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**The American University in Cairo**  
**School of Global Affairs and Public Policy**

**LAW MODELS FOR ONE WORLD**

**A Thesis Submitted to the**  
**Department of Law**  
**in partial fulfillment of the requirements for the LL.M. Degree in**  
**International and Comparative Law**  
**By**

**Ahmed Anany Abdelazez Anan**

**December 2012**

The American University in Cairo

School of Global Affairs and Public Policy

LAW MODELS FOR ONE WORLD

A Thesis Submitted by

*Ahmed Anany Abdelazez Anan*

to the Department of Law

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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

## LAW MODELS FOR ONE WORLD

Ahmed Anany Abdelazez Anan

Supervised by Professor Hani Sayed

### ABSTRACT

The World Bank's prevailing conception that unifies the economic tools and the social goals of development in one comprehensive agenda through using law models in the core is unrealistic process that allows the Bank to play a political role regarding the policies of the member countries. The alternative strategy, in my view, is either to determine a point of reference to lead the development process of the transition countries instead of providing unified law models or to determine a specific legal reform agenda for each country that is compatible with its priorities and necessities. This alternative strategy should be limited to the mandate of the World Bank as a financial institution avoiding any extra burdens that contradict with the sovereignty of the member states. In fact, in my contention, the neoliberal comprehensive agenda of the World Bank may be described as a paternalistic assistance to the transitional countries that ignores the different goals of development for each country.

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## I. Introduction

The International Finance Corporation (IFC) held an event to celebrate Egypt's ranking amongst the world's top ten reformers for the fourth time in a row. The ranking is based on the IFC-World Bank Doing Business Report of 2010.<sup>1</sup>

The World Bank evaluates Egypt's reform policies as one of the top ten celebrating the Egyptian government's efforts to modernize the procedures related to investment and doing business, particularly in the fields of: Business startup, dealing with permits, employing workers, registering property, access to credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business.<sup>2</sup> For more illustration to some of these reforms, Egypt established an automated system for the procedures of tax registration and removed all restrictions on the minimum capital requirements of limited liability companies for any small company can easily start a business. Moreover, the Unified Building Law that was issued in May 2008 has shortened the time required for getting a construction permit to 30-days. With regard to property registration, the fees were cut to a maximum of EGP 2000, according to Law No. 83 of 2006. For credit, the Egyptian Credit Bureau was established. In the area of trading across borders, electronic services were introduced to Egyptian ports, the one-stop-shop system was developed to issue the necessary documents for export and import, the average tariff rate was cut several times to reach 6.9 percent, and tariff items decreased from 27 items to 6 items in order to streamline imports and exports. In addition, the Tax Law was issued to cut corporate tax to 20 percent. It became possible to file tax returns via the Internet and the number of paying taxes has become 8 times less

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<sup>1</sup> Egypt Receives Doing Business 2010 Award, Minister Mohieldin Honored (26 June 2010), available at <http://www.euromed-capital.com/spip.php?article399&lang=en>

<sup>2</sup> The World Bank consists of two development institutions owned by 187 member countries: The International Bank for Reconstruction and Development (IBRD) and The International Development Association (IDA). The IBRD aims to reduce poverty in middle-income and creditworthy poorer countries, while IDA focuses on the world's poorest countries. Our interests in this essay is focused on the IBRD because is the institution that is mainly responsible for most of the projects directed to transition countries or post socialist countries. Available at [www.worldbank.org](http://www.worldbank.org)

than before. In May 2008, the Economic Court Law was issued to facilitate litigation procedures; enabling prompt settlement of economic disputes.<sup>3</sup>

Egypt was one of two countries in the world that managed to hold their position on the list of the countries in the Doing Business Group ranking for over five years to keep their place, as a top ten reformer.<sup>4</sup> Furthermore, Egypt has jumped 59 positions in the Doing Business Report from the 165th place in 2007 to the 106th in 2010. In the business startup indicator, Egypt was ranked the 24th, up 102 positions compared to the 2007 report. On the index of access to credit/finance, Egypt was ranked the 71st, up 85 places compared to the 2007 report. Egypt also was also ranked the 29th on the index of trading across borders, up 57 places compared to the 2007 report. As for the registering property indicator, Egypt came in the 87th position, up 60 positions compared to the 2007 report. Regarding the index of protecting investors, Egypt was ranked the 73rd, up 32 positions compared to the 2007 report. As for the index of paying taxes, Egypt came in the 140th place, up 12 positions compared to the 2007 report. On the index of dealing with permits, Egypt was ranked the 156th, up 9 positions compared to the 2007 report.<sup>5</sup>

The previously mentioned legal and procedural reforms just simplify the reforms undertaken by Egypt; showing the evaluation process of the Doing Business Group of the World Bank to Egypt during the last three years before January 25, 2011 revolution. All of these reforms are part of a comprehensive reform agenda that has been undertaken in accordance with the recommendations and requirements of the World Bank's neoliberal reform agenda.<sup>6</sup> In fact, it is an astonishing tale of the World Bank to appreciate the development process in Egypt during the past year that preceded the Egyptian January 25, 2011 revolution. However, the tale is not concerned only with the reform project in Egypt. The World Bank provides a comprehensive reform

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3 Egypt Receives Doing Business 2010 Award, Minister Mohieldin Honored (26 June 2010), Available at <http://www.euromed-capital.com/spip.php?article399&lang=en>

4 The Doing Business Project, launched in 2002 as one of the World Bank Projects that provides objective measures of business regulations and their enforcement across 183 economies and selected cities at the sub national and regional level. It is the main project responsible for the applications of the neoliberal agenda beside many other projects. Available at <http://www.doingbusiness.org/>

5 The World Bank Doing Business Group, Measuring Business Regulation, <http://www.doingbusiness.org/data/exploreeconomies/egypt/>

6 See generally THE WORLD BANK ANNUAL REPORT, 2001 & 2002 ( experts on "Building Effective Legal and Judicial Systems" and "Promoting the Rule of Law") [www.worldbank.org](http://www.worldbank.org)

package that is premised on many theoretical and practical efforts to different actors in order to be universally applied in the development process of any country that needs financial assistance.

To elaborate, since 1980, the World Bank has started to provide specific requirements that should be fulfilled in the economic systems of countries that demand financial assistance and loans. They are not the usual requirements that may be stipulated from a bank in order to guarantee the repayment of the debt; rather, it is a recommendation for the adoption of an efficient free market system. Indeed, the World Bank requires a structural adjustment strategy that depends on a deregulatory process through removing barriers aiming to limit state control over the market as a prerequisite to emergency loans from the Bank.<sup>7</sup>

Moreover, and during the first years of the 90s decade, the project of the World Bank was developed through adding more requirements to be fulfilled in the institutions of the countries implementing the World Bank reform projects. The World Bank realized that the traditional ways of reforming the economics of the transitional countries, through removing the barriers or limiting the state interference, is not a useful tool in adopting an efficient free market system; especially, most of the legal and institutional structure of the transitional countries is contradicting with the market system economy. Therefore, the World Bank provides a unified legal reform model or law model based on efficient markets “best practices” that should be universally adopted. The “Best practices” model is a selective approach to different legal rules and regulations arising from the different common law system of the developed countries in order to provide the law reform model that should be applied. It is not only a structural adjustment strategy but also a change in the fundamental legal and institutional arrangements of the state.<sup>8</sup>

During the first years of the last decade, the World Bank project started to turn into a comprehensive development agenda that should be part of the

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<sup>7</sup> ALVARO SANTOS, *The World Bank's Uses of the "Rule of Law" Promise*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL*, (Cambridge University Press, 2006) 267

<sup>8</sup> *Id* at 268



economic and social policy of the state before any lending project starts. It is a process to reform the entire system of the country that demands financial assistance. It is a comprehensive project that is done through the recommendations and the projects of the different groups of the World Bank. The goal is a comprehensive development in the social and economic dimensions of the country that seeks financial assistance.<sup>9</sup> Indeed, the required reforms in the last three decades, even if they are not obligatory, they are pre-conditional to any loan provided either from the World Bank or from the International Monetary Fund. In fact, this new trend in lending is referred to in the World Bank literature as the neoliberal-agenda of development.

In my view, the first generation of reforms (1980 till 2000) has focused on the market and the business dimension.<sup>10</sup> It mainly appears in the work of the Doing Business Group as one of many entities of the World Bank. The neoliberal-agenda in the market and business dimension, as the assumption of the World Bank goes, provides the necessary tools for legal and institutional reforms in order to an efficient implementation of free market economy system.<sup>11</sup> The main scheme is using law models as a tool for economic reform. While the second generation of reforms (2000 to date), adds the social dimension of development.<sup>12</sup> Democracy, human rights, good governance and the adherence to the rule of law are the main elements of the social dimension of the neoliberal-agenda. These social concerns are the new targets of the development agenda in the second generation of reform or what they call the “Post Washington Consensus.”<sup>13</sup> Development in the second-generation of

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9 *Id* 268

10 See generally SCOTT H. JACOBS, *The Second Generation of Regulatory Reforms*, International Monetary fund <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/jacobs.htm>

11 See generally THE WORLD BANK ANNUAL REPORT, 2001 & 2002 ( experts on “Building Effective Legal and Judicial Systems” and “Promoting the Rule of Law”)

12 See generally KERRY RITTICH, *The Future of Law and Development: Second Generation Reform and The Incorporation of The Social*, THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006),

