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# **Law and Development: In transnational perspective, with sociological imagination and experimental attitude**

Amanda Perry-Kessaris\*

## **Abstract**

In this paper I argue that a transnational (as opposed to state-centric) perspective on legal development is essential (conceptually, empirically and normatively) both for practitioners, and for those who seek to understand and critique them; that it is best conceptualised with sociological imagination; and that it opens the door to the rehabilitation of the field of legal development into a more nimble and productive space for empirically-informed experimentation.

## **Introduction**

'Law and development' or, better, 'legal development'<sup>1</sup> is a field of thinking and practice focusing on the role of law as a means, end, obstacle or irrelevance in securing 'improvements' to human welfare. Although these relationships are addressed everywhere, and by a range of actors, the field is traditionally construed as focusing on the generation, especially with foreign assistance, of 'improvements' in relatively poor countries.<sup>2</sup>

A transnational perspective treats law as a global multi-layered phenomenon whilst at the same time decentring 'the state' and unsettling rigid conceptions of what 'it' is or might be. So to take a transnational perspective on legal development is to explore the causes and effects of the use, abuse and avoidance of all kinds of law; in the name of legal development; and by and on all kinds of actors.

In this paper I argue that a transnational (as opposed to state-centric) perspective on legal development is essential (conceptually, empirically and normatively) for both

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\* Professor of Law, Kent Law School [a.perry-kessaris@kent.ac.uk](mailto:a.perry-kessaris@kent.ac.uk).

<sup>1</sup> Tamanaha 2011

<sup>2</sup> Perry-Kessaris 2011

practitioners and those who seek to understand and critique them; that it is best conceptualised through a sociological imagination; and that it opens the door to the rehabilitation of the field of legal development into a more nimble and productive space for empirically-informed experimentation towards understanding what is (present relationships between law and development) and might yet be (what 'improvements' might look like).<sup>3</sup> These arguments are evidenced and illustrated primarily with reference to the World Bank because it is the most high-profile and influential, albeit by no means the only<sup>4</sup> transnational actor in the legal development field; because, to its credit, its annual World Development Reports provide an accessible insight into the evolution of its legal development thinking and practice; and because it seems to be en route to adopting something akin, or at least sympathetic, to a transnational, sociologically-informed, experimental approach to legal development.

'Of all those figures associated with development and with the production of development knowledge', the economist has 'stood out clearly above the rest'.<sup>5</sup> The resulting 'economics imperialism' has been an unfortunate obstacle to the success of legal development work.<sup>6</sup> Contemporary legal development work has some distinctively sociolegal roots and branches,<sup>7</sup> but has been overshadowed by the rise of a particularly abstract and mathematized version of neoliberalism, especially from

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<sup>3</sup> See further Dunne and Raby 2014 on speculative design and Cooper 2014 on achievable utopias.

<sup>4</sup> Other providers include bilateral funders such as UK Department for International Development (DFID), US Agency for International Development (USAID) and the Japan International Cooperation Agency (JICA); as well as other international institutions such as the Asian Development Bank (ADB). Figures are hard to come by but what appears to be the most comprehensive survey found that the key donors spent 2.6 billion dollars on legal and judicial development in 2008: International Development Law Organization, Legal and Judicial Development Assistance Global Report 2010, (2010).

<sup>5</sup> Escobar, 2005, p. 141.

<sup>6</sup> Fine and Milonakis, 2009, Perry-Kessaris 2011, Perry-Kessaris 2014.

<sup>7</sup> For an understanding of Anglo-American practice see Carty, 1992, Trubek and Galanter, 1974.

1989 onwards. Within the World Bank the dominance of abstract and mathematical methods over legal development has manifested itself most completely in the rise of ‘investment climate discourse’,<sup>8</sup> in which national legal systems have been presented as products and foreign investors as their most significant consumers, and which has been directed towards ‘improving’ the quality of those legal systems by placing them into league tables based on speed and efficiency.<sup>9</sup> Of special significance from a transnational perspective is that investment climate discourse places state legal systems and foreign investment actors in the centre of the analysis, and black boxes all human actors (state and non).

