

R:\JKO Writings\Role for Northeast Asia - June 30, 2006.doc

Developing Development Theory: Law & Development Orthodoxies and
the Northeast Asian Experience

John K.M. Ohnesorge

University of Wisconsin Law School

Draft: Do not cite without author's permission

- I. *Introduction*
- II. *The Orthodoxies of Law and Development*
 - A. *Law and Development in the Era of Modernization*
 - B. *Dependency and World Systems Theory: Modernization's Discontents*
 - C. *The Washington Consensus Rule of Law*
 - D. *The Legal Origins Orthodoxy: Law and Finance, Legal Origins, and the Common Law - Civil Law Divide*
 - E. *The "Comprehensive Development" Rule of Law*
- III. *Testing the Orthodoxies Against Northeast Asia*
 - A. *Modernization and its Discontents Meet Northeast Asia*
 - B. *Northeast Asia and the Neoliberal Rule of Law?*
 - C. *Legal Origins and Northeast Asia's Development*
 - D. *Comprehensive Development and Northeast Asia*
- IV. *Beyond Critique: New Approach to Law and Development from the Northeast Asian Practice*
 - A. *The Limits of Critique*
 - B. *Cabbages to Kimchee: Constructing an Alternative Approach to Legal Development Assistance from Northeast Asia's Legal "Failures"*
 - 1. *Northeast Asian Instrumentalism and the Compartmentalization of Law*
 - 2. *Legal Education, Legal Professions, and the Social Role of the Formal Legal System*
 - 3. *Contract and Property Rights Enforcement*
 - 4. *Intellectual Property Law*
 - 5. *Additional Examples*
 - C. *Putting Substance Over Form in Legal Technical Assistance*
- V. *Conclusion*

Developing Development Theory: Law & Development Orthodoxies and the Northeast Asian Experience

John K.M. Ohnesorge*

I. Introduction

This summer Brazil [nearly] won another soccer World Cup, [which would have been] its sixth in __ years.¹ If soccer's world governing body, FIFA, wanted to create an approach to soccer development to help "backward" countries such as the United States become internationally competitive, would we expect FIFA to study Brazil's youth soccer system? Of course we would. We would accept that FIFA staff would bring to the project their own preconceived ideas and assumptions, and we would expect them to study successful countries other than Brazil, since not all of Brazil's practices are likely to be appropriate at all times, in all places. But we would certainly expect FIFA to develop its model based on studies of successful

* Assistant Professor of Law and Assistant Director, East Asian Legal Studies Center, University of Wisconsin Law School. S.J.D., Harvard Law School, 2002. J.D., University of Minnesota Law School, 1989. I would like to thank Bill Alford, Marc Galanter, Bryant Garth, Terry Halliday, Chuck Irish, Neil Komesar, Changhee Lee, Yoshi Matsuura, Veronica Taylor, David Trubek, and Frank Upham for their comments and suggestions. I would like to thank participants in workshops at Tsinghua University in Beijing, Seoul National University, Korea University, Chuo University, Doshisha University, Hokkaido University, Cornell Law School's conference on Japanese law, and participants in the panel, " " at the 2004 Annual Meeting of the Law & Society Association. Much of this paper was written while a visiting researcher at Nagoya University's Center for Asian Legal Exchange (CALE), and I particularly want to thank that Center, and Japan's Ministry of Education for their support.

¹ Larry Rohter, *In Brazil, Unpaved Path to Excellence*, NEW YORK TIMES, June 25, 2006, at Section 8, page 1, col. 1.

national soccer programs, and we would certainly expect that it would take Brazil's experience seriously. At worst we would expect FIFA to check the proposals it developed against actual national experiences, and a program for soccer development that was largely contradicted by Brazil's historical experience would hardly be taken seriously.

Now, what if we needed a theory on the role of law in economic development, but chose to develop that theory without paying serious attention to the role that law played in modern history's leading economic development success stories, the "miracle" economies of Japan, South Korea and Taiwan in the latter half of the twentieth century?² Absurd as it sounds, this is exactly what we have done. As this paper will show, we have produced over recent decades a series of theories on law and development, none of which were derived from close study of Northeast Asia, and none of which fit at all well with the evidence we have of how law actually did function in Northeast Asia during rapid economic development. Not surprisingly, there has not been a history of trying to test the specific claims of these theories empirically against the Northeast Asian experience.

Why do we need to theorize about law and economic development? Beyond our normal interest in understanding law's relation to social life, international financial institutions ("IFI's") such as the World Bank, the International Monetary Fund ("IMF"), and the Asian Development Bank devote enormous resources to "law and development" programs advocating change in the legal systems of countries under their influence. Likewise, such law and development initiatives play an important role in the work of major bilateral development assistance providers such as

² Hereinafter "Northeast Asia."

the United States Agency for International Development (“USAID”),³ Germany’s *Gemeinschaft für technische Zusammenarbeit* (“GTZ”),⁴ or the Japan International Cooperation Agency (“JICA”).⁵ More importantly, these initiatives affect the lives of literally billions of people in developing countries, since even governments which maintain a high degree of sovereign autonomy, such as those of China and India, can be influenced by the ideas and ideologies that emanate from the World Bank or other law and development actors. And while the typical initiative targets the legal system of a poor country, or one that is transitioning from a planned to a market economy, it is noteworthy that South Korea was the world’s 11th (12th?) largest economy and a member of the OECD when, as a result of the Asian Financial Crisis and Korea’s resulting need for international assistance, it’s legal system became the target of IMF, World Bank, and U.S. pressure.⁶