13 The term Washington Consensus was coined in 1989 by the economist John Williamson to describe a set of ten relatively specific economic policy prescriptions that he considered constituted the "standard" reform package promoted for crisis-wracked developing countries. These policies were advocated by Washington, D.C.-based institutions such as the International Monetary Fund (IMF), World Bank, and the US Treasury Department.[1] The prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy. Subsequently to Williamson's work, the term Washington Consensus has commonly come to be used in a second, broader sense, to refer to a more general orientation towards a strongly market-based approach (sometimes described, typically pejoratively, as market fundamentalism or neoliberalism). Available at [www.cid.harvard.edu/cidtrade/.../washington.html](http://www.cid.harvard.edu/cidtrade/.../washington.html)

reforms is not only legal and institutional, but also demands the achievement of many social goals in order to formulate a comprehensive reform policy.<sup>14</sup>

The main practical field of the neoliberal-agenda is to assist the post socialist countries, even if it is not restricted to these countries, to transform their economic systems from a state owned or controlled systems to free market economy systems.<sup>15</sup> In the last two decades, Egypt was considered as one of these transition countries in which was involved in a transformation process from a centralized economy or what is described as a socialist system to a free market economy. Consequently, Egypt was obliged to adopt the required unified legal, institutional and social reforms of the neoliberal agenda in order to be eligible for the economic and financial assistance of the World Bank and to be ranked as an efficient country for investments.<sup>16</sup>

Although Egypt was ranked as one of the most active countries in the reform of its rules and procedures to be aligned with the obligations and requirements of the neoliberal-agenda, categorizing the transformation and reform process as a successful one in my view, is a controversial issue. The evaluation of the World Bank to the development process in Egypt classified the latter as the best reformer in the last three years before the Egyptian 25<sup>th</sup> of January revolution. As a matter of fact, this ranking process contradicts the actual event that followed. The Egyptian revolution has revealed that most of the Egyptians did not have had the same vision or assessment to the development process in Egypt; especially, in the social field "second generation." In other words, they didn't grasp the change or reap the fruits of the reform. In my view, committing to the World Bank's project has not only failed in improving the economy of Egypt, but has also failed, in the second generation reform, in providing a comprehensive reform, despite the high ranking of Egypt's reforms.

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14 See generally KERRY RITTICH, *The Future of Law and Development: Second Generation Reform and The Incorporation of The Social*, THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006),

15 See generally THE WORLD BANK ANNUAL REPORT, 2001 & 2002 ( experts on "Building Effective Legal and Judicial Systems" and "Promoting the Rule of Law")

16 SUFYAN ALISSA, *The Political Economy of Reform in Egypt: Understanding the Role of Institution*, Carnegie papers, Carnegie Endowment for International Peace [http://carnegieendowment.org/files/cmec5\\_alissa\\_egypt\\_final.pdf](http://carnegieendowment.org/files/cmec5_alissa_egypt_final.pdf)

However, I chose to introduce the topic through the contradiction between the numerical assessment of the development process in Egypt and the instantly recognizable feeling that personally stunned me after January 25, 2012. I felt that these ranks, numbers and reforms are a futile portray or a trap to mislead any serious scholar in this field. Accordingly, I tried to trace the story from the perspective of a legal practitioner who's trying to find the myth behind the contradiction. In my contention, the issue is not to evaluate the impacts of the neoliberal agenda on the development process in Egypt; rather, it is the fallacy in the conception and the methodology of the reform project of the World Bank that may create the same contradiction between the official reports and the actual progress in many other post socialist countries.<sup>17</sup>

To be more specific, this essay is hardly defended as an empirical examination or a study case to the Egyptian development process or even to its transformation to a free market system. It is totally irrelevant to assess the impacts of adopting these required reforms on the development process in Egypt. It is also irrelevant to evaluate the content of the rules, procedures and social reforms of the neoliberal agenda. I am not biased to a specific economic system or a social model. Accordingly, I do not intend to defend socialism or to criticize either the development process in Egypt or the content of the neoliberal agenda. This essay would rather focus on the conception and methodology of using the law in the reform agenda of a financial institution. It is also a criticism to the conception of unifying the tools and the goals of development using the law in the core. In fact, I will present a realistic analysis that denies the resurrection of comparative law and the transplanting process in a formalistic approach. In addition, I will to criticize the new political role of the World Bank in determining and defining the social concerns of different societies.

My main argument is to reject the strategy of the World Bank in providing one comprehensive reform agenda. Consequently, I suggest that the World Bank should determine either a point of reference or different reform agendas.

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<sup>17</sup> See generally Gunter Frankenberg, *Stranger than Paradise: Identity and Politics in Comparative Law*, 2 UTAH LAW REV 259 (1997) PP. 259-74

The goal is to replace the detailed catalog of reform in the economic field by different reform agendas and to illegitimate the political role of the World Bank in the social dimension. In order to clarify my arguments, I will start my essay in chapter II by presenting the use of law in the neoliberal agenda during the three main phases of reform. Chapter III provides the theoretical premises that formulated the concept of neoliberalism and the neoliberal agenda of the World Bank. Chapter IV is a critique to the conception, methodology and political intervention of the World Bank. Finally I will conclude through summarizing the points of weaknesses and suggesting a new vision.

## II. Law in neoliberalism

In neoliberalism, there is huge number of literature concerning the concept "rule of law" and its role as a tool or a goal of development. Despite the huge number of literature, the "rule of law" is still a debatable concept, where no one can provide a universally agreed upon concept. One can find different classifications or understandings to the concept of the rule of law whether formal, substantive, or functional in which each classification could be criticized in a different way.<sup>18</sup> However, it is not a necessity to provide such definition to the concept of "rule of law," it is only important to refer to the prevailing understanding of law in neoliberalism that consider the adherence to the "rule of law" in the market as the main key for any successful development reform agenda.

Moreover, it is important to refer that before the current neoliberal project in reforming legal systems, there were many other law reform projects that connected law reform with successful development. One of these projects is the American Law and Development (L& D) Movement raised by western liberal lawyers during the 1960s and 1970s that was supported by the US aid agencies such as the USAID and the FORD foundation.<sup>19</sup> The Law and

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18 Rule of law as a Goal of Development Policy, The World Bank, Law and Justice Institutions  
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> – See also ALVARO SANTOS, *The World Bank's Uses of the "Rule of Law" Promise*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006)

19 The United States Agency for International Development (USAID) is the United States federal government agency primarily responsible for administering civilian foreign aid. President John F. Kennedy created USAID in 1961 by executive order to implement development assistance programs in the areas authorized by the Congress in the Foreign Assistance Act of 1961. USAID's stated goals include providing "economic, development and humanitarian assistance around the world in support of the foreign policy goals of the United States". [www.usaid.org/](http://www.usaid.org/) The Ford

Development Movement are considered as a step from the rich west to establish the basis for adherence to the rule of law in countries in transitions. The L&D movement focused on countries that moved from socialism to capitalism through a strategy that depends on cultural approach in reforming law school education. The Law and Development Movement assumed a model of regulated market economy where the state plays an active role. The goal was freedom and democracy but the focus was on economic growth. They assumed that economic growth is going to spillover the country to democracy.<sup>20</sup> In fact, it was a political project that failed to reach a comprehensive development because of the lack of theory and the failure of the "spillover" process. Another project was the attempt of the human rights movements during the 1970s and 1980s that named "the project of democracy." It was an organized movement that focused on the improvement of local institutions and the constitutional guarantees for human rights. The goal was to fight the authoritarian systems through a diligent judicial review, strong judicial independence and easy access to justice. The answer for the problem, in their view, considers the adherence to the "rule of law" as a necessity for reaching a democratic society.<sup>21</sup>

However, the current reform project of the World Bank is different from the previous movements, but it shared the same vision regarding the importance of the "rule of law."<sup>22</sup> Indeed, although the World Bank and the International Monetary Fund are now considered as major players in the law reform projects, there is no reference to the concept of rule of law or legal reform in the Bank's agreement. Through the last three decades those two international institutions were involved, through their different departments and groups, in a huge number of legal reform projects in the post socialists' countries influenced by the liberal free market school. Their main vision was to provide a reform agenda that has the ability to organize market economies through stable rules concerning the protection of private property and the

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Foundation is a private foundation incorporated in Michigan and based in New York City created to fund programs that were chartered in 1936 by Edsel Ford and Henry Ford. [www.fordfoundation.org/](http://www.fordfoundation.org/)

<sup>20</sup> See generally DAVID M. TRUBEK, *The Rule of Law in Development Assistance Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006)

<sup>21</sup> *Id*

<sup>22</sup> *Id*

enforcement of contracts in order to reach maximum efficiency. These rules are designed in a predictable way for investments, transactions and economic growth isolated from any political consideration.

Law in the neoliberalism of the World Bank is a set of rules and regulations that provides the optimal operation of the market for the purpose of efficiency and growth not for a distributive concerns or as a reflex to specific interests of specific group. The main role of the state is to support the private transactions between individuals without any control over the market. Moreover, the neoliberalism of the World Bank has changed in the last decade from an economic reform agenda to a comprehensive development policy. This change is noticed through the attempts of the World Bank to include specific social concerns in the third phase. The incorporation of this social dimension has thus shifted the position of the "rule of law" from a tool to a goal.

The target of this chapter is to present the current reform project of the World Bank and to explore the historical events and ideas that participate collaterally in positioning the "rule of law" as the center of the neoliberal development agenda. My goal is to clarify the shift in the position of law from the edge in the first phase of reform to the center in the third phase of reform. My focus is to explain the 'best practice' agenda of the Doing Business Group, in addition to the incorporation of the social dimension as a goal of development.

### **A. Deregulatory reforms**

The first occurrence for the use of the rule of law of the World Bank was mainly during the 1980s debt crisis as a required condition for financial assistance.<sup>23</sup> The World Bank was convinced that state intervention in the market and governmental corruption are the main obstacles for economic growth and repayment of debt. Therefore, the main goal of the Bank was to assist the debtors to repay the debt through balancing the budget.