When instead we take a transnational perspective on legal phenomena, ‘society – not the state – becomes the backdrop and context for our iterations of law’ and ‘the state does not sit “on top” of society (or the market), but is part of society’.<sup>10</sup> In the same moment it becomes apparent that ‘our analytical focus’ must turn to ‘how we theorize the relation between law and society’.<sup>11</sup> But legal and social *theory* alone are not enough. A transnational perspective provokes and necessitates a distinctly sociological methodological orientation—that is, a commitment to ‘consistently and permanently ... reinterpret law systematically and empirically as a social phenomenon’.<sup>12</sup> A rigorously sociolegal approach gives the best hope of productively connecting (conceptually, empirically) with the realities experienced by the human actors that are the producers and subjects of legal development thinking and practice. The normative imperative to be in continuous empirical and conceptual conversation with realities is perhaps extra-significant in the field of legal development. A sociologically-inspired or sociolegal approach provokes and enables us to remember that here time and money are extra-short, the lives at stake are extra-strained and the tangle of interests and values at play is extra-complex. So there is little moral space for fictions or fantasies such as those offered by the

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<sup>8</sup> Perry-Kessaris 2008.

<sup>9</sup> Perry-Kessaris 2011 and 2017.

<sup>10</sup> Zumbansen 2014, p. 3.

<sup>11</sup> Zumbansen 2012 p. 305.

<sup>12</sup> Cotterrell 1998, p. 183.

abstract, mathematized versions of economics that have been applied to legal (and other) development questions in recent decades.<sup>13</sup>

Conceptually, sociolegal approaches provoke and enable us to maintain close relationships with realities because they focus on humans as ‘social animals’<sup>14</sup> and are, therefore, flexible, robust and complexity-loving. These characteristics are important because the roles and relative importance of laws and legal institutions shift according to the transnational question at hand, but the centrality of human actors is constant. A sociolegal approach conceptualizes law ‘as wholly concerned with the co-existence of individuals in social groups’, and a commitment is made to assessing ‘particularities in a wider perspective; to situat[ing] the richness of the unique in a broader theoretical context’ so as to ‘provide orientation for its interpretation’.<sup>15</sup> So if we take a sociolegal approach to transnational legal spaces, starting with a clear focus on human relations and working outwards, then we have a greater chance of being conceptually consistent and relevant across those questions.

Empirically, sociolegal approaches demand ‘a detailed examination of variation and continuity in actual historical patterns of social coexistence, rather than in relation to idealized or abstractly imagined social conditions’.<sup>16</sup> As such they provoke and enable us to favour genuinely evidence-based thinking and practice, understanding and imagining. What is required is a movement away from the dominant, overwhelmingly quantitative, economic theory-driven approach; towards a remembering that economic life is part of wider social life; and onwards to the more accurate specification of problems and possible solutions.<sup>17</sup> And of course it is just such honest attention to reality that allows the inherently transnational aspects of legal phenomena to be noticed.

The World Bank’s 2015 World Development Report—the flagship publication of the flagship development assistance provider—focuses on Mind, Society and Behaviour.

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<sup>13</sup> See Ha-Joon Chang 2014.

<sup>14</sup> Marx 1993 [1939].

<sup>15</sup> Cotterrell 1998, p. 183

<sup>16</sup> Cotterrell 1998: 183. See also Perry-Kessaris 2013a, p.12.

<sup>17</sup> See further Ashiagbor et al (eds) *Towards an Economic Sociology of Law* 2013.

It draws together conceptual and empirical insights from sociology, psychology and design thinking to argue that:

‘paying attention to how humans think (the processes of mind) and how history and context shape thinking (the influence of society) can improve the design and implementation of development policies and interventions that target human choice and action (behavior)’.<sup>18</sup>

This 2015 Report is the first instalment in an explicit ‘trilogy’ examining ‘how policy makers can make fuller use of behavioral, technological, and institutional instruments to promote economic development and end poverty’.<sup>19</sup> The Bank has confirmed that the third and final instalment, scheduled for 2017 and entitled *Governance and Law*, will draw on sociological and behavioural findings, this time applying them more explicitly to determine proper roles for states. So the 2015 Report can be taken to presage the rehabilitation of legal development within the World Bank and beyond. The remainder of this paper seizes the opportunity presented by this apparent break in tradition to explore how the World Bank has previously failed to, is now beginning to and might still further, deploy sociological imagination and experimental attitude to achieve greater conceptual and empirical clarity regarding the transnational phenomenon that is legal development.

