The study of the relationship between law and economic development goes back at least to the 19th century. It is a question that attracted the attention of classical thinkers like Marx and Weber. After WWII, this relationship became an issue not just for theorists, but also for practitioners of development assistance. Development agencies first turned to law because they saw it as an instrument for economic growth. More recently, they have begun to see “the rule of law” as constitutive of development and thus as an end in itself.

The inclusion of law in development assistance practice influenced and was influenced by intellectual trends in the academy as economists began to think about the role law might play in development and legal academics sought to relate legal theory and development practice. Views on the relationship between law and development, and thus on the nature of legal assistance efforts, have changed over time. This book charts the history of these efforts and analyzes the most recent and surprising manifestation of the effort to theorize this relationship.

Starting in the 1980s, however, the development agencies began to pay much more attention to the role of law. This renewed influence in law was heavily influenced by the emergence of neo-liberal ideas about development. Neo-liberal thinkers stressed the primary role of markets in economic growth. As development policy makers sought to
transform command and dirigiste economies into market systems, and integrate developing nations into the world economy, they began to see law as an important arena for policy.

This was not a turn to law in general, but to a particular vision of law and its role in the economy. Of course, new laws would be needed to dismantle state controls. But, consistent with the dominant economic theory that working markets were both necessary and sufficient for growth, the primary role assigned to legal institutions was one of a foundation for market relations. Attention was paid to the core institutions of private law, to the role of the judiciary in protecting business against the intrusions of government, and to the need to change local laws to facilitate integration into the world economy. Not much attention was paid to regulatory law. When it was, regulation was often presented as an unnecessary intrusion on the market. Neo-liberal law and development thought focused primarily on the law of the market: relatively little concern was shown for law as a guarantor of political and civil rights or as protector of the weak and disadvantaged.

This “neo-liberal” turn led to the second moment in law and development theory and to a remarkable expansion of the assistance effort. The first law and development efforts were small in scale, involving a few projects mostly in Africa and Latin America. The neo-liberal era ushered in a massive increase in the level of investment and the scale of projects. Investments by bilateral and multilateral agencies as well as by private foundations reached into the billions. “Law and development” became big business.

The results of the neo-liberal move and the second law and development moment have been analyzed and critiqued from many points of view. In this book we recapitulate and expand on some of these analyses. But the real focus of the volume is on the description, analysis, and critique of the third moment in law and development theorizing. Our goal in this volume is to delineate the new paradigm and develop a critical practice appropriate to the latest turn in development thought. We seek to place the “mainstream” in broader context, understand its sources and evolution, and raise questions concerning the “third moment”.

It is the thesis of this volume that a new “paradigm” in law and development theory is emerging. In the 1990s and the early years of this century, changes have occurred in development economics, assistance policy and practice, and legal thought. Neo-liberal ideas have been revised and additional elements added to the definition of development. In this context, mainstream law and development doctrine has changed. This change has influenced and been influenced by shifts in development policy more generally. This book had its origins in a consensus among the authors that emerged during a conference on “Law and Economic Development: Critiques and Beyond” held at the Harvard Law School in 2003.\(^1\) All of us have been studying the relationship between law and economic development, some for many years. As we prepared for the 2003 event, we all realized that a significant shift had occurred in this field during the 1990s. This shift included the development of a new orthodoxy and the emergence of a new critical practice.

\(^1\) The conference was sponsored by the Harvard Center for European Legal Research.
We gave the shift different names, we offered somewhat different explanations for the changes, and we held differing views about the possible relationship between changes in theory and changes in practice. But we all saw that a major revolution was taking place. We decided to pool our efforts and work together to produce a more complete analysis of this new phenomenon and a richer critique. The group met several times over the following year. This volume is the result.

1) “Law and Development” as the Node of Three Disciplinary Fields

Our thesis is that at any point in time, the theory and practice of “law and development” as a field of study can be better understood if it is seen as the intersection of current ideas in economic theory, prevailing legal ideas, and the institutional policies and practices of the development agencies. These spheres are analytically separable but practically intertwined. They influence each other in complex and reciprocal ways. Both the theory and the practice of law and development are shaped by, and at the same time, shape the spheres of economic theory, legal theory, and institutional practice. The book does not suggest a relation of causality of ideas between these various spheres. Our goal is to disentangle the separate spheres, understand how each has changed in recent years, study how they have interacted, and chart the multiple dynamics of influence.