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23 The Latin American debt crisis was a financial crisis that occurred in the early 1980s (and for some countries starting in the 1970s), often known as the "lost decade", when Latin American countries reached a point where their foreign debt exceeded their earning power and they were not able to repay it

Consequently, the World Bank required a structural adjustment strategy that depends on a deregulatory process; aiming at limiting the state control over the market as a prerequisite to emergency loans from the Bank. Removing the impediments in the market, trade liberalization, privatization, securing property rights, ending subsidies and the implementations of reform programs in macroeconomic and financial management were the core of the Structural Adjustment Policies (SAP).<sup>24</sup>

The concept of the "rule of law" as a reform project was not a direct prerequisite from the World Bank for financial assistance, but it was considered necessarily for the implementation of the macroeconomic reforms agreed to as a part of the structural adjustment policies. Thus, the first phase of reform was characterized by three features; first, the goal was the efficiency of the market. Second, the tool was the emergency structural adjustments loans. Third, rule of law was just to limit the state intervention and to fight corruption through decreasing the regulations of the market.

## **B. Good governance**

During the 1990's of the last century, the neoliberalism reform agenda provided the rule of law and the presence of appropriate institutions "good governance" as the keys for organizing successful and efficient market. This development policy emerged from the Washington based international financial institutions that asserts on a development that depends on free market and export led growth.<sup>25</sup> The reform is concerning particular types of law "good laws" that is determined as basic laws or neutral grounds regulations for market activity without any consideration to arbitrary, ideological and redistributive rules. Good laws are a set of laws and institutions that provides the basic structure for economic transactions in market economies avoiding any arbitrary interference or administrative control from of the state aiming to achieve the goal of creating an efficient free market economy. Good laws are

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24 ALVARO SANTOS, *The World Bank's Uses of the "Rule of Law" Promise*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006) 268

25 Washington D.C.-based institutions are the International Monetary Fund (IMF), World Bank, and the US Treasury Department.[1] They provided in 1989 "Washington consensus" prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy.

depoliticized frame for economic activity, universally applied regardless of the culture, place, and time, and uncontroversial to the goals and interests they are seeking to achieve. They are self explanatory and straightforward laws in their concerns toward market efficiency; no distribution or equity concerns. Indeed, they are a set of rules and institutional reforms that aim to support private transactions and protect the free market system from the state control in the economic activity and prevent the incorporation of political concerns or special groups' interests in the market economy.

To be more specific, in 1996 World Development Report, from Plan to Market, the World Bank provides the conditions that should be fulfilled from transition countries to move from plan or administrative control over market to a free market system. Although the target of the report was to provide a successful transformation process for the transition countries, the reform policies represent the prevailing conception about the ideal economic societies linked with the legal and institutional requirements of the international economy. Law and institutional reforms were introduced for the first time as a fundamental condition for economic reforms. Consequently, the World Bank linked any financial assistance with adopting this new reform agenda in the economy of the state that demand such assistance.

In the view of the Bank, for a transition country, the most effective approach to move from the control of the state over the market to market economy is to direct laws to serve the free transaction of individuals and the enforcements of contracts instead of the administrative decisions of the state. The approach is to place the adherence to the rule of law as the main operator of the market assuming that once appropriate change or model is introduced in the rules, the market system as a whole will be more prepared to the demands of development. Moreover, the World Bank assumes that the legal system consists not only of applicable rules but also of the processes through which these rules are to be applied and of the institutions in charge of these processes. The change in the process depends not only on the appropriate change in the fundamental rules but also the institutions in charge of these processes.



Consequently, for the neoliberal agenda of the World Bank, it is not enough to review rules and regulation in transition countries or to remove barriers on the market targeting to limit the intervention of the state as it was the case in the 1980s; rather, the goal is to introduce a fundamental change in the whole system through set of laws that is derived from actual practice of an efficient market. It is a set of neutral rules adopted only for the sake and interests of the market "market friendly rules." Moreover, this conception or agenda is not introduced for implementation only in transition countries, but it also may be applied in developed countries as a safeguard to their economies and markets from any expected financial crises. It is simply rebuilding the legal system in a way that enhances free market system in the economies of the transition countries away from state interference.<sup>26</sup>

According to this view about the concept of the rule of law in the neoliberal agenda, the strategy of the World Bank tries to provide set of the fundamental rules and institutional reforms that will prepare the whole society to the demands of development. In order to do that, the neoliberal agenda of the World Bank provides a unified legal reform model or law model based on efficient markets best practices. "Best practice" agenda is a selective approach to different legal rules from different developed countries to provide the law reform model that should be applied. The Bank justifies the use of these "best practices" as they are already applied efficiently in the markets of the developed common law countries since many decades based on the legal origins literature. The legal origins literature assumes that rules and regulations of the market in the common law systems are better for free economy than similar rules and regulations in the civil law system. Therefore, the Bank does not create a rule that is formulated to serve free market; rather, the Bank demands the adoption of the most efficient rules in the common law system. For example, the Bank selects the rule from a country that is described as the most successful in formulating the selected rule and applying it. Then, the Bank Gathers the selected rules from different countries in one agenda "best practice." Indeed, the World Bank tries to unify the applicable rules of market

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26 .F.I. Shihata; "Judicial Reform in Developing Countries and the Role of the World Bank " A paper submitted to the seminar on justice in Latin America and the Caribbean in the 1990s, organised by the Inter American Development Bank, San Jose, costa Rica, February 1993. TDM 0 (2003), [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) URL: [www.transnational-dispute-management.com/article.asp?key=983](http://www.transnational-dispute-management.com/article.asp?key=983)

economy in one best practice agenda in order provide the necessary tools for the ideal implementation of an efficient market economy in all the countries of the world.<sup>27</sup>

The strategy of the bank is clearly illustrated through the work of the Doing Business Group, which is the main group responsible for the improvement of the market and business environment. They are actually the provider of the 'best practice' agenda. They provide specific measures of the market rules and regulations through examining the local companies in different countries. The examination is done through analyzing data in a comparative analysis process in order to gather the most efficient regulations through determining specific indicators started by five ending in 2011 with 11 indicator in order for improving the regulatory environment for business around the world. It is clear from the Doing Business reports that the bank considers five main topics or indicators, beside many others, as the initial concerns of the Bank: 1 - starting a business; 2 - enforcing a contract; 3 - hiring and firing workers; 4 - getting credit; and 5 - closing a business.

Those five topics are the key to serve the free transactions between individuals, to ensure certainty and to avoid arbitrary decisions from the government. Every year the Doing Business group increases the number of the indicators for more comparison, but for the goal of this essay presenting the five main indicators are enough to clarify the idea. It is enough to clarify the legal origin conception of the World Bank in determining the most efficient rules from different countries.

The process is done through collecting data about these indicators from different countries of the world in order to determine which common law country provides the best rule in each different topic. The best model or rule is determined with regard to the direct economic and social outcomes. For example, a country that provides the best model in the process of starting a business is the country that its rules in this regard decrease the number of days needed for local company in this process to the minimum in comparison to other countries. The best practice agenda means that the best model in any

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<sup>27</sup> See generally THE WORLD BANK ANNUAL REPORT, 2001 & 2002 ( experts on “Building Effective Legal and Judicial Systems” and “Promoting the Rule of Law”)

topic should be unified in other countries that are not applying the same set of rules. If Australia as a developed country has the shorter days for a corporation to start a business, the regulation of Australia in this topic should be included in the best practice agenda in order to be applied in other countries. For a developing country, it gets a higher position in the ranking list of countries, if it applies more selected rules from the best practice agenda in the current year compared to what was applied in the previous years.

However, the second phase of reform retains the same features of the first phase, adds the need for institutional reform "good governance" as a condition to any project lending loans from the Bank and suggest the "market friendly" rules and regulations that should be universally adopted as one "best practice" agenda. Indeed, the concept of "rule of law" in the second phase means adopting the rules that best protect business environment.

### **C. Comprehensive development**

After introducing law reforms as a fundamental condition for economic growth and market efficiency through the neoliberal agenda at the during the second phase at the beginning of the ninety decade, the World Bank is going further to a new dimension regarding the social aspects of development. In the last years of the past century, the World Bank started to face a new literature of critique against the neoliberal agenda strategy that ignores the social aspects of development and concentrates only on the economic growth and market efficiency. Some argues that this ignorance of the social dimension have produced many negative impacts on the neoliberal agenda, while others argue that the neoliberal agenda itself lead to a great negative influence on the society. As a respond to this critique, the World Bank incorporated many social concerns or objectives in the reform agenda as the new dimension of development. Development now is not only an economic and law reform project, but also includes many social concerns that exist beside the same law and economic reforms of the first generation to formulate together a comprehensive reform agenda. These social concerns are the new targets of

development agenda or as it may be called" second generation reform"<sup>28</sup> or the post Washington consensus as many may refer.<sup>29</sup>

The new development agenda in the third phase includes many social objectives, such as democracy, health, education, gender, human rights, and social justice etc. In the view of the World Bank or as a respond to the critique, the incorporation of these objectives is the appropriate way to limit the negative social impacts of the neoliberal agenda in order to create an efficient economic environment. "Rule of law" is not only a matter that is connected structural adjustment as it introduced in the first phase or to economic considerations as it was justified from Ibrahim Shihata in the second phase, but also it is development itself. In fact, the World Bank is justifying this incorporation process of these social concerns in the development agenda for two different reasons. First, it is fundamental for the economic growth and markets efficiency. Second, it is a goal that should be achieved in order for a development agenda to be described as a comprehensive one.