### A sociological imagination

‘A concept renders a slice of chaos available for thought’.<sup>20</sup> But Peer Zumbansen (2013) has rightly observed that the study of transnational law is littered with multiple overlapping and conflicting conceptual frameworks, and proposes that the field be brought to some order through the adoption of three ‘translation categories’: ‘*actors*’ (‘state, society, community, and organization’); ‘*norms*’ (‘law, rules, orders, custom, and social norms’) and ‘*processes*’ (‘engagement, interaction, contestation, resistance, opposition, and voice’)—A-N-P for short—operating in ‘“spaces” of governance and regulation’.<sup>21</sup> My own search for order has led me to think instead in

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<sup>18</sup> World Bank 2015 p. 2.

<sup>19</sup> World Bank World Development Report website. Available at <http://go.worldbank.org/LBM5VYIF10>

<sup>20</sup> Cooper p. 26 Quoting Hallward 2006.

<sup>21</sup> Zumbansen 2012 p. 4.

terms of four levels or analytical units of sociolegal life: actors<sup>22</sup>, interactions<sup>23</sup>, regimes<sup>24</sup> and rationalities<sup>2526</sup> These units or levels are mutually-constitutive –that is, actors affect/are affected by interactions (including communal networks) which in turn affect/are affected by regimes, which in turn affect/are affected by rationalities. This categorisation is compatible with A-N-P but nonetheless worthy of elaboration in this context because it emphasises some sociologically significant detail: actors are essentially human, and their (inter)actions are guided (if at all) by a combination of motivations and rationalities.

*Human actors...*

Human actors give life to all aspects of legal development: producing, consuming, distributing and disposing of law as well as those goods and services that law facilitates and regulates. It is this fact above all others that makes legal development an inherently transnational phenomenon. The application of a ‘sociological imagination’<sup>27</sup> generates the questions: Who are these actors? How do they behave and why? Max Weber (1925) observed that in so doing actors are driven by one or more of four types of motivation: values (belief action), emotions (affective action), habits (traditional action) and goals (instrumental action). These categories are, paradoxically, useful in part because of their hollowness: reminding us that the variety of values, emotions, habits and goals is such that it is both vital to create categories and perilous to generalise about their contents. And so we begin to worry about the personas around whom we tend to design legal development thinking and practice. What do we miss as a consequence? What do our choices say about us? In recent decades development, including legal development thinking and practice within the World Bank, has been dominated by a very thin, Neoclassical Economics view of actors as individual rational utility maximisers. That view has been

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<sup>22</sup> Similar to Zumbansen’s actors but focusing on humans, with states etc. seen as groups of humans.

<sup>23</sup> Similar to Zumbansen’s processes, but, for example, emphasising their inherently social character.

<sup>24</sup> A combination of elements of Zumbansen’s norms and processes.

<sup>25</sup> Including some elements of Zumbansen’s norms.

<sup>26</sup> Perry-Kessaris 2013a, 2014, 2015; drawing on Frerichs 2011.

<sup>27</sup> C. Wright Mills 1959.

supplemented, but not supplanted, by New Institutional Economics' understandings of individuals as forever constrained by institutions, and by Behaviouralist Economics' understandings of rationality as forever bounded.<sup>28</sup> The introduction of experimental methods to the World Bank means a shift in emphasis away from prescriptions based on assumptions about individual rational utility maximisers and towards solutions grounded in evidence gathered from real social actors.<sup>29</sup> Policy makers are now exhorted to 'search for and rely on sound evidence ... and allow the public to review and scrutinize their policies and interventions, especially those that aim to shape individual choice'.<sup>30</sup>

*...interacting*

It is in the interactions between these actors that law is used, abused and avoided, and that legal development takes shape. In a legal development context some of the most significant interactions occur between members of the public and legal system personnel (judges, bureaucrats, lawyers), but also among the 'experts'—that is, from development assistance providers and from states. A historic emphasis on individual rational utility maximisers has meant that this dimension has been missed in much legal development work. But these interactions are of more than contextual relevance, they define the very content of legal development. For example, Terrence Halliday and Bruce Carruthers (2009) have identified three ways in which such transnational interactions affected the content and implementation of bankruptcy standards by the IMF across a range of East Asian countries following the regional financial crisis in the late 1990s: in the 'intermediation' by local and foreign experts between IMF and state actors in the negotiation of the new standards by;<sup>31</sup> in the overt or covert 'foiling' by state actors of the new standards;<sup>32</sup> and in the 'recursive'

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<sup>28</sup> Ha-Joon Chang 2014.

