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Promoting the Rule of Law Abroad

In Search of Knowledge

Thomas Carothers

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
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CHAPTER FOUR

Mythmaking in the Rule-of-Law Orthodoxy

FRANK UPHAM

THE MANIFOLD EFFORTS by Western development institutions to encourage and sometimes compel developing countries to create the rule of law often rest on a very formalist conception of the goal—that is, regimes defined by strict adherence to established legal rules and freedom from the corrupting influences of politics. Rule-of-law promoters contend that such reforms are essential to establishing stability and norms that encourage investment and sustainable economic growth in the developing world. In evaluating this new rule-of-law orthodoxy that has emerged in the development business in the past decade and a half, I question some of its underlying assumptions, including this idea that economic development requires formalistic rule of law and the notion that the rule of law is actually apolitical in economically developed democracies like the United States.

The foundation of my argument is that law is deeply contextual and that it cannot be detached from its social and political environment. This is just as true in developed countries as in developing countries, but this truth is absent from the new rule-of-law orthodoxy. Two important consequences follow from this failure to acknowledge the political nature of law, particularly of U.S. law. First, it leads to an underestimation of the difficulty and complexity of legal development.[1] If law can be seen as a set of neutral rules, or at most institutions, different national legal systems can be formally compared and modeled, and successful models

can be transplanted into countries with failed systems, much as businesses adopt "best practices" in manufacturing processes, inventory management, and so on. Law, in other words, is seen as technology when it should be seen as sociology or politics. Second, the denial of the universally political nature of law has led aid providers to act as though law is good and politics is bad. Besides the irony of a movement that advocates democracy while denigrating politics, the result is the quixotic quest for an impossible ideal where impoverished developing countries are expected to strive for a pristine rule of law that their developed counterparts have not achieved. More important, the distaste for politics has led legal reformers to avoid it and to try to build legal systems outside of and in opposition to it, where property and contract rights are seamlessly enforced without reference to their political and social consequences. Not only will such an enterprise inevitably fail, but also it would often be undesirable even from the largely economic perspective of the institutions that dominate the law and development movement.

The Rule-of-Law Model

Given the substantial attention and money that development organizations now direct to rule-of-law assistance, one would assume that there is a carefully elaborated model of law and development based on empirical evidence from the developmental periods of Western economies, what has worked and not worked in the developing world over the last fifty years, and the experience of the previous period of law and development in the 1960s. If such a model exists, however, I have not found it.[2] Instead, one finds a series of assumed legal systems that seems to have emerged fully formed from the pages of a high school text on U.S. democracy, and not a very sophisticated text at that. Advocates of rule of law extrapolate from Weberian sociology and the imagined experiences of Western capitalism to the rest of the world. Universal theories of the interdependence of legal form and economic activity lurk behind the rhetoric of the rule of law without a great deal of intellectual agonizing over exactly what this form of law entails, how it relates to economic activity, or how it fits in different political, social, and institutional contexts. The result is a formalist model of law detached from the social and political interconnections that form actual legal systems everywhere.

This view of law rests on two assumptions about law and society. The first is that the description of law as a system of rules can be a reliable guide to understanding legal systems. The second assumption has two

parts: one, that law's primary role in society is dispute resolution; and two, that society depends on formal legal adjudication for stable and predictable dispute resolution. I examine each of these assumptions in turn, not in the abstract but by drawing on the writings of two prominent advocates for legal reform in the developing world: Ibrahim Shihata, former general counsel of the World Bank, and Hernando de Soto, Peruvian author of *The Other Path*.

The World Bank Model

At the end of the 1980s, in an effort to increase the effectiveness of the World Bank's development loans, its legal staff began to address what it calls "governance" issues in borrowing countries. Concerned that the way power is exercised in developing countries may contribute to the inefficient use of World Bank funds, yet constrained by its Articles of Agreement from considering political criteria in its lending, the general counsel of the World Bank in those years, Ibrahim Shihata, drafted a memorandum that distinguished governance from politics and identified the former as a legitimate consideration in the awarding of bank loans.

In general terms, Shihata equated governance with "good order"; in more specific terms, he called it the rule of law, which he defined at one point as a "system based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules" (emphasis in original). Such a system, Shihata claimed, provides a legal foundation for social stability and economic growth and is a prerequisite for the effective use of World Bank assistance:

> Reforms cannot be effective in the absence of a system, which translates them into workable rules and makes sure they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body, and e) there are known procedures for amending the rules when they no longer serve their purpose.[3]

Shihata went on to state that, in the absence of such a system, the fates of both individuals and enterprises will be left "to the whims of the

ruling individual or clique" and that only such a system can provide the "general social discipline" that makes economic reform possible.

Shihata's views are echoed throughout subsequent World Bank literature. A few excerpts from the Bank's website are illustrative:

> Legal and Judicial systems that work effectively, efficiently, and fairly are the backbone of national economic and social development. National and international investors need to know that the rules they operate under will be expeditiously and fairly enforced. Ordinary citizens need to know that they, too, have the surety and protection that only a competent judicial system can offer.[4]
>
> Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system.[5]
>
> A competitive business and corporate sector is built on the foundation of strong property rights, ease of company formation, corporate governance, the availability of flexible collateral mechanisms to support the availability of credit, and reliable insolvency systems to minimize lender risk and encourage the rehabilitation of viable firms in financial difficulty. Laws and legal institutions also underpin fund raising and securities trading through well-regulated securities markets.[6]

It is hard to argue that an effective, efficient, and fair judicial system is not a good thing or that a country will be better off without "an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system," and I will not attempt to do so. Later in this chapter, however, I will elaborate on my objections to the type of rhetoric exemplified by the above quotes, but at this point, three observations will suffice:

- These statements are platitudes, with no more precise meaning than "a well-educated citizenry is the first guardian of democracy" or "ask not what your country can do for you, but what you can do for your country."

- They present an exclusive path to development, using phrases like "a government *must* ensure" and "investors *need* to know" and statements that legal systems "are *the* backbone of national economic and social development" without which "no equitable development is possible." They leave no sense that there may be other paths to development other than through an effective, efficient, and fair legal system, and they imply that nothing can happen until these institutions are perfected. There is no acknowledgment of the variety of types of development or the possibility of different sequences within the development process.
- These statements are evangelical. They advocate a course of action based on faith in social perfection, in this instance, a perfect legal system, which in turn produces a transparent and equitable order. There is no room for ideological compromise, no hint that building such a system might be difficult and costly, or that other necessities of development might have to be sacrificed to build it.[7]

The World Bank is by no means alone in this embrace of the new rule-of-law orthodoxy. "The rule of law, not men" is a standard maxim of U.S. politics. Politicians of every stripe repeat it as a mantra, perhaps sincerely, while running on platforms that explicitly promise a political makeover of the current judiciary. Law professors urge the protection of the fragile institution of the rule of law in the face of centuries of political manipulation of the U.S. judiciary. "Rule of men" has the connotation of arbitrariness, corruption, and instability; "rule of law" promises procedural fairness, honesty, and consistency. Justice Antonin Scalia has also weighed in favor of a rule of law that is a "law of rules," as opposed to a more sloppy law that allows "men" to influence outcomes.[8] There is also a general agreement that markets and rule of law go hand in hand. Without the slightest textual basis in the U.S. Constitution, the U.S. Supreme Court has declared that special efforts should be made to preserve economic rights because markets require stability.[9] For other types of rights, stability is apparently less important. Returning to the law and development context, the U.S. Congress has most recently put these sentiments in statutory form in the African Growth and Opportunities Act.[10] In other words, the World Bank and other international development institutions are not plowing new ground; they are simply attempting to put into action some of the central platitudes of U.S. legal and political ideology.