These social objectives are not only the responsibility of the state but also the responsibility of the society as a whole.<sup>30</sup> This means that a new mode of governance is introduced in the third phase "second-generation reforms." It appears in more space for soft laws and private actors rather than formal law and strict enforcement of regulations. In this regard, the World Bank efforts for reform are pushing toward programs and projects that assist the civil society institutions, non-governmental organizations, and human rights activities to sustain the market and economic growth and the social dimension as targets of development. This trend to assist the civil society does not mean that the role of state is totally ignored. In contrast, is the right of the state for more participation in the social dimension of the reform agenda, especially, if

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28 KERRY RITTICH, *The Future of Law and Development: Second Generation Reform and The Incorporation of The Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006) 203

29 The term Washington Consensus was coined in 1989 by the economist John Williamson to describe a set of ten relatively specific economic policy prescriptions that he considered constituted the "standard" reform package promoted for crisis-wracked developing countries. These policies were advocated by Washington, D.C.-based institutions such as the International Monetary Fund (IMF), World Bank, and the US Treasury Department.[1] The prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy. Subsequently to Williamson's work, the term Washington Consensus has commonly come to be used in a second, broader sense, to refer to a more general orientation towards a strongly market-based approach (sometimes described, typically pejoratively, as market fundamentalism or neoliberalism).

30 SCOTT H. JACOBS, *The Second Generation of Regulatory Reforms*, article prepared for delivery at the IMF conference on second generation reforms November 1999.

its interference is a necessity in some fields such as social justice and human rights. This right of that is given to the state may be interpreted as an attempt from the World Bank to limit the best practice agenda that depends on the concept of “one size fits all agenda”<sup>31</sup> even though there is no evidence for this.<sup>32</sup>

The main core of the social dimension is concentrated on human rights, good governance and the rule of law.<sup>33</sup> Rule of law represented in legal, judicial and institutional reform is playing the central role as a leading factor to a successful economic development and efficient markets. It is also a tool for achieving the social dimensions as the new targets of the second generation of reforms. This means that the role of the legal reforms, in my view, is extended to include reform in the institutions, rules and regulations that is concerned with the social objectives of the second generation. Moreover, rule of law is introduced as a part of the social dimension; therefore, it is a target or goal of a comprehensive development agenda within other social concerns and objectives. In fact, the law reforms of the second generation agenda are playing three different roles that overlap; first, it still a tool for economic reform, second, it is also a tool for social reform and finally, it is a part of the social dimension of the development agenda as one of the goals. The rule of law in second generation reform is not a project for reform; rather it is a complete policy that should be adopted from a country that seeks a financial assistance. In fact, a comprehensive development means the adherence to the "rule of law" in all fields. Law in the third phase "second generations" is at the center of the development agenda.

### **III. Theoretical antecedents**

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31 KERRY RITTICH, RECHARACTERIZING RESTRUCTURING ;LAW DISTRIBUTION AND GENDER IN MARKET REFORM, NLD Brill Academic Publishers, 2002 p 99

32See generally DOING BUSINESS EXECUIIVE SUMMARY REPORT, 2011& 2012, do not refer to any change in the strategy of the world bank regarding the best practice agenda and the ranking process for rules and regulations,

33 KERRY RITTICH, *The Future of Law and Development: Second Generation Reform and The Incorporation of The Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006) 203

The ideas of Frederick Von Hayek are the main theoretical premises that shaped the concept of neoliberalism.<sup>34</sup> His writings constitute the substantive-instrumental conception of using law in development that radically appears in the legal origin Strategy of the Doing Business group. Moreover, the ideas of Douglas North regarding the fundamental institutional arrangement are the path of governmental interference in free market.<sup>35</sup> These ideas allowed Ibrahim Shihata to build the institutional frame of the role of the World Bank in legal reform agenda justifying the Bank interference in the policy decisions of the member countries without violating the Mandate of the Bank.<sup>36</sup>

### **A. Hayekian liberalism**

It is because the law giver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules of the case, that it can be said that laws and not men rule.<sup>37</sup>

"The Road to Serfdom" is one of the most influential books in articulating the basic conception of free market system or market libertarianism. It is written by the Austrian economist Friedrich Von Hayek in 1944 who aimed to warn from the governmental control over the economic "central planning economy" or even any governmental interference in a position that defends individualism and freedom arguing that state control means a totalitarian political system (fascism or socialism). However, at that time, Hayek was in the losing side, as most of the governments of the

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34 Friedrich August Von Hayek an Austrian economist (8 May 1899 – 23 March 1992); In 1974 Hayek shared the Nobel Memorial Prize in Economic Science.

35 Douglass Cecil North (born November 5, 1920) is an American economist known for his work in economic history. He is the co-recipient (with Robert William Fogel) of the 1993 Nobel Memorial Prize in Economic Sciences. In the words of the Nobel Committee, North and Fogel were awarded the prize "for having renewed research in economic history by applying economic theory and quantitative methods in order to explain economic and institutional change." During 20 year from 1971 till 1993, Douglas provides a complete theory of economic dynamics that help to understand the way economies evolve through time

36 Dr Ibrahim F I Shihata, vice president and general counsel of the World Bank from 1983 to 1998, an international jurists and expert on international development.

37 KERRY RITTICH, RECHARACTERIZING RESTRUTURING ;LAW DISTRIBUTION AND GENDER IN MARKET REFORM, NLD Brill Academic Publishers, 2002 page 104 citing F. A Hayek, " Law commands and order" ,*The Constitution of Liberty*, at 148

capitalists' countries have chosen to plan the peace economy after the Second World War influenced by the Keynesian plans for economy.<sup>38</sup>

After the 1973 oil crisis,<sup>39</sup> a tendency to revive Hayekian thoughts is strengthened in Mont Pelerin Society, as a post World War Two organized society to discuss the "*laissez-faire ideals*."<sup>40</sup> Hayek main idea considers the free market is the road to the freedom of individuals and democracy, while socialism necessarily implies totalitarianism. Although liberalism is compatible with democracy, they are not the same concept. Liberalism or free market is the principle value that should be protected in order to live in a free society.<sup>41</sup> Due to Hayek view, the main concern of neoliberalism is to limit the coercive powers of the state.<sup>42</sup>

The French version in this regard is based on the process of constructing the rules on rational basis not on actual practices, while the English version depends on the recognition of the applied rules not the creation of these rules. Indeed, liberalism in the English version is a process to adopt the best recognized and functional rules that emerge from economic practice without any interference from the state as it said by Hayek "based on an evolutionary interpretation of all phenomena of culture and mind and on an insight into the limits of the powers of the human reason."<sup>43</sup> Hayek argues that the English version of neoliberalism is the one that should be applied.

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38 John Maynard Keynes, (5 June 1883- 21 April 1946) was a British economist who is considered as one of the founders of macroeconomics. He argued that government should interfere in planning the market because free market cannot automatically solve unemployment, recession and other economic problems. See Generally *The Commanding Heights: The Battle for the World Economy* is a book by Daniel Yergin and Joseph Stanislaw, first published as *The Commanding Heights: The Battle Between Government and the Marketplace That Is Remaking the Modern World* in 1998. In 2002, it was turned into a documentary of the same title, and later released on DVD.

39 The 1973 oil crisis started in October 1973, when the members of the OAPEC (consisting of the Arab members of OPEC proclaimed an oil embargo in which it is considered along with the 1973-1974 stock market crash as the first event since the Great Depression to have a persistent economic effect.

40 After World War II, in 1947, when many of the values of Western civilization were imperiled, 36 scholars, mostly economists, with some historians and philosophers, were invited by Professor Friedrich von Hayek to meet at Mont Pelerin, near Monteuux, Switzerland, to discuss the state and the possible fate of liberalism (in its classical sense) in thinking and practice. The group described itself as the Mont Pelerin Society, after the place of the first meeting. It emphasized that it did not intend to create an orthodoxy, to form or align itself with any political party or parties, or to conduct propaganda. Its sole objective was to facilitate an exchange of ideas between like-minded scholars in the hope of strengthening the principles and practice of a free society and to study the workings, virtues, and defects of market-oriented economic systems. [www.montpelerin.org/](http://www.montpelerin.org/)

41 KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING ;LAW DISTRIBUTION AND GENDER IN MARKET REFORM*, NLD Brill Academic Publishers, 2002 page 104 Citing The writings of Friedrich Von Hayek

42 Another view that consider coercion is not only from state rather it might be at the hands of individuals in free market "Coercion and Distribution in a Supposedly Non-Coercive State"

43 KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING ;LAW DISTRIBUTION AND GENDER IN MARKET REFORM*, NLD Brill Academic Publishers, 2002 at 105 citing Hayek "*The Principle of liberal social order*"

The liberal social order, in his view, is premised on a sharp distinction between private law and public law. The former is derived from natural law (most functional economic practice), while the latter is the legislation for organizing the society. If there is no limit to state intervention through public law, there is a situation that distracts the liberal social order leading the society to totalitarian state. Consequently, the spontaneous order is the most functional economic practice; legal rules are founded and discovered not created even if society is manmade, it cannot intently change. The spontaneous order as represent the natural law in the liberal social are the principle that should be protected from state intervention. It is abstract natural laws that do not determine any benefits to specific group, predictable and could be universally applied.

Consequently, Hayek conception toward a free market provides three main conclusions that collaterally establish the core idea of neoliberalism. Natural law, efficiency, and the limits of state intervention are the three fundamental principles that govern the free market system since the 1980s. Natural laws are the spontaneous order or most functional rules in the liberal social order that are divided to three categories of rules; stability of possession, transfer by consent and performance of promises. Moreover, efficiency is optimized in a free market when the concept of "rule of law" represented in the natural private law is prevailed through mere enforcement of common law. Any governmental measures in this situation cost the society more than it might benefit cutting the causality between freedom and efficiency. Finally, legislations are the chief instrument of oppression because justice should be negative. Consequently, there is a contradiction between freedom in market and distributive justice. State intervention through legislations should not aim any particular result to a particular group. State interference should assist the natural forces of economy reconcilable with freedom such as frame work activities and public goods. Rule of law cannot be engaged in distributive social justice or used as tool for the distribution of wealth. Free and efficient market does not distribute wealth, it only disperses. Indeed, state t should only interfere for poverty not for equality or redistribution.