It is no surprise that changes in economic theory affect institutional practice. But it is important to note that the reverse is also true, as institutional experience is fed back into economic theory. And developments in legal theory can affect the other spheres as well. Development theory makes use of legal theories but legal thought delimits the scope and reach of the use of law in development theory and practice. Similarly, ideas about law in development are affected by changes in all three spheres as law and development theorists respond to changing ideas in economics and legal theory and adjust to new institutional practices.

The analysis of the spheres and their interaction in the several chapters helps us chart

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2 The group met at the University of Wisconsin in October 2003 and at the University of Toronto in April 2004.
3 Take for instance Joseph Stiglitz and Amartya Sen, whose theories figure prominently in the current development paradigm. Both have made forceful critiques of the neoliberal development model and of the work of international financial institutions in promoting that model. But they also have taken advantage of the World Bank to have an impact on current thinking in economics.
recent changes and understand the emergence of a new vocabulary and an increasingly
dominant way of thinking about development. The resulting maps are an effective guide
for understanding and contesting current mainstream thought and practice.

Our authors suggest many reasons why a new law and development mainstream vision is
emerging. These include changes within the field of development economics, reactions to
failures of the neo-liberal moment, changing policies and practices of the World Bank
and other development agencies, developments within legal theory in the center and the
spread of a new legal consciousness to the periphery.

One of the recurring themes in this volume is the complex relationship between changes
in development economics and practices and changes any point in time in ideas about
law’s role in development. All the authors recognize the relationship between these
bodies of ideas. They may not agree on the exact nature of this relationship but all
acknowledge that at given points in time ideas from the several spheres seem to fit
together and this fit results in a new “moment” in law and development thought and
possibly in practice. Thus we have seen that a certain set of ideas about law seemed to fit
with neo-liberal ideas about the economy and that a new set of correspondent institutional
practices emerged.

In the following chapters we explore how neo-liberal economic theories have been
qualified. Economists have recognized the existence of market failure, accepted the
possibility that due to asymmetrical information and transaction costs regulation may be
efficient, and questioned the simple view that free trade always promotes growth. We see
that greater attention is paid to institutions and thus on the specificity of local conditions
and local actors and the role of informal as well as formal practices. We describe the
dominant modes of legal reasoning and the most influential legal theories and consider
the increasing emphasis of the role of the judge in deciding controversial legal claims
with wide economic effects. Lastly, we examine the change of strategy in international
development institutions, particularly in the World Bank including the rise of projects of
legal and judicial reform and apparent concern for “access to justice”.

2) The Third Moment in Law and Development Theory and Critical Practice

Most of the chapters in the book focus on what we have called the “Third Moment” but
they give have different names to, and different accounts of, the new orthodoxy and take
different approaches to the emerging critique. For example, in describing mainstream
theory David Kennedy refers “chastened neo-liberalism” while Trubek calls it “Rule of
Law II”, Rittich talks about the “incorporation of the social”, Newton speaks of the “post
Moment”, and Santos identifies it with the Comprehensive Development Framework.

\[^4\] Not only are the names they use different: they differ on what is actually happening and
how to critique it. Take the question of whether a fundamental change has really
occurred. Trubek and David Kennedy see a basic shift occurring while Rittich agrees that
something is going on but is somewhat more skeptical about how fundamental a change
has occurred. Duncan Kennedy devotes substantial attention to describing the legal
theory in the new mainstream while Newton focuses more on the critical dimension of
a) Legal ideas

The progress from the first to the third moment in law and development not only moves law to the center of development policy making; it also changes the rationale for legal development assistance. Up to now, the rationale for such assistance has been instrumental. Proponents argued that in one way or another law was a tool to bring about development, and development meant economic growth. But in the current era, the concept of development has been expanded to include law as an end in itself. Third moment development thinkers have not rejected instrumental arguments; they still think that law is important to constitute markets and implement a host of policies. But they also see legal institutions as part of what is meant by development, so that legal reform is now justified whether or not it can be tied directly to growth.

Another feature of the third moment is the indeterminacy of the new vocabulary. People with different political views and projects can employ the same elements of this vocabulary for different ends. Thus, for example, the same terminology of human rights can be used to promote the interests of oppressed minorities and holders of property.

To understand the current moment in thinking about “law and development”, we must first look at developments within the sphere of legal theory. The current moment can be seen as the coming together of thinking about law within the development agencies with recent trends in legal theory that are described in Duncan Kennedy’s chapter on “The Third Globalization of Legal Consciousness”.