Such law and development activities are not new, but date at least from the 1960s, when primarily Western governments, institutions, and academics became involved with the legal

3 Law and development projects at USAID can be found under the rubric of Economic Growth & Trade < http://www.usaid.gov/our_work/economic_growth_and_trade/eg/lir_where_active.htm > and under USAID’s Office of Democracy & Governance < http://www.usaid.gov/our_work/democracy_and_governance >

4 On the GTZ’s law and development work in China, see . . .

5 Japan channels many of its law and development efforts through the International Cooperation Department (“ICD”) of the Ministry of Justice’s Research and Training Institute, in Osaka. Information is available at <<http://www.moj.go.jp/ENGLISH/RATI/LTA/pt0.html> > . For discussions of Japan’s current law and development initiatives, see, Yoshiharu Matsuura, “Toward A New Generation Comparative Law: A Framework for Bilateral Collaboration in Law & Development Projects in Asia,” __ *Wisconsin International Law Journal* __ (2005), and Veronica L. Taylor, “New Markets, New Commodity: Importing and Exporting Japanese Law,” __ *Wisconsin International Law Journal* __ (2005); Hikaru Oguchi, *The Bureaucratic* . . . (Nagoya/HLS LLM)

6 Hwa-Jin Kim, *Living with the IMF*, 17 *BERKELEY J. INT’L L.* 61 (1999). Korea is also engaged in law and development activities of its own, with the Korea International Cooperation Agency and Korea’s Ministry of Justice funding criminal justice training for developing countries at

systems of many developing and newly-independent countries.⁷ Over these decades of law and development activity, the world also came to recognize the economic miracle that had occurred in Northeast Asia, and that region's outstanding economic performance became the subject of extensive analysis and debate by students of economic development from various academic disciplines.⁸ Surprisingly, however, given Northeast Asia's unquestioned economic success, the region's legal systems have been largely overlooked as potential sources of knowledge concerning the fundamental questions of law and development.⁹ Despite a rich literature on Northeast Asian legal systems, and despite ventures by some scholars of Northeast Asian law into law and development debates,¹⁰ it is no overstatement to say that scholarship on Northeast Asian law plays an insignificant role in the theoretical literature on law and development.

This lack of interest would not be a problem if Northeast Asia's economies were neither

Korea's Legal Research and Training Institute. See,

⁷ Though rarely mentioned now in Western discussions of law and development, the socialist world had its own version of law and development, supporting the spread of socialist legal institutions, for example from the Soviet Union to China in the 1950s. Western and socialist law and development initiatives were parallel aspects of the larger Cold War contest for global influence.

⁸ Economics, political science, and sociology are all well represented. The literature on Northeast Asian development is truly voluminous, and includes country-specific studies, as well as regionally-focused works.

⁹ An exception is Katharina Pistor and Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995* (1999).

¹⁰ See, e.g., William P. Alford, *The More Law, the More*, Stanford Working Paper; Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 Am. J. Comp. L. 89 (2003); Mark J. Ramseyer, *Odd Markets in Japanese History* (1996); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Endowment for International Peace Working Paper No. 30, September, 2002; Frank Upham, *Speculations on Legal Informality: On Winn's 'Relational Practices and the Marginalization of Law*, 28(2) LAW & SOCIETY REVIEW 233 (1994); Jane Kaufman Winn, "Relational Practices and the Marginalization of Law," 28(2) Law & Society Review ___ (1994); Tom Ginsburg, "Review Essay: Does Law Matter for Economic Development: Evidence from Asia," 34 Law & Society Review 829 (2000); Christoph Antons, ed., *Law and Economic Development in East and Southeast Asia* (2003); Kanishka

exceptionally good nor exceptionally bad, so that it could be argued that studying their legal systems would probably yield nothing very useful on the questions of law and development. Yet that, of course, is not the case. Northeast Asia's economies are the best examples we have of sustained, equitably distributed, industrialization and development. Given that indisputable record of economic and social success, and given the fact that literature on Northeast Asian legal systems is widely available, the fact that Northeast Asia is not at the core of law and development theorizing seems impossible to justify. This paper addresses that discrepancy in two ways. First, the dominant law and development orthodoxies will be examined through the lens of widely accepted understandings about the functioning of Northeast Asia's legal orders during the region's high growth decades.¹¹ To the extent these orthodoxies cannot accommodate the Northeast Asian experience, it will be argued, they are deeply inadequate. In addition to this critical dimension, however, this paper will also articulate a positive vision of what the study of East Asian law could contribute to law and development, offering a new approach to law and development activities informed by Northeast Asia's experience. It should not "take a theory to beat a theory;" strictly speaking we should be willing to discard a theory once it has been disproved by evidence, and this should include our prevailing theories on law and economic development. On the other hand, the law and development efforts underway throughout the world are not going to stop even if their intellectual underpinnings are pulled away. The initiatives are going to continue, and the people actually doing the work are going to need some kind of coherent intellectual framework to guide their efforts. This likely explains why these

Jayasuriya, ed., *Law, Capitalism and Power in Asia* (1999).