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## **B. Institutional reform frame**

Douglass C North is the one who presents the basic idea that connected the economy with the law through his examination to the historical process of the economic change and performance through time. As he argues, the main defect in the economic system is the denial of the possibility of linking between the economic decision and political process or policy decisions. In order to build this linkage, he asserts on the importance of the fundamental institutional arrangement in the economic performance of a country. The reform in the fundamental institutional arrangements are the most effective tool for change and growth because the free market system, in contrast to the classical school assumption, involves a coercion powers between individuals. Therefore, free market could not left without governmental interference by law in order to prepare the environment of the secondary arrangement in an efficient way. The governments should realize the possibility of issuing policy decisions via economic decisions. This policy decisions is done through the fundamental institutional arrangements (laws, rules, regulations etc) that will consequently improve the secondary institutional environment (relations between individuals, private property and enforcements of contracts).

Institutions form the incentive structure of a society and the political and economic institutions, in consequence, are the underlying determinant of economic performance. Time as it relates to economic and societal change is the dimension in which the learning process of human beings shapes the way institutions evolve. That is, the beliefs that individuals, groups, and societies hold which determine choices are a consequence of learning through time - not just the span of an individual's life or of a generation of a society but the learning embodied in individuals, groups, and societies that is cumulative through time and passed on intergenerationally by the culture of a society.<sup>44</sup>

The idea started in the 70s as a proposition for more research while in the 90s he provided a complete theory. He starts by referring to the critique to the assumption of the neo-classical school that no coercion between

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44Douglass C. North, *Economic Performance through Time*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1993 Prize Lecture, December 9, 1993 at 2

individuals in an efficient market, which means that information feedback, is predictable and it could correct the market in order to maximize profit.<sup>45</sup> He does not agree that this secondary institution arrangement between individuals does not include coercion, rather they include, which means that information feedback could not correct the market.<sup>46</sup> The free market economy could not correct itself through information feedback. Then the economy does need interference from the government by law (fundamental institutional arrangement) in order to create an environment that help the secondary institutional arrangement to act in an efficient way. In fact, it is not only a matter of economy that produces an efficient market; rather, the basic decision rules (fundamental arrangement) which is applied by governmental interference by law (must encourage and enforce contractual relations (secondary institutional arrangement) that encourage socially beneficial consequences. North refers to the importance of the institutions in the economic performance adding to Hayek's view of a boundary to governmental interference. The limits of the governmental interference, in his view, are the improvement in the rules and regulation that keeps and preserve the private relations between individuals. He provides the right activity of governmental interference in the free market system.

Ibrahim Shihata, the Vice President and the general counsel of the World Bank from 1983 to 1998 and the most important lawyer or jurist that articulates the idea of connecting legal reforms with economic reforms through his position in the World Bank. He is the godfather of the neoliberal agenda for reform. He is the one how build a link between the conception of Hayek in free market, the theory of North that simply encourage the governmental interference by "rule of law" and the role of the World Bank as a financial institution that guides the governments of the member countries to the most appropriate rules or tools to interfere in a free market system without arbitrary decisions in order to reach an efficient economic environment. His work is a comprehensive conception toward building a link between the role of the Bank

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<sup>45</sup>Ronald Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS 1960

<sup>46</sup>Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 38 POLITICAL SCIENCE QUARTERLY 470 (1923)

as a financial institution and its demands for a good legal and judicial environment (fundamental institutional arrangements).<sup>47</sup>

Consequently, he enlarges the role of the World Bank to include law and institutional reform (fundamental institutional arrangements) providing legal justifications to what may appear as a contradiction and violation to the purpose of the World Bank due to its mandate. In his attempt to justify the need for legal reforms before any financial assistance from the World Bank, Shihata faced a problem that is raised from the role and function of the World Bank as it appears in the articles of the (IBRD) International Bank for Reconstruction and Development agreement, which defines the purpose of the institution in economic and financial terms that prohibit political activities. In this regard, Shihata provides a legal justification that distinguishes between a change in the bank's function, its modes of intervention and lending instruments that can be legally defended as long as they do not alter the Bank's overall mandate as stated in its articles. By contrast, a change in the Bank's purpose can only be introduced in a legally correct manner through the amending of its articles. Consequently, the bank cannot exceed its mandate and act as an agency in charge of legal reform in its developing members. However, the Bank may take economic consideration into account, even if legal reform may have political origins, or associated with political factors as long as the economic effects are clearly established. Such consideration may be of political origins pursuing the strengthening of governance in order for more stability and predictability not ideological preference should remain the Bank's concern. In fact, he attempts to provide a framework, which keeps the Bank away from prohibited political activities and protects it from the risk of violating its articles in its varied roles as a financial institution.

Therefore, variations in the Bank's functions, its modes of intervention and lending instruments can be legally defended as long as they do not alter the Bank's overall mandate as stated in its Articles. By contrast, a change in

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<sup>47</sup> See generally Ibrahim Shihata, *Issues of Governance in Borrowing Members – The Extent of their Relevance Under the Bank's Articles of the Agreement*, the World Bank Legal Papers

the Bank's purpose can only be introduced in a legally correct manner through the amendment of its Articles.<sup>48</sup>

Moreover, he elaborates the view of the bank regarding the relevance and importance of the legal and judicial reform to the economic reform agenda of the World Bank. The transition countries need a fundamental change in the rules, procedures and institutions in order to prepare the market in an efficient way. Law should not be treated only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. This enables law to play two roles one as a keeper and interpreter of the statute and the other is a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner. The legal and judicial reform agenda of the World Bank in Shihata view should be limited within his legal justification to its economic impacts (economic consideration)

Law has long been recognized not only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. These two attributes enables it to play two seemingly conflicting roles: that of a keeper and interpreter of the status quo and, simultaneously, that of a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner.

And

Yet, for the most part, the discussion of legal reform has hitherto concentrated on the most effective ways in which law may be modernized, that is the introduction of changes in the rules (both substantive and procedural, primary and secondary, etc) to enable them to meet the constantly evolving needs of the societies they are meant to regulate. This approach assumes that once appropriate changes are introduced in the rules, the legal system as a whole will be more responsive to the demands of modernization and development.<sup>49</sup>

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48 *Id* at 246

49 Ibrahim. Shihata; "Judicial Reform in Developing Countries and the Role of the World Bank " A paper submitted to the seminar on justice in Latin America and the Caribbean in the 1990s, organised by the Inter American Development Bank, San Jose, costa Rica, February 1993. TDM 0 (2003), at 1 & 2 [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) URL: [www.transnational-dispute-management.com/article.asp?key=983](http://www.transnational-dispute-management.com/article.asp?key=983)

In sum, Shihata explains the new role of the bank in the economic reform process of the transition countries. First, he is legitimizing and justifying the extending of the role of the Bank to act more than a lending financial institution. He says that this role is relevant and necessary to the economic reform process; therefore, it is a change in the function, not a change in the purpose. Second, he elaborates the Bank demands for law reform as a tool for economic reform. A comprehensive reform in the rules, processes and institutions (fundamental institutional arrangements) is a necessity for a transition country.

### **C. Legal origins literature**

Legal origin is a concept or theory that prevailed in modern economic scholarly work that determines the strength of financial markets and the structure of corporate ownership in connection to legal system origin. In their view, the legal origin of the country is central in its influence on the performance of the financial markets. The assumption goes that the common law institutions effectively protect outside shareholders, while civil law institutions do not. In their view, the capacity to protect outside shareholders explains why some rich nations' capital markets are strong while others' are weak.

Do legal origins common law vs. civil law largely determine whether capital markets develop strongly? Many finance economists have concluded, in an explosion of influential articles in the past decade, that legal origin is indeed central. Common law institutions effectively protect outside shareholders, it is said; civil law ones do not. This differing legal capacity to protect outside shareholders explains why some rich nations' capital markets are strong while others' are weak.

The stakes aren't just academic. The developing world and international agencies are told that "transplanting the correct legal code (i.e., the common law) will enhance economic development."<sup>2</sup> This new legal origins view has in key circles elbowed aside the view that (1) economic function propels stock markets: stock markets develop when technology demands large enterprises and capital must be gathered from many sources, and this process works when (2) policymakers or private players

build the institutions that support stock markets and(3) have enough political support that the polity does not attack finance. The last element that national politics can confine policymakers' institution-building has increasingly found theoretical support and evidence. Here I assess which approach legal origin or political economy — is the better bet for future research and show how political and policy theories for the richer nations tie into systematic differences in how those nations experienced the turmoil of the early twentieth century. Differences in corporate finance in the wealthy West in the second half of the twentieth century could well be due more to the differing consequences of the earlier World Wars than to subtle differences between civil and common law.

For more illustrations, as M. Roe explains the theory "the original creation of legal systems centuries ago created legal and decision-making structures that continue today to facilitate or impede market outcomes."<sup>50</sup> The civil law by relying on codes, narrow judicial intervention, high regulation, and market directives instead of market solutions impedes financial markets. The common law by relying on adaptive judges, wide judicial discretion, light regulation, and private contracting facilitates financial markets."In other words, legal origin theory brings to mind the classical differences between civil and common law. First, common law system simply regulate less, it's said; they prefer market solutions and private contracting to centralized, statist regulation. Second, the common law judge better protects outside financiers, especially minority stockholders, with common law based fiduciary duties. The civil law judge is in contrast hamstrung by a rigid code. Third, because legal origin long preceded modern financial outcomes, markets could not have determined origin.

Moreover, this concept of legal origin has its effect on the work of many of the international development institutions. This concept leads them to accept the assumption that transplanting the correct legal code (i.e., the common law) will enhance economic development. With regard to the World Bank, the new view of the legal origin has affected the policy adopted in this international institution. The economist staff trained under the new thinking about legal origins' centrality denigrate civil law style institution-building,

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<sup>50</sup> Mark J. Roe, *Legal Origins Politics and Modern Stock Markets*, HARV. L. REV 120 (2006) at 463

such as regulation, codification, and public enforcement. Indeed, the "best practice" agenda provided from the Doing Business Group is completely based on the legal origin theory.