De Soto and the Evils of Informalism

The rhetoric of the rule of law does not emerge solely from Washington sources. It has eloquent advocates elsewhere, the most powerful of whom is Hernando de Soto.[11] De Soto has provided an empirical basis for the assumptions of the World Bank model of the rule of law, but he has done so in a deeply paradoxical way—not by describing the failure of development without law but by describing its triumphs. As such, de Soto provides an extremely revealing example of how the imagined world of the rule of law blinds us to the reality of economy and society and makes it impossible to imagine alternative sources for the stability and fairness that all the participants in this debate desire.

In *The Other Path*, de Soto describes the success of informal elements in Peru's economy in achieving economic growth and social mobility, despite the lack of formal legal protections. He convincingly claims that Peru's official economy had become so encrusted with legal and regulatory formalities that virtually all economic growth within the official sector had ceased. He describes the success of informal actors, usually poor immigrants to Lima from rural areas, in establishing stable systems of production and exchange without rules to define entitlements or formal institutions to settle disputes. Although de Soto sees informality as ultimately limiting growth, he contrasts the vitality of the informal sector with the stagnation of Peru's formal economy.

The phenomena that de Soto describes provide powerful evidence of the possibility of sustained and complex economic activity, at least on an individually small scale, without structure or protection provided by a formal legal system. The lesson more commonly drawn from de Soto's work, however, is that the isolation of poor Peruvians from law has seriously limited their economic opportunities and, in turn, the general economic growth of Peru. Instead of weakening their faith in the need for formal law, de Soto and those influenced by him call for the official recognition of the informal economy and its inclusion within a dramatically restructured formal legal system. They argue that legalization of the rights of those in the informal sector under this new regime would give them greater access to credit and legal protection for large-scale investment.

De Soto envisions a legal system that would operate within a deregulated economy stripped of virtually all of the government intrusion that has stifled the Peruvian economy and outside of which the informal economy flourished. It would be an economy much like that envisioned

by Shihata. The market would allocate resources efficiently through the operation of Adam Smith's invisible hand. Individuals and corporations would have clear property and contract rights that would be more or less seamlessly interpreted and enforced by the courts. Government's role would be limited to responding to instances of market failure.

So far, so good. It would be hard to dispute that vigorous entrepreneurs who have thrived under a thoroughly corrupt regime without any legal rights whatsoever would not do even better under an honest pro-market regime. I may argue that de Soto and his followers are naïve in dreaming the same dreams as Shihata or the U.S. Congress, but that is not what is most perplexing about this school of thought. What is most perplexing is that they have amassed rich empirical data about economic and social success in the real world of corruption and government incompetence and yet appear totally uninterested in the lessons that these data may hold for developing countries. More specifically, they seem uninterested in the possibility that a formal legal system of the type they advocate could stifle growth or that courts would face the apparent conflict between the application of rules and economic growth. Nor do they consider the possibility that the formal legal system they envision could not exist within the context of real-world politics. They seem to assume that those whose interests would suffer from the mechanical operation of the market and the rule of law either would not have legitimate avenues to oppose its operation or would choose not to do so out of an appreciation of the greater good. Also left out of the calculus is any cost-benefit analysis. Even if one assumes that a formal legal system of this type is possible and that it contributes to economic growth, it remains an open question whether it is worth the cost, including of course, the opportunity cost of the financial and human resources necessary to establish and maintain such a system.

However, the apparent disinterest in investigating the practices that have provided social stability and investment security and fostered growth in the informal sector in Peru is the most surprising omission of de Soto and his followers. In seeming defiance of their own evidence, they leave untouched the assumption that productive capitalism cannot develop without formal adjudication, scrupulously enforced contracts, and inviolable property rights. They are not interested in whether the informal practices that supported growth in Lima could be replicated elsewhere or whether they might be superior, at least in a cost-benefit sense, to a formal legal system. De Soto never considers, for example, whether it might be more cost effective to introduce some of the successful informal

mechanisms into the stultified formal sector, instead of formalizing the informal sector.

Equally striking is the failure, not only of de Soto but also more puzzling of Shihata and the World Bank, to investigate examples of informal economic growth in other parts of the world. There is a substantial literature on the possibility of social order and economic growth in the absence of formal law in the United States (and in Japan, which I discuss in the next section), but it is worth noting here the experience of the People's Republic of China (PRC) and the Chinese diaspora.[12] It is difficult to imagine a developing country of any size that has outperformed the PRC economically or socially over the last two decades. China's economy grew on average 9.7 percent from the beginning economic reforms in 1978 to the late 1990s.[13] Nor has China had any difficulty attracting foreign capital, with more than $53 billion in foreign direct investment in 2003 alone. Furthermore, although China is suffering from growing social dislocation, disparities of wealth, and official corruption, its record in these areas is better than that of most developing countries. Most important for our purposes, the PRC has achieved this growth without a legal system worthy of the name. No one would claim that China has had the legal institutions envisioned by the World Bank during most of this period, and yet, except for a series of conferences by the Asian Development Bank, there has been little interest in finding out how this has been done or whether it can be replicated elsewhere.[14]

Nor has the rule-of-law movement paid much attention to the economic success of ethnic minorities. Although this general topic is too extensive to deal with here, the experience of the Chinese in Southeast Asia presents an example of "lawless" growth that is even more striking than China's recent successes. In China, at least the economic growth was legal in the sense of taking place with the approval of the regime; for the overseas Chinese, economic success has frequently taken place in defiance or circumvention of formal legal norms, so much so that one commentator has referred to the Chinese in Malaysia as "guerilla capitalists."[15] Some observers of overseas Chinese capitalism share de Soto's concern that doubtful legal status limits growth and technological innovation, but it is unclear whether these problems arise from legal informality or the constant political uncertainty and racial hostility that the Chinese have faced in most of Southeast Asia. It is clear, however, that the overseas Chinese within these societies have had economic success despite legal uncertainty and that their success has often, if not universally, outpaced that of the ethnic majorities, who have enjoyed full legal protection.[16]

It is possible, of course, that overseas Chinese and the PRC might have enjoyed even greater economic success had they had the advantage of a fully functioning legal system of the World Bank type.[17] Indeed, it may be impossible to argue in the abstract with the desirability of the characteristics and results that Shihata and de Soto ascribe to the rule of law: that contracting parties should be required to perform the substance of their promises or pay compensation, that business people should be able to predict the requirements of licensing procedures and to receive the license when they are able to meet those requirements, or that investors should not be surprised by rule changes that deprive them of a return on their investment or, worse, the value of the investment itself. But even if we assume that these are theoretically attractive attributes, before we conclude that the rule of law should become an immediate goal for developing societies, we must be convinced that it is a possible goal and the benefits of achieving it will be greater than the cost. Rule-of-law building is not worth spending money on unless the imperfect institutions created by such expenditures will have beneficial effects that outweigh their costs and any harm they create. To investigate the possibilities, costs, and varieties of the rule of law, in the next two sections I examine two highly successful economies of the twentieth century—those of the United States and Japan. Through an examination of their legal systems and their relationship to the rule-of-law ideal, we can get a more sophisticated sense of what the role of law is, what it entails, and what alternatives may exist. I start with the United States, the most vigorous advocate and practitioner of the rule-of-law development model.

Myths and Realities of Law and Practice in Developed Countries (I): The United States

The rule-of-law ideal might be summarized as universal rules uniformly applied. It requires a hierarchy of courts staffed by a cadre of professionally trained personnel who are insulated from political or other nonlegal influences. The decision-making process must be rational and predictable by persons trained in law; all legally relevant interests must be acknowledged and adequately represented; the entire system must be funded well enough to attract and retain talented people; and the political branches must respect law's autonomy. To casual observers, the epitome of the rule of law is the United States, and the United States is a leading exponent of the new rule-of-law orthodoxy. When we look

closely at the U.S. legal system, however, we find few of these characteristics.