¹¹ Widely held understandings can be misleading or simply wrong, of course, especially with respect to foreign legal systems. Every effort will therefore be made to subject commonly held

efforts often appear to repeat mistakes of the past, seemingly immune to a long tradition of insightful academic critique. As a matter of bureaucratic life, if not of science, it may take at least a framework to beat a theory, and in that spirit this paper offers a framework for understanding law and economic development that explicitly takes into account the Northeast Asian experience.

This new approach is novel because it incorporates explicitly the functioning of law and legal institutions during the Northeast Asian “miracle” era. More importantly, however, the approach offered here is novel because it abandons the central assumption of all the orthodoxies it seeks to replace, which is that legal rules and institutions have clearly defined functions, and that the role of law and development efforts is to get client countries to adopt specific reforms that can be expected to produce intended results. Instead of drawing on Northeast Asia to create yet another set of law and development prescriptions for implementation by developing countries, the Northeast Asian experience will be used here as evidence that the proper role of law and development assistance is both more modest and more demanding. More modest because it involves the admission of uncertainty and competing goals in the functioning of legal rules and institutions, yet more demanding in that it recognizes the formalist logic of existing orthodoxies is insufficient, and must be replaced by continued monitoring, learning-by-doing, and re-examination of both means and ends.

This insistence upon the importance of Northeast Asia for understanding law and development is premised first of all upon a methodological choice in favor of empirical analysis, not to the exclusion of other types of analysis, but as indispensable nonetheless. Even if one

notions to appropriate scrutiny, however this essay is not primarily a work of comparative law.

defines development in purely economic terms, law and legality make up only a small part in the broader social matrix that will be relevant to how any economy performs. This broader matrix includes non-legal factors such as education levels, demographics, natural resource endowments, geographical location, technology levels, domestic political institutions, social and cultural norms and practices, and international politics and economics. A society's policy choices with respect to these factors will often be reflected in positive law, of course, so social or economic reforms almost invariably involve legal change. Law and development activities aim for something more ambitious, however, and seek to put legal system functioning itself at the center of the development equation. Because so many non-legal factors are clearly relevant to a country's economic performance, however, and because these factors, like legal system performance, tend to be difficult to isolate, quantify and study scientifically, the best we can probably hope for in constructing law and development theory will be theory that will help structure and guide inquiry, but which will not constitute hard science.

The conviction behind this paper is that the best way to generate such "soft" theory is inductively, studying recent history's examples of both economic success and economic failure, then trying to draw defensible inferences based upon what can be observed about the functioning of law in these episodes.¹² While studying failures can no doubt be instructive, carefully

15 For an application of this approach to the task of developing theory about economic development more generally, see Alice H. Amsden, *THE RISE OF 'THE REST': CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING COUNTRIES* 290 (2001) ("Models that are inductive use concrete cases of industrial expansion rather than abstract hypotheses to explain growth and guide policy making."). Economist Dani Rodrik has applied a similar approach in his work on the role of government in East Asian development. See, Dani Rodrik, "Getting Interventions Right: How South Korea and Taiwan Grew Rich," National Bureau of Economic Research Working Paper No. 4964 (December, 1994). For a wonderful example from an earlier era of economic development theorizing, see Alexander Gerschenkron, *The Modernization of*

studying the countries that developed most successfully, as this paper does, would at least allow one to avoid a noted blind spot in Max Weber's theorizing about law and capitalism. Weber's famous "England problem" was that aspects of the English Common law tradition seemed rather dramatically different from the formally rational ideal type that Weber posited was associated with the rise of capitalism, despite the fact that England is considered the birthplace of modern capitalism.¹³ Because modern law and development orthodoxies tend to replace Weber's Germanic bias with an Anglo-American bias,¹⁴ in the face of Northeast Asia's Germanic legal traditions, they mirror Weber's mistake. Moreover, even theories that are not developed inductively ought to be tested empirically, and given the vast scholarship on Northeast Asia's economic success, the region is well-suited to that task.

If this inductive, empirical approach is indeed an appropriate way to generate and/or test theory about law and development, there are several factors that make Northeast Asia an especially appropriate region to which it could be applied. First and foremost is "the miracle," the fact that Japan, then later South Korea and Taiwan, are the premier development success stories of the twentieth century.¹⁵ Japan's economy is now the world's second largest, behind

Entrepreneurship, in MODERNIZATION: THE DYNAMICS OF GROWTH 246 (Myron Weiner, ed., 1966).

¹³ On Weber's "England Problem," see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wisc. L. Rev. 720.