#### IV. Law models for one world

The use of the law in the neoliberal agenda indicates that the World Bank has many conceptions in this regard that contradicts each other in actual implementation. In my view, there are three main conceptions for the use of law that appears in the neoliberal agenda of the World Bank. The first one is determining the "rule of law" as goal of development in an intrinsic-substantive conception. This appears in the third phase of reform through incorporation of the social dimension in the development agenda. Law is required as one of specific social concerns that should be reached for the goal of achieving comprehensive development, regardless of its impact on market efficiency and economic growth. Indeed, the adherence to the "rule of law" is one of the main goals in the third phase of reform. The second one is the use of the law in the institutional reform of the judicial system, which is introduced in the second phase of reform. The efficiency of the judicial system is a tool to reach economic growth in an institutional-instrumental conception of the use of law. The third one, which is the main core of neoliberalism, is the use of specific rules and regulations "market friendly rules" as a tool for economic reforms in the business field in a Hayekian substantive-instrumental conception of law.

The use of law in neoliberal agenda	First phase of reform 1980 till 1990 <i>Market and business dimension</i>	Second phase of reform 1990 till 2000 <i>Market and business dimension</i>	Third phase of reform (second generation) 2000 to date. <i>Comprehensive development agenda</i>
Substantive instrumental	Less regulation in the business dimension.  The goal is economic growth and free market efficiency	Less regulation in the business dimension.  The goal is economic growth and free market efficiency.	Less regulation in the business dimension.  The goal is economic growth and free market efficiency.
Institutional instrumental		Less regulation in the	Rebuilding the institutions of

		business dimension.  The goal is economic growth and free market efficiency	the state.  The goal is economic growth and free market efficiency.
Intrinsic substantive			The incorporation of the social concerns.  The goal is comprehensive development.

These three conceptions of the use of law that appear in the work of different groups of the World Bank are provided to be applied in two main dimensions of development. The first one is the business dimension in order to achieve market efficiency and economic growth, while the second one is the social dimension in order to achieve comprehensive development. However, I believe that the use of law in the business contradict with the use of law in the social dimension. These two aspects of the use of law are totally two different reform agenda that practically should not be the responsibility of the same institution in one comprehensive agenda. For more illustration, some aspects of development contradict in some circumstances with each other that a specific country, for example, should choose either achieving efficiency in the market or specific goals in the redistribution of the wealth process.

The comprehensive development is not one specific agenda that is achieved when a country reach specific goals. There is no one comprehensive agenda for development because each country has its own goals of development. I argue that the attempts of the World Bank to provide one comprehensive development agenda, using law in the core, is unrealistic conception that is full of contradictions in an approach that hampered the bank with unjustified political responsibility. In order to elaborate my argument, I will criticize the use of law in the neoliberal agenda through dividing the chapter into two parts. First, focuses on the unrealistic conception in using law in the business reform in a substantive-instrumental conception. Second, focuses on the use of law in an intrinsic-substantive conception that, in my view, creates a new unjustified political responsibility of World Bank in the social reform.



## A. **Business reform**

The use of legal reforms, as a tool for economic reforms in a substantive-instrumental conception, is the main scheme of the neoliberal agenda of the World Bank. The Doing Business Group, as a part of the private sector development group, is the entity inside the World Bank responsible for providing the best applicable rules "best practice" for the improvement of the business environment in order to achieve market efficiency and economic growth. Although the "best practice agenda" is not an obligatory reform agenda for countries that seeks financial assistance, it is actually required from the Bank before issuing any financial loan.

"One size fits all," is the criteria governing the best practices agenda in an attempt to unify the applicable rules of law in all the countries of the world in order to achieve the ideal market economy. The unified laws are based on a selective approach of most functional common law rules and regulations.<sup>51</sup>The main goal is to provide a set of rules that by nature "market friendly rules" assist in protecting the fundamental aspects of free market such as transaction between individuals, enforcement of contracts and private property. These market friendly rules do not provide any specific interests to specific group or even they have no redistributive effects on wealth. They are only for the efficiency of the market, predictable and could be universally applied anywhere. Indeed, applying this "best practice agenda" in a developing country strongly indicates, in the literature of the World Bank and the annual reports of the Doing Business Group, that there is an improvement in the investment and business environment of this country.

The legal origin literature provides the reasons, in the view of the World Bank, for selecting these specific rules and regulation and gathers them in the best practice agenda. The legal origin theory simply indicates that the common law legal system is better in protecting liberal free market, therefore, the best practice agenda is a selective approach of most functional rules and regulations in the common law countries. These rules and regulations of the best practice

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<sup>51</sup> See generally THE WORLD BANK ANNUAL REPORT, 2001 & 2002 ( experts on "Building Effective Legal and Judicial Systems" and "Promoting the Rule of Law")

agenda should be transplanted in all the countries of the world. However, it is irrelevant to evaluate the efficiency of these specific legal rules incorporated in the best practice agenda. This part is an examination to the practical consequences of using law models (substantive-instrumental) as a tool for economic reforms. I do not object to the libertarians' conception that specific rules are by nature assist the free market system; rather, I object to that they are the same market friendly rules everywhere. I object that they should emerge from a common law system. My focus is on the concept of "one size fits all" that strongly direct the work of the doing business group. I argue that "one size fits all" is a false conception about market and law that will render the best practice agenda to a useless tool of reform in a new formalistic transplanting process.

### **1. The false conception about market**

The Doing Business Group provides one best practice reform agenda for different markets in different countries. It is irrelevant for the "best practice" reform agenda to provide an examination and an empirical research to determine whether these rules are beneficially applicable in these different markets. It is only relevant that all of these countries have accepted adopting free market economy. This acceptance is sufficient to unify the rules of law through providing one best practice agenda of market friendly rules that emerge from the spontaneous order of the market of the common law countries. For more illustration, the neoliberal narrative argues that "market friendly rules" is a process to adopt the best recognized and functional rules that emerge and derived from natural law (most functional economic practice of the market). The spontaneous order of the market is the tool that creates the most functional economic practice; legal rules are founded and discovered not created. It is abstract natural laws that do not determine any benefits to specific group, predictable and could be universally applied. Indeed, the best practice reform agenda assumes that it is one globalized market or these different markets have the same structure.

Natural rules "market friendly rules," in my understanding, is the product of spontaneous order of the market. If the market friendly rules, as it

assumed, are the result of the spontaneous order of the market, the change of the structure of the market from one country to another means different spontaneous order and different rules. The assumption that "one size fits all," which means a universally applied market friendly rules ignores the fact that each market has different structure and components that work independently in a way that reflects different social and cultural relations between individuals and different political and historical circumstances.<sup>52</sup> Markets are not fixed entities; rather, markets have different structures that have different spontaneous order providing different products (friendly rules).<sup>53</sup> To be more specific, the central point of the structure of the market is a network of social relations between individuals that affect most of the economic rules, especially the rules of supply and demand, private property and enforcement of contracts.<sup>54</sup> "Reading against the dominant account, it emerges that markets are tremendously malleable and contingent social structure rather than the relatively fixed and determinate entities that they appear to be neoliberalism."<sup>55</sup>

The market's structure differs from one country to another regardless of the acceptance of all of these countries to adopt market economy system. These differences in the structures exist regardless of how unified the economic system that governs the market is. Because of these differences in the structures, it is technically a useless exercise to assume that market friendly rules are universally applied rules. The rule that is considered a friendly rule for the market in specific country because it is the product of the spontaneous order of this market may not be beneficial for other market because the latter has produced its own friendly rules. The best practice agenda cannot provide a unified market friendly rules, and even if, no evidence for the origins of these rules.

## **2. The superiority of common law**

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52 The World Bank goes further in second generation reform to an attempt to unify the social and political goals rather than accepting the differences as I am going to criticize.

53 KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: GENDER AND DISTRIBUTION IN THE LEGAL STRUCTURE OF MARKET REFORM (SJD Thesis, Harvard Law School, 1998), p. 4

54 Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 38 *POLITICAL SCIENCE QUARTERLY* 470 (1923)

55 KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: GENDER AND DISTRIBUTION IN THE LEGAL STRUCTURE OF MARKET REFORM (SJD Thesis, Harvard Law School, 1998), p. 4

Even if the structure of the market is the same across the world that they should produce or should have the same market friendly rules provided in the "best practice agenda," there is no connection between these rules and the origin of the legal system as it is assumed in the neoliberal narrative. The conception that law is discovered contradicts with the conception that it is only discovered in common law. As it explained by M. Roe:

Legal origin — civil vs. common law — is said in much modern economic work to determine the strength of financial markets and the structure of corporate ownership, even in the world's richer nations. The main means are thought to lie in how investor protection and property protection connect to civil and common law legal origin. But, I show here, although stockholder protection, property rights, and their supporting legal institutions are quite important, legal origin is not their foundation.<sup>56</sup>

The legal origins theory is not the reason behind the strength of the market in common law nations; rather, it is the modern policies in respecting the property and stock market through the strict regulation stipulated by the statute. Moreover, the historical events of that every core civil law nation suffered from military invasion and occupation that negatively influenced the main institution of capital market in these nations. It also influenced the policies adopted after the war in which these differences in policies affected the strength of the capital market more than it may be assumed for the effect of the legal origins theory.<sup>57</sup>

In my view, different circumstances for each country influence the structure of the market more than the legal origin of the system. It is a matter of market, not a matter of law. In fact, the legal origin theory that is adopted by the Doing Business Group does not provide any sufficient reasons to limit the transplanting process from only common law systems. The doing business group does not provide any effort for justifying the incorporation of the legal rules of common law in the best practice agenda or even any causal link between the rule and the expected outcome from transplanting it. This lead the

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<sup>56</sup>Mark J. Roe, *Legal Origins Politics and Modern Stock Markets*, HARV. L. REV 120 (2006) at 462

<sup>57</sup>Id 463

bank to a false conception about law through process of blind transplanting of rules without any empirical research to the social and economic impacts of these selected rules.