Rule by Politicized Judges, Not Law

The judiciary is a good place to begin. The U.S. judiciary is permeated by politics, especially when compared with the judiciary in legal systems influenced by the civilian tradition of continental Europe. Most state judges are elected and serve for a term of years. They belong to political parties and are chosen for their allegiance to partisan platforms. If they are not constantly aware of the effect of their important rulings on the electorate and their party's leaders, they will not be reelected, and they will cease to be judges.

The case of Rose Bird, the Chief Justice of the California Supreme Court who was removed from office by California voters for her stubborn opposition to the death penalty, is one of the best-known instances of judges being punished for fidelity to their vision of the law, but more typical is the recent transformation of the Texas judiciary at the hands of competing commercial interests.[18] In the early 1980s, wealthy trial lawyers succeeded in transforming the historically pro-business Texas Supreme Court into an "all-Democratic, lawsuit-friendly court that began upholding enormous jury verdicts against corporate and medical defendants." In response, corporations and doctors struck back and reversed the court's politics, again through partisan elections, so that by the mid-1990s, the winning record of defendants before the court had risen from 40 to 83 percent. By 2000, with a governor running for president as a "compassionate conservative" using his interim appointment powers to portray a picture of moderation, the pendulum had swung back once again toward the center.

All parties to such controversies claim that their position is faithful to the correct interpretation of the law and that their opponents' positions are politically motivated distortions of the law. What is striking about these arguments and vital to understanding the psychological hold of the rule-of-law orthodoxy is that many, if not most, of the participants on both sides sincerely believe that their side alone is being faithful to the letter of the law and that the other side, most charitably put, is mistaken. The sincere belief in these claims and their effectiveness as political tactics does not, however, make them true.

If we move from the state to the federal judiciary, the picture is more complicated but fundamentally similar. Federal judges are appointed,

not elected. They serve for life, subject only to impeachment for egregious misbehavior, and the story of the politically conservative judge becoming a liberal on the bench (or the reverse) is rare. The inspiring stories of life tenure giving judges the security to grow in their jobs or to adhere to principle should not blind us to the reality of the appointment process, however. It is overwhelmingly political, and, the occasional Earl Warren or Hugo Black notwithstanding, federal judges rarely experience substantial conversions. It would be difficult to imagine it otherwise, because they are usually appointed when they are in their fifties, after decades of professional and political activity. Of course the ultimate proof of the infrequency of judicial bench conversions is the role of judicial appointments in federal politics, both during presidential elections and in the relationship between the president, who nominates federal judges, and the Senate, which must confirm them. If judges often acted inconsistently with their prior political views, judicial appointments would not loom so large in political campaigns.

More striking, if less obvious and well known, than the open political behavior of those appointing judges is the political engagement of sitting U.S. judges. Judge Richard Posner of the Court of Appeals for the Seventh Circuit, for example, published a book in 2000 arguing for the prosecution of President Clinton for perjury in the Monica Lewinsky affair while the Office of Independent Counsel was considering that very issue. Although controversial, this action was not generally criticized as crossing the bounds of judicial propriety. Indeed, after the remarkable case of *Bush v. Gore* that decided the 2000 presidential election, several Supreme Court justices took to the road to discuss the decision.

Despite unending proclamations of fidelity to precedent, political neutrality, judicial restraint, and other legal virtues, U.S. judges overwhelmingly follow their political preferences when the opportunity presents itself. As mentioned above, the most powerful evidence of this fact is the amount of attention given to judicial appointments in presidential campaigns and Senate confirmation hearings, but more direct examination of judicial behavior bears out this common-sense observation. A 1993 study by social scientists Jeffrey Segal and Harold Spaeth on the implementation of judicial restraint by Supreme Court justices between 1953 and 1989 serves as an example.[19] The authors studied the voting patterns of justices on the Warren, Burger, and Rehnquist courts in cases involving labor rights, civil liberties, federalism, and economic regulation and compared them with the justices' professed fidelity to judicial restraint. The result was that justices, whether liberal or conservative,

were only restrained when it suited their preexisting political preferences. Otherwise, they found some reason to overcome their devotion to restraint. In a testament to the power of the myth of the apolitical, formalist rule of law, one of the worst "offenders" was Justice Felix Frankfurter, an icon of judicial restraint in the eyes of generations of law professors and students.[20]

Structured Irrationality

It is not just the politicization of the judiciary that contradicts the formalist model. Four fundamental aspects of the structure of the U.S. legal system make the World Bank version of the rule of law literally impossible. First, federalism guarantees, indeed celebrates, national inconsistencies in legal rules and results. Each state enjoys its own legislative and judicial sovereignty, limited only by the supremacy clause of the federal Constitution. As a result, most laws governing commercial or financial activity are state laws and vary throughout the fifty-one jurisdictions. Model codes such as the Uniform Commercial Code substantially reduce the disparities in many areas but do not eliminate them. Nor do they touch the procedural and institutional differences that make "forum shopping" an integral part of much commercial and products liability litigation.

It is not, for example, coincidence that the vast majority of large American corporations are incorporated under the laws of Delaware. Nor is it because most major corporations are headquartered in Delaware. Delaware has triumphed in the interstate competition to attract corporate registration fees and related business because it created a legal regime that most corporations have found more attractive than those found in their states of origin. Far from being condemned by legal scholars or politicians, this type of interstate legislative competition is valued as creating a series of laboratories of legislation on the one hand and preventing states from stifling economic activity by creating legal regimes less favorable to corporations on the other.

The second structural aspect of the U.S. legal system that deviates substantially from the rule-of-law orthodoxy is the jury system. As with federalism, there are myriad reasons why one might want a jury system, particularly in criminal trials, but fidelity to the rule of law is not one of them. Whether one defines the rule of law as the rational application of rules to facts or more abstractly as the rule of law, not men, juries simply do not fit. Juries are in theory limited to deciding questions of fact and are generally prohibited from relying on their own interpretation of

legal rules. Even if the distinction between law and fact were clear—and dozens of scholarly careers have been made disputing that point—it is quite likely that many juries do not even understand the law that they are to apply.

This lack of understanding has nothing to do with intelligence or good will. It is structural and, at least in that sense, intentional. Lawyers spend three postgraduate years learning the techniques necessary to analyzing, interpreting, and applying legal rules in a professionally acceptable manner. Judges usually have decades of practice honing these skills. To expect a jury to understand legal rules in the same way and depth just because a judge patiently explains them borders on the fantastic. A jury may well have a good, common-sense understanding of the judge's instructions, and hence a good, common-sense understanding of the legal rules, but it is imperative to note that a common-sense understanding of the law is most definitely not what is required by the rule of law. Common sense varies from person to person and context to context; it is not a sound basis for the rule of law, however defined. Indeed, the supposedly "common-sense" decision making of the anthropological stalwart village elder or neighborhood boss is precisely the image against which the rule of law is most frequently contrasted. If one argues for a common-sense application of the law, one is arguing against the rule of law.

The third structural aspect of the U.S. legal system that leads to deviations from the rule-of-law orthodoxy is its system of civil procedure, specifically the adversary system. Here there are two aspects that deviate from fidelity to rules: the lawyers' obligations to their clients and the passive role of judges. Ethical rules require lawyers to represent their clients zealously, to keep virtually all information received from clients confidential, including information of illegal acts, to work to discredit the opposing party's evidence regardless of its truth, and, perhaps summing up the result of all the other duties, to give their primary loyalty to their client, not to truth or law.

