commercial actors.