¹⁴ See, *infra* note __ (on Talcott Parsons and modernization), and *infra* note __ (on Legal Origins literature)

¹⁵ World Bank, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993). Japan's success came earliest, beginning in the decades around the turn of the 20th century, when Japan was transformed from a relatively isolated, largely agricultural economy into an industrial power capable of challenging Western military power in Asia,¹⁵ and of striking fear into Western manufacturers. After its industrial base was devastated in World War II, Japan experienced a second "miracle" during the 1950s, 1960s and 1970s, as its economy quickly returned to its pre-War levels, then maintained growth rates that made Japan one of the world's

only the U.S., while Taiwan currently stands in seventh place, and Korea at 1_{st}. Beyond overall growth figures, there are several other factors that one can point to as evidence of a development miracle in Northeast Asia. With respect to technology, for example, within the space of a few decades Japan, and later Taiwan and Korea, moved from technological backwardness to close to world frontiers in many fields.¹⁶ In the 1950s South Korea was one of the world's poorest countries, considered a basket-case by Western observers,¹⁷ but by the 1970s its scientific and engineering expertise allowed it to credibly threaten to mount an atomic weapons program.¹⁸ Despite the scandal surrounding Dr. Hwang, other Korean scientists are at the forefront of stem cell research,¹⁹ while Korean manufacturers such as Samsung Electronics, Hyundai Motors, and

richest societies by the 1980s. Taiwan and South Korea experienced the dark side of Japan's initial economic development, as they both were colonized by Japan, and remained under Japanese rule until 1945. Though some see this period of Japanese colonial rule as not entirely negative with respect to post-independence economic development,¹⁵ the Korean and Taiwan 'miracles' are normally seen as beginning around 1960, and lasting until some time in the 1980s. An important strain of economics scholarship criticizes the "miracle" label on the ground that all, or nearly all, of Northeast Asia's economic growth can be explained using normal tools of economic analysis. See, Alwyn Young; Paul Krugman, *The Myth of Asia's Miracle*, *Foreign Affairs* (199_). While this may be true, it begs the comparative question of why Northeast Asian economies were able to do what so many others could not.

¹⁶ Albert G.Z. Hu and Adam B. Jaffe, *Patent Citations and International Knowledge Flow: The Cases of Korea and Taiwan*, NBER Working Paper No. 8528, October 2001, JEL No. O3 ["Korea and Taiwan are two of the newly industrializing economies that have achieved tremendous technological progress and economic growth. Both have graduated from imitation to innovation within a single generation, by building their indigenous technological capabilities and moving up the technology ladder."]

¹⁷ William Easterly, *Explaining Miracles: Growth Regressions Meet the Gang of Four*, World Bank Policy Research Paper 1250, February, 1994, at 11-12.

¹⁸ Young-Sun Ha, *Nuclearization of Small States and World Order: The Case of Korea*, 18 *ASIAN SURVEY* 1134, (1978). By the 1970s Taiwan, too, had the technological capability to mount a nuclear weapons program. Denny Roy, *TAIWAN: A POLITICAL HISTORY* 143-144 (2003).

¹⁹ As of June, 2005, South Korea had published 29 human embryonic stem cell lines, second only to the 46 published by the United States. Richard Gardner and Tim Watson, "A Patchwork of Laws," in *The Future of Stem Cells*, Financial Times and Scientific American Special Report, July 2005, A16, at A20-A21.

Pohang Iron and Steel Corporation (POSCO) are world powers in their fields.²⁰ Taiwan's science and technology are also at world frontiers in many fields, particularly semiconductors and personal computers.²¹ Social indicators also show remarkable progress, as health care, life spans, education levels, diets, all showed remarkable improvement.²² One of the most striking aspects of these various achievements is that they have been shared comparatively equally, so that Northeast Asian societies do not display the vast disparities between rich and poor that often accompany rapid economic expansions.²³

In addition, although observers often focus on the similarities among Japan, South Korea and Taiwan, for example as successful modernizers,²⁴ as examples of export-led growth,²⁵ or as exemplars of the "developmental state,"²⁶ there is also a great deal of diversity among the three in areas that likely matter for development. Post-War Japan has been a democracy, for example, while Taiwan and Korea were both authoritarian for large parts of their high-growth periods. And despite the fact that Taiwan and Korea were both colonies of Japan, as a result of differing colonial policies²⁷ and other historical factors,²⁸ their post-WWII histories have differed

²⁰ See, Tae-gyu Kim, "Republic of Samsung' Builds up in Korea," Korea Times, May 17, 2005; B.M. Lee, "Rolling in the Dough," Newsweek (International Edition), May 18, 2005.

²¹

²² World Bank, *The East Asian Miracle*, supra note ____.

²³ Id. at

²⁴ Harvard Studies, e.g.

²⁵ Kreuger, Bagwati, e.g.

²⁶ See, e.g., Robert Wade, *Governing the Market* (199_).

²⁷ Japan's political policies towards Korea were harsher and more ambitious than those towards Taiwan, at times calling for Korea to be incorporated into Japan proper, and for Korean culture to be essentially eradicated. Taiwan, by contrast, was treated much more like a "normal" colony. Japan's economic policies towards the two colonies differed as well, with Taiwan remaining a largely unindustrialized exporter of agricultural products to Japan, while Korea, particularly the northern regions, became fairly heavy industrialized.