As with federalism and juries, there are powerful arguments for requiring attorneys to give their primary loyalty to their clients. Many of these, however, relate to political theory, rather than the rule of law as defined as an accurate mechanism for the uniform application of rules to facts. It is true that many attorneys and law professors defend adversarial procedures by arguing that zealous advocacy by two equally talented partisans is the best path to truth. Even if one accepts this position in theory, the social reality is that opposing sides are rarely represented by equally talented lawyers with equal resources. All too often

one side has vastly more talent and money than the other, so much so that the weaker party is not likely even to bring the matter to litigation, much less win if it did.

One might expect in instances in which one party has markedly greater resources or a clearly more effective attorney that the judge would have an obligation to step in to correct the imbalance. Such is not the case in common law legal systems, in which the judge plays a role more akin to a referee than to a seeker or guarantor of justice or fidelity to rules. The judge is not ethically required to redress inequalities of resources, talent, or dedication that threaten to lead to inaccuracy or injustice. Nor is he or she to structure the trial so that truth will emerge or prevent an advocate from misleading the jury with a deceptive cross examination that remains within the bounds of legitimate zealousness. The judge's role is to create a space where the opposing lawyers can compete, within the rules to be sure, but with their primary obligations to their clients, not to the law. Then, at the end of the competition between frequently mismatched lawyers, the judge turns the result over to a group of citizens whose legal education is usually limited to television shows.[21]

A final anomaly of the U.S. legal system as an exemplar of the new rule-of-law orthodoxy is the extreme reluctance on the part of federal or state governments to make the law available to people with little or no means.[22] Perhaps the most fundamental norm of the rule-of-law ideal is the uniform application of the law, without which the universality of norms, their rationality, indeed their substantive content, mean nothing. Society will not reflect the benefits of the rule of law if the rules are not enforced evenhandedly or if one side to a dispute does not have the resources to bring the matter to the attention of the law. Despite the simplicity of this concept, the U.S. government has never devoted even a fraction of the resources necessary to ensure that the poor have access to the courts. In recent decades, the United States, for example, spent approximately one-ninth as much per capita on civil legal services for lower-income persons as England.[23] The implication is that the uniform application of law is not important enough to spend significant resources on, which is a policy judgment that seems unlikely if Americans were as convinced as Shihata and de Soto that the rule of law is indispensable to economic growth or stability.

Legitimately Politicized Institution

The above discussion is intended to convince the reader that the U.S. legal system is a thoroughly and intentionally politicized institution. It

is emphatically not intended to portray the legal system as in any way illegitimate, ineffective, or undeserving of political or intellectual support. It is important in this context to remember several aspects about politics. Politicization is not equivalent to corruption. Also, politics is the lifeblood of all regimes, especially democratic ones. Unfortunately, the rule-of-law orthodoxy equates politics with corruption. Law and judging are supposedly clean, procedurally transparent, and stable; politics is dirty, procedurally opaque, and chaotic. Consequently, the sins of corrupt judges in developing countries and elsewhere are conceived of as the result of political interference, and an "independent judiciary" is defined as one free of any political influence, without any consideration of whether such a judiciary is even possible or advisable. Instead of this focus on the depoliticization of the judiciary, international financial institutions and other international purveyors of the new rule-of-law orthodoxy should be concerned with the judiciary's legitimacy and effectiveness, not its political purity.

The question then becomes not whether courts play a political role but how that role is structured and managed. In the United States, it appears to be handled very well. Politics in the U.S. judiciary has not led to the "telephone justice" of Russia, where the judges sometimes change their minds at the order of a politician, or the "local protectionism" of China, where the courts favor local enterprises because local governments control their budgets. U.S. justice is a deeply institutionalized form of politics that operates over relatively long time spans—either the terms of elected state judges or the political cycles of presidentially appointed federal ones. More fundamentally, it operates within a very narrow political spectrum. The difference between Democrats and Republicans is tiny compared with the differences among political interests in many other countries, and judges, whether elected at the state level or appointed at the federal, are likely to be moderates within their parties. In most U.S. jurisdictions, it is also true that parties rotate in power, so that the judiciary is not totally dominated by one party or one political view.

Important consequences flow from political stability. Because judges' political preferences are concentrated at the middle of the political spectrum, their socialization to their roles as judges, although superficial compared with civil law countries such as Japan, is more successful in overcoming personal preferences than it would be if political differences among them or within society were more dramatic. Equally important, most cases will not pose issues that appear political to most judges. As opposed to persons at more extreme ends of the political spectrum, they

accept the legitimacy of both positions in the vast majority of cases brought before them. The result is a stability of doctrine that appears like "the rule of law" but owes more to the political stability of the United States than to the political independence of the U.S. judiciary.

The difference between U.S. judges on the one hand and Russian or Chinese judges on the other, therefore, is more complicated than might first appear. If the "telephone justice" of Russia is motivated by a financial interest in one of the litigants' success, the issue is one of corruption and is distinct from questions of the neutrality of the judiciary, politics, or the rule of law. For example, corrupt Russian judges who affirm the decision of a corrupt bureaucrat are more like that bureaucrat than they are like an honest judge. If, however, judges decide for one litigant over the other because they are convinced that that decision is better for society and will strengthen their political allies, then the comparison with U.S. judges becomes more a matter of degree and institutional style than one of principle. Similarly, if Chinese judges decide for a local litigant because otherwise their budget will be reduced or they will not be able to get desirable housing, this is corruption, and it is the equivalent of a bureaucrat denying a license because the licensee would compete with local industry. If, however, the conference of judges within the particular court discusses the case and decides that one result is more consistent with the guidelines set out by the National People's Congress as interpreted by the Chinese Communist Party, then we again have an institution that is comparable to U.S. courts and particularly to appellate courts, where negotiated, collegial decisions are the norm and where political preferences are arguably even clearer than at the trial level.

This discussion may seem both shocking and wildly implausible. How could the Russian or Chinese judiciaries be compared to the American? I agree that the U.S. legal system is incomparably better, but the reason is not that the U.S. judiciary is independent of politics and the Chinese and Russians are enmeshed in it. It is that the Chinese and Russian judges are much more likely to be corrupt, to be part of corrupt institutions, and to be so poorly paid and educated that resisting corruption simply does not make practical sense. Although this distinction may make little difference if you are a politically naïve and unconnected litigant—as most foreign enterprises or financial institutions are likely to be—it makes a great deal of difference if one is prescribing a formula for China or Russia to use in building an effective judiciary.

Myths and Realities of Law and Practice in Developed Countries (II): Japan

One would think that postwar Japan would be an obvious model for the rule-of-law movement. Japan was the first non-Western economy to develop, it did so relatively quickly, and it did so under a democratic regime. To my knowledge, however, legal reformers seldom consult the Japanese experience. A possible reason is lack of knowledge about Japan, but rule-of-law advocates are not generally known for letting a lack of local knowledge stop them from advising on appropriate strategies. A more likely explanation is the institutional structure of the movement, particularly its fragmentation into national factions. A U.S. aid organization is not likely to approve a contract for the dissemination of the Japanese model. Perhaps most important, however, is the general sense, often encouraged by the Japanese themselves, that Japan is culturally unique and that whatever happens there is of little practical use to others. Closely related is the argument that consulting Japan's legal experience would be worthless because Japanese life is hardly affected by law, that law is irrelevant to most Japanese and disfavored as a means of dispute resolution, and that the Japanese economy is ruled by powerful bureaucrats unhindered by legal restrictions.

I agree that law has played a less visible role in Japan than in the United States but not for the cultural reasons assumed. Much of this conventional wisdom is either exaggerated or simplistic, and I will try briefly to correct some of these misunderstandings in the next section.[24] My purpose here, however, is not to argue that Japan should be a model for legal development, although I see no reason why Japan should be less relevant than the United States. My primary point here is that the Japanese experience stands, as does the American, in sharp contrast to the assumptions of the rule-of-law development discourse.

