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PATH DEPENDENCE, DEVELOPMENT, AND  
THE DYNAMICS OF INSTITUTIONAL  
REFORM†

*In the past decade, an institutional perspective on development has become increasingly prominent in development thinking. However, the reform experience thus far suggests that if institutions indeed matter for development, we still do not have a firm understanding of how to transform dysfunctional institutions. Drawing on concrete examples of rule of law and property rights reforms, we argue that path dependence theory can shed some light on past failures and provide guidance for future reforms.*

*Keywords:* institutional theories/path dependence/rule of law/property rights/development reforms

I Introduction

The field of development theory and practice, at least in the post-war years, has been peculiarly susceptible to all manner of fads and fashions with respect to both the ends and the means of development. Various schools of thought have come in and out of favour: capital fundamentalism, *dirigiste* central planning, dependency theory, the Washington Consensus (market fundamentalism), and eclectic combinations of all of the foregoing.<sup>1</sup> As well, various economic conceptions of development, such as economic growth, have been juxtaposed with more holistic conceptions of development such as human well-being or freedom.<sup>2</sup>

Another trend has developed momentum in the past decade or so. An institutional perspective on development has become increasingly prominent in development thinking, captured in the mantra 'Institutions Matter' or 'Governance Matters.' Beginning in the 1990s, based on the assumption that 'institutions matter,' there has been a massive surge in development assistance for institutional reform projects in developing

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1 See H.W. Arndt, *Economic Development: The History of an Idea* (Chicago: University of Chicago Press, 1987).

2 See Amartya Sen, *Development as Freedom* (New York: Random House, 1999).

and transition economies, involving investments of many billions of dollars.<sup>3</sup> However, the reform experience thus far suggests that if institutions indeed matter for development, we still do not have a firm understanding of how to transform dysfunctional institutions. Or, as Douglass North recently stated, '[t]o put it bluntly, we may know a lot about politics, but not how to fix them.'<sup>4</sup> Our main argument in this article is that path dependence theory can shed some light on past failures and provide guidance for future reforms.

Part II below provides a brief historical overview of the 'Institutions Matter' perspective, showing a progression from initial enthusiastic reception of the idea, followed by reform proposals largely inspired by institutional assumptions, to a mixed – not to say disappointing – track record of successes. Parts III and IV then turn to path dependence theory in economics and political science as an important explanation of this disappointing track record of success, with a particular focus on rule of law and property rights reforms. Although path dependence theory is largely backward looking and descriptive, Part V argues, it still offers valuable insights that should illuminate future institutional reform strategies, again with a particular focus on rule of law and property rights reforms.

## II *Institutional perspectives on development*

### A THE EUPHORIA: INSTITUTIONS MATTER FOR DEVELOPMENT

The idea that institutions matter for development is based on the assumption, developed by Douglass North and other new institutional economists,<sup>5</sup> that institutional frameworks create incentives for behaviour, leading to different outcomes. According to North,

[t]he specific institutional constraints dictate the margins at which organizations operate and hence make intelligible the interplay between the rules of the game and the behavior of the actors. If organizations – firms, trade unions, farm groups, political parties, and congressional committees to name a few – devote their efforts to *unproductive activity*, the institutional constraints have provided

3 See David Trubek, 'The Rule of Law in Development Assistance: Past, Present and Future' in David Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 74 [Trubek, 'Rule of Law'].

4 Douglass C. North, *Understanding the Process of Economic Change* (Princeton, NJ: Princeton University Press, 2005) at 67 [North, *Understanding*].

5 See generally *ibid.*; see also Douglass C. North, 'The New Institutional Economics and Third World Development' in John Harriss, Janet Hunter, and Colin M. Lewis, eds., *The New Institutional Economics and Third World Development* (London: Routledge, 1995) 17 [North, 'New Institutional'].

the incentive structure for such activity. Third World countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity.<sup>6</sup>

These theoretical assumptions have inspired empirical studies that try to assess the validity of the hypothesis that *institutions matter for development*. The overall tenor of this empirical perspective can be captured by examining one particularly influential study titled ‘Governance Matters.’ This cross-country study – undertaken by Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, all of whom are affiliated with the World Bank – is part of the World Bank’s ongoing research on governance, has been updated on a regular basis, and now covers almost 200 countries.<sup>7</sup> The World Bank’s Governance Project involves compiling a large number of subjective measures of institutional quality – meaning data obtained from either polls of country experts or surveys of residents – and grouping them into six clusters: ‘voice and accountability,’ ‘political stability,’ ‘government effectiveness,’ ‘regulatory quality,’ ‘rule of law,’ and ‘control of corruption.’

The authors of ‘Governance Matters’ created indexes that measure institutional quality along each of these six dimensions, as well as a composite ‘governance’ index designed to measure the overall quality of governance in a society. They regressed three measures of development – per-capita GDP, infant mortality, and adult literacy – on these indices. They found strong correlations (and assert causal relationships) between each of their sub-indices of institutional quality, as well as a composite governance index, and their measures of development; hence

6 Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) at 110.

7 Daniel Kaufmann, Aart Kraay, & Pablo Zoido-Lobaton, *Governance Matters* (World Bank Policy Research Working Paper No. 2196, Washington, DC: World Bank, 1999), online: World Bank <<http://www.worldbank.org/research>>; Daniel Kaufmann, ‘Rethinking Governance: Empirical Lessons Challenge Orthodoxy’ [Discussion Draft 11 March 2003] (Washington, DC: World Bank, 2002), online: World Bank <[http://www.worldbank.org/wbi/governance/pdf/rethink\\_gov\\_stanford.pdf](http://www.worldbank.org/wbi/governance/pdf/rethink_gov_stanford.pdf)>. See also Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996–2004* (World Bank Policy Research Group Working Paper No. 3630, Washington, DC: World Bank, 2005), online: World Bank <[http://www.worldbank.org/wbi/governance/pdf/GovMatters\\_IV\\_main.pdf](http://www.worldbank.org/wbi/governance/pdf/GovMatters_IV_main.pdf)>; Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators, 1996–2007* (World Bank Policy Research Working Paper No. 4654, Washington DC: World Bank, 2008), online: SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1148386](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148386)>; Daniel Kaufmann, ‘Governance Redux: The Empirical Challenge’ in Michael E. Porter *et al.*, eds., *The Global Competitiveness Report 2003–2004*, (New York: Oxford University Press, 2004) 137 [Kaufmann, ‘Governance Redux’]. See also World Bank, *Where Is the Wealth of Nations? Measuring Capital for the 21st Century* (Washington, DC: World Bank, 2007).

their conclusion that 'governance matters.' In a more recent iteration of this work, Kaufmann reports that

the effects of improved governance on income in the long run are found to be very large, with an estimated 400 percent improvement in per capita income associated with an improvement in governance by one standard deviation, and similar improvements in reducing child mortality and illiteracy. To illustrate, an improvement in the rule of law by one standard deviation from the current levels in Ukraine to those 'middling' levels prevailing in South Africa would lead to a four-fold increase in per capita income in the long run. A larger increase in the quality of the rule of law by two standard deviations in Ukraine (or in other countries in the former Soviet Union), to the much higher level in Slovenia or Spain, would further multiply this income per capita increase. Similar results emerge from other governance dimensions: a mere one standard deviation improvement in voice and accountability from the low level of Venezuela to that of South Korea, or in control of corruption from the low level of Indonesia to the middling level of Mexico, or from the level of Mexico to that of Costa Rica, would be associated with an estimated fourfold increase in per capita incomes, as well as similar improvements in reducing child mortality by 75 percent and major gains in literacy.<sup>8</sup>

Drawing on the Kaufmann *et al.* data, Dani Rodrik, Arvind Subramanian, and Francesco Trebbi estimate the respective contributions of institutions, geography, and international trade in determining income levels around the world.<sup>9</sup> They find that the quality of institutions 'trumps' everything else: once institutions are controlled for, conventional measures of geography have, at best, weak direct effects on income, although they have a strong indirect effect by influencing the quality of institutions. Similarly, once institutions are controlled for, trade is almost always insignificant, except for indirect effects on institutions. In their study, Rodrik *et al.* use a number of elements that capture the protection afforded to property rights as well as the strength of the rule of law. To convey a flavour of the striking nature of their findings, the authors find that an 'increase in institutional quality of one standard deviation, corresponding roughly to the difference between measured institutional quality in Bolivia and in South Korea, produces a two log-point rise in per-capita incomes, or a 6.4-fold difference – which, not coincidentally, is also roughly the income difference between the two countries.'<sup>10</sup>

At least superficially, the institutional perspective on development is attractive because it seems to identify important determinants of a

8 Kaufmann, 'Governance Redux,' *supra* note 7 at 145.

9 Dani Rodrik, Arvind Subramanian, & Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development' (2004) 9 *J.Econ.Growth* 131 at 141 [Rodrik *et al.*, 'Institutions Rule'].

10 *Ibid.* at 4.

given country's development prospects that are within that country's control, suggesting that governments should no longer consider themselves captive to factors such as geography, climate, natural resources, colonial history, and the international economic order. And this perspective has been acted upon. Since the 1990s, based on the assumption that 'institutions matter,' there has been a massive surge in development assistance for institutional reform projects. Many of these efforts have focused on strengthening the rule of law in developing countries. The World Bank alone reports that it has supported 330 rule of law projects and spent \$2.9 billion on this sector since 1990.<sup>11</sup>

A major emphasis of many rule of law reform projects has been judicial reform, which encompasses initiatives to reduce case backlog, increase judicial independence, and train judges. These reforms have proceeded despite the fact that the content of the rule of law has been a matter of long-standing controversy that contrasts 'thick' versions largely equating the rule of law with a just legal system to 'thin' versions that emphasize procedural values such as transparency, predictability, and due process.<sup>12</sup>

Another perspective is adopted by many economists, who argue that whatever else the state does, it should provide effective institutions and processes to protect private property rights and enforce contracts, which are considered prerequisites for investment and economic growth in market economies. The importance that property rights have acquired in contemporary thinking on economic development has been reflected in the success and influence of Hernando de Soto's *The Mystery of Capital*, which argues that strong formal protection for private property rights is the key factor that explains the developed world's economic success. According to de Soto, the potential benefits of formalizing property rights are significant. He claims that the total value of all real property held but not legally owned by the poor of the Third World and former Communist nations, which he characterizes as 'dead capital,' is at least \$9.3 trillion.<sup>13</sup> Reflecting this view, the World Bank and other international development agencies have supported and financed programs for the formalization of property rights and the creation of titling systems to secure such rights in many developing countries.<sup>14</sup>

11 See Trubek, 'Rule of Law,' supra note 3.

12 See Michael Trebilcock & Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008) at 16–23 [Trebilcock & Daniels, *Rule of Law*].

13 Hernando De Soto, *The Mystery of Capitalism: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) at 35 [De Soto, *Mystery*].