²⁸ Taiwan ended up being ruled by the Nationalist government that had substantial experience in

substantially. Important differences can be seen with respect to foreign investment,²⁹ to state ownership of industry,³⁰ in patterns of private ownership of industry,³¹ and in defense expenditures.³² While recognizing that overemphasizing similarities can result in some unfortunate “ism,”³³ the pattern of broad similarities with relatively discrete differences which Northeast Asia offers should facilitate empirically based theorizing that will be more convincing than could be done with a sample of countries which had little in common.³⁴ Part IV of this

China prior to fleeing to Taiwan in the late 1940s, as it was losing the Chinese civil war to Mao Zedong and the communists. Korea, in contrast, was under U.S. military rule until 1948, after which formal authority was turned over to a newly-established political system dominated by U.S. protégée Syngman Rhee, who won the first presidential election.

²⁹ Policies toward foreign investment have varied among the three, as have levels. Foreign direct investment played a much greater role in Taiwan than in Korea or Japan, contributing ____% to total capital formation in ____, as compared to ____% in Korea and ____% in Japan over comparable periods. [fn] Since the Financial Crisis however, Korea has taken a much more liberal stance toward foreign investment in terms of form, ownership levels, and economic sectors, with the result that foreign investment in the economy has exploded. Foreign investment in Japan has also increased [], as Japan’s slump has contributed to the unwinding of stable shareholding relationships that discouraged certain forms of foreign investment, and has reduced the value of various assets to the point that they are attractive to foreign buyers.

³⁰ Japan’s economy was characterized by little direct state ownership, while the level in Korea was higher, and the level in Taiwan was higher yet. [. . .] For a discussion of the differences between Taiwan and Korea, see Alice H. Amsden, *Big Business and Urban Congestion in Taiwan: The Origins of Small Enterprise and Regionally Decentralized Industry (Respectively)*, 19 WORLD DEVELOPMENT 1121 (1991). Note that some see the attempt to define public and private realms in the developmental state as an attempt to impose a construct that is not fully applicable. See, Lee, supra note __ (on government control over finance in South Korea).

³¹ Most of the large private firms in Korea and Taiwan have been family controlled, while this has not been the case in Japan. Stijn Claessens, et al., *Who Controls East Asian Corporations?* World Bank Policy Research Working Paper 2054 (1999).

³² Not surprisingly, Korea has the highest per capita defense spending of the three.

³³ Orientalism, essentialism, racism, to name some possibilities.

³⁴ For studies of Northeast Asia examining specific differences against relatively common background conditions, see, Hun Joon Park, *Small Business in Korea, Japan, and Taiwan: Dirigiste Coalition Politics and Financial Policies Compared*, 41 Asian Survey 846 (2001) [comparing different policies towards small and medium enterprises]; Richard Whitley, *Business Systems in East Asia (199_)* (comparing business structures in Japan, Korea, Taiwan, and Hong Kong); John K.M. Ohnesorge, *States, Industrial Policies & Antidumping Enforcement in Japan*,

paper is an exercise in that sort of theory building, but as a foundation for that exercise Parts II and III, below, will first examine existing law and development orthodoxies against the Northeast Asian experience. It is out of that critique, it is hoped, that an alternative approach to law and development can arise. Part II chronicles the key orthodoxies that have informed law and development efforts from the 1960s to today, and Part III then demonstrates that in important ways none of them can be reconciled with the Northeast Asian law and development experience. This lays the groundwork for Part IV, which offers an alternative approach to law and development based on the Northeast Asian experience.

II. The Orthodoxies of Law and Development

Looking at the history of law and development thinking, at least in the U.S., one can identify two quite distinct dominant orthodoxies,³⁵ which prevailed in the 1960s and the 1990s, respectively. To those two orthodoxies must now be added two new “proto” orthodoxies, which at the present time can be seen as contending for dominance. This section chronicles the

South Korea and Taiwan, 3 Buffalo J. Int'l. L. 289 (1996-97)(comparing antidumping practices in Japan, Korea and Taiwan); Gary G. Hamilton and Nicole Woolsey Biggart, *Market, Culture, and Authority: A Comparative Analysis of Management and Organization in the Far East*, 94 AMERICAN SOCIOLOGICAL REVIEW, Supplement S52 (1988) (examining different outcomes with respect to enterprise organization, despite relatively similar background conditions).

³⁵ Although it might be useful to think of these orthodoxies as paradigms in the Kuhnian sense, use of that term seems to demand a type of internal, psychological analysis that will not be attempted here. I am not privy to whether people and institutions who advocate particular law and development orthodoxies do so as a result of operating within a Kuhnian paradigm which constrains and structures the ways that they conceive the issues and the universe of possible responses, but for purposes of this exercise it may not matter. Furthermore, unlike the natural sciences, for which Kuhn developed his ideas, law and development initiatives is so little connected with a research agenda, as opposed to an active, political agenda, that it seems better

development of these orthodoxies and “proto-orthodoxies.”