The third globalization contains two separate elements: “policy analysis” and “public law neo-formalism”. Policy analysis involves balancing the competing considerations and conflicting interests present in complex legal problems and finding a supposedly rational solution. In this mode, judges are supposed to make decisions by assessing consequential outcomes and balancing competing considerations. Neo-formalism involves purportedly deductive reasoning based on foundational texts like treaties and constitutions. An important part of the third globalization is its focus on the central role of the judge. The judge is the “heroic” figure in this mode of legal consciousness, simultaneously resolving complex disputes through consequentialist balancing techniques and preserving basic rights and curbing illegitimate state action through formalist deduction. This amalgam of policy analysis, public law neo-formalism, and identity/rights thinking first emerged in the US but also took hold in Europe after WW II. Kennedy argues that this consciousness, which constitutes a synthesis of elements from the US and European traditions in legal thought, is spreading outside Europe and the US to the transition and developing countries.
The process by which this new legal consciousness is transmitted from the center to the periphery is very complex. To be sure, the “third globalization” of legal thought is influenced by the practices of the development agencies. But there are other mechanisms that foster the reception of this consciousness in countries around the world, and the emergence of this way of thinking in many countries may be as much a cause of the development of a new law and development orthodoxy as it is a result of development policy.

Kennedy eschews straightforward causal analysis but his chapter includes a litany of factors that could account for transmission. These include the spread of constitutional courts, the role of transnational law firms and transnational legal NGOs, the incorporation of this mode of thought in the work of international organizations, the global reach of US courts, and the emergence of a transnational legal elite. Development agencies promoting “the rule of law” may be missionaries of the new faith, but they may arrive in country to find it has already been adopted.

b) Economic Ideas

The current moment is to a great extent the result of the acknowledged failures of neo-liberalism. Of course, voices on the left have pointed to the limits of neo-liberalism from the very beginning. But voices from within the original mainstream have been far more influential in defining the current moment. As the neo-liberal moment played itself out, even those who believe that the market is the only way to allocate resources for growth came to recognize that markets do not create themselves, may sometimes fail, and cannot deal with all issues of concern to developing countries.

When institutional economists began to posit the need for state intervention to create institutional infrastructure, and people like Joseph Stiglitz reminded everyone that markets have inherent imperfections, there emerged within development economics itself the recognition that law might be needed to create the necessary infrastructure for markets, regulate activity when markets fail, and provide for social needs that markets could not meet. An even broader role for law emerged from the views of economists like Amartya Sen who argued that law, democracy and human rights should be included in the very definition of development.

For David Kennedy, thanks to changes in development theory and legal theory, a new law and development mainstream has emerged. This new mainstream includes the basic neo-liberal ideas concerning the importance of law for the operation of private markets. But it also has room for a limited form of state intervention in markets as well as for protection of human rights. The new mainstream rejects the strong neo-liberal presumption against regulatory law and accepts the need for legal intervention to reduce transaction costs and compensate for market failures.

David Kennedy observes that whereas neo-liberals thought that the market required a highly formalist approach to the judicial role, the new mainstream accepts the importance of consequentialist thought in the law of the market. But while instrumental or consequentialist policy analysis is central to mainstream law and development theory in
the third moment, it is only one part of a complex amalgam. It may seem strange that the
new mainstream can embrace instrumental legal thought for the law of the market but
rely on formalism for the interpretation of treaties, constitutions, and similar fundamental
texts. This amalgam can be seen as related both to the disillusion with extensive state
intervention in the economy and the spread of constitutionalism and judicial review
around the world. David Kennedy’s chapter argues that it is just this form of legal
consciousness that has been embraced by the development policy mainstream.

A distinctive aspect of the new development theory mainstream could be called,
following Rittich, the “incorporation of the social”. With the introduction of the World
Bank’s Comprehensive Development Framework (CDF), the leading development
assistance institution have proclaimed the need to pay greater attention to social,
structural, and human dimensions of development. This has meant more concern for
human rights, gender equity, direct poverty alleviation, democracy and access to justice.

The move to the social reinforces the importance of the judge in the current moment and
helps explain the importance given to the judiciary in today’s development assistance
practices. We can call it social, because it de-emphasizes the economic side of the
development equation— and emphasizes the social and human side of the process. It
appeals to a “holistic” or integral definition of development in which each of the
constitutive dimensions of development (economic, social, political, legal) are in a
relation of interdependence. On the instrumental or policy-analysis side, policies have to
be attuned to the local conditions of the market and its existing institutional forms. Judges
are expected to make decisions by assessing consequential outcomes and balancing
competing considerations in light of the local context. There is an emphasis on
consensus building, on increasing participation of all stakeholders to reach agreement and
thus ownership of the projects. On the other hand, there is a clear rights analysis, “neo-
formalist” component, associated with CDF that has made of “freedom” the paramount
consideration of development. In other words, the CDF has enhanced both an
instrumental and rights analysis aspect of the 3rd globalization.

c) Institutional Practices

The changes in economic and legal ideas affected and were affected by changes in the
rhetoric and sometimes in the practices of the development agencies. Accused by critics
of not doing enough to create the conditions for markets, placing too much faith in
markets as development institutions, ignoring issues of equality, being insensitive to the
needs of women, and not doing enough to promote democracy, development agencies
began to redefine what they meant by development and increase their investment in law
reform projects.