14 World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (New York: Oxford University Press, 2004); Ahmed Galal & Omar Razzaz, *Reforming*

## B DISAPPOINTING RESULTS

The euphoria surrounding institutional reform in the 1990s and early 2000s has been superseded by a more sober view of progress and prospects for institutional reform in developing countries. In part, this is because of a mixed record of success in democratic reform, which, along with rule of law reform, has been a major focus of institutional reform initiatives. Since 1972, the number of (nominal) democracies in the world has increased from about forty to well over 100. However, many of these democracies are fragile, shallow, or corrupt, and, according to Thomas Carothers, fewer than twenty of them are *en route* to becoming successful, well-functioning democracies.<sup>15</sup> Attempts to establish functioning democracies in Iraq and Afghanistan are two contemporary examples of the challenges that democratic reformers face, while recent serious setbacks to democratic evolution in countries such as Kenya and Zimbabwe provide further grounds for more pessimistic – or, at least, more sober – prognoses of democratic reform in many developing countries.

As lawyers, however, we focus in this paper primarily on the challenges facing many developing countries in reforming their legal institutions so as to strengthen the rule of law.<sup>16</sup> Here again, initial euphoria has been replaced by a more sober assessment of the challenges that many developing countries face in embarking upon serious rule of law reforms.

According to Carothers, in a widely cited paper titled ‘The Rule of Law Revival,’

One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles. The concept is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization . . . The rule of law promises to move countries past the first, relatively easy phase of political and economic liberalization to a deeper level of reform. But that promise is proving difficult to fulfill.<sup>17</sup>

In a similar vein, Bryant Garth and Yves Dezalay claim that

[t]he rule of law has become a new rallying cry for global missionaries. Money doctors selling competing economic expertises continue to be very active on

*Land and Real Estate Markets* (World Bank Policy Research Working Paper No. 2616, Washington, DC: World Bank, 1999), online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=636201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636201)>.

- 15 Thomas Carothers, ‘The End of the Transition Paradigm’ (2002) 13 *J. Democracy* 5; Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999).
- 16 See more generally, on the relationship between law and development, Kevin Davis & Michael Trebilcock, ‘The Relationship between Law and Development: Optimists versus Skeptics’ (2008) 56 *Am. J. Comp. L.* 895 [Davis & Trebilcock, ‘Relationship’].
- 17 Thomas Carothers, ‘The Rule of Law Revival’ (1998) 77 *For. Aff.* 95 [Carothers, ‘Revival’].

the global plain but the 1990s also witnessed a tremendous growth in rule doctors armed with their own competing prescriptions for legal reforms and new legal institutions at the national and transnational level . . . So far the rule of law industry cannot claim too many successes in the latest campaign.<sup>18</sup>

According to Brian Tamanaha,

For all but the most sanguine observers, the triumphalist confidence of the 1990s has dissolved . . . Amidst this host of new uncertainties there appears to be wide agreement, traversing all fault lines, on one point, and one point only: that the rule of law 'is good for everyone . . .' This apparent unanimity and support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement . . . Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion . . . If it is not already firmly in place, the rule of law appears mysteriously difficult to establish.<sup>19</sup>

In a recent book,<sup>20</sup> Michael Trebilcock and Ron Daniels explore efforts over the past two decades or so to enhance the rule of law in many developing countries in Latin America, sub-Saharan Africa, Eastern and Central Europe, and Asia – with a mixed to weak record of success in strengthening even a relatively 'thin' conception of the rule of law that focuses primarily on due process values. Indeed, on the rule of law indicator adopted by Kaufmann *et al.* in their governance studies,<sup>21</sup> the rule of law deficiencies in many developing countries are both serious and persistent, and in some cases the situation is deteriorating. In 2007, according to the World Bank's governance data on the status of the rule of law in many countries throughout the world, only three of seventeen Latin American countries and only eight of forty-seven countries in sub-Saharan Africa had positive rule of law ratings. In all twelve countries of the former Soviet Union, ratings were negative (though the experience in other Eastern European countries has been more positive). Asia, with its huge diversity of countries, presents a much more mixed picture, defying ready generalizations; however, rule of law ratings are generally low, with notable exceptions such as Singapore and Hong Kong.

18 Bryant Garth & Yves Dezalay, 'Introduction' in Yves Dezalay & Bryant Garth, eds., *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002) 1.

19 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 1, 3, 4.

20 Trebilcock & Daniels, *Rule of Law*, supra note 12.

21 Kaufmann *et al.*, *Governance Matters*, supra note 7 at 8, define the rule of law as including 'measures of the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of both violent and non-violent crime, effectiveness and predictability of the judiciary and the enforceability of contracts.'

Other recent studies provide extensive evidence of how little we know as to how to go about promoting the rule of law in developing countries.<sup>22</sup> For example, after reviewing this evidence, Carothers concludes that

[t]he rapidly growing field of rule of law assistance is operating from a very thin base of knowledge at every level – with respect to the core rationale of the work, the question of where the essence of the rule of law actually resides in different societies, how change of rule of law occurs, and what the real effects are of changes that are produced.<sup>23</sup>

Daniel Fitzpatrick provides a similarly sombre evaluation of many efforts to reform property rights regimes in developing countries. Based on an extensive review of the reform experience, he contends that the greater the divergence between state law and local norms, the more likely it is that attempts to enforce exclusionary claims will lead to open access rather than to an authoritative property rights regime. He argues that legal and normative pluralism is a particularly common phenomenon in the Third World and is often accompanied by institutional pluralism – a fragmentation of the state into competing agencies and levels of government – and that in circumstances of legal, normative, and institutional pluralism, efficient property rights regimes will not necessarily emerge. Fitzpatrick also contends that the problem of establishing and enforcing property rights is closely connected to the problem of social order. Unless social order is established, most commonly through legitimate and capable government, the process of allocating and enforcing property rights will tend to cause conflict, because claimants will resort to competing legal, normative, and coalitional enforcement mechanisms.<sup>24</sup>

#### C DO WE KNOW HOW TO CHANGE BAD INSTITUTIONS?

In the remainder of this article we offer some insights that we argue are likely to enhance our prospects of success in institutional (especially legal) reforms for development. As a starting point, we need to establish what we mean by institutions. The term ‘institutions’ has been used in

22 See Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) at cc. 1, 2 [Carothers, *Promoting*]. See also Erik G. Jensen & Thomas C. Heller, eds., *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press, 2003) [Jensen & Heller, *Beyond*]; see esp. Thomas C. Heller, ‘An Immodest Postscript’ in Erik G. Jensen & Thomas C. Heller, eds., *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press, 2003) 382 [Heller, ‘Immodest’].

23 Carothers, *Promoting*, supra note 21 at 27.

24 Daniel Fitzpatrick, ‘Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access’ (2006) 15 *Yale L.J.* 996.

ambiguous ways in some of the more prominent writing by the New Institutional Economists. For example, North defines institutions as follows:

Institutions are the rules of the game of a society, or, more formally, are the humanly devised constraints that structure human interactions. They are composed of formal rules (statute law, common law, regulation), informal constraints (conventions, norms of behaviour and self-imposed codes of conduct), and the enforcement characteristics of both. Organisations are the players: groups of individuals bound by a common purpose to achieve objectives. They include political bodies (political parties, the senate, a city council, a regulatory agency); economic bodies (firms, trade unions, family farms, cooperatives); social bodies (churches, clubs, athletic associations); and educational bodies (schools, colleges, vocational training centres).<sup>25</sup>

From a lawyer's perspective, this is an odd definition of institutions. Beyond a country's constitution, lawyers would not tend to think of institutions as 'the rules of the game.' For example, the legally prescribed speed limits on given highways would not be considered an institution but, rather, a legal rule promulgated by one set of institutions, enforced by another, and, in the event of disputes, adjudicated by yet another. Also, the distinction between institutions and organizations that North draws is idiosyncratic in that many of his forms of organizations, such as 'political bodies (political parties, the senate, a city council, a regulatory agency),' would be conceived of by lawyers as institutions charged with making law, administering law, or enforcing law. Finally, by including informal constraints ('[cultural] conventions, norms of behaviour and self-imposed codes of conduct') in his definition of institutions, North renders his conception of institutions so all-encompassing that it includes almost any factor that may influence behaviour.

For our purposes, we understand 'institutions' to mean those bodies (formal and informal) charged by a society with making, administering, enforcing or adjudicating its laws or policies. With this clarification of our conception of institutions (if only by stipulation), we now turn to the question that is the central focus of this article: How can dysfunctional institutions be changed?

We believe that the answer to this question can be derived from another body of recent literature, developed primarily by economics and political science scholars who emphasize the centrality of path dependence in the evolution of every society's institutions. This literature recognizes the unavoidable reality that institutional reformers are never writing on a *tabula rasa* but, rather, operate within a complex set of

25 North, 'New Institutional,' supra note 5 at 23.

context-dependent particularities – economic, political, social – that have shaped the historical evolution of existing institutions. These particularities affect the nature and scope of feasible institutional reforms. This is the topic to which we turn next.

### III *Path dependence*

Part III explores the use of path dependence theory<sup>26</sup> in both economics and political science, focusing on three concepts: self-reinforcing mechanisms, switching costs, and critical junctures. The first two concepts, which are emphasized by economic theory, provide an explanation of why institutions are difficult to change. The third, drawn from political science, suggests that there are key moments when there may be room for more radical reforms. These ‘critical junctures’ are contrasted with ‘normal times,’ when there are severe constraints on major institutional changes and only gradual reforms working on small margins are feasible. The development literature has to a limited extent acknowledged the importance of these concepts, but they have been largely ignored by reformers, perhaps because they have little predictive value. In this article we attempt to show the relevance of these concepts to institutional reform initiatives through examples from experience in rule of law and property rights reform.

#### A PATH DEPENDENCE IN ECONOMICS: SELF-REINFORCING MECHANISMS AND SWITCHING COSTS

In essence, path dependence describes how the reinforcement of a given set of arrangements over time raises the cost of changing them.<sup>27</sup> Applied to institutions, the theory helps to explain how institutions (and networks of institutions) take shape through self-reinforcing mechanisms and why – as a consequence – they are difficult to change. The key insight

26 Some claim that path dependence is not a theory. See, e.g., Adrian Kay, ‘Path Dependency and the CAP’ (2003) 10 *J.Europ.Pub.Pol’y* 405 at 406 [Kay, ‘Path Dependency’; citations omitted]:

Path dependency is not a framework or theory or model in the terms of Ostrom: it does not provide a general list of variables that can be used to organize ‘diagnostic and prescriptive inquiry’ nor does it provide hypotheses about specific links between variables or particular parameters of those links. Instead, path dependency is an empirical category; a concept which can be used to label a certain type of temporal process. The concept *per se* does not provide an explanation of why systems sometimes develop in a path dependent way.