### **3. The false conception about law**

In order to transplant the suitable rules and regulation for legal and economic reform, you need to understand how these specific rules may function in the legal, social, and political environment of the transition country that will import the rules. The formal approach is to transplant the rule from a country that this rule has functionally supports the economic and development progress. The realistic approach is to provide a comparative study for the reasons behind the success of this rule in supporting the economic and development progress. This comparative study is a necessity because you, as a comparative law scholar, know that the field of law is not only rules or fundamental rules but also the environment in which these rules are implemented or “law in action.” Consequently, if the same reason or the same environment behind the success of the rule exists in the transition country, the rule will function in a manner that supports the economy and development as it did in the developed country.

If you have your own ideology that classifies the efficiency of the legal rules in connection to its legal origin then you do not need any comparative study.<sup>58</sup> The best practice reform agenda that is premised on the legal origins conception is a formal approach that gives more emphasis on law on the book rather than law in action.<sup>59</sup> The conception of the superiority of common law in the field of free market has led the World Bank to select a formal approach of transplanting legal rules and regulations. The formal approach is to transplant the rules from developed countries because you already are affected by your own ideology or you know it is enough developed without looking for the actual reasons that helped the rule to function efficiently. Consequently, the neoliberal agenda expects that it is sufficient and efficient for an international mechanism of reform to provide a law model for the entire world

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<sup>58</sup> See Generally *Id*

<sup>59</sup> See Generally John K. M. Ohnesorge, *China's Economic Transition and The New Legal Origins Literature*, *China Economic Review* (2003)

that is transplanted from different common law developed countries. The prescription of law model is to cure the illnesses found in all of the legal systems of the world regardless of how these systems react to it.

This formal approach led the doing business group to depend on a rigid methodology for evaluation and assessment of the legal rules and procedures without empirical research regarding the reasons for the efficiency of the legal rule in the developed country legal system and how it is going to function in another country. The rigid methodology depends on a direct linkage between legal rules, as they are articulated in the developed country code, and the direct economic impact of implementing these rules. It evaluates each rule separated from other rules in the same legal system and separated from the legal, social, and political environment where this rule is functioned in order to provide ranking list for each country.

The formal approach does not provide a methodology to evaluate the legal system of the developed country or other reasons that might helped the rule to function in an efficient way. For example, if the rules of enforcing contracts in specific country provide easier way and shorter time for individuals to enforce contracts, they are the most appropriate rules to be transplanted in transition countries regardless of any other factor such as the tools of the police or the culture of citizens in respecting their agreements. Indeed, the best practice agenda assumes that applying the same rule from one country to the same legal question in another country should provide the same legal answer or conclusion. It is only the rule as it is articulated in the book.

This formal approach is a false conception about law that ignores two fundamental factors regarding the implementations of the rules “law in action.” First, the new law models are not dealing with one court. Different courts will provide different reactions to the rules through different techniques of interpretations that vary from a common law system to a civil law system to an Islamic law system or even in the same legal system. Each Court will reformulate the rules through their different understandings of their meanings. This reformulation of the rule leads to different answers to the same question of law, which contradicts the assumptions behind using blind transplanting or

law models. Best practices or unified rules or models of law may only be applied in international courts because an international court's reaction to them may be the same.<sup>60</sup> International rules of interpretation may contain some similarities because of the hybrid legal, social and political culture of the international courts. In contrast, every local court will interpret the same rule using a very different approach or different techniques of interpretation. Moreover, even in the same legal system, the only tool to unify the practices of the courts is granted to one Supreme Court without any role of the legislature in this process. In fact, the new law models are not going to be applied in the same court.

The second factor is the failure of this formal approach to realize whether the transition country legal, social and political environment does actually support the new comers of rules and regulations or present a hostile environment to these rules. The supportive polity or the supportive environment in which these rules are going to be implemented are more important factors or reasons for the success of the rule in the reform process than the origins of the rule or the concept of unifying the rules in one law model.<sup>61</sup> The contradiction between World Bank as an international legislature or a supervisor of the transplanting process and the legal, social, and political beliefs of the individuals in the society may be a burden on these reforms more than the origin of the rule. The main result of this contradiction may appear in the gaps between the law models that are blindly transplanted from the book and the way it is implemented "law in action." This means that the transplanting process of a specific rule will function in an efficient way if it becomes a part of the desirable tradition of the society "supportive environment."

#### **4. New formalism**

The doing business group should select the hard approach in transplanting legal rules that is based on a comparative study for the reasons

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<sup>60</sup>See generally Rodolfo Sacco, *Legal Formants: A Dynamic Approach To Comparative Law*, *The American Journal of Comparative Law* he provides an example of unifying the rules in the EU.

<sup>61</sup> Mark J. Roe, *Legal Origins Politics and Modern Stock Markets*, *HARV. L. REV* 120 (2006)

behind the success of these rules in supporting the economic progress. In this strategy, the doing business group should hold a realistic ideology toward the field of law. The use of law models as a tool for economic reforms is practically a useless exercise that is premised on false conceptions about market and law. The conception of unifying the rules of law, which is incorporated in the neo liberal agenda, is not a realistic view for the legal and economic reforms intended, especially for the transition countries. Although these unified rules or models of law appear as a functional pragmatic tool for economic reforms, a deep understanding of market and law, clearly, reverse them into a false tool. These false conceptions about market and law will render the law models of the neoliberal agenda into a useless tool for economic reforms. In fact, approving law models as standards for legal and economic reforms is to some extent a new type of legal formalism.

## **B. Social reform**

After introducing law reforms as a fundamental condition for economic growth and market efficiency through the neoliberal agenda during the second phase, the World Bank is going further to a new dimension regarding the social aspects of development "second generation of reform."<sup>62</sup> Development in the third phase "second generation" is not only an economic and law reform project focusing on the business and economic field, but also includes many social goals. Rule of law, human rights, democracy and social justice are the main goals of the social dimension in the second generation reform. These social goals that exist beside the same required law and economic reforms of the first generation are an attempt from the World Bank to provide a comprehensive development reform agenda.<sup>63</sup>

I argue that the use of law in the social reform is a new project that has no theoretical basis in an approach that entitles the Bank with unjustified political role. I will clarify this argument in three main points. First, the use of law in the social reform dimension is a new project that contradicts with the

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<sup>62</sup>First generation includes phase one and two, while second generation is a term to refer to phase three of reform. This term is used from Kerry Rittich in many of her publications.

<sup>63</sup>See generally KERRY RITTICH, *The Future of Law and Development: Second Generation Reform and The Incorporation of The Social*, THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRASISAL, (Cambridge University Press, 2006),



theoretical basis of neoliberalism as a free market economy reform. Second, this new project has no theoretical basis for the incorporation of the social goals. Third, it ignores the role of the World Bank as a financial institution.

### **1. New Project**

The core of the neoliberalism is the protection of the fundamental aspects of the free market system without any distributive concerns or determining any benefits to specific group. For more illustration, in the business reform, the World Bank provides specific rules and regulations in order to achieve efficiency of the market and economic growth in a substantive-instrumental conception to the use of the law. In the social reform, the World Bank has determined specific social goals for the entire world in an intrinsic-substantive conception to the use of law. The conception of unifying the tools that is used in the business environment is replaced by unifying the goals in the social dimension. The World Bank interference in the social dimension is to provide specific rules and regulation that is concerned with distributive matters or determining specific benefits to specific groups such as social justice and gender. This interference negates the idea of economic efficiency due to the libertarian conception toward free market system. A liberal free market, as it assumed in the first and the second phase of reform, may contradict with the social objectives in the third phase. It is unreasonable to suppose that it is one comprehensive reform project. They are two projects that each one has different goals and tools. In fact, the World Bank is not providing legal and economic reform project; rather, it is a new project that has no connection to either law reform or economic reform.

### **2. The lack of the theory**

The incorporation of the social dimension is not only a new project that contradicts with the libertarian theory for a free market but also does not provide any conception or theoretical basis. For more illustration, the economic theory of Douglas C. North provides the World Bank by the theoretical base that clarify the impact of law or changing in the fundamental rules in the field of economic development under the libertarian requirements for free market system. While Shihata's explanations defend the interference of

the Bank in the legal system of the member states, assert on the rule of law and fundamental institutional arrangements as a catalyst for economic reform. Therefore, as it is justified by Shihata the vice president, the World Bank may require specific legal reforms for economic consideration.

Their work is a substantive-instrumental conception of the use of law that is limited with the use of legal rules as just a tool to reach an efficient free market system. It is a path for the Bank to interfere in the economic systems of the member state helping in defending the strategy and the role of the latter in requiring law reforms as a tool for economic reform during the first and second phase of liberalism. It is a theoretical privilege that strengthen the argument of the Bank in order for a successful implementation for the neo liberal reform project.

The theoretical work of North and Shihata do not refer to one comprehensive agenda or even do not refer to social aspects of development. Therefore, it is not sufficient to connect the social dimension with the attempts of the World Bank to provide one comprehensive development agenda or to the attempts to limit the negative impacts of the neoliberal agenda. The World Bank does not provide any legal justification or even any economic consideration to the incorporation of the social dimension in the neoliberal reform project. The World Bank should either do not interfere in the social dimension or to provide theoretical base to connect this aspect of development with the efficiency of the free market system. Indeed, the incorporation of the social dimension could be criticized for the lack of theory.