<sup>29</sup> For an excellent and nuanced comparative account of different economic schools see Ha-Joon Chang especially chapter 4.

<sup>30</sup> World Bank 2015 p. 20.

<sup>31</sup> Halliday and Carruthers 2009, pp. 293–336.

<sup>32</sup> Halliday and Carruthers 2009, pp. 337–62.



cycles of local lawmaking and implementation through which the new standards were introduced (or not) and adjusted.<sup>33</sup>

Such interactions (whether motivated by values, emotions, habits and/or goals) vary in intensity and duration from impersonal and ad hoc one-offs, to the kind of sustained and trusting, often transnational, 'communal networks' exposed by Roger Cotterrell. He offers the concept of communal networks as a way of highlighting those interactions that 'have some stability and moral meaning', even though they may be 'fluid', 'transient', transnational, and as such, beyond traditional conceptions of 'society'.<sup>34</sup> Communal networks are not 'limited to or "imprisoned within" distinct social groups'.<sup>35</sup> They exist wherever, including transnationally, there are stable interactions and a sense of belonging, all sustaining/sustained by mutual interpersonal trust. So they occur not only among the personnel of the traditional state, but also in the non-state spaces created by wider and deeper processes of rolling back of government and outsourcing.<sup>36</sup> To highlight the existence of multiple overlapping communal networks is to get closer to empirical reality, and to have a greater chance of capturing, understanding and altering the origins and roles of law.

*...creating, and subject, to regimes*

Regimes are systems, patterns or aggregations of interactions. They manifest themselves on a large scale, but they are mutually constitutive of interactions. They may be public or private; formal or informal; local, national, international or transnational and they include laws and other norms. Neither they, nor responses to

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<sup>33</sup> Halliday and Carruthers 2009, pp. 293–399. See also von Benda-Beckman 1989.

<sup>34</sup> Cotterrell, 2006b, p. 65. The World Bank makes a common error in speaking about 'societies' as Roger Cotterrell, among others, has long observed, 'society' is too blunt and too abstract a concept to be of much use in thinking about contemporary transnational socio-legal life.

<sup>35</sup> Cotterrell, 1997, p. 85.

<sup>36</sup> See for example Perry-Kessaris 2008 which identifies communal networks in and between foreign investment, government and civil society actors in Bengaluru.

them, are fixed.<sup>37</sup> But legal development work, in particular that exemplified by the investment climate project, has often taken a very linear, superficial approach to regimes. For example, much time has been spent on generating snapshots from statistics that are grounded in questions such as ‘how much of an obstacle is corruption’? Not only do such questions produce non-data (If I say it is not an obstacle does that mean I don’t pay? I am not asked? I pay and it works?), they also intentionally set to one side the complex, changeable and mutually constitutive origins and roles of law in social life. Happily, the World Development Report 2015 indicates an openness a more complex understanding of law when it refers to it as just one of a range of ‘tools...for shifting norms’<sup>38</sup> and one which is mutually constitutive of other aspects of social life: ‘law can change not only incentives for action but also the social meaning of actions’.<sup>39</sup> The Report explores at length the fact that in most places and times, corruption has existed as a ‘social norm’: there has been a ‘shared belief that using public office to benefit oneself and one’s family and friends is widespread, expected, and tolerated’. It is ‘only gradually’ that ‘the principle of equal treatment for all before the law’ has ‘emerged, and in most states it is still a work in progress’.<sup>40</sup>

*...influencing, and influenced by, rationalities*

A sociolegal imagination highlights the range of, equally real and relevant, rationalities through which actors involved in transnational legal development, from so-called experts to so-called lay-people, ‘apprehend the world’.<sup>41</sup> The rationalities underlying development practice have tended to align with those prevailing in the dominant economics school of economics, and the recent dominance of neoliberal economic thinking has placed two important limitations on the Bank’s ability to work well in the legal development sphere.