27 For a helpful overview of path dependence theory and its applications see Paul Pierson, ‘Increasing Returns, Path Dependence, and the Study of Politics’ (2000) 94 *Am.Pol.Sci.Rev.* 251 at 252–7 [Pierson, ‘Increasing Returns’]; our discussion below draws in part on Pierson’s survey of the literature.

associated with path dependence theory is that, under certain conditions, economic and other activities may be subject to increasing returns, whereby the benefits of engaging in them increase, rather than decrease over time as more and more people invest in a given way of doing things. As these investments – of time, money, skills, and expectations – add up, the relative cost of exploring alternatives steadily rises.<sup>28</sup>

A simple model of path dependence would therefore emphasize three features of an arrangement: (1) an initial set of choices or random events that determine the starting position; (2) the subsequent reinforcement of those choices or events through ‘feedback effects’; and (3) the degree to which switching costs may preclude good alternatives from being explored in the long run.

The second and third features – feedback effects and switching costs – are especially important because they generate reinforcement, or increasing returns. The economist Brian Arthur identifies four key characteristics of an activity or an environment that produces this reinforcement: (1) large set-up or fixed costs, which create incentives to ‘stick with’ a given activity (as unit costs decrease with rising output); (2) learning effects, which include the productivity gains that flow from increased familiarity with that activity (and incentives to adapt to it); (3) coordination or network effects, by which people derive increased benefits from an activity that others participate in; and (4) adaptive expectations.<sup>29</sup>

Arthur also identifies several consequences of increasing returns or self-reinforcement: the fact that chance events do not ‘cancel out’ over time but instead are ‘remembered’ as they build on each other, meaning, more broadly, that small events can have large effects over time; inflexibility, or ‘lock-in’ of a given path as a result of the increasing cost of changing course; potential path inefficiency, meaning that an activity that becomes locked in may generate sub-optimal outcomes; and unpredictability, in that we cannot determine in advance which activities will be adopted in the long run.

The theory of increasing returns and path dependence more generally has been used to illuminate a range of economic phenomena that otherwise seem hard to explain – in particular, how objectively sub-optimal or non-rational outcomes can be generated in a variety of contexts. The most popular examples explain how early success in a marketplace can

28 Increasing returns path dependence is the most prominent of several models. For a description of other approaches see Oona A. Hathaway, ‘Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System’ (2001) 86 Iowa L.Rev. 101 at 106–22.

29 Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (Ann Arbor: University of Michigan Press, 1994).

lead to the adoption of sub-optimal technologies.<sup>30</sup> They also include analyses of how industrial clusters are formed (as networks develop around key players in a marketplace) and how comparative advantages in international trade can develop (they may be shaped by random opportunities as well as, for example, resource endowments).<sup>31</sup> Along similar lines, economic models of endogenous growth have used increasing returns to explain how economies with more initial wealth experience faster economic growth over time. This growth may be due to the spread of knowledge,<sup>32</sup> increases in market size (and spillover effects among complementary economic activities), or specialization.<sup>33</sup>

The development literature that has focused on institutions has not completely ignored the importance of self-reinforcing mechanisms, switching costs, and path dependence. For instance, Kevin Davis, Michael Trebilcock, and Bradley Heys<sup>34</sup> support the argument (originally developed by Amy Chua)<sup>35</sup> that the economic dominance of certain ethnic groups in many developing countries may be explained by a number of factors, including differences in individual preferences and abilities, discrimination, variations in social capital, and increasing returns to scale, and that these factors are often self-reinforcing, creating a form of path dependence.

Dani Rodrik has highlighted the role of path dependence in generating the wide diversity of institutions and policies observable around the world, including developed countries. He argues that path dependence has been a fundamental impediment to deep economic integration.<sup>36</sup>

30 Paul A. David, 'Clio and the Economies of QWERTY' (1985) 7 *Am.Econ.Rev.* 332 [David, 'Economies of QWERTY']; but see Stan J. Liebowitz & Stephen Margolis, 'The Fable of the Keys' (1990) 33 *J.L.Econ.* 1.

31 Paul Krugman, 'History and Industry Location: The Case of the Manufacturing Belt' (1991) 81 *Am.Econ.Rev.* 80; Paul Krugman, *Pop Internationalism* (Cambridge, MA: MIT Press, 1996); Ricardo Hausmann & Dani Rodrik, 'Economic Development as Self-Discovery' (2003) 72 *J.Develop.Econ.* 603.

32 Paul M. Romer, 'Increasing Returns and Long-Run Growth' (1986) 94 *J.Pol.Econ.* 1002.

33 Alberto F. Ades & Edward L. Glaeser, 'Evidence on Growth, Increasing Returns, and the Extent of the Market' (1999) 114 *Q.J.Econ.* 1025.

34 Kevin Davis, Michael Trebilcock, & Bradley Heys, 'Ethnically Homogeneous Commercial Elites in Developing Countries' (2001) 32 *Law & Pol'y Intl.Bus.* 331.

35 Amy Chua, 'Markets and Ethnicity: A New Paradigm for Law and Development' (1998) 108 *Yale L.J.* 1.

36 Dani Rodrik, *Feasible Globalizations* (KSG Working Paper No. RWP02-029, Cambridge: Harvard University, 2002), online: Harvard University <<http://ksghome.harvard.edu/~drodrik/Feasglob.pdf>> at 6–8. See also Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton, NJ: Princeton University Press, 2007) at cc. 5, 6 [Rodrik, *One Economics*]; Francis Fukuyama, 'Development and the Limits of Institutional Design' (Plenary address to the Global Development Network, St. Petersburg, Russia, 20 January 2006), online: Global Development Network <[http://depot.gdnet.org:6666/gdnshare/pdf2/gdn\\_library/](http://depot.gdnet.org:6666/gdnshare/pdf2/gdn_library/)>

More specifically, Rodrik illustrates the importance of reinforcing mechanisms in the interaction between different rules in a particular legal system using the example of social insurance in Japan and its connections with corporate governance and the anti-trust system:

Different elements of a society's institutional configuration tend to be mutually reinforcing. Consider, for example, the manner in which Japanese society provides its citizens with social protection. Unlike Europe, the Japanese government does not maintain an expensive welfare state financed by transfers from taxpayers. Instead, social insurance has been provided in the postwar period through a combination of elements unique to 'Japanese-style' capitalism: lifetime employment in large enterprises, protection of agriculture and small-scale services ('mom-and-pop' stores), government-organized cartels, and regulation of product markets. All of these have in turn repercussions for other parts of the institutional landscape. One implication of these arrangements is that they strengthen 'insiders' (managers and employees) relative to 'outsiders' (shareholders) and therefore necessitate a different corporate governance model than the Anglo-American one: in Japan, 'insiders' have traditionally been monitored and disciplined not by shareholders but by banks. In the United States, by contrast, the prevailing model of shareholder-value maximization privileges profits over the interests of insiders and other 'stakeholders.' But the flip side of this is that profit-seeking behavior is constrained by the toughest anti-trust regime in the world. It is difficult to imagine governments in Europe or Japan humiliating their premier high-tech company the way that [the] U.S. has done with Microsoft.<sup>37</sup>

Although the concept of self-reinforcing mechanisms is helpful in understanding how countries arrived at where they are today, path dependence studies are largely backward looking. The concept helps us understand what has happened in the past and is particularly useful in clarifying events that are otherwise hard to explain, but these mechanisms do not allow us to make predictions about the future, because we do not know which arrangements or self-reinforcing mechanisms will prevail. Even in cases where there are voluntary and purposive interventions, one of the implications of self-reinforcing mechanisms is unpredictability, as Arthur emphasizes. Thus, in addition to being backward looking, the concept has no direct normative implications, and it might therefore be thought to be of limited value in informing future reforms. As we will argue in Part v below, however, path dependence theory yields important positive implications that can be fruitfully used to inform the feasibility of normatively motivated institutional reforms.

annual\_conferences/seventh\_annual\_conference/Fukuyama\_plenary1.pdf>; Francis Fukuyama, *Statebuilding: Governance and World Order in the 21st Century* (Ithaca, NY: Cornell University Press, 2004).

<sup>37</sup> Rodrik, *Feasible Globalizations*, supra note 36 at 7 [citations omitted].

Before using path dependence in a forward-looking manner, we will argue (in Part IV) that path dependence can shed light on some of the failures of past reforms. Our argument about past reforms resonates with Douglass North's most recent book, *Understanding the Process of Economic Change*,<sup>38</sup> in which he emphasizes three key implications of the path dependence perspective for institutional change. First, at the individual level, the institutional structure inherited from the past may reflect a set of beliefs that are impervious to change, either because the proposed changes run counter to that belief system or because the proposed alteration in institutions threatens the leaders and entrepreneurs of existing organizations. Where fundamentally competing beliefs exist side by side, the problems of creating a viable set of institutional arrangements are increased and may make the establishment of consensual political rules a prescription for short-run disaster. Second, at the institutional level, the artefactual structure that defines the performance of an economy comprises interdependent institutions; changing just one institution in an attempt to achieve the desired performance is always an incomplete and sometimes a counter-productive activity. Third, at the broader social level, a mix of formal institutions, informal institutions, and their enforcement characteristics defines institutional performance; while the formal institutions may be altered by fiat, the informal institutions are not amenable to deliberate short-run change, and their enforcement characteristics are only very imperfectly subject to deliberate control. As we will argue below, the ignoring of self-reinforcing mechanisms such as belief systems, formal institutional interconnections, and the interaction between formal and informal institutions explains some of the failures of past reforms.

Considering these implications of path dependence theory for institutional reforms, the room for manoeuvre seems rather constrained if we attempt to use concepts from path dependence theory in a forward-looking manner. Self-reinforcement mechanisms increase switching costs, locking in certain legal, political, and institutional arrangements. In addition, mutually reinforcing mechanisms suggest that institutional interdependencies that are the historical legacy of myriad past events may undermine the success of nodal institutional reforms, implying that we cannot modify any of these institutions in isolation but must address the entire institutional matrix – which may not be feasible in normal times.<sup>39</sup> Political scientists distinguish normal times from critical junctures, during which change is more likely. This is the topic to which we turn next.

38 North, *Understanding*, supra note 4.

39 *Ibid.* at 8.