Discussions of law and development orthodoxies invariably begin with what Trubek and Galanter dubbed “liberal legality,” associated with modernization theory of the 1950s and 1960s.³⁶ That orthodoxy was largely spent by the early 1970s, as the broader modernization ethos succumbed to realities such as the Vietnam War and the extent to which “modern” Western societies did not themselves fit the model, and as funding for law and development activities dried up.³⁷ The critics of modernization theory did not succeed in providing an alternative dominant orthodoxy, but they did produce two influential bodies of work, dependency theory and the world systems approach, which will also be discussed here. The second commonly recognized era of law and development began around 1989, with fall of the Berlin Wall and the subsequent collapse of the Soviet Union. Much had changed in the economics academy since the 1970s, and the new law and development orthodoxy that developed was a neoliberal Rule of Law orthodoxy associated with what has been termed the “Washington Consensus.”³⁸ While this intellectual history is generally accepted, this paper argues that a complete picture must now include two more recent proto-orthodoxies, which are quite distinctive, and which might be seen as contending for dominance. One of these, termed here the “comprehensive development Rule

to analyze these activities in more traditional political action terms.

³⁶ David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wisconsin Law Review* 1062.

A useful recent introduction to modernization theory is Nils Gilman, *MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA* (2003).

³⁷ Gilman, *supra* note __ at __.

³⁸ John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND ECONOMIC DEVELOPMENT IN EAST AND SOUTHEAST ASIA* (Christoph Antons, ed., 2003). On the origins of the “Washington consensus” concept, see John Williamson, *From Reform Agenda to Damaged Brand Name: A Short History of the Washington Consensus and Suggestions for What to Do Next*, *FINANCE & DEVELOPMENT*, September, 2003,

of Law,” can be associated with the World Bank under President James Wolfensohn,³⁹ while the other, termed here the “legal origins” approach, has its origins in the writings of financial economists originally interested in legal systems and financial system performance.⁴⁰ As will be developed in section III, below, this paper is inspired by the conviction that none of these orthodoxies fares well when examined in light of the Northeast Asian experience of law and economic development.

A. Law and Development in the Era of Modernization

The modernization orthodoxy saw its heyday in the 1950s and 1960s, but as will be seen, certain of its core assumptions remain influential. Certainly the best chronicled orthodoxy in law and development, the modernization orthodoxy was not concerned only with economic development, but saw development as a process by which “traditional” or “backwards” societies would transform along a host of dimensions to become “modern.” Scholars from a range of disciplines shared the modernization ethos, indeed interdisciplinarity was a fundamental to the goal of developing a total theory of society,⁴¹ so they naturally produced traditional-modern

at 10.

³⁹ See, Kerry Rittich, . . . See also, John K.M. Ohnesorge, “*Etat de droit* (rule of law) *et developpement economique*,” 18 *Critique Internationale* 46 (January, 2003) (an English version, “On Rule of Law Rhetoric, Economic Development, and Northeast Asia ,” is available at < >).

⁴⁰ See, John K.M. Ohnesorge, *China’s Economic Transition and the New Legal Origins Literature*, 14 *CHINA ECONOMIC REVIEW* 485 (2003). This literature is also referred to as the “law and finance” literature, and sometimes as the “law matters” literature.

⁴¹ See, Gilman, *supra* note ___ at 77-79 (discussing interdisciplinary aspects of modernization initiatives at Harvard, Yale, and Chicago, and tracing interdisciplinary focus to Talcott Parson’s search for a unified theory of social action in which the role of neoclassical economics would be limited.)

schemas based upon their disciplinary concerns. The following schema, produced by Harvard social psychologist Alex Inkeles, nicely captures the ethos as it lays out the factors said to characterize Modern Man:

1. “openness to new experience, both with people and with new ways of doing things such as attempting to control births;
2. the assertion of increasing independence from the authority of traditional figures like parents and priests and a shift of allegiance to leaders of government, public affairs, trade unions, cooperatives, and the like;
3. belief in the efficacy of science and medicine, and a general abandonment of passivity and fatalism in the face of life’s difficulties;
4. ambition for oneself and one’s children to achieve high occupational and educational goals.

“Men who manifest these characteristics:

5. like people to be on time and show an interest in carefully planning their affairs in advance;
6. show strong interest and take an active part in civic and community affairs and local politics; and
7. strive energetically to keep up with the news, and within this effort to prefer news of national and international import over items dealing with sports, religion, or purely local affairs.”⁴²

This type of schema was central to modernization research, sometimes, as here, leaving the “traditional” side of the equation unspecified, but often including both.⁴³ Modernization scholars clearly believed that it was possible to identify objectively valid characteristics of

42 Alex Inkeles, *Making Men Modern: On the Causes and Consequences of Individual Change in Six Developing Countries*, 75 *AMERICAN JOURNAL OF SOCIOLOGY* 208 (1969).