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<sup>37</sup> See Abhijit V Banerjee and Esther Duflo, *Poor Economics: Barefoot Hedge-Fund Managers, DIY Doctors and the Surprising Truth about Life on Less than \$1 a Day* (Penguin 2010) 243.

<sup>38</sup> World Bank 2015 p. 53.

<sup>39</sup> World Bank 2015, p. 53.

<sup>40</sup> World Bank 2015, p. 60.

<sup>41</sup> Drysek

First, as noted above neoclassical economics has derived much of its ‘strength’ from the fact that it ‘places human cognition and motivation in a “black box”’,<sup>42</sup> assuming humans to be self-interested rational utility maximisers. That assumption is as wrong as it is strong. In reality humans have ‘multiple selves’; they ‘are formed by their societies’; they are ‘impressionable’ and ‘bumbling’; and they are not simply ‘selfish’.<sup>43</sup> Human (inter)actions are expressions of a mixture of motivations, rationalities and failure to reflect at all—respectively referred to by the Bank in its reformatory 2015 Report as ‘social thinking’, ‘thinking with mental models’ and ‘automatic thinking’<sup>44</sup>. And this “human factor” in decision making and behavior means that seemingly small details of design can sometimes have big effects on individuals’ choices and actions’ (WDR 2015 p. 18). As will be seen further below, herein lie potentially important opportunities to use evidence-based experimentation to improve legal decision-making.

Second, the dominance of a neoliberal economic rationality has caused the Bank, in particular through its investment climate discourse, to present the function of law as facilitating and regulating private transactions between individuals. These are ‘real and legitimate’ but very partial descriptions of the roles played even by economic law, which of course deals with the full range of production, distribution, exchange and consumption.<sup>45</sup> In order to take further its new found interest in the social life of law, the World Bank would do well to note Roger Cotterrell’s observation that ‘law’s aspiration is towards...something more than the society of morally unconnected, rights-possessing individuals’ that this neoliberal vision ‘tends to presuppose’.<sup>46</sup> He insists that we ‘keep a firm attachment to the idea of law as a *communal*’ resource,<sup>47</sup> to law’s ‘utopian, aspirational face’, that which has leavened ‘hopes of emancipation and progress throughout modern history’.<sup>48</sup> The ‘communal’ functions of law centre on ‘approving and protecting the empirical conditions that facilitate’ mutual

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<sup>42</sup> World Bank 2015 p. 3 Quoting Freese 2009, 98.

<sup>43</sup> Chang 2014 pp. 192-9.

<sup>44</sup> World Bank 2015 p. 98.

<sup>45</sup> Perry-Kessaris 2008.

<sup>46</sup> Cotterrell 1996, pp. 18 and 334.

<sup>47</sup> Cotterrell 2002a, p. 643. Original emphasis.

<sup>48</sup> Cotterrell 1996, p. 17.

interpersonal trust.<sup>49</sup> More specifically, legal systems can offer three ‘communal mechanisms’: legal systems *express* what already holds actors together’; they draw actors in further by ensuring their *participation* in social life; and they *coordinate* the differences that hold actors apart. Each of these communal legal mechanisms is a ‘marker, consolidator and developer’ of the trust that binds networks of community’.<sup>50</sup>

Again the 2015 Report offers cause for hope since it specifically, albeit in necessarily limited depth, explores the communal dimensions of social life:

‘When people think, they generally do not draw on concepts that they have invented themselves. Instead, they use concepts, categories, identities, prototypes, stereotypes, causal narratives, and worldviews drawn from their communities’ (World Bank 2015, p. 11).

These communities referred to by the Bank and by Cotterrell may be founded in connections that are, for example, intellectual (e.g. economics or Feminism), institutional (Goldman Sachs, the civil service) or religious. Indeed they are found among development professionals.<sup>51</sup> So it is hugely significant that the Bank emphasises that this mix is ‘not limited to those at higher or lower income levels, or to those at higher or lower educational levels, or to those in high- income or low-income countries’.<sup>52</sup> It exists everywhere, including in inside the ‘law and development industry’.<sup>53</sup> For ‘development professionals are ... influenced by their social tendencies and social environments,’ (social thinking) they ‘use deeply ingrained mindsets’ including ‘disciplinary, cultural, and ideological priors’ that render ‘them susceptible to confirmation bias’ (thinking with mental models); and they are ‘prone to error when decision-making contexts are complex’ (‘automatic thinking’) (WDR 2015 p. 2 and 181-2).