## B PATH DEPENDENCE IN POLITICAL SCIENCE: CRITICAL JUNCTURES

In political science, scholars have used path dependence theory to describe the evolution of a wide variety of political institutions, a type of scholarship generally known as historical institutionalism.<sup>40</sup> The label 'historical institutionalism' does not describe a coherent body of literature, as Paul Pierson and Theda Skocpol demonstrate.<sup>41</sup> Instead, it encompasses a wide range of authors who believe that 'history matters.' Some of the commonalities between these authors, however, are that they study institutional evolution over time (instead of singling out a moment in time on which to focus their analysis) and analyse combined effects of institutions and the processes that led to their evolution (instead of considering institutions alone).<sup>42</sup> In historical institutionalism, the concepts of self-reinforcing mechanisms and high switching costs have been used to better understand the 'stickiness' of certain institutional and political arrangements. In this respect, path dependence in the political sciences is similar to the concept of increasing returns in economics, as used by Arthur.<sup>43</sup>

In contrast to the economic version of the theory, however, political scientists give greater prominence to the notion of 'critical junctures' or 'conjunctures.' These conjunctures can be defined as 'interaction effects between distinct causal sequences that become joined at particular points in time.'<sup>44</sup> Junctures are critical because they place institutional arrangements on particular paths or trajectories, which are then very difficult to alter.<sup>45</sup> Historical institutionalists 'focus on distinct sociopolitical processes that become linked in different and causally crucial ways depending on relative timing.'<sup>46</sup> With respect to the importance of critical junctures, Pierson and Skocpol state that

[a] clear logic is involved in path dependent processes [in a political system]: outcomes at a critical juncture trigger feedback mechanisms that reinforce the

40 Historical institutionalism has many other defining features in addition to the use of path dependence theory. Four key features are (1) conceptualizing the relationship between institutions and individual behaviour in relatively broad terms, (2) emphasizing the asymmetries of power associated with the operation and development of institutions, (3) viewing institutional development as intrinsically connected to path dependence and unintended consequences, and (4) integrating institutional analysis with other factors, such as ideas. Peter Hall & Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Pol.Stud.* 936 at 938.

41 Paul Pierson & Theda Skocpol, 'Historical Institutionalism in Contemporary Political Science' in Ira Katznelson & Helen Milner, eds., *Political Science: The State of the Discipline* (New York: W.W. Norton, 2002) 693 at 694–5 [Pierson & Skocpol, 'Historical'].

42 *Ibid.* at 695–6.

43 Pierson, 'Increasing Returns,' supra note 27; Kay, 'Path Dependency,' supra note 25 at 406.

44 Pierson & Skocpol, 'Historical,' supra note 41 at 702.

45 Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004) at 133–67 [Pierson, *Politics*].

46 Pierson & Skocpol, 'Historical,' supra note 41 at 703.

recurrence of a particular pattern into the future. Such processes have very interesting characteristics. They can be highly influenced by relatively modest perturbations at early stages. Once actors venture far down a particular path, however, they are likely to find it very difficult to reverse course. Political alternatives that were once quite plausible may become irretrievably lost. Thus, events or processes occurring during and immediately following critical junctures emerge as crucial.<sup>47</sup>

In the development literature, the concept of critical junctures has been used to analyse transitions to democracy. For example, Daron Acemoglu *et al.* describe how critical historical junctures can generate divergent pathways of political-economic development.<sup>48</sup> In particular, they contest the modernization hypothesis,<sup>49</sup> which holds that institutional change is necessarily driven by economic development. They argue that 'empirical results show that while the level of per capita income and the level of democracy are correlated, there is no relationship between the *change* in income per capita and the *change* in democracy over the past 150 years.'<sup>50</sup> In short, they do not find a causal connection between economic development and democracy over time. They argue that transitions to democracy are better explained by underlying historical factors that affect both the level of income per capita and the likelihood of democracy in a country. These historical factors include the political and economic institutions established at the time of colonization, which, in turn, were determined by the conditions originally found in these countries: rates of settler mortality, indigenous population density, and wealth. The authors show that countries with high rates of settler mortality and higher indigenous population density at the time of colonization experienced greater extraction of resources and repression by Europeans ('extractive' economies) and, consequently, are less likely to be democratic today than are countries with high rates of settlement ('neo-Europes'). Thus, the historical factors that existed at the time of colonization explain why countries have pursued different institutional paths. Acemoglu *et al.* therefore conclude that 'countries have embarked upon different development paths, most likely at some critical junctures during their histories, and while some paths have led to democracy and prosperity, some others involved non-democracy and relative poverty.'<sup>51</sup>

47 Ibid.

48 Daron Acemoglu *et al.*, *Reevaluating the Modernization Hypothesis* (NBER Working Paper No. 13334, August 2007), online: National Bureau of Economic Research <<http://www.nber.org/papers/w13334>> [Acemoglu *et al.*, 'Reevaluating'].

49 Seymour M. Lipset, 'Some Social Requisites of Democracy: Economic Development and Political Legitimacy' (1959) 53 *Am.Pol.Sci.Rev.* 69.

50 Acemoglu *et al.*, 'Reevaluating,' *supra* note 48 at 3.

51 Ibid. at 26.

By using path dependence, these studies offer a persuasive explanation of why different countries have different institutions and why they are at different stages of economic development. However, the concept of critical junctures has a deterministic flavour, because it does not indicate how to predict or create these junctures. This is why some have concluded that 'the idea of path dependence is perhaps best suited to explaining the reproduction of a critical juncture legacy rather than the production of the critical juncture itself.'<sup>52</sup>

In addition to being deterministic, the concept of critical junctures may be too elusive to be helpful to reformers. The concept embraces both cathartic events and 'minor perturbations' that have cumulative and compounding, but often unpredictable, effects through time; it is therefore difficult to know *ex ante* what is or is not a critical juncture. Colonization, for instance, is an obvious critical juncture; but others are much less obvious. As a result, while some junctures may be easy to identify contemporaneously,<sup>53</sup> others are much harder for reformers to identify while they are happening, without the benefit of hindsight. Indeed, we will often realize that something was a critical juncture only *ex post facto*, when the entire sequence of events has unfolded.<sup>54</sup> This is not very useful for those trying to implement institutional reforms.

In his book *Politics in Time*, Paul Pierson seeks to take advantage of the insights of path dependence (in the form of historical institutionalism) while at the same time mitigating its self-imposed limitations. To do this, he uses 'cross-fertilized concepts.'<sup>55</sup> The outcome is a more dynamic account of institutional reforms, not only considering institutional change as a macro process in which a complex set of context-dependent particularities – economic, political, social – influence the changes but also recognizing that reformers are not writing on a *tabula rasa* and have limited control over the social processes that will end up determining the outcome of each institutional reform, no matter how well planned.

52 Jacob S. Hacker, 'The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy' (1998) 12 *Stud.Am.Pol.Develop.* 57 at 78.

53 Post-conflict societies may be an example, if the conflict has destroyed existing patterns of influence by certain interest groups. This argument is developed by Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven, CT: Yale University Press, 1982). But see Susan Rose-Ackerman, 'Was Mancur a Maoist? An Essay on Kleptocracy and Political Stability' (2003) 15 *Econ.& Pol.* 163 [Rose-Ackerman, 'Was Mancur'] (indicating that Olson's post-war examples are not analogous to the situation of post-conflict societies in Africa).

54 As, for instance, in the case of the QWERTY keyboard. See David, 'Economies of QWERTY,' *supra* note 30.

55 Pierson, *Politics*, *supra* note 45.

Pierson is not alone in this attempt. The Nobel laureate Douglass North was a pioneer in his own efforts in applying path dependence to institutional development.<sup>56</sup> As North puts it, path dependence theory is not deterministic; instead,

[a]t every step along the way there are choices – political and economic – that provide . . . real alternatives. Path dependence is a way to narrow conceptually the choice set and link decision-making through time. It is not a story of inevitability in which the past neatly predicts the future.<sup>57</sup>

Similarly, Pierson notes that nothing in path dependence analysis implies that a particular alternative is permanently locked in following a move onto a self-reinforcing path. Instead, institutional change typically involves a dynamic of punctuated equilibrium. There are brief moments at which opportunities for major institutional reforms appear, followed by long stretches of institutional stability. Junctures are critical because they place institutional arrangements on particular paths or trajectories, which are then very difficult to alter. In this context, change continues, but it is bounded change – until something erodes or swamps the mechanisms of reproduction that generate continuity. The challenge, then, is to define how we can best operate within this context of bounded change.

#### *IV Ignoring path dependence in rule of law and property rights reform*

The path dependence literature provides a wealth of information on institutional change that reformers would be wise to take seriously. First, the concepts of self-reinforcing mechanisms and switching costs, for instance, can be important because they show that reforms in key institutional nodes of any system are likely to fail if they do not address both the nature and the scale of the switching costs faced by internal and external actors engaged in or with these institutions. Second, to the extent that particular institutions have become embedded, over time, in a broader matrix of mutually reinforcing institutional interdependencies, nodal reform that ignores these interdependencies is likely to be further compromised. Third, following North, we acknowledge the interconnections between formal and informal institutions. Despite being crucial for

56 North, 'New Institutional,' supra note 5. Pierson notes that North made one of the few attempts to apply path dependence theory to institutional analysis more generally, combining it with rational choice theory. And other scholars, as Pierson puts it, did not take up North's effort. Thus, Pierson's effort to build the bridge between historical institutionalism and rational choice theory builds largely on North's pioneering work.

57 North, 'New Institutional,' supra note 5 at 98–9.

successful reforms, informal institutions are based on cultural norms and social dynamics and, unlike formal institutions, cannot be changed by fiat.<sup>58</sup>

In Part IV we turn to rule of law and property rights reforms that exemplify how reformers could make more effective use of the lessons to be gleaned from path dependence theory. In promoting these reforms, reformers have often ignored the three key lessons from path dependence theory. In section IV.A we look generally at rule of law reforms that have in most cases ignored self-reinforcing mechanisms and the switching costs they entail, as well as the interconnections among legal institutions. In section IV.B we turn to property rights reform and the interactions between formal and informal property rights regimes.

#### A PROMOTING RULE OF LAW REFORMS

A prominent focus of judicial reform initiatives was to reduce court backlogs, which have been large and growing in many developing countries. Reform efforts to this end have involved improved court record keeping through enhanced information technology and more proactive techniques for case management. Complementary reform initiatives have often involved externally supported judicial training and development of programs.<sup>59</sup> In some cases, these initiatives seem to have had a positive impact on court backlogs, although, as various scholars have noted, enhancing judicial capacity by increasing the volume of cases processed has little or nothing to do with the quality of judicial decision making.<sup>60</sup> Judicial corruption and incompetence are endemic in many developing countries, particularly at lower levels of the court systems and outside major urban centres. Reform efforts have barely penetrated these courts and are thus largely ineffective, since most citizens' only contact with courts is at the lowest level of the system.<sup>61</sup>

One challenge confronting reforms is that they ignore self-reinforcing mechanisms at the individual level: belief systems or patterns of behaviour on the part of internal and external actors are likely to have adjusted to the established institutional arrangement and will not readily adapt to the new regime. These forms of self-reinforcing behaviour are likely to increase the switching costs of moving to a new system, generating resistance to reforms akin to the 'installed base problem.'<sup>62</sup>

58 North, *Understanding*, supra note 4.

59 Trebilcock & Daniels, *Rule of Law*, supra note 11 at c. 2.

60 Jensen & Heller, *Beyond*, supra note 21, esp. Heller, 'Immodest,' supra note 22.

61 Ibid.

62 The term 'installed base' refers to early adopters of a technology, who will bear a disproportionate share of transient incompatibility costs and may therefore resist the adoption of a newer technology. The larger the installed base, the more inertia it

The individual belief systems and patterns of behaviour targeted by judicial reforms are reinforced by legal education. In many developing countries, such education has historically focused heavily on rote learning and regurgitation for exams.<sup>63</sup> In Latin America, many public law schools also suffer from overpopulation and have many part-time students and instructors.<sup>64</sup> While private law schools have recently proliferated in many countries, they are of highly variable quality, ranging from internationally recognized institutions to part-time degree or diploma mills.<sup>65</sup> Legal education institutions in Central and Eastern Europe have historically been tightly controlled by the state, which has led to a standardized, inflexible, and increasingly inappropriate legal curriculum.<sup>66</sup> In some countries in this region, with the support of international NGOs and other institutions, efforts have been made to reform the curriculum in ways that are relevant to the new economic, social, and political environments in which these countries find themselves and to reduce or eliminate the ideological connection between law and the state that prevailed in the Communist era.<sup>67</sup>

Legal education in Africa is extremely varied with respect to institutional support, funding, and curriculum development. South Africa, a relatively rich nation, has considerable legal education infrastructure but continues to suffer from underfunding and low quality of historically black institutions.<sup>68</sup> Many other African countries have much weaker legal education infrastructures that suffer from a serious lack of resources,

will generate. Joseph Farrell & Garth Saloner, 'Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation' (1986) 76 *Am.Econ.Rev.* 940.