### **3. Political role**

It is obvious that the main scheme of the neo liberal agenda that depends in the reform process on law models has extended in second generation reform to specific social models in an arbitrary choice of the most valuable interests for the countries. One can argue that not only the World Bank does not provide any theory or contradicts the assumption of the libertarian free market, but also provide a new political role for the Bank that contradicts with its role as a financial institution. The requirement of the reform in the social dimension

does not refer to the nature and the role of the Bank as a financial institution; rather, it only connects and justifies this extension of the role to the necessity of providing a comprehensive development agenda. The new project reveals the internal confusion of the Bank toward its role and limits of interfere. Indeed, it is a new political role in which from one side is trying to balance the limits of interference and from other side or the actual side is extending the role of the Bank in a strategy that breach the sovereignty of the countries and violates the mandate of the Bank.

As a respond to the critique of the first generation regarding the negative social impacts, the World Bank incorporated many social concerns justifying this incorporation as fundamental for the economic growth and markets efficiency and as a goal for comprehensive development agenda. On one side the bank is clearly connecting the mode of interference to economic consideration, which is within the limits of the role of the Bank. On the other side, in the second reason, the bank negates any attempt to provide a causal link between the social objectives and the economic efficiency. The World Bank as a financial institution decides, without providing any causal link, that these social concerns are important regardless of their impacts on economy and market. The work of the bank in this concern is not clear in linking between each topic and the economic and social outcomes of applying it. In my view, economy is a mechanism to reach social goals not as second generation reform assumes that the social objectives are important to economic growth. For example, for any country, the adoption of a market economy system does not indicate that the political regime of this country needs to export the social and political goals of the country that is evaluated as the most efficient market. Moreover, in many situations, economic efficiency may contradict with social objectives in a way that impose on the states to select one choice of them as the valuable choice for the interest of the country. It is not reasonable to delegate the World Bank in this choice. In Fact, the World Bank is confused between committing to its role as a financial institution and between extending the mode of interference to political decisions that is considered within the state sovereignty.

Another instance in this regard, is the trend to assist the civil society and the state for more participation in the social dimension of the reform agenda. For the civil society, it appears in more space for soft laws and private actors rather than formal law and strict enforcement of regulations. For the state, it appears in the right for more participation in the social dimension of the reform agenda; especially, if its interference is a necessity in some fields such as social justice and human rights. On one hand, this strategy may be interpreted as an attempt from the World Bank to limit the best practice agenda used in the business dimension through allowing plurality in order for more focus on actual necessities for each country, which preserve the nature of the Bank as a financial institution. On the other hand, the World Bank is effectively determining the importance of specific social objectives and alternatively legitimizing and delegitimizing the means and strategies by which they can be pursued.<sup>64</sup> The bank holds the responsibility to decide the social targets of a country that is seeking an economic reform. This means that it is still one best practice agenda, even there is no ranking process in the social dimension, without actual participation whether from the state or from the civil society except as executives to the World Bank without any commitment from the latter to its role as a financial institution.

The confused conception of the bank regards the use of the law in the second generation of reform as tool or a goal, leads the bank to a confusing project between economics and politics. In my contention, the Bank use of law in the third phase is interference in the political field of the member countries. This interference is not supported by any legal justification even though it is very important because as Shihata said the legal reform is a change in the function of the Bank, not a change in the purpose of the Bank. Shihata has avoided violating the mandate through connecting the process of law reform to an economic outcome warning from any political intervention. Shihata's Justifications is a legal basis to preserve the role of the Bank as a financial institution, while the incorporation of the social dimension extends the role of the Bank to a political role that contradict with the sovereignty of the member

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<sup>64</sup> *Id*

countries and violates the mandate of the Bank. In fact, the World Bank demands the reform in the political system before any financial assistance.

## **V. Conclusion**

I introduced this essay by referring to the contradiction between the rigid evaluation process of the neoliberal agenda and the actual events in Egypt. I wanted to argue that the stakes are not in the content or the implementation of the free market system in Egypt, but in the conception and methodology of the neoliberal agenda of reform. Accordingly, I traced the neoliberalism during three decades. I presented the deregulatory process and the structural adjustment policy in the markets of the post socialist's countries. Then I clarified the required institutional reforms "good governance" that is prevailed in the second phase of reform. I focused on the concept of law models that is introduced in the "best practice" agenda of the Doing Business group. My goal was to compare between the use of law in the first two phases of reform (first generation) and the third phase of reform (second generation), which is remarked by the incorporation of the social dimension to produce a comprehensive development agenda. I wanted to clarify that the conception regarding the use of law that is moved from the edge of liberalism in the first and second phase to the core of the new comprehensive development agenda of the World Bank in the third phase (second generation).

Moreover, the essay presented the theoretical premises of neoliberalism. Hayekian's conception regards the social liberal order and the main aspects of a free market system. I referred that the Hayekian conception of liberalism is governing vision for the global economy since 1980. In addition to Douglas C North theory on the way to interfere in these liberal markets by policy decisions that improves the fundamental institutional arrangement. He presents the key to state interference in a free market economic system. My goal was to connect between the concepts of the liberalism as it theoretically appears in the global economy and the role of Ibrahim Shihata in engaging the World Bank in the law reform projects. The latter draw the frame for the Bank to interfere in the legal and judicial reform projects of the transition countries through connecting this interference to economic consideration. Finally I referred to

the theory of legal origins that direct the transplanting process in the "best practice agenda" of Doing Business Group.

I would like finally to summarize my critiques and recommendations in the following points. First, the comprehensive development project of the World Bank is not one project; rather, it is two projects of reform that each one contradicts the other in actual implementations. The first one is concerned with the business environment, market efficiency and economic growth, while the second one is concerned about the social aspects of development. Each project has different conception for the use of law in development. In the market, law is used as a tool for economic reform in a substantive –instrumental conception. While in the social dimension, the adherence to the "rule of law" is end goals of development in an intrinsic-substantive conception.

Second, is the concept of superiority of the common law has led the Bank to ignore two important aspects. The first one is the different structures of the market in different countries. The second one is the concept of "law in action." The result is unified tools, as it appears in the law models, (substantive-instrumental). It is a rigid methodology either in adopting legal, institutional and procedures reforms or in the evaluation of these reforms that appears in the work of Doing Business Group. Law models of the "best practice agenda" are blind transplanting process, which is, in my view, a new mode of formalism that denies any scholarly efforts to the realistic school in law.

Third, incorporation of the social dimension is a new reform project that has no theoretical premise or even any connection to the liberal market system. The World Bank is unifying the goals of development in the social dimension through defining specific concerns that should be reached as development itself. The incorporation of the social dimension is not the appropriate answer to limit the negative effects of neoliberalism; rather, it may give the Bank the right to require new social law models and regulation to new areas such as gender and human rights. It is an approach that may create another best practice agenda in the social dimension.

Fourth, defining development and determining the social concerns of different states is to some extent a new unjustified political role of the World Bank. This role violates the articles of the mandate of the World Bank and negates the conception of Ibrahim Shihata that limited the new manner of financial assistance to a change in the function of the World Bank not a change in the purpose. Indeed, the interference in the social field is a political role that totally creates a new purpose to an international financial institution. Moreover, this political role of the bank in legitimizing specific social concerns contradicts with the sovereignty of the states in determining its own social policy.

I suggest as a general comment, the World Bank should stop the attempts to provide on unified comprehensive reform agenda leaving for each country space to determine its goals and tools for achieving comprehensive development. Moreover, the World Bank should strictly commit to Ibrahim Shihata justification for the criteria of interference in the economies of different countries. The criteria are to connect legal reforms to economic consideration in a case by case strategy. Indeed, the World Bank is not policy maker; rather, it should commit to its role as a financial institution.

In the business and market dimension, the legal reforms should hold a realistic ideology that recognizes the field of law as not only rules; rather, it is or it includes many other aspects that have a great impact on applying the rules. These aspects start with judicial behavior at the center; moving around it the behavior of governmental officials; then the accepted formula that judges depend on; then various persons ideas about what law should accomplish; then the legal and social philosophy as outer portion of the circle of the field of law.<sup>65</sup> Consequently, legal reforms in the neoliberal agenda should be classified as “ought to rules” or various people’s ideas about what law should accomplish, which do not encompass the entire field of law. Therefore, the influence of these “ought to rules” or “law models” on economic reforms is not going to exceed their position as one circle of many other circles that formulate the field of law.

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65 Karl Uewellyn, “A Realistic Jurisprudence – The Next Step” 30 COLUMBIA LAW REVIEW 431 (1930)

If the influence of law models is limited only to their position as one aspect of many aspects, then the neoliberal agenda should only determine either a point of reference to be achieved instead of providing unified law models or a specific legal reform agenda for each country. This point of reference, such as determining the strict enforcement of contract as a reference to the countries without providing specific rules for such process, allows the different judicial systems to determine their tools in protecting enforcement of contracts. It gives them the opportunity to determine the best functional rule for their society on a case-by-case basis. This, consequently, allows the judicial system to express their legal values, necessities, and traditions through the new legal reforms.

The same can be said for providing a different legal reform agenda for each specific country. This specific legal reform agenda should include and express the real reform necessities and priorities in the transition country. Indeed, it is not enough to approach the transplant process by a legal origin ideology in a formal methodology for selecting the appropriate fundamental rule to insure enforcement of the intended goals of the Bank because law in action is always unpredictable. The legal, social, and political environment that support the new law models is important than selecting the best practice or unifying the rules.

In the social dimension, the World Bank should avoid any political role in determining the social concerns. Each country has the right to determine its priorities and necessities in the social aspect. Law, in the social field, should reflect the victory of one of two conflicting interests in the society or represent the redistributive policy of the government, not as a progressive tool of reform that is used in the business dimension. Indeed, neither the social field is the responsibility of the World Bank nor it is a guarantee for the repayment of debt.