Inadequacy of a Cultural Explanation

In the Middle Ages, when the English were still throwing litigants into rivers to see if they would float, Japan had developed a legal system to adjudicate competing land claims that valued procedural regularity, the right to confront hostile witnesses, and objective third-party adjudication based on evidence instead of magic or divine ritual.[25] Even during the Tokugawa period (1600 to 1867), seen largely as the heyday of neo-Confucian authoritarianism and the flat prohibition of the legal profession,

formal legal institutions were overloaded with lawsuits, legal advice was a significant industry, and legal justice was not impossible for even the most downtrodden. By number of cases, commercial matters and debt collection cases dominated, but the courts were used for disputes concerning property rights and personal status as well.

Law continued to play a significant role in the eighty years of Imperial Japan, and not solely as a superficial ornament borrowed from the West. Legal rules and litigation to enforce them became an important tool in defending privilege and challenging it.[26] Landlords exploited their rights under the civil code, demanding rent legally, although perhaps not morally, due, and tenants sued landlords for overreaching. Husbands exercised their rights to quick and simple divorce, and wives countered with suits for damages suffered because of their husbands' adultery. Contracting parties sued each other for default, and neighbors sued each other for irritating and harassing land use practices. Lawyers were numerous, litigation was common, and the results were not always to the liking of the political elite. The one exception was litigation against the government, especially any direct challenge to the legality of government action. There the courts were more circumspect. Some courts provided relief in the nature of torts, but success against the government in administrative cases was rare.

The leading politicians within the Imperial Diet reacted to this blossoming of legal activity with horror. By the 1920s, they were passing progressively harsher statutes to restrict litigation and protect the "beautiful customs" of Japan's imaginary past from the corrupting influences of law, individualism, and modernity, but to little avail. Eventually the onset of militarism brought litigation rates, and not incidentally the number of lawyers, down drastically, but it was not until the advent of postwar democracy that the government's efforts bore fruit in a more conventional sense. The number of lawyers relative to population or gross national product plummeted through the simple device of a legal limitation on their number. For most of the second half of the twentieth century, the government simply set the maximum annual production of legal professionals, including judges and procurators, at five hundred. The result was dramatic but entirely predictable. The number of lawyers in the country actually shrank from the 1930s to the 1960s despite significant population growth in those years.[27] The number of attorneys rose slowly but steadily thereafter and by 1995 had more than doubled in absolute numbers, although the increase in per capita terms was significantly less. Litigation rates are harder to characterize, but by one count

they dropped by 75 percent between 1883 and 1990.[28] The absolute number of cases, as opposed to per capita rates, varied during that period, ebbing and flowing in rough but clear positive correlation with economic recessions. The number of judges and procurators remained virtually constant from the immediate postwar period through the 1990s.

What is remarkable about this shrinking of the legal sector is that it occurred at a time of rapid economic expansion and demographic dislocation. That is well illustrated by the share of the national budget spent on the court system, which went from an already low 0.91 percent in 1955 to an infinitesimally small 0.36 percent in 1999.[29] Also striking is the fact that from 1950 to 1970, the percentage of Japanese living in cities practically doubled, presumably increasing the need for the social ordering of formal law.[30] Put simply but accurately, during the very same period that the economy boomed and society underwent substantial changes, the number of legal professionals per capita declined, the litigation rate fell, and the size of the formal legal system relative to the economy shrank substantially. It is difficult to exaggerate the importance of the juxtaposition of these phenomena to the topic of this chapter. If formal legal institutions were necessary for either social order or economic growth or even just weakly associated with it, one would expect the de-emphasis of formal law to have hindered growth. Instead, in Japan a shrinkage of legal institutions is positively correlated with growth, although no causal connection—that the lack of attention to formal legal institutions created growth—can be proved.

Regulatory Environment

How could the Japanese economy have flourished in the face of a set of formal legal institutions that were steadily shrinking in relationship to the level of economic activity, social change, and population? Although rule-of-law advocates would not argue that economic policy should be governed by courts and policy decisions made through litigation, an important tenet of the rule-of-law orthodoxy is that there should be a clear separation between private and public in the economy. In Japan, however, a legally established and maintained system of private incentives is not the dominant explanation for the rapid economic growth over the last fifty years.

Although there are forceful exceptions, the conventional explanation is that the Japanese economy developed under the strong guidance of a dedicated and talented cadre of powerful central governmental

bureaucrats that created what has become known as the developmental state.[31] In this world, the bureaucrats of the Ministry of International Trade and Industry (MITI) and the Ministry of Finance (MOF) decided where Japan's resources should be invested. In the argot of industrial policy, they picked winners and then did their best to make sure their choices were correct. The market played a crucial but passive role; it was there to ratify MITI's choices and to reward the winners, but it did not allocate investment resources as assumed by economists. On the contrary, according to this view, the market had to be bypassed and distorted both to provide emerging sectors the necessary resources and to provide a soft landing for the losers. For the proponents of the developmental state model of Japan, the law played virtually no role.

The accuracy of this characterization of the Japanese state and economy is strongly debated, with a major focus being the role of the bureaucrats and whether they deserve credit for Japan's success or whether they acted at the behest and under the control of Japanese politicians. Although potentially crucial for a general model of development and the question of the relative roles of democracy and expertise, this issue is not central to our immediate purposes. In fact, I would argue that these two viewpoints underestimate the role of private third parties in the formation and implementation of economic policy.[32] Whether Japanese bureaucrats acted on their own, as agents of elected politicians, or in cooperation with the private sector, the crucial point is that they largely acted outside of the formal legal system and were unaffected by it. Again, it is important to note that I do not mean that they deprived individuals or corporations of property or profits, although this did happen on occasion.[33] My point is that economic policy was discussed, formed, and implemented largely through informal mechanisms that were consciously shielded from the interference of the formal legal system.

The administrative actors in this process were MITI and the MOF, for industrial and financial policy, respectively, and whatever other ministries were involved in a particular question. The private actors were the trade associations of the involved industry or some similar ad hoc group, in some cases bridging two or more affected industries or sectors. The implementing agents were most frequently cartels, facilitated by MITI but directly enforced by the trade associations. These cartels were sometimes legal, formally approved by MITI or the Fair Trade Commission (FTC). At other times, the cartels were legally informal, created through consultation between the industry and MITI, sometimes with the

understanding of the FTC, sometimes without. On rare occasions, the FTC would object to a cartel's formation or attack an existing one.

What was almost completely missing during the entire postwar period through the 1980s was intervention by the courts in the implementation of economic policy on behalf of private parties. Individual banks undoubtedly chafed under some of the restrictions of the MOF, and industrial firms certainly disagreed with the cartel allocations of MITI and trade associations and with the need for cartels in general. Disagreements led to fierce and bitter battles among the players in a given industrial field, but they rarely took their grievances public and even less frequently to the courts. In fact, those few times when firms went public, much less litigated, became legends known by nicknames like "the Naphtha War," the "Lions Oil Incident," and the "Sumitomo Metals Incident" and are recounted in the popular media in the breathless terms usually reserved for sports or soap operas.