63 Trebilcock & Daniels, *Rule of Law*, supra note 11 at c. 8; Joseph Tome, 'Heading South But Looking North: Globalization and Law Reform in Latin America' (2000) *Wisc.L.Rev.* 691; Cheng Han Tan *et al.*, 'Legal Education in Asia' (2006) 1 *Asian J.Comp.L.* 1 at 17.

64 Stephen Meili, 'Legal Education in Argentina and Chile' in Louise G. Trubek, *Educating for Justice Around the World: Legal Education, Legal Practice and the Community* (Aldershot, UK: Ashgate, 1999) 138 at 142.

65 Mónica Pinto, 'Legal Education in Argentina and Other South Latin American Countries' (Association of American Law Schools, 2000), online: AALS <<http://www.aals.org/2000international/english/argentina.htm>>; American Bar Association Central European and Eurasian Law Initiative [ABA-CEELI], 'CEELI Focal Area: Legal Education Reform,' online: ABA <[http://www.abanet.org/rol/programs/resource\\_legal\\_education.html](http://www.abanet.org/rol/programs/resource_legal_education.html)>.

66 George E. Glos, 'Soviet Law and Soviet Legal Education in an Historical Context: An Interpretation' (1989) 15 *Rev.Soc.L.* 227 at 257; Susan Finder, 'Legal Education in the Soviet Union' (1989) 15 *Rev.Soc.L.* 197 at 207.

67 Open Society Justice Initiative, 'National Criminal Justice Reform, Georgia: Policing,' online: Justice Initiative <<http://www.justiceinitiative.org/regions/cafsu/georgia>>.

68 Philip F. Iya, 'From Lecture Room to Practice: Addressing the Challenges of Reconstructing and Regulating Legal Education and Legal Practice in the New South Africa' [2000–2003] *Third World Leg.Stud.* 141 at 144.

including such basic resources as teaching and library materials.<sup>69</sup> Like their counterparts in Latin America, many African law schools continue to emphasize rote, black-letter learning, although recent efforts have been made to incorporate both clinical legal education and human rights dimensions into law school curricula. In many Asian countries there are large numbers of legal education institutions of widely varying quality; there has recently been a dramatic proliferation of these institutions in China.

Resistance to legal reforms in many developing countries seems attributable in part to the vested interests of professors, judges, and existing practitioners, who seek to insulate themselves from changes in curriculum and from reforms of substantive or procedural features of the existing legal system,<sup>70</sup> in part because these changes entail a depreciation of their existing human capital and require investments in new human capital. Lawyers who were trained in and who practice or teach in a socially dysfunctional legal system, and who have made substantial investments in human capital in learning how to function in such a system, are often not a progressive force for legal reform.<sup>71</sup>

A more general problem with judicial reforms, however, is that they do not account for relevant institutional interconnections in a legal system that link what happens inside the courtroom with a series of events that precede and succeed the courtroom proceedings. In particular, recent rule of law reforms have paid little attention to reforming the most relevant law-enforcement agency, the police force, despite the fact that in many countries the police have historically been viewed as a form of paramilitary organization, dedicated primarily to regime maintenance in societies dominated by military or authoritarian governments.<sup>72</sup> This has made policing of secondary importance in many developing and transitional economies and has led incumbent political regimes to support or, at least, to acquiesce in extensive human rights abuses by police forces, including torture, coerced confessions, indefinite detention without trial, and rampant corruption. In an attempt to deal with these forms of abuse, modest efforts have been made in some developing and transitional economies to implement civilian oversight mechanisms and reform criminal procedure laws.<sup>73</sup> These laws, at least in

69 World Bank Legal Department, *Federal Republic of Yugoslavia Legal and Judicial Diagnostic* (World Bank, 2002) at 502 ('in most African law schools one gets the distinct impression that the aims of legal education have not been given serious attention').

70 Ronald J. Daniels & Michael J. Trebilcock, 'The Political Economy of Rule of Law Reform in Developing Countries' (2004) 26 *Mich.J.Int'l L.* 99 [Daniels & Trebilcock, 'Political Economy'].

71 *Ibid.*

72 See Trebilcock & Daniels, *Rule of Law*, *supra* note 12 at c. 3.

73 *Ibid.*

theory, enable courts to act as a check on these forms of abuse through, for example, rules that deem evidence inadmissible if it was obtained illegally. In practice, however, courts in many developing and transitional economies have not been assertive monitors of abuses of public office, in part because of their historical subservience to the executive branch of government in terms of appointments, promotions, and resources.<sup>74</sup> Attempts at strengthening judicial independence through the creation of semi-autonomous judicial councils to vet appointments and promotions and to maintain a disciplinary regime for judicial misconduct have often met with fierce resistance from the executive and legislative branches of government, as well as from the judiciary itself.<sup>75</sup>

The problem of ignoring other elements of the judicial system, such as the police, in rule of law reforms is replicated in penal reforms.<sup>76</sup> The historical role of prisons in many countries has been principally tied not to crime, punishment, or rehabilitation but to suppressing political opposition or to extracting labour from vast populations of captive workers (especially in the former Soviet Union). Reform efforts in this context have focused on developing correctional institutions as professional public institutions, often through training programs for correctional personnel provided by international agencies and NGOs, and on providing paralegal advisory services to inmates to advise them of their rights relating to abuses suffered within correctional institutions and their related legal rights under the country's criminal justice system. Some countries, especially in Latin America, have appointed official ombudsmen to investigate prisoners' complaints and report thereon to government, while in other countries (including a number of countries in sub-Saharan Africa), pursuant to regional treaty commitments, official *rapporteurs* make periodic visits to correctional institutions and report publicly on conditions therein.

These reforms seek to improve correctional institutions in many developing countries and transitional economies but ignore their relationship with the criminal justice system. For instance, severe prison overcrowding has been a chronic problem in developing countries, leading to uninhabitable conditions within cells and to a very high incidence of infectious diseases such as HIV/AIDS and tuberculosis. However, the existing reforms ignore the fact that a significant source of the overcrowding problem in correctional institutions in many developing countries is the high

74 *Ibid.*

75 See Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for International Peace, Working Paper No. 28, 2002), online: Carnegie Endowment <<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1015>>.

76 See Trebilcock & Daniels, *Rule of Law*, *supra* note 12 at c. 5.

percentage of inmates held on remand awaiting trial, often for lengthy periods, because of inefficiencies in the broader criminal justice system.<sup>77</sup> Where reforms to the criminal justice system have been undertaken, providing judges with greater discretion to impose non-custodial forms of sentencing, the judiciary has often proved reluctant to invoke these powers, particularly in contexts of widespread public concern over high and rising rates of violent crime.

Corrections, dealing as it does with a small and marginalized subset of the population, is (perhaps more than any other institution) inextricable from the broader successes and failures of rule of law reform. It depends, at least, on the efficiency of court processes, the effectiveness of law enforcement, the broader complex of social factors determining crime rates more generally, a vigorous legal bar willing to defend prisoners' rights, and a culture of human rights robust enough to conceptualize prisoners as falling within its ambit.

Another example of attempted institutional reform involves the bureaucracy. In many developed and developing countries, important aspects of the administration of justice are vested in specialized law-enforcement or administrative agencies that deal with matters as diverse as the regulation of public utilities, environmental regulation, and the enforcement of competition law. Tax administration is an example of a specialized law-enforcement or regulatory function that all developing countries must perform, and hence it provides an important example of the challenges that developing countries face with the performance of such agencies.<sup>78</sup> Effective performance of this function is of critical importance to all developing countries, because a constrained ability to collect revenues legally due also constrains governments' expenditures on pressing developmental priorities. In many developing countries the gap between taxes nominally due and taxes actually collected is extremely large – often in the range of 40 per cent – suggesting the potential margins for improved tax administration performance.<sup>79</sup>

To improve the tax system, a number of developing countries have set up large taxpayer units (LTUs), with a view to developing specialized and integrated expertise in tax assessment, given that LTUs are where much of the effective taxable capacity in many developing countries resides. In addition, a number of developing countries have also set up

77 Mark Ungar, 'Prisons and Politics in Contemporary Latin America' (2003) 25 *Hum.Rts.Q.* 909 at 912.

78 See Trebilcock & Daniels, *Rule of Law*, supra note 12 at c. 6.

79 For examples from India, Indonesia, Mexico, Singapore, Spain, and the Philippines see Arindam Das-Gupta & Dilip Mukherjee, *Incentives and Institutional Reforms in Tax Enforcement: An Analysis of Developing Country Experience* (Delhi: Oxford University Press, 1998).

semi-autonomous revenue agencies (SARAS), designed to ensure the fiscal autonomy of the agency and much greater freedom in personnel policies and IT development.<sup>80</sup> Many of these reforms appear to have been successful in broadening the taxpayer base and increasing the percentage of taxes nominally due that is actually collected. However, the experience with SARAS over time has been mixed: typically, these agencies appear initially to have a significant impact on the percentage of taxes actually collected, but subsequently their performance tends to deteriorate, in some cases because of rampant corruption within the agency (self-reinforcing mechanisms)<sup>81</sup> and in some cases because of increasing political interference from the ministry of finance and other executive arms of the government in personnel and assessment processes (institutional interconnections).<sup>82</sup> This suggests that the ability of these agencies to maintain themselves as islands of virtue in an otherwise corrupt or incompetent general public administration may be quite limited absent complementary reforms, over time, of the surrounding institutional matrix.

In sum, approaches to rule of law reforms that do not take into account adaptive behaviour with respect to the particular institutional context in question, as well as mutually reinforcing effects among interdependent institutions, are unlikely to be successful.