This emphasis on motivation and rationality as significant variables in development processes is based on a recent and growing appreciation for evidence-based experimental approaches. And it offers a genuine opportunity for widespread improvements in the capacity of development practitioners to understand and

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<sup>49</sup> Cotterrell, 2002a, p. 643 and 1997, p. 88.

<sup>50</sup> Perry-Kessaris 2008.

<sup>51</sup> Perry-Kessaris 2014.

<sup>52</sup> World Bank 2015 p. 4.

<sup>53</sup> See further Perry-Kessaris, 2014, 184.

improve the connections between law and those communal networks that it is intended to serve.

### **With experimental attitude**

A sociological imagination reveals the fluid and complex relationships between actors, interactions, regimes and rationalities that determine transnational legal development. In so doing it opens up space for aspirational experimentation, starting with questions such as: What precisely might 'better' look like? As pioneering experimental behavioral development economists Abhijit Banerjee and Esther Duflo emphasise that to move away from 'big questions' and 'big answers', as implied in experimental and behavioural approaches to development, is no admission of defeat nor expression of disinterest. It is a commitment to finding and doing what works.<sup>54</sup>

An experimental approach highlights 'the importance of piloting and testing before wide-scale implementation, ideally with the designers themselves or with a subset of the users to ensure that the product (policy) has maximized effectiveness and efficiency'.<sup>55</sup> Examples of what this approach means in practice for legal development can be found in the work of national governments such as Mind Lab in Denmark and the UK Behavioural Insights Team which achieved dramatic increases in tax payment rates, at zero cost, simply by improving the content of reminder letters.<sup>56</sup> A similar strategy was fully demonstrated in Finland's Design for Government programme of 'human-centric governance through experiments', most recently including the testing, in collaboration with two think tanks and the Department of Design at Aalto University, and eventual adoption of a basic income proposal.<sup>57</sup> The World Development Report 2015 and UNDP practice indicate that this particular type of experimental approach is finding its way into the practice of international legal development assistance providers and onwards to the

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<sup>54</sup> Banerjee and Duflo p. 237.

<sup>55</sup> World Bank 2015 p.189.

<sup>56</sup> See also the work of the UK Policy Lab as set out in its blog *Open Policy Making* Available at <https://openpolicy.blog.gov.uk/category/policy-lab/>

<sup>57</sup> Hallsworth et al. 2014. See also Annala et al. 2015; Mokke 2015 and Gold 2015.

governments of poorer countries (where necessity, mother of invention, is of course forever prompting other types of experimentation, from tinkering to revolution).

The World Development Report 2015 refers in some detail to the Problem-Driven Iterative Adaptation (PDIA) model which values ‘authorizing environments that encourage experimentation, positive deviance’, and the repeated use of the question ‘why’ as a tool.<sup>58</sup> Significantly for legal development, the World Bank notes that experimental and behavioural approaches do not predict the scale or depth of state (legal) intervention in social life: ‘Not every psychological or social insight calls for more government intervention; some call for less’.<sup>59</sup> But it does predict new and different roles for law: ‘because mental models are somewhat malleable’ interventions can target them to promote development objectives.<sup>60</sup> There are many ways to trigger change: ‘propaganda, semiotic and subconscious communication, persuasion and argument, art, terrorism, social engineering, guilt, social pressure, changing lifestyles, legislation, punishment, taxation, and individual action’ (Dunne and Raby 2013 p. 160). Each of these is more likely to succeed when designed with the benefit of behavioural insights. For example, the World Development Report 2015 demonstrates how alterations to the design of an envelope can affect whether and how much a person borrows.<sup>61</sup>

This experimental spirit shares much with design thinking, not only in terms of the tool used (such as persona generation, mapping, typography and layout) but also in

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<sup>58</sup> See Andrews, Matt, Pritchett, Lant and Woolcock, Michael (2013) ‘Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA).’ *World Development* 51 (Nov.) 234–44 at p. 238. See also Datta, Saugato, and Sendhil Mullainathan. 2014. ‘Behavioral Design: A New Approach to Development Policy.’ *Review of Income and Wealth* 60 (1): 7–35.