In short, it is hard to argue that the regulation of the Japanese economy for the first three to four decades of the postwar period had many of the institutional characteristics called for by the rule-of-law orthodoxy. Yet it would be equally difficult to argue that the Japanese system was not successful, not only in achieving economic growth but also in preserving civil order and a high degree of social justice. Although this chapter is not the place to discuss in depth the factors that made this possible, a few are worth mentioning. First, the actors involved in economic policy formation and implementation were stable institutions staffed by dedicated and competent private and public bureaucrats. Whether it was the corporations themselves, the trade associations that represented them, or the ministries that had responsibility for their regulation, their staffs were well educated and trained and usually stayed at or close to the institution for their entire career. Second, there were pervasive and institutionalized means of communication between the public and private institutions. The most famous is the *amakudari* (descent from heaven) system—the process through which top ministry bureaucrats received senior management positions in the private sector upon retirement from public service. There was also informal interaction on an almost daily basis between regulated and regulator. Third, there was little direct corruption in the public sector. *Amakudari* might be interpreted as a form of corruption, but its effect was indirect and in any case far from the massive and explicit corruption of many public bureaucracies. Fourth, the politicians and the voters behind them always had a veto power if policy failed disastrously or important interests were ignored.[34] Fifth, in some

big disputes between economic powerholders and victims of their predatory practices, the courts intervened at crucial times and provided an outside limit to the flexibility and arrogance of the insiders. Finally, as we see in the next section, these regulatory institutions existed within a society where most conflict was handled by informal mechanisms consciously created to channel it away from the courts and other public institutions that might bring it into the public sphere.

Dispute Resolution

Japan has managed conflict that fell outside of the regulatory context described above through myriad informal mechanisms generally lumped under the rubric of alternative dispute resolution. Japan is rightfully renowned for such devices, but it will suffice here to look briefly at two instances: one in the politically charged area of environmental disputes and the other in the routine area of automobile accidents. They will give us some sense of the way that Japan has dealt with the inevitable social dislocation of economic growth without a legal system that fits the rule-of-law development model.

Prior to the current decade-long recession, perhaps the greatest social crisis faced by Japan in the postwar period was the environmental degradation of the 1950s and 1960s. The Japanese government was unable to respond decisively to pollution, despite clear evidence that unrestrained industrialization was destroying Japan's social fabric. The postwar pro-development consensus made protest unpopular, and pollution victims had few allies in the Diet or the powerful ministries. Opposition parties were able to control many local governments but unable to take effective action.

In the end, it was a litigation campaign that broke the political logjam and forced the central government to respond. The result was effective and comprehensive regulation of industrial pollution that was stricter than that of the U.S. and most of Europe, including schemes for the compensation of pollution victims that for a time were considered models for the rest of the developed world. What interests us here, however, is the mode that Japan chose to deal with environmental disputes subsequent to that era. Despite the demonstrated success of tort litigation in exposing and redressing pollution, the Japanese government explicitly rejected using the legal system for future conflict. Instead it established bureaucratically managed compensation and mediation schemes to channel disputes out of the courts.

The environmental dispute system was a direct response to a political crisis, but it is representative of similar informal systems that cover virtually every field of social interaction conceivable in a modern polity. From divorce or adoption to human rights or employment, there is a government-created conflict resolution scheme ready for potential litigants. They range from conciliation attached to family courts to local human rights committees under local government supervision. Many casual observers of Japan attribute these devices to a cultural preference among the Japanese for harmony and consensus over the divisiveness of litigation. Others see a political conspiracy to use references to culture and tradition to keep political issues out of the courts, where they may escape elite control. Undoubtedly both views have some currency: There are historical antecedents for mediation in the Tokugawa period, and the political advantage of bureaucratically administered mediation is clear. What is of interest to us, however, is the success of these devices in managing social conflict without direct resort to the formal legal system.

Traffic accidents provide an excellent example of how this has been achieved in Japan. As Tanase Takao, a leading Japanese sociologist of law, put it:

> [W]hile in the United States, except in minor injuries, people routinely bring their claims to lawyers, in Japan nearly all the injured parties handle compensation disputes themselves without the aid of lawyers. Only when they encounter extraordinary difficulty and feel that, as a very last resort, they will have to use the court, do the Japanese ask the help of lawyers.[35]

In his account, less than one percent of total accidents end up in court and no more than two percent involve private attorneys at any stage. For those who believe that harmonious dispute resolution is the natural result of Japanese culture, it is striking that such was not always the case. Litigation was common in the 1960s and peaked in 1971. Thereafter, the government, the police, insurance companies, bar associations, and the courts took measures that reduced the number of absolute cases by two-thirds in a decade. It is not necessary to go into the details of how this was accomplished, but it is important to note that there was nothing spontaneous or uniquely Japanese about the process. On the contrary, it was carefully structured to provide adequate compensation to accident victims without the expense of the formal legal process. Nor was it developed without attention to legal rules. A key aspect of the process is

the provision of free legal consultation by police, insurance companies, and even bar associations, but the emphasis in these consultations is on the ability of the parties to handle the vast majority of accident claims without litigation or professional involvement. The judiciary played a role by carefully and consistently simplifying liability rules and compensation formulas, a task well suited to the Japanese judiciary because it more closely resembles a tightly controlled and regimented bureaucracy than does its U.S. counterpart.

As is implied by the involvement of the bar and the judiciary in the automobile accident scheme, legal institutions can play important supporting and enabling roles in Japan's informal dispute resolution mechanisms. Family court conciliation is another such example, although in this instance the goal has often been the processing of complaints rather than even rough fidelity to legal rights. In other areas, especially those under the jurisdiction or policy sphere of particular ministries, processes are conducted with considerably less involvement of legal rules, institutions, or personnel. The common denominator for all dispute procedures, however, is a concerted and largely successful effort to avoid the cost and formality of litigation; and, to this extent, informal mechanisms such as these and similar ones in every developed country may be a more attractive route for developing countries to pursue than relying on the creation of a full-blown "rule-of-law" legal system. Again, it is necessary to stress that these systems have not arisen spontaneously from the depths of Japanese culture but were specifically designed by the government to discourage parties from litigation. They are not, in other words, uniquely Japanese; nor do they depend on a culturally submissive population ready to compromise its interests in the name of harmony. They may depend, however, on a degree of internal social cohesion that many developing countries do not currently have. Even more important, they clearly require an effective bureaucracy, another state institution that is in short supply in much of the world. Even so, informality may still be preferable to the formality of a rule-of-law judiciary, which is at least equally dependent on social conditions and vastly more expensive.

Implications for Developing Countries

Both the formal legal mechanisms of the United States and the largely informal mechanisms of Japan have served these two societies well in the period under review, despite deviating from what the new rule-of-law orthodoxy would assume is necessary for economic growth.[36] What lessons do these two examples have for contemporary developing countries?

The first and most important lesson may be that neither the Japanese nor the U.S. legal system is likely to provide a useful model for other societies. The U.S. legal system deviates substantially from the rule-of-law ideal; it is massively expensive in terms of human capital, as well as in purely financial terms; and its primary features are at least as attributable to political goals, ideals, and compromises as they are to efforts to promote economic growth. The Japanese system was certainly created with economic growth in mind and has operated with that goal foremost, but the institutional requirements of the Japanese system seem almost as historically dependent as the American. The relatively balanced interaction of political, governmental, and private institutions, each component of which was characterized by competence and stability, seems more suitable as a goal of development efforts than the means.

Furthermore, each system has substantial flaws. The details of the U.S. legal system are as likely to be cited as a politically created impediment to economic efficiency than as a foundation for it. Indeed, the Japanese government has repeatedly claimed that the U.S. legal system is so ineffective and unfair that it constitutes a nontariff trade barrier. The Japanese system is also currently under siege, blamed for contributing to the decade-long recession that has tarnished the country's economic "miracle." Indeed, it could be argued that the very institutions that served Japan so well while it was a fast-growing economy are no longer suitable now that it is a mature one.