#### B IMPLEMENTING PROPERTY RIGHTS REFORMS

Property rights reforms in developing countries have often been disruptive at many levels, raising the question of whether potential benefits from these reforms might be exceeded by the costs of disrupting and displacing existing systems of property rights.<sup>83</sup>

80 For reports of success in transitional economies see European Commission, *2001 Regular Report on Poland's Progress Towards Accession* (SEC(2001) 1752, Brussels: Commission of the European Communities, 2001) at 63, online: Office of the Committee for European Integration <<http://www.ukie.gov.pl/HLP/files.nsf/a50f2d318bc65d9dc1256e7a003922ed/dc76837a9620b5d5c1256e7b0048fd23?OpenDocument>>. These units were also implemented with some success in Africa and Latin America. Robert Taliercio, Jr., *Designing Performance: The Semi-autonomous Revenue Authority Model in Africa and Latin America* (World Bank Policy Research Working Paper No. 3423, Washington, DC: World Bank, 2004).

81 Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform*, (Cambridge: Cambridge University Press, 1999) at 86 (showing that in tax reform, incentives schemes can be used only if levels of performance can be measured by external monitors).

82 Robert Taliercio, Jr., 'Unsustainably Autonomous? Challenges to the Revenue Authority Model in Latin America' (Paper presented at the Meeting of the American Political Science Association, San Francisco, 2001).

83 This section draws on a more extensive review of the empirical evidence in Michael Trebilcock & Paul-Erik Veel, 'Property Rights and Development: The Contingent Case for Formalization' (2008) 30 U.Pa.J.Int'l L. 397.

On the one hand, the proponents of strong formal legal protection of private property rights assert that such protection is likely to yield the following benefits: (a) more efficient use of resources, because exclusive use of property leads to the internalization of both positive and negative externalities; (b) increased access to credit through security of tenure and easy transferability of property; (c) increased incentives for investment and productive enhancements to assets because of security of tenure; and (d) less inefficient competition for resources because of security of tenure. On the other hand, other strands of scholarship emphasize that in many developing countries, a rich array of informal mechanisms for securing the benefits of private property rights has typically evolved, either through repeat interactions among affected economic agents that provide sufficient incentives for individuals to respect each other's informal property claims or because cooperative and efficient informal social norms regarding property emerge among close-knit groups.

The empirical evidence relating to the case for formalization of private property rights tends to suggest that formal regimes may lead to more efficient use of property but that in many contexts, informal regimes are often a reasonably close substitute and that mechanisms for at least limited forms of alienability often evolve without formal property rights. As to whether formalization of property rights increases access to credit, the evidence is mixed. Where informal credit markets are strong, there appears to be little benefit from formalization in many contexts. Similarly, where credit markets are weak for other reasons, formalization is likely to have limited impact on access to credit. While formal property rights do appear to lead to increased investments in productive asset enhancements, this seems to depend to an important extent on the security afforded by informal norms. Similarly, formal property rights seem to decrease inefficient forms of resource competition, but here the evidence is relatively fragmentary.

While there may be some benefits to the formalization of property rights regimes, such regimes also entail various forms of costs. First, the costs entailed in setting up a land registration or recording system, including initial surveys and the cost of updating the registry or recording system through time to reflect changes in the composition of land-owning groups or intervening transactions, are significant. Second, formalization and individualization of land tenure may seriously undermine the possibility of communal tenure's playing an insurance role for members of the land-owning group and, through time, may result in the emergence of a landless class with few, if any, other economic opportunities or sources of insurance or social safety nets. Third, formal rules may undermine effective informal institutions by creating dysfunctional conflicts or dissonances between the two classes of regimes in ignoring

the significance of cultural switching costs. This problem is likely to be particularly acute if formal mechanisms are predicated on spatial notions of ownership while informal regimes recognize a much more functional conception of property rights, including a wide variety of usufructuary rights such as the right to gather firewood, collect water, gather fruit or hunt, fish, or traverse land owned by other groups or individuals. Fourth, the relative finality of formalization programs, depending on their design and implementation, can expose and exacerbate previously latent divisions between or among claimant groups, leading to increased social conflict. Fifth, flaws in the titling process are likely to be exploited by politically or economically powerful groups at the expense of women and other marginalized groups, who face various barriers to accessing a formal property rights system. Sixth, even assuming that a formal property rights system is well designed, deeply entrenched informal norms, if they are sharply antithetical to the new system, may impede its successful implementation and may result in its being largely ignored or becoming quickly outdated.<sup>84</sup> Finally, as in the case of rule of law reforms, there are important institutional interconnections: a land titling system is predicated on effective complementary institutions, including the judiciary, the legal profession, and the police, and thus formalizing property rights without complementary reforms, over time, to these other institutions may achieve very little.

This is not to say that informal regimes are always efficient. For example, they may be efficient only for members of close-knit groups and entail negative externalities for non-members. Informal regimes themselves may also reflect path dependence and time lags in responding to changes in the economic or technological environment, so that there may well be efficiency gains to be realized, at least potentially, from a more formal property rights regime. However, comparative experience to date suggests that there is no uniform first-best solution to property rights issues in developing countries. Local conditions matter, and solutions need to be tailored to these conditions.

#### V *Using path dependence in institutional reforms*

Path dependence theory should encourage those concerned with development to take seriously the importance of time and history in designing future institutional reforms. As we have argued above, the frequent failures of rule of law and property rights reforms seem to be explained in part by the fact that reformers ignored the importance of self-reinforcing mechanisms, switching costs, and institutional interdependencies.

84 See Daniel Fitzpatrick, 'Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access' (2006) 15 Yale L.J. 996.

Reformers could incorporate these three concepts into their reform strategies by (1) abandoning assumptions that institutional changes are being made on a blank slate by accounting for switching costs; (2) abandoning the focus on micro processes and acknowledging and accounting for complex interactions within the broader institutional matrix; and (3) acknowledging that outcomes are influenced by informal rules and norms.

In Part v we analyse the importance of the concept of critical junctures for future reforms. The concept of critical juncture shows that comprehensive or ambitious reforms in minimally functional institutions (or networks of institutions) during 'normal' times are likely to be strongly resisted. As path dependence theory emphasizes, much institutional change will be incremental and will occur on many small margins. Indeed, attempting too much may be a recipe for achieving too little.

#### A REFORMS DURING NORMAL TIMES: ACKNOWLEDGING SELF-REINFORCING MECHANISMS AND INSTITUTIONAL INTERDEPENDENCIES

The lessons of path dependence lead to a conundrum. Isolated institutional reforms focused on micro processes are likely to ignore both self-reinforcing mechanisms and institutional interdependencies, and they are therefore often doomed to failure. However, ambitious reforms during 'normal times' are disruptive and likely to fail because of the serious switching costs that they are likely to entail (and the resistance that these will engender). Thus, despite institutional interdependencies, all-encompassing reforms are simply not feasible. This is true during normal times, and there seems to be evidence that even in post-conflict societies (which may present more opportunities or, at least, greater urgency for change), all-encompassing reforms often achieve very limited success.<sup>85</sup>

Are reformers, then, left only with windows of opportunity (critical junctures) in which major reforms can be successfully implemented? Is there any way that reformers can account for the lessons of path dependence theory without being caught in a potentially eternal waiting period for the right moment? As Dani Rodrik puts it, 'the challenge for the empirical literature on institutions is to explore these [path-dependent] patterns without falling into the trap of reductionism or of historical and geographical determinism.'<sup>86</sup>

There are two potential (and complementary) strategies for dealing with this conundrum. First, reformers may be able to identify some

85 Marina Ottaway, 'The Post-War "Democratic Reconstruction Model": Why It Can't Work' (paper presented at the US Institute of Peace, 2002).

86 Rodrik, *Feasible Globalizations*, supra note 35 at 188; see also Rodrik, *One Economics*, supra note 36 at c. 2.

institutions that can be more easily detached from a broader mutually reinforcing institutional matrix or can be created *de novo* (e.g., SARAS, new constitutional or human rights courts or commissions, semi-independent regulatory agencies, forms of alternative dispute resolution).<sup>87</sup> This strategy may enable more ambitious stand-alone reforms that nevertheless have important showcase effects, although even here the experience with SARAS suggests that these institutions are likely to be fragile unless supported by complementary reforms, over time, to the surrounding institutional matrix.

The second strategy is to reform existing interconnected and mutually reinforcing institutions in a time-sensitive manner by prioritizing a sequence of reforms, beginning with certain core reforms but recognizing that further complementary reforms will be necessary in the future to reinforce initial reforms. This implies that reforms should be incremental; by contrast, many current reform practices are either stand-alone without being incremental or so encompassing as to be unfeasible. Of course, different countries will have different priorities. One example is control of corruption in post-conflict societies. Many of these states cannot provide even minimal public order, because they do not have the basic institutions of government. In some of these cases, corruption might become a second-order priority, but in other post-conflict environments it is necessary to target the types of corruption that, if not addressed immediately, can derail the entire transition.<sup>88</sup> Thus, in some post-conflict societies, control of corruption should be a priority.

Sequencing is important because initial reforms can set up paths that will later be difficult to reverse, thanks to self-reinforcing mechanisms. As Susan Rose-Ackerman argues,

[p]eace-building strategies must avoid triggering vicious spirals. An economy that is jumpstarted by giving monopoly powers to a few prominent people may produce a society that is both lacking in competition and unequal. Early stage decisions can lock in the power of a small elite whose vested interests then hold back efforts to increase competition and enhance fairness. Although it may be risky and difficult to counter corruption in post-conflict peace-building, if the problem is allowed to fester, it can undermine other efforts to create a stable, well-functioning state with popular legitimacy.<sup>89</sup>

87 See Heller, 'Immodest,' *supra* note 22.

88 Madalene O'Donnell, 'Corruption: A Rule of Law Agenda?' in Agnès Hurwitz, ed., *Civil War and the Rule of Law: Security, Development, Human Rights* (Boulder, CO: Lynne Rienner, 2008) 225.

89 Susan Rose-Ackerman, 'Corruption and Post-conflict Peace-Building' (2008) 15 *Ohio N.U.L.Rev.* 328 [Rose-Ackerman, 'Corruption'].

We will discuss how to deal with priorities and sequencing in sections v.c and v.d below. First, however, we will analyse reforms during non-normal times.

#### B REFORMS DURING ABNORMAL TIMES: DEALING WITH SWITCHING COSTS

One of the lessons of path dependence is that we are not writing on a blank slate. It is true that in abnormal times (*e.g.*, times of economic collapse, major political crises or scandals, a civil war, a military invasion) the credibility and legitimacy of incumbent elites may be weakened by such crises, opening up an opportunity for more radical reforms.<sup>90</sup> However, the existence of a political crisis is not a guarantee that *good* ideas will be adopted. Indeed, crises present both opportunities and dangers. A government, in the face of crisis, may attempt to defer and defuse public concern by setting up, for example, a commission of inquiry or a task force and hoping that the matter will simply go away over time (which, through procrastination, may ultimately exacerbate the problem). Alternatively, the government may be stampeded by public consternation into the precipitous adoption of new policies or institutions that appear to address the immediate symptoms of the crisis while in fact, in the longer term, failing to address its underlying causes or, indeed, exacerbating them.