<sup>59</sup> World Bank 2015 p. 20. Ha-Joon Chang notes that because behavioural, especially experimental, economists start from the individual they little to say about economic systems. For this is must draw on other more politically determined economic theories: Chang 2014, p. 161. It is in combining a range of approaches-- letting a hundred development flowers bloom (to paraphrase Mao via Chang)—that the best chances of success lies.

<sup>60</sup> World Bank 2015 p. 13.

<sup>61</sup> World Bank 2015, p. 8.

terms of emphasis: process, especially problem identification, is prioritised over product, especially ‘solutions’; and failure is valued.<sup>62</sup> Elsewhere this trend is described as ‘innovation’. For example, the UNDP Innovates team defines ‘innovation for development’ as being ‘about testing a hypothesis, learning quickly and adapting your work.’<sup>63</sup> The Global Innovation Fund (a London-based not for profit funded by a range of state international development agencies) defines innovation rather more loosely, ‘to include new business models, policy practices, technologies, behavioural insights, or ways of delivering products and services that benefit the poor in developing countries -- any solution that has potential to address an important development problem more effectively than existing approaches.’<sup>64</sup> There exists a not insignificant amount of false advertising among the self-described crowdsourcing-disrupting-inno-hack-tech-labs that populate the legal innovation field. But the change in mindset towards experimentation and innovation appears to be real and widespread enough to take serious note.

The innovative spirit is visible in relation to the willingness of state-centric practitioners to capitalise on (rather than merely outsource to) entrepreneurial transnational non-state actors. For example, the Governance Global Practice at the World Bank has collaborated with mySociety, a UK-based NGO that develops web tools and apps to promote public participation and accountability (for example, by encouraging citizens to report problems and request information), and to exploit linkages between government responsiveness and citizens trust.<sup>65</sup> Meanwhile, a recent UNDP project young people in Barbados and the Caribbean used design thinking and practice to ideate and communicate ideas for crime reduction.<sup>66</sup> Elsewhere, Global Namati is a transnational network of paralegals working primarily on issues community land right, citizenship, environmental justice and health which emerged from the Timap project in Sierra Leone that garnered warm praise from the

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<sup>62</sup> World Bank 2015 pp. 17, 21, 182, 199.

<sup>63</sup> UNDP Innovates 2016, p.18.

<sup>64</sup> Global Innovation Fund website (Available at <http://www.Globalinnovation.fund>) Accessed on 23 May 2016.

<sup>65</sup> MySociety website and Kumar 2016.

<sup>66</sup> Mikami 2016.

World Bank's Justice for the Poor programme.<sup>67</sup> It builds on the premise that 'the institution of the paralegal offers a promising methodology of legal empowerment' that fits between the traditional legal development tools of bottom up legal education and top-down legal representation'—between law and society—and thereby 'maintains a focus on achieving concrete solutions to people's justice problems' through not only litigation but also 'the more flexible, creative tools of social movements'.<sup>68</sup> Likewise, Integrity Idol is a rapidly expanding transnational citizen-led campaign 'to highlight honest officials'. The core activity of the campaign is to activate searches by local volunteers for public officials who act with integrity, to produce a shortlist from which a winner is selected by public vote. The campaign values 'process over outcome' in particular the resulting 'national conversation in positive terms about the change we'd like to see and the people we would like to be working in government on our behalf'.<sup>69</sup> Similarly, Barefoot Law is a Ugandan not-for-profit that provides free legal services via the internet and SMS; and which has attracted a wide range of transnational support, including from UNICEF, Ford Foundation and the Hague Institute for the Internationalisation of Law. Next, Live Lebanon is UNDP initiative that matches crowd-funding from the Lebanese diaspora to development projects initiated by local groups in Lebanon. There is no sign to date of projects with a legal development dimension being funded under this scheme, but it is surely only a matter of time.<sup>70</sup> Finally it is surely significant that innovation and experimentation can even been seen in relation to development reporting: 2016 saw UNDP Innovation using a comic book format to disseminate progress on some of its projects.<sup>71</sup>

An additional key benefit of evidence-based policy is that it provokes and facilitates meaningful, evidence-based retrospective evaluation—something distinctly lacking in much legal development work.<sup>72</sup> For example, routine analysis by the World Bank Doing Business Project of its investment climate work have focused on how much

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<sup>67</sup> Dale 2009.