A second lesson is that the creation of a formal rule-of-law system of the type advocated by adherents of the new rule-of-law orthodoxy may well not be worth the cost. As I have argued, even the United States, the country most insistent on the virtues of the rule of law for developing countries, has chosen to depart from the model in fundamental ways, and Japan was able to grow economically with a relatively shrinking legal sector. If these societies grew without a formalist rule of law, why should a developing country consider it a necessity? Of course, this does not mean that the protection of basic rights is not necessary. Nor does it mean that an effective formal legal system may not be politically desirable or that political stability may not be a prerequisite to growth, but it does not appear that the formalist rule of law has been a major immediate factor in economic growth in these two countries. In fact, if one had

to choose, it would be the informal systems of Japan that would seem most useful to developing countries. One would urge caution, therefore, before recommending that a developing country divert significant resources from more directly productive activities or, more important, attempt to replace effective and inexpensive means of social order with any formalist rule of law.

The last point—that legal transplants may displace indigenous institutions—deserves elaboration. The cost of importing a formalist legal system is not solely the expense of courthouses and legal education or the diversion of human talent into the legal profession. A more important cost is the risk to existing informal means of social order, without which no legal system can succeed. Although it is highly unlikely that the transplanted system will operate as it did in its country of origin or as intended by the borrowing country, it does not follow that it will have no social effect.[37] A legal system provides a powerful set of resources, and those who see themselves as benefited will use such resources to their own advantage. That is, of course, precisely what the creators of a legal system wish for. But if the social context of a legal system is not able to support the individual exercise of rights or if the incentives governing the use of the resources are not finely calibrated, the results can be far from those intended. In other words, unless the creators of the legal system get it exactly right, unexpected consequences will occur. In a mature system, established institutions can deal with negative consequences. However, in countries with new legal systems, especially ones imposed or imported from abroad, preexisting institutions often lack the experience, expertise, and, most seriously, political legitimacy necessary to deal with unforeseen consequences of reform. Legal anarchy can result in a society that has a new, formal legal system but lacks the social capital, institutions, and discipline to make use of it.

The reason that advocates of the new rule-of-law orthodoxy are willing to take this risk, in my opinion, is that they view the rule of law as an indicator of social development.[38] Such advocates hold a relatively unvarying vision of the end product of legal reform efforts, without requisite attention to the social, cultural, economic, and political contexts within which such efforts take place. Legal systems are so complex and so intertwined with these contexts that the chances of large-scale legal transplantation performing in the way intended, especially right off the bat, are slim. Because the reformers are focusing on the expected result—the formalist rule of law—rather than the new institutions' interaction with the social context, it is difficult for them to perceive problems and react

effectively to the inevitable surprises, which are certain to arise, particularly if contextual factors are ignored.

I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries. Indeed, some have argued that legal transplants are the main source of legal change, not only in the developing world, but everywhere. It would be foolish and futile to argue against it, and it would mean arguing against transnational legal learning. My point is a much more limited one and one that seems self-evident to most students of the actual role of law in society. A legal system is too complicated to be planned from the top down. Any group of competent legal scholars with the necessary audacity could devise a formal legal system that would work well on paper, making the various assumptions about human behavior, institutional capacity, and incentive structures necessary to implement their worldview.

Unfortunately this exercise is akin to what the planners of the former Soviet Union did with their economy. I doubt that we can expect any greater success from the proponents of the new rule-of-law orthodoxy. The problem with centralized economic planning, after all, was not that the planners were stupid, ignorant, or corrupt; it was that an economy is too complicated to be effectively directed over the long term by a central authority. The design of a legal system faces the same issues. Even if the assumptions about human behavior are correct, the knowledge of social context is insufficient to calibrate perfect rules, and the legal institutions are too weak to implement them on their own. As Robert Putnam has eloquently demonstrated about Italy, legal rules do not operate in a social vacuum. Identical rules can exist in dramatically divergent societies.[39] The secret to legal borrowing and to legal reform in general, therefore, is not merely attention to the foreign model or the institutional goal; it must include close attention to, genuine respect for, and detailed knowledge of the conditions of the receiving society and its preexisting mechanisms of social order.

Notes

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1. The record of externally imposed law reform is dismal. For recent commentary on Russian failures, see Merritt B. Fox and Michael Heller, "Corporate Governance Lessons from Russian Enterprise Fiascoes," *New York University Law Review* 75, no. 6 (December 2000): 1720–80. For more comprehensive accounts, see Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, D.C.: Carnegie Endowment for International Peace, 1999); and Yves Dezalay and Bryant Garth, *The*

Internationalization of Palace Wars: Lawyers, Economists, and the International Reconstruction of National States (Chicago: Chicago University Press, 2002). For a human rights perspective, see Lawyers Committee for Human Rights, *Building on Quicksand: The Collapse of the World Bank's Judicial Reform Project in Peru* (New York: Lawyers Committee for Human Rights, 2000).