In the effort to screen good ideas from bad, or at least to minimize the risk of precipitous adoption of bad ideas in the face of a crisis, how a government goes about reforming existing policies or institutions is of critical importance. In our view, while government must establish some broad but nevertheless clear (non-aphoristic) parameters or objectives for the policy reform process, and not abdicate this function to others, the task of working through alternative policy options and instruments for realizing these objectives is often best achieved by delegation of this task to a multi-stakeholder forum that combines both technical expertise and the involvement of interest groups (ideas and interests), including especially interests that were marginalized in the formulation and administration of previous but now contested or discredited policies or institutions. Ensuring effective representation of demand-side interests to ensure, in turn, a central focus on consumer or citizen (not producer) welfare as a policy objective is an especially critical challenge.

The design of ongoing institutional regimes for administering new policies is important not only in ensuring that the policies are faithfully implemented but also because such institutions, if well designed, hold out some prospect of mitigating reliance on crisis-driven policy or

90 See Michael J. Trebilcock, 'Journeys Across the Divides' in Francesco Parisi & Charles K. Rowley, eds., *The Origins of Law and Economics: Essays by the Founding Fathers* (Cheltenham, UK: Edward Elgar, 2005) 422.

institutional changes and promoting, to the extent possible in the public sector, the continuous quality improvement model of policy innovation. This is a challenge in every jurisdiction, but it has proved acutely problematic in developing countries seeking to improve the ongoing administration of laws, regulations, and other public policies.

Even in abnormal times, it is unlikely that all pre-existing economic, social, and cultural factors that create costs for switching to new institutional regimes can be ignored (as contemporary challenges to institutional reform in, for example, Iraq and Afghanistan exemplify).<sup>91</sup> Thus, even in abnormal times reformers should not only recognize the importance of switching costs but also be sensitive to the different kinds of switching costs associated with reform.

There are mechanisms to deal with switching costs that can be used both in abnormal and in normal times.<sup>92</sup> First, in terms of political economy considerations, switching costs may be high for those who benefit from the institutional *status quo*.<sup>93</sup> These costs may be mitigated by reforms that create or strengthen a countervailing political constituency that benefits from the reforms.<sup>94</sup> Alternatively, vested interests may need to be bought off or grandfathered in some way to mute opposition to the reforms. Second, switching costs may also reflect individuals' learning costs in adapting to a new regime (the 'installed base problem').<sup>95</sup> These can be mitigated by state-sponsored public education programs and by gradual processes of transition that avoid the need for abrupt adaptation to a new regime. Third, switching costs may reflect the scarcity of financial and human resources required to implement new institutional regimes, which can be mitigated by external financial and technical assistance. Finally, switching costs may reflect deeply embedded cultural benefits or practices that are resistant to change.<sup>96</sup> Here,

91 Rose-Ackerman, 'Corruption,' supra note 89 (this can be true even in post-conflict societies).

92 These mechanisms are proposed and analysed in greater detail in Daniels & Trebilcock, 'Political Economy,' supra note 70.

93 Resistance to reform can also be higher if there is uncertainty about the identity of potential beneficiaries. The uncertainty is higher in large-scale reforms. Dani Rodrik & Raquel Fernandez, 'Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty' (1991) 81 Am.Econ.Rev. 1146.

94 How much instability these reforms should generate, *i.e.*, how much room for constant contestation would be good for future reforms, is a topic that deserves further research. An analogous problem is whether democratic instability is good for development. For an insightful analysis see Rose-Ackerman, 'Was Mancur,' supra note 53.

95 See Part IV supra.

96 See, *e.g.*, how informal institutions for contract enforcement in the footwear industry resisted the changes brought by an open trade regime when NAFTA was implemented in Mexico. Christopher Woodruff, 'Contract Enforcement and Trade Liberalization in Mexico's Footwear Industry' (1998) 26 World Develop. 979.

reforms that adapt traditional institutions (e.g., traditional forms of alternative dispute settlement or communal property rights) may mitigate problems of cultural dissonance. Moreover, institutional reforms implemented over time may, in turn, lead to modifications in cultural belief systems.<sup>97</sup>

#### C. RULE OF LAW REFORMS: DEFINING PRIORITIES<sup>98</sup>

Both domestic and international proponents of rule of law reform in developing countries face the hitherto under-acknowledged challenge of rendering rule of law reform politically salient to most citizens of these countries, in part because judicial reforms (and reforms to legal education) are likely to have long-term and low-visibility social pay-offs for the citizenry at large and hence are unlikely to engage their sustained interest and support, given the many more pressing and immediate survival challenges they often face. Strategic choices on sequencing are important in addressing this challenge. In this respect, we question (along with others) the aptness of the high priority often accorded to formal judicial reform by the international community in the rule of law reform initiatives that it has promoted in developing countries in recent years,<sup>99</sup> given that most citizens have infrequent contact with formal courts.

Instead of starting with courts, rule of law reforms should pay more attention to issues that are more likely to affect the day-to-day interactions of the citizenry with the legal system – police, prosecutors, specialized law enforcement and administrative agencies (such as tax administration), access to justice initiatives such as informal community-based dispute resolution mechanisms – where more visible and immediate material benefits from successful institutional reform are likely to be experienced by a wide cross-section of the citizenry, who thus can be enlisted as a major political constituency supporting rule of law reforms. While reforms in these areas will require that self-reinforcing mechanisms,

97 But see North, *Understanding*, supra note 4 at 163–4 ('[we must have a clear understanding] of the margins at which the belief system may be amenable to changes that will make possible the implementation of more productive institutions').

98 This section draws on a much more extensive review of the recent reform experience in Trebilcock & Daniels, *Rule of Law*, supra note 12. See also Carothers, *Promoting*, supra note 21; Jensen & Heller, *Beyond*, supra note 22.

99 Carothers, 'Revival,' supra note 17; Stephen Golub, 'A House Without a Foundation' in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) 105; Stephen Golub, 'The Legal Empowerment Alternative' in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) 161; Bryan Garth, 'Building Strong and Independent Judiciaries for the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results' (2002) 52 DePaul L.Rev. 383.

institutional interdependencies, and switching costs be addressed, a broad-based supportive political constituency may provide the necessary political impetus for tackling these challenges.

Community-based forms of alternative dispute resolution (ADR) are a class of judicial reforms that appears to have shown significant promise, largely through demonstration effects; they illustrate the importance of reducing cultural switching costs and reducing reliance on institutional interdependencies. ADRs sometimes build on traditional forms of community-based dispute settlement, such as adaptations of the Lok Adalat system in India, the Shalish system in Bangladesh, or the Gacaca Tribunals in Rwanda, in the aftermath of years of civil war and genocide. These adaptations have sought to marry indigenous methods of dispute settlement with broader rule of law norms, such as equality before the law, so as to minimize cultural switching costs. In these cases, reformers have struggled to navigate the difficult compromise between two sometimes conflicting models of dispute resolution, as well as the respective roles of the formal court system and informal modes of dispute settlement and interactions between them, which illustrates the challenge of resolving institutional interdependencies. Despite the difficulties, these ADR reforms have a major benefit: they acknowledge and rely on context-specific forms of institutional vindication or instantiation of rule of law values, nurturing an increasingly robust domestic constituency for rule of law reforms more generally over time. In this sense, these reforms enable a broadly representative range of social, economic, and political interests to see their interests and values as aligned with the promotion and preservation of the rule of law.

Another method of enhancing access to justice is the Casa de Justicia, or House of Justice, in Latin America. Casas de Justicia, located in poor and marginalized neighbourhoods, have spread throughout Latin America and deal with everyday problems such as child support and custody issues, domestic violence, property disputes, misdemeanours, personal injuries, and administrative matters. Not simply legal clinics, the Casas incorporate local prosecutors, public defence lawyers, legal aid officers, police units, even social workers, counsellors, and psychologists, and have been described as one-stop legal shops. The Casas are also closely linked to ADR, encouraging innovative solutions to legal problems and seeking to channel cases away from the formal court system where appropriate. Other programs have been developed across the region by NGOs and other private actors, many of which replicate to some extent the Casa de Justicia model of legal aid. In the Philippines, Alternative Law Groups, building on existing community organizations, have pursued broader social reform agendas successfully, often through political activism at the local government level rather than through formal litigation in the courts.

## D PROPERTY RIGHTS REFORMS: SEQUENCING

Because of the complex interactions between a property rights regime and the social, economic, political, and legal framework within which such a regime operates, it is not fruitful simply to argue for or against the formalization of a property rights regime. Rather, the relationship between property rights and development is much more complex, and a context-dependent, nuanced approach to these issues is required.

The context dependence of successful property regimes leads to three important considerations. First, property formalization programs cannot be considered as isolated economic development projects, as one might consider certain physical infrastructure projects. Rather, they must be considered as part of a general framework for economic development, typically including a wider set of reforms aimed at promoting the rule of law.<sup>100</sup> Contrary to the optimistic rhetoric of Hernando De Soto's work, property formalization programs are not, standing alone, the key to unlocking the potential of the developing world.<sup>101</sup>

Second, it is essential to recognize that the characteristics of a property regime are highly dependent on local context, so that it is unrealistic to expect that one model of a successful regime will be applicable across various states. In fact, one would expect that while the functions performed by property rights regimes may be similar in many stable countries, the characteristics of such regimes, as well as strategies for their implementation, will differ substantially across states. This suggests that, in practice, local or regional models of property regimes may be more successful than Western models.<sup>102</sup>

Finally, significant changes to property regimes should be approached with caution, and drastic, uniform top-down property changes should be avoided.<sup>103</sup> Contrary to conventional economic thinking, the formalization of property rights is not necessarily desirable at all stages of development or for all property owners. Formalization programs can have

100 Kenneth W. Dam, *The Law–Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institution Press, 2006) at 91 ('Proponents of the rule of law in the context of economic development often express the core of their position ... by emphasizing the need to "enforce contracts and protect property rights"').

101 Ibid.

102 For recent work on this notion see Sharun Mukand & Dani Rodrik, 'In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance' (2005) 95 *Am.Econ.Rev.* 374 [Mukand & Rodrik, 'Holy Grail'] (arguing for implementation of appropriate policies and institutional arrangements on the local level).

103 For a classic paper exploring the importance of avoiding drastic imposed changes see Charles Lindblom, 'The Science of "Muddling Through"' (1959) 19 *Pub.Admin.Rev.* 79. See also James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press 1998) [Scott, *Seeing*].

far-reaching social and economic consequences and, under certain conditions, can have negligible or deleterious impacts. The context specificity of property rights regimes is not, however, a reason for inaction, or a reason to counsel against the formalization of property rights in all cases. Under some circumstances, as noted above, formal property rights may enhance economic growth, and it would thus be poor policy never to support the formalization of property rights.