Take the issue of judicial reform, for example. Judicial reform has been a central feature
of legal development assistance for a long time. As Santos explains, however, the World
Bank’s rationale for its judicial projects has shifted over time. Initially, interest in judicial

5 One might see the rise of interest in empirical studies of judicial performance and judicial reform projects
as a consequence of this new view of the role of the judge.
reform was justified almost exclusively by the need to create basic institutions for market transactions and to limit state intervention in markets. This helps explain why neo-liberal theory and legal development practice stressed the importance of formalism in the private law of the market. Formalism seemed like a method to both increase the predictability of judicial action and to constrain any judicial temptation to interfere in market relations.

This has changed with the recognition that limited interventionism may be needed to avoid market failures. Once it became clear that some degree of regulation would be needed it became obvious that judges would have to employ consequentialist thought to ensure fulfillment of regulatory objectives. That helps explain the reemergence of policy analysis in law and development thinking. A similar change in policy and perhaps in the practice of judicial reform is related to the introduction of the social. As Santos and Rittich show, with the appearance of the CDF the World Bank has included judicial efficiency and judicial sensitivity to market needs among the objectives of judicial reform projects. It has also begun to focus on “access to justice” and has supported some direct efforts to empower advocates for the poor and other “unrepresented interests”.

3) The new critical practice

A distinctive feature of the third moment in law and development thought is the emergence of a new critical practice. The critique of law and development orthodoxy has a long history, dating back to Trubek and Galanter’s “Scholars in Self-Estrangement” which challenged much of the theory and practice of the first moment. Today’s critical practice started as a reaction against the neo-liberal moment. It included a critique of such elements as neo-formalism in the law of markets, the strong anti-regulatory presumption, simple-minded legal transplantation, apparent subordination of issues of equity and social development to the overarching goal of rapid economic growth, and the costs involved in rapid integration of developing nations into an open global economy.

But the emergence of the new mainstream in the third moment, with its subtle softening of neo-liberal orthodoxy, introduction of constitutionalism and human rights, and apparent reintroduction of the social, presents a more complex challenge. To deal with the emerging new mainstream we must not only account for the most recent changes, but also develop a critical analysis of what is a more complex situation. This volume seeks to meet those challenges.

In addition to describing the emergence of a new form of mainstream theory about the role of law in development, our authors seek to launch a new critical practice. This practice builds on and incorporates earlier critical approaches but goes beyond them to confront the rhetoric and practices of the third moment.

a) Antecedents and foundations

Not all of the “new” critical practice is new. Indeed, many of its guiding ideas have their origins in critiques developed in the previous law and development moments. This should be no surprise as many of the issues that earlier critics raised are still with us. Mainstream thought may have changed, but it hasn’t changed completely. And even where there seem
to be new theories animating development policy, it is far from clear that development practice follows the new rhetoric.

b) Unreconstructed market fundamentalism

All of our authors suggest that despite rhetorical change, the development assistance world still places primary faith in markets. Despite the rhetoric of the social, World Bank legal projects still focus primarily on creating the conditions for market activity. And while there is now a recognition that market failure may justify limited state intervention, it seems that the assistance agencies have a very narrow definition of market failure and thus relatively little tolerance for state intervention. Further, as Santos has documented, development agencies like the World Bank are not monoliths, and even if some units are committed to real change, others, possibly more powerful, may stick to the core ideas of the neo-liberal moment.

c) The gap between rhetoric and reality

A recurring theme in the analysis of the third moment is to question the extent to which development practice follows changes in law and development theory. Several of our authors question whether the changes that we have observed really reflect deep changes in policy and practice, or whether they really are little more than a smokescreen to deflect critics.