43 Perhaps the most influential of these schemas, Talcott Parsons’ “pattern variables,” included both sides in the variables, said to capture the dynamics of all societies. For another effort by Parsons along the same lines, see, Talcott Parsons, *Evolutionary Universals in Society*, 29

“modernity” in constructs like this, but in retrospect Modern Man looks less like a scientifically useful general type than like the self-image of a liberal Harvard professor. One suspects that if Modern Man had ventured from Harvard Square into Somerville or East Cambridge he might have realized that he did not need to fly to India to collect data on “traditional man,” who likes reading the sports section, listens to his priest (at least some of the time), and isn’t always punctual or interested in local politics. Falling into the same unfortunate dynamic, “modern society” came to resemble nothing so much as liberal intellectual America’s vision of itself, a social welfare state characterized by a homogeneous, secular political culture, pluralist democratic politics, industrialization, urbanization, occupational specialization, high social mobility, and the nuclear family, among others.⁴⁴

The specifically legal dimension of the modernization ethos shared important elements of the general approach. Law reform was not simply about economic development, it was about helping the Third World develop “modern” legal systems.⁴⁵ A modern legal system, like a modern society for modernization theorists more generally, was supposed to be the ultimate stage in a more or less universal process of societal evolution, but at the same time bore a striking resemblance to an idealized vision of the contemporary U.S. legal system.⁴⁶ And again like modernization theory more generally, the idealized picture reflected the normative commitments of America’s moderate, liberal elite, who at that time could claim to represent an American consensus in a way that seems fantastic now.⁴⁷ In addition, the elements of “liberal legality”

AMERICAN SOCIOLOGICAL REVIEW 339 (1964).

⁴⁴ See, Gilman, *supra* note ____.

⁴⁵ Trubek and Galanter, *supra* note ____.

⁴⁶ *Id.*

⁴⁷ Even if real at the time, that consensus papered over disagreements that had existed before,

were distinct yet mutually reinforcing, so that one could have faith that assisting in the modernization of one institution or body of law would have salutary “spillover effects” on the whole system.⁴⁸ For example, one might believe in the priority of economic growth over other aspects of development, as some modernization scholars did, but even if one didn’t one could still assist in economic law reform with confidence that the “seamless web” nature of the legal system would result in better performance on non-economic dimensions as well.⁴⁹

What were the specific elements of this idealized “modern” legal system circa the late 1960s? In terms of its overall function, law was to be the instrument by which reformist Third World governments would bring about social change in the direction of socially responsible capitalism and pluralist democracy.⁵⁰ This view entailed both a faith that Third World states were committed to the public interest, and a faith that law could be made “potent” and predictable enough to serve this social engineering function.⁵¹ Beyond the image of law itself, the actual emphasis of law and development efforts was very much on legal education. As David Trubek has argued recently, the modern, instrumental conception of law seemed to require an attack on four distinct manifestations of legal formalism: formalism in judicial reasoning,

and have since resurfaced to dominate American politics. For example, the American political Right’s current project of enlisting fundamentalist Christians and Catholics, on religious grounds, against the federal judiciary represents the sort of ideological warfare that should have been long discarded in the legal culture of a “modern” society, though of course it would have been perfectly understandable to the Left of the New Deal and prior generations. Likewise, the recent revival of the old battle against teaching evolution in the public schools, certainly best explained as a result of people’s religious beliefs, suggests that the post-ideology “modernization” consensus was exceptional, rather than a final, higher stage of social evolution.

⁴⁸ On “spill-over” arguments and the Neoliberal Rule of Law, see Ohnesorge, *supra* note ___, at ___.

⁴⁹ Trubek and Galanter, *supra* note ___, at ___.

⁵⁰ *Id.*, at ___.

⁵¹ *Id.* at ___.

formalism in law making, formalism in the way legal professions understood the function of the lawyer, and importantly, formalism in the way law was taught.⁵²

In addition to programs to introduce specific statutory or institutional changes, therefore, reforming legal education became an important fulcrum for gaining leverage to reorient entire legal cultures, and one does not really have to read between the lines to see that the goal was Americanization.⁵³ Americanizing legal education would help cure Third World lawyers of their penchant for formalism, turning them from Weberian automatons into pragmatic problem solvers. Quoting AID's General Counsel Thomas Farmer,

“[E]ven more important (than flawed legal education) is the lawyer's preoccupation with formal rules rather than with creative problem-solving – whether the problems are those of a government trying to implement a new development program or those of private clients (local or foreign), trying to conduct business in a society experiencing the many stresses and strains besetting the developing countries.”⁵⁴

Freeing Third World lawyers from their formalist fetters would allow a crucial expansion of their social roles, both in government service and in private practice, and it is clear in hindsight how this role was based on the image of the elite American business lawyer, moving easily between government service and high-level corporate practice:

“[T]he role of the lawyer in most developing countries is on the whole a very narrow one indeed. Both in government and private work, the lawyer is usually considered a technician and

⁵² Trubek,

⁵³ In the words of AID General Counsel Thomas Farmer in 1966, “[t]he explanation (for the woeful performance of developing country lawyers) seems to lie first of all in the nature of their legal education – a system generally based on foreign models more responsive to conditions in Europe than to the distinctive needs of the developing societies.” Address by Thomas L. Farmer, General Counsel, Agency for International Development, Department of State, before the Council of the Section of International and Comparative Law, American Bar Association, Montreal, Canada, August 7, 1966; published in Vol. 112, Part 19, Congressional Record 25449-25450 (1966) (quoted in Ballman, *infra* note ___).