Because of these considerations, unless there is clear and compelling evidence pointing to the need for a systematic state-led formalization program, the optimal response in many contexts may be a voluntary and sporadic system of title registration. Although a sporadic program of title registration is not without its own costs,<sup>104</sup> such a program brings substantial benefits relative to systematic formalization. As one of the authors has argued elsewhere, in the face of limited resources and state capacity, a sporadic system of land registration has the benefit of providing the additional security and clarity of formal property rights to those who desire it most.<sup>105</sup> Because it simply provides an additional vehicle for owning property, a sporadic registration program does not require disturbing the arrangements of those groups that are content with the *status quo*. Where customary arrangements limit individuals' economic opportunities, the option of formalization is present. Moreover, a voluntary system overcomes the collective action problem of providing the machinery for the enforcement of those property rights by having the state provide it and allowing people to opt into it.

Perhaps the strongest benefit of a sporadic and voluntary formalization system, however, is that it avoids the myriad unforeseeable and potentially negative consequences that can result from the top-down imposition of a uniform system of property arrangements. As we have stressed, a property rights regime is not an isolated institution but, rather, an institution that has strong interrelationships with a variety of other institutions. In such circumstances it may be impossible to predict all the potential consequences flowing from drastic institutional changes, and unpredictable and unintended negative consequences may emerge from imposed changes.<sup>106</sup> A gradual and reversible process of voluntary change at the individual level can mitigate such potentially harmful consequences and reduce reliance on institutional interdependencies.

104 Michael Trebilcock, 'Communal Property Rights: The Papua New Guinea Experience' (1984) 34 U.T.L.J. 377.

105 *Ibid.* at 412–3.

106 For interesting examples relating to this point see Scott, *Seeing*, *supra* note 103. See also Rachel Kranton & Anand Swamy, 'The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India' (1999) 58 J.Dev.Econ. 1 (discussing how reform led to increased competition among lenders, and the resulting effects on the farmers of India).

Even where a systematic program is clearly superior to a voluntary program, drastic and irreversible changes should be avoided. Instead, changes should be incremental in nature. For example, where communal property is prevalent, rather than registering individual titles to specified plots of land to the exclusion of all others, a rudimentary titling program could be undertaken, using simple compass-and-chain rather than full-scale cadastral surveys, whereby only the base group title would be registered, without prejudice to the various functional rights that others might possess under customary law. Land-owning groups might also be given a more formal legal structure and clearer decision or governance rules (akin to private corporations, with restrictions on share transferability) while maintaining limits on the outright alienability of group land.<sup>107</sup> Such programs lessen the potential for serious social conflict or disruption from abrupt legal change by reducing cultural switching costs and facilitate an evolutionary process for the emergence of stronger private property rights over time.

Rodrik *et al.* reach rather similar conclusions:

We illustrate the difficulty of extracting policy-relevant information from our findings – using the example of property rights. Obviously, the presence of clear property rights for investors is a key, if not the key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer. But nothing is implied about the actual form that property rights should take. We cannot even necessarily deduce that enacting a private property rights regime would produce superior results compared to alternative forms of property rights.

... there is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions.

... there is much to be learned about what improving institutional quality means on the ground. This, we would like to suggest, is a wide open area of research. Cross-national studies are at present just a beginning that point us in the right direction.<sup>108</sup>

107 See generally Daniel Fitzpatrick, 'Best Practice Options for the Legal Recognition of Customary Tenure' (2005) 36 *Dev. & Change* 449, arguing that conventional law and economics theory fails to explain the development of open access in many Third World property systems and that rising resource values are more likely to lead to open access than to private property when the institutional environment is characterized by competing legal and norm-based systems. See generally Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (Washington, DC: World Bank & Oxford University Press, 2003) at 5–6 (finding 'a considerable evolution and increased sophistication' in the recent recommendations for property reform).

108 Rodrik *et al.*, 'Institutions Rule,' *supra* note 9 at 157, 158. See more generally Rodrik, *One Economics*, *supra* note 36 at c. 5.

In a similar vein, in a recent paper, 'Institutions and Development: A View from Below,' Rohini Pande and Christopher Udry state,

Recent years have seen a remarkable and exciting revival of interest in the empirical analysis of how a broad set of institutions affects growth. The focus of the recent outpouring of research is on exploiting cross-country variation in 'institutional quality' to identify whether a causal effect runs from institutions to growth. These papers conclude that institutional quality is a significant determinant of a country's growth performance.

These findings are of fundamental importance for development economists and policy practitioners in that they suggest that institutional quality may cause poor countries and people to stay poor. However, the economic interpretation and policy implications of these findings depends on understanding the specific channels through which institutions affect growth, and the reasons for institutional change or the lack thereof . . . We also conclude from our review that this literature has served its purpose and is essentially complete. The number of variables available as instrumental variables is limited, and their coarseness prevents close analysis of particular causal mechanisms from institutions to growth . . . This suggests that the research agenda identified by the institutions and growth literature is best furthered by the analysis of much more micro-data than has typically been the norm in this literature.<sup>109</sup>

The authors go on to illustrate the importance of this micro-perspective by describing property rights in land in four African countries (Gambia, the Democratic Republic of Congo, Ghana, and Côte d'Ivoire), emphasizing the importance of the distinction between *de jure* and *de facto* land rights, the importance of customary law, the heterogeneity of land rights even within countries, and the intertwining of political and contractual institutions.

## VI Conclusion

As we noted at the beginning of this article, there are different normative conceptions of the ends of development that command significant support. While we do not espouse any particular conception of development here, all of them face the challenge of determining a set of means for advancing their chosen ends – that is, of getting from here to there. For example, Sen's conceptions of development as freedom (a holistic conception of human well-being) emphasizes interconnections between different spheres of human agency – economic, political, and social – arguing that freedom cannot be parcelled out and promoted in one

109 Rohini Pande & Christopher Udry, 'Institutions and Development: A View from Below' (2006), online: Yale University <[http://www.econ.yale.edu/~rp269/website/papers/institutions\\_revisionjan.pdf](http://www.econ.yale.edu/~rp269/website/papers/institutions_revisionjan.pdf)> at 2–3.

sphere without regard to the others.<sup>110</sup> While Sen does not explore this issue in his book, we believe that this concern with interconnections among ends is also applicable to institutional reforms concerned with institutional means for vindicating those ends. Under Sen's conception, for example, rule of law reforms that focus largely on judicial reforms and ignore institutional interconnections with police, prosecutors, and correctional systems will yield a very incomplete strategy for advancing human agency. Similarly, on De Soto's view of the importance of property rights to economic growth, ignoring the interrelationship between formal and informal property rights regimes and other elements of the formal legal system is unlikely to yield an effective set of policy prescriptions for economic growth.<sup>111</sup> All proponents of various ends of development face issues of prioritization and sequencing in the choice of institutional mechanisms for the vindication of their chosen ends over time.

Some tentative implications that follow from attention to path dependence in formulating institutional reform strategies are as follows:

- (1) Because of context-specific factors that explain the evolution of existing institutions (and networks of institutions), no one-size-fits-all blueprint for legal reform or broader institutional reform in developing countries is likely to be optimal. Other developing countries that share many of the same historical experiences and institutional characteristics as the country whose institutions are the focus of reform efforts are likely to be a more useful source of information, experience, and ideas as to what is likely to work than are other countries which share few of these common characteristics.<sup>112</sup> Future research on reform options, to be effective, will often have to be led by scholars within the countries in question, complemented by scholars with relevant comparative expertise pursued through collaborative research initiatives.
- (2) Because of switching costs and institutional interdependencies, ambitious or highly innovative across-the-board political, bureaucratic, or legal reforms carry a significantly greater risk of failure than more modest or incremental reforms. Disillusionment with the progress of democratic and rule of law reforms in many developing countries may, in this respect, reflect unrealistic expectations.
- (3) If more ambitious or innovative institutional reforms are to be pursued successfully, they should focus on institutions that can be more easily detached from mutually reinforcing mechanisms and become relatively freestanding, although even in such cases complementary reinforcing institutional reforms over time are likely to be necessary.

110 Sen, *Development as Freedom*, supra note 2.

111 De Soto, *Mystery*, supra note 13.

112 See Mukand & Rodrik, 'Holy Grail,' supra note 102.

- (4) Detached, freestanding institutions, pilot programs, or decentralized initiatives enlisting enthusiastic participants are likely to be more successful than across-the-board centralized reforms of existing institutions that conscript unwilling participants by imposing significant switching costs on them. Demonstration effects from pilot projects may subsequently persuade sceptics on either the demand or the supply side of the institutional reform equation that switching costs are not as large as previously assumed or that the benefits of incurring these costs are larger than expected. Such pilot projects also have the virtue of reversibility, in the event that they generate unintended consequences, and thus entail lower risks.
- (5) In reforms that are sensitive to switching costs from the institutional *status quo*, it is important to identify the different kinds of switching costs – whether they reflect political economy factors that have shaped and been reinforced by the initial choice of institutions; lack of financial or technical resources; learning effects; coordination or networks effects; or deeply entrenched cultural or religious beliefs or practices. While these factors can be conceived as exogenous constraints on institutional reforms, one can equally view them as endogenous factors that have shaped the evolution of the institutional *status quo*. On either view, they will also significantly shape the feasible margins of reforms, but in different ways.
- (6) Political and economic crises or catharses may provide opportunities for more radical institutional change, but they may also present risks of denial, deferral or repression, or precipitous adoption of ill-conceived policy or institutional choices in response to public consternation or disaffection. To mitigate these risks, the reform process must broaden the pool of policy ideas by enlisting previously marginalized constituencies and incorporating them into more enduring institutional reforms so as to create a new alignment of ideas, interests, and institutions.

We are fully cognizant of the modesty of these conclusions. However, we take comfort from the fact that it reflects a similar modesty on the part of at least some of the more prominent New Institutionalists, including Douglass North:

Path dependence means that history matters. We cannot understand today's choices (and define them in the modeling of economic performance) without tracing the incremental evolution of institutions. But we are just beginning the serious task of exploring the implications of path dependence.<sup>113</sup>

113 North, 'New Institutional,' *supra* note 5 at 100.

A major frontier of scholarly research is to do the empirical work necessary to identify the precise source of path dependence so that we can be more precise about its implications.<sup>114</sup>

In recent years, debates have raged over the virtues and vices of gradualism versus radical and all-encompassing reforms in at least two major contexts: privatization of state-owned enterprises in the former command economies<sup>115</sup> and foreign aid for development.<sup>116</sup> In these and similar contexts, the lessons of path dependence would suggest a presumption in favour of gradualism and a scepticism toward grand transformative plans<sup>117</sup> that ignore or discount the importance or the durability of the institutional *status quo*.

114 North, *Understanding*, supra note 4 at 7.

115 For an overview of the debate on gradualism versus shock therapy in transitional economies see Davis & Trebilcock, 'Relationship,' supra note 16.

116 For an overview of the debate on gradualism versus big push strategies in foreign aid see Amartya Sen, 'The Man Without a Plan' (2006) 85 For.Aff. 171.

117 Scott, *Seeing*, supra note 103.