d) Containment

Several of the chapters suggest that even when doctrine has actually changed, the new policies may severely restrict the scope of any change. Take, for example, the recognition that law may be needed to correct market failure. This may seem like a significant expansion of the neo-liberal model, but if market failure is defined very narrowly this doctrinal shift may leave much of the original model unchanged. Similarly, as Rittich argues, the “incorporation of the social” may add something but it also allows development agencies to control what is meant by the social and define it in ways fully compatible with the core strategy. Thus the critics suggest that the third moment may involve some real change, but only enough to contain critics of the neo-liberal mainstream.

e) The continuing vitality of the critique of formalism

A major feature of prior critical practices was the critique of formalism. This critique has a long and distinguished pedigree in legal thought. For much of the 20th century legal scholars have pointed out that formalist objectives were unrealizable and formalist ideology masked judicial discretion. This critique was applied to the critique of the reliance of formalism in the new liberal law of the market. To the extent that continued market fundamentalism keeps those ideas alive the critique remains valid. Further, although third moment legal thinkers have introduced an element of consequentialism into their revised law of the market, they have added public law neo-formalism to the law
and development amalgam thus creating a new target for this type of critique.

f) False universalism

Another feature of the new critical practice is the challenge it poses to the idea that there is one model of development and thus one model for law in development. At the height of the neo-liberal moment, Margaret Thatcher issued her famous dictum that “there is no alternative” and the development agencies of that time adopted the so-called “Washington Consensus” which preached market fundamentalism and economic integration as the solution for all countries. In the legal sphere, this view led to what Newton calls “prescriptive transplantism” in which Western legal models are imposed on transitions and developing countries.

Although third moment development thinking has expanded to include issues of democracy and the social, and to recognize the need for limited interventionism, the development agencies still are largely committed to the idea that there is one basic model that should be followed by all developing and transition countries. While revisionist mainstream thinkers accept the need for limited differences and sequencing of reforms, the critics seek to challenge the continued adherence to a basic universalism and suggest the possibility of alternative development paths and legal models.

g) The forgotten issue of distribution

A very central feature of the new critical practice is the effort to reinstate distributional issues on the development agenda. The critics have challenged two features of third moment thought. The first, inherited from the neo-liberal moment, is the idea that a mature system of private law creates a level playing field. The myth of the distributional neutrality of the private law order was exposed by the legal realists decades ago and continues to be a major point of critique in the present moment.

This effort to demonstrate that private law as well as regulatory interventions has distributional consequences merges with the critique of neo-liberal tendencies to efface distributional questions in development doctrine more generally. As both Newton and David Kennedy point out, where all earlier theories of economic development assumed that distributional issues were fundamental to an effective growth strategy, market fundamentalists focus exclusively on the role the operation of allocative efficiency through markets to promote growth.

Finally, the critics note that the redefinition of law as an end of development further obscures the issue of distribution. Even if instrumental rationales for legal reform downplay distributional consequences, at least they make claims about the relationship between these changes and growth and these claims can be met by distributional analysis. But if law is an end in itself the whole issue seems to go away.

h) The hegemony of the world economic order

The new critical practice questions the relationship between the legal systems of
developing and transition countries and the hegemony of the world economic order. Although the focus of critical practice is on the policies of the development agencies, critics recognize that their actions are only one of many international forces that affect the legal orders of developing and transition economies. These legal orders are affected by trade regimes like the GATT and NAFTA, by the role played by transnational legal actors, by cultural flows, and other factors. To the extent that these forces constrain alternatives to a one-size fits all model of capitalism, critics seek to expose their impact and question their necessity.

i) The possibility of contestation

Fundamental to the critical practice is the desire to open things up for challenge and contestation. The critics believe that more equitable and fairer approaches to development are possible. They think that legal rules, practice, culture and consciousness are arenas in which false universalism can be contested and alternatives proposed. They all hope that this volume will encourage such contestation.

4) Conclusion: The Unity and Distinctiveness of the Volume

The critique sketched out and the possibility of contestation it permits help show the ways in which this volume differs from other studies of law and development in the Third Moment and the unity among the several chapters.

The current literature reveals several very different approaches to law and development that contrast with the argument of this volume. The first are the “chastened-neoliberals” who think that very minor adjustments in the neo-liberal model, plus better implementation of reforms, are all that is needed. Included in that group are those who see the problems as largely technical, simply requiring better indicators and more empirical studies to perfect the model. The second are those that think that all that we need is to fully implement the move to the social and the embrace of policy analysis and public law formalism.

In contrast, these essays suggest that the practice of law and development must pay close attention to issues of distribution, question the alleged neutrality of both policy analysis and public law formalism, identify sites of contestation and explore the myriad alternatives within development models, considering the role that law might play in producing them.