2. There are excellent studies of past experience, such as Kevin Davis and Michael Trebilcock, "What Role Do Legal Institutions Play in Development?" draft prepared for the IMF Conference on Second Generation Reforms, Washington, D.C., November 8–9, 1999, but they do not yet rise to the level of accepted guides for lending institutions.
3. Ibrahim F. I. Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members," in *The World Bank in a Changing World* 1, ed. Franziska Tschofen and Antonio R. Parra (Boston: Martinus Nijhoff, 1991), 85. For similar ideas, see Edgardo Boeninger, "Governance and Development: Issues and Constraints"; Pierre Landell-Mills and Ismaïl Serageldin, "Governance and the External Factor"; and Denis-Constant Martin, "The Cultural Dimensions of Governance," in *Proceedings of the World Bank Annual Conference on Development* (Washington, D.C.: World Bank, 1991), 267; and Clive S. Gray, "Reform of the Legal, Regulatory, and Judicial Environment: What Importance for Development Strategy?" Development Discussion Paper no. 403 (Cambridge, MA: Harvard Institute for International Development, September 1991).
4. Available at www1.worldbank.org/legal/legop_judicial.html.
5. James D. Wolfensohn, then president of the World Bank, quoted from the World Bank's Comprehensive Development Framework, available at www.worldbank.org/legal/ljrconference.html.
6. Available at www4.worldbank.org/legal/legps.html.
7. For a description of this urge for order across subject matters and ages, see James C. Scott, *Seeing Like a State: How Certain Themes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).
8. Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (Fall 1989): 11754–88.
9. Six justices—Rehnquist, Kennedy, O'Connor, Scalia, Souter, and White—agreed that "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . ." *Lawyer's Edition* (2nd) 115 (1996): 737.
10. Available at the African Growth and Opportunities Act web site: www.agoa.gov/About_AGOA/agoatext.pdf.
11. Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World*, trans. June Abbott (New York: Harper & Row, 1989). De Soto has since written a sequel, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000). Although significantly more sophisticated in its description of the nature and role of property rights in the informal economy, his emphasis on the importance of formal legal institutions remains fundamentally unchanged.
12. For literature on the United States, see Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).
13. Official Chinese government date, reported by the World Bank, *World Development Report* (New York: Oxford University Press, various years).
14. The failure to investigate has not been total. See Katharina Pistor and Philip Wellons, *Role of Law and Legal Institutions in Asian Economic Development, 1960–1995* (Manila: Asian Development Bank, 1998).
15. K. S. Jomo, "A Specific Idiom of Chinese Capitalism in Southeast Asia: Sino-Malaysian Capital Accumulation in the Face of State Hostility," in *Essential Outsiders: Chinese and Jews in the Modern Transformation of Southeast Asia and Central Europe*, ed. Daniel Chirot and Anthony Reed (Seattle: University of Washington Press, 1997), 237–57.
16. Gary G. Hamilton and Tony Waters, "Ethnicity and Capitalist Development: The Changing Role of Chinese in Thailand," in Chirot and Reed, *Essential Outsiders*, 258–84.
17. It is also possible that minority status, if not illegality, was instrumental in the success of overseas Chinese. For several reasons why minorities may be culturally and structurally advantaged in economic activities, see Hamilton and Waters, "Ethnicity and Capitalist Development."
18. Jim Yardley, "Bush's Choices for Court Seen as Moderates," *New York Times*, July 9, 2000, A1. Also representative are William Glaberson, "Fierce Campaigns Signal a New Era for State Courts," *New York Times*, June 5, 2000, A1; and Kevin Sack, "Judge Trades on Renown in Race," *New York Times*, June 5, 2000, A22.
19. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993). See also Jonathan D. Casper, "The Supreme Court and National Policy Making," *American Political Science Review* 70, no. 1 (March 1976): 50–63; and Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," *Journal of Public Law* 6 (1958): 279–95.
20. Segal and Spaeth, *Supreme Court*, 316–9. Segal and Spaeth discovered a number of other interesting surprises. For example, despite the rhetoric of state sovereignty and federalism, justices were less deferential to state government decisions than to those of the federal government, p. 311.
21. The reader should not take from this comment any bias against television dramas. As indicated in the text, the television version of law may have a great deal more to do with common concepts of the rule of law than does the professional version.
22. I am referring here to civil cases only. Legal representation is provided to criminal defendants, although with varying degrees of success. Civil cases are of more direct interest to the present topic, because civil law largely shapes the economy and provides the framework that economic actors rely on for their activities. For a comparison of U.S. provision of civil legal services with those of European countries, see the symposium issue of the *Maryland Journal of Contemporary Legal Issues* 5, no. 2 (1994). Statistics in this chapter are drawn from Earl Johnson Jr., "Toward Equal Justice: Where the United States Stands Two Decades Later," *Maryland Journal of Contemporary Legal Issues* 5, no. 2 (1994): 199.
23. The comparisons with some of the other North Atlantic societies were better, but the United States was still outspent by a factor of 2.5:1 by France and Germany, the next lowest two countries on the list of per capita expense. Johnson, "Toward Equal Justice," 212. Japan, however, through the 1990s spent even less than the United States.
24. It is also outdated and more representative of the first three decades of the postwar period than of the last two, but because we are concerned primarily with Japan's period of high growth, the outdated nature of these assertions is largely irrelevant to us.
25. The reference is to the *shiki* system of land rights adjudication developed during the Kamakura period. See Jeffrey Mass, *The Development of Kamakura Rule, 1180–1250* (Stanford, CA: Stanford University Press, 1979). For discussions of the role of law and legal institutions in later periods of Japanese history, see, for example, Frank K. Upham, "Weak Legal Consciousness as Invented Tradition," in *Mirror of Modernity: Invented Traditions of Modern Japan*, ed. Stephen Vlastos (Berkeley: University of California Press, 1998), 48–64; and Herman Ooms, *Tokugawa Village Practice: Class, Status, Power, Law* (Berkeley: University of California Press, 1996).
26. Sources include J. Mark Ramseyer, *Odd Markets in Japanese History: Law and Economic Growth* (New York: Cambridge University Press, 1996); and John O. Haley, "The Politics of Informal Justice: The Japanese Experience, 1922-1942," in *The Politics of Informal Justice* 2, ed. Richard Abel (New York: Academic Press, 1982), 125–47.

27. The precise figure was 7,136. Dan Fenno Henderson, "The Role of Lawyers in Japan," in *Japan: Economic Success and Legal System*, ed. Harald Baum (Berlin: Walter de Gruyter, 1997), 40.
28. I cite these statistics for dramatic purposes only. Comparing lawsuits is as good an illustration of the adage, "lies, damn lies, and statistics," that I know, especially when the comparison crosses eras or jurisdictional borders. The most recent attempt to evaluate Japanese litigiousness that I know of is Christian Wollschläger, "Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics," in Baum, *Japan*, 89–142. The figures for the 75 percent drop come from Wollschläger, figure 1, p. 94. The specific figures are virtually meaningless, but they express both the direction and degree of litigation rates.
29. Curtis Milhaupt and Mark West, "Law's Dominion and the Market for Legal Elites in Japan," unpublished paper.
30. Japan Access, "The High Growth Era," Mainichi Interactive, available at www.jinjapan.org/access/economy/grow.html.
31. Chalmers Johnson, *MITI and the Japanese Miracle* (Stanford, CA: Stanford University Press, 1982) is the classic. Ironically, Johnson and his followers are known as revisionists, but within Japanese studies, both of the academic and popular varieties, it is those who argue that economic orthodoxy works as well with Japan as with anywhere else that are the outsiders. A prominent example of this heterodoxy is J. Mark Ramseyer and Frances McCall Rosenbluth, *Japan's Political Marketplace* (Cambridge, MA: Harvard University Press, 1993).
32. Frank K. Upham, "Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective," *Fordham International Law Journal* 20, no. 2 (December 1997): 396–511.
33. Frank K. Upham, "The Man Who Would Import: A Cautionary Tale about Bucking the System in Japan," *Journal of Japanese Studies* 17, no. 2 (Summer 1991): 323–43.
34. The seemingly total failure of financial policy throughout the 1990s and the political turmoil that followed may be illustrative of this democratic oversight, although the changes in electoral rules may be more directly responsible.
35. The system for automobile accidents is beautifully described by Japanese legal sociologist Tanase Takao in "The Management of Disputes: Automobile Accident Compensation in Japan," *Law & Society Review* 24, no. 3 (1990): 662. His article puts the automobile accident scheme in the context of general conflict control and is an excellent source for understanding the Japanese approach to litigation and social conflict.
36. Of course, it is theoretically possible that both societies developed despite their respective modes of economic ordering and that legal systems more closely resembling the rule of law would have resulted in even more impressive performance. Because this possibility is purely hypothetical and speculative, I do not address it here. It is also possible that the respective legal systems played a minor role in economic growth.
37. The experience of Japan's Civil Code of 1889 is illustrative. The Meiji leaders may well have intended their new legal system primarily as a demonstration to foreign powers of their modernity, but the code was taken seriously by the Japanese people. They used its provisions in the courts to pursue their own interests in ways that political leaders of Japan had not anticipated and did not welcome. The result was a flurry of legislation in the 1920s to "correct" the excessive individualism of the Japanese by limiting the peoples' rights under the code and requiring prospective plaintiffs to use "traditional" means of dispute resolution in place of litigation.
38. I have borrowed this idea from Michael Dowdle, "Rule of Law and Civil Society: Implications of a Pragmatic Development," unpublished paper.
39. Robert D. Putnam, Robert Leonardi, and Raffaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993).

CHAPTER FIVE

A House without a Foundation

STEPHEN GOLUB

THE RULE-OF-LAW ORTHODOXY, the dominant paradigm followed by development organizations seeking to promote the rule of law in developing countries, is a flawed and incomplete approach.[1] As principally practiced by multilateral development banks, which are major sources of rule-of-law aid, it concentrates on the reform of laws and legal institutions, particularly judiciaries.[2] It is state-centered and "top-down" in nature, focusing funds on government institutions and usually working through their top officials to design and implement projects. It conversely minimizes support for civil society or building the legal capacity of the poor. To the extent it does touch on such issues, it does so as adjuncts to state-centered activities. The World Bank and to some extent the other multilateral development banks apply the orthodoxy to build more business-friendly and investment-friendly legal systems that presumably help spur economic growth and reduce poverty. Other development organizations, such as the United States Agency for International Development (USAID) and other bilateral aid agencies, sometimes use the rule-of-law orthodoxy to promote such additional goals as good governance and public safety, whether as ends in themselves or as steps toward reducing poverty. The problems with the orthodoxy are not these economic and political goals, per se, but its questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged.[3]