<sup>68</sup> Maru 2006, p. 428.

<sup>69</sup> Integrity Idol website.

<sup>70</sup> Live Lebanon website.

<sup>71</sup> UNDP Innovates 2016.

<sup>72</sup> Cohen et al. 2011.



measurement of legal systems has been achieved, and how much noise has been generated in media and policy circles about those measurements. It has been down the Independent Evaluation Group (IEG) to recommend that the Doing Business team ‘make its reform analysis more meaningful’ by analyzing the effects of Doing Business-inspired reforms ‘on: (i) firm performance; (ii) perceptions of business managers on related regulatory burdens; and (iii) the efficiency of the regulatory environment in the country.’ That is: meaningful impact.<sup>73</sup>

## Conclusion

‘A modest science practiced with humility...is more likely to be useful than a search for universal theories about how capitalist systems function or what determines wealth and poverty around the world’ (Rodrik 2015 vii). The transnationally-aware, sociologically imagined, pro-experimental approach through which I have here explored legal development does not pursue the ‘hopeless and quixotic’ goal of constructing a grand narrative (Boudon 1991). Rather it falls within what sociologist Robert K. Merton (1957) categorises as theories of the ‘middle range’: it helps to ‘organize a set of hypotheses and relate them to selected observations . . . which would otherwise appear segregated’.<sup>74</sup> It thereby allow us to ‘consolidate, identify transferable lessons and then move more wisely onwards and upwards’.<sup>75</sup>

The attitudinal shifts outlined in the World Bank’s World Development Report 2015, if followed through, suggest that it is genuinely beginning to countenance diversity in both development problems and development solutions. To borrow from Ha-Joon Chang, the dominant economic narrative within the Bank is now to accept that ‘different economic theories say different things partly because they are based on different ethical and political values’ resulting in a ‘confidence to discuss [legal development] for what it really is—a political argument – and not a “science” in which there is clear right and wrong’.<sup>76</sup>

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<sup>73</sup> Independent Evaluation Group (2008), *Doing Business: An Independent Evaluation. Taking the Measure of the World Bank-IFC Doing Business Indicators*

<sup>74</sup> Boudon 1991, pp. 519 and 520.

<sup>75</sup> Perry-Kessaris 2012 p. 4.

<sup>76</sup> Chang, 2014 p.164.

This new orientation is in many ways a return to the heartland of economics. For Dani Rodrik, the core strength of economics lies in its models, and what makes a model ‘indispensable, when used well, is that it captures *the most relevant aspect of reality in a given context*’ (2015 p. 11). ‘Different contexts—different markets, social settings, countries, time periods, and so on—require different models’ (2015 p. 11). ‘Today it is almost a mantra for development economists, finance experts and international agencies that no single set of policies is appropriate for all countries and that domestic reforms must be tailored to specific circumstances’ (Rodrik 2015, p. 167); but the universal prescriptions of the Washington Consensus to ‘stabilize, privatise, liberalize’ (2015, 167) were an example of the ‘paradoxical’ tendency of economists to huddle around the ‘preferred models of the moment’, to produce ‘uniformity’ of approaches despite a ‘diversity’ of opinion (Rodrik 2015, 150 and 159). Economics is, he argues, best approached as a horizontally expanding ‘library’ of models from which the economist can choose.

The Bank has begun to place real humans at the centre of its analysis of development work, allowing itself to dig into the very human behaviour of not only its consumers but also itself as a collection of human producers. It explicitly distinguishes between motives and rationalities. It does much to decentre the state because it resists assuming it to be either a facilitator of or an obstacle to economic life. Instead it sees states as being both formed of, and affecting, multiple human actors. It thereby offers a more realistic entry point to understanding the spaces in which legal development thinking and practice occur. Once in that zone it has found itself better able to access and deploy experimental, evidence-based approaches with all the potential benefits that they bring.

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