⁵⁴ Farmer, *supra* note ___, at ___.

generally appears prepared to accept restriction to a technician's role. The government lawyer rarely participates in the policy making process and frequently even cedes the task of legislative drafting to government administrators. The private lawyers rarely acts (sic) as a general business advisor and generally does not participate significantly in negotiation on behalf of his client."⁵⁵

The Americanism of this emphasis is made apparent by the reaction of a German-trained IMF lawyer of the time, who argued that there was no real reason to think that it was their doctrinal legal training that was keeping Third World lawyers excluded from policy making process, while foreign lawyers were allowed in.⁵⁶ The problem was more the other way around: until Third World governments brought local lawyers into the policy making process, for which he thought many were already ready, those lawyers would never develop the practical skills that would allow them to contribute meaningfully to that process.⁵⁷ The idea that "Americanizing" legal education would solve this problem was misguided, as

"[no] law school would attempt to teach its students how to draft central banking, commercial banking or exchange control legislation. This kind of specialization will have to develop as part of a lawyer's future professional career in government service, and it can only develop if the lawyer is given a chance to acquire an intimate knowledge of the policy considerations which determine the substance of the law."⁵⁸

Development assistance was predominantly bilateral during the modernization era, rather than flowing through international organizations such as the United Nations or the international financial institutions,⁵⁹ a happy coincidence considering the society-wide scope of the

⁵⁵ Farmer, *supra* note ___, at ___.

⁵⁶ See, Franz Ballman, *Legal Technical Assistance of the International Monetary Fund to Member Countries Through Economic Development Legislation*, 3 JOURNAL OF LAW & ECONOMIC DEVELOPMENT 197, 202 (1968).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ David M. Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future," at ___ (June, 2003). The International Monetary Fund was involved in legal technical assistance

modernization approach. While advocating economic law reforms is inherently political, attempting to “modernize” entire societies seems obviously more so. But attempts have been made to limit political interference by international institutions such as the IMF, the World Bank and the Asian Development Bank,⁶⁰ and although such textual constraints are open to interpretation,⁶¹ it is clear that their presence at least shapes the law and development rhetoric of the IFIs.⁶² But despite the fact that the bilateral nature of the law and development programs meant no international law limits on potential political implications, the Cold War context provided recipient governments with at least a partial shield against unwelcome political interference, turning to the Soviets.⁶³ With the collapse of the socialist world, developing countries have no way to “enforce” the non-political interference norm, and this fact, together with the rise of new institutional economics, meant that even the IFIs no longer had to take the norm very seriously.⁶⁴

B. Dependency and World Systems Theory: Modernization’s Discontents

by the late-1960s, however, though at that point the IMF was less demanding of its borrowers. (conditionality?) See, Ballman, *supra* note __. As for the choice between the United Nations and institutions such as the World Bank or the IMF, some suggest that developed countries shifted the development agenda away from the UN and to the IFIs because they were easier to influence.

See, John Toye, *Changing Perspectives in Development Economics*, in *RETHINKING DEVELOPMENT ECONOMICS* 21, 32 (Ha-Joon Chang, ed., 2003).

60

61

62 The IMF was clearly aware of this issue, at least in the 1960s. See, Ballmann, *supra* note __, at 198 (“The aim is always to achieve technical professional quality as opposed to a certain political result. . . . [p]olitical considerations are . . . the domain of the government; they are not the concern of the experts.”).

63 For many modernization theorists, the Soviet Union did in fact constitute a modern society, as it appeared to be highly industrialized and urbanized, with a government that had succeeded in penetrating the society to mobilize the populace. See, Gilman, *supra* note __, at ____.

The decline of the modernization ethos is a complex story that played out differently in various locations and in various academic fields,⁶⁵ but one key area of dissatisfaction with the approach had to do with its tendency to trust in the Third World state as representing the public interest, defined as socially responsible economic development and pluralist democratic governance. Looking at the issue this way highlights an important parallelism between attacks on modernization theory from the Left and the Right, which also links them both to contemporaneous developments in the U.S. By the 1970s neoclassical economists interested in development issues were developing their attack on state intervention as inefficient and an excuse for rent-seeking by government functionaries. This movement had direct links to the economic attack on regulation being developed by conservative economists in the U.S.⁶⁶, which helped spark a revolution in American public law.⁶⁷ From the Left, meanwhile, came the charge that the Third World state was captured by international capital, in league with local comprador elites,⁶⁸ a charge that shares much with the contemporaneous claims from the American Left that U.S. regulatory agencies were captured by the industries they were supposed to be regulating in the public interest.⁶⁹ The neoclassical attack will be discussed in connection with the rise of the Neoliberal (“Washington Consensus”) Rule of Law, section ____, below, while the following passages address attacks on modernization thinking from the Left, which

64 See, *infra*, on notes ____.

65 See, Gilman, *supra* note __, at ____.

66 See, e.g., George Stigler, *Theory of Regulation*, *Bell Journal of Economics*, ____.

67 Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 *Chicago Kent Law Review* 1039 (1996-97).

68 Toye, *supra* note __, at ____.

69 See, *supra* note __; Merrill, *supra* note ____.

came in the form of dependency theory and world systems analysis.⁷⁰

Dependency theory is typically associated with economists Raul Prebisch, Andre Gunder Frank,⁷¹ and their followers, while world systems analysis is associated with the historian Emmanuel Wallerstein.⁷² While there are important differences between the dependency and world systems approaches, the two can be said to share the following basic views. First, both assign nations of the world to categories such as “core/periphery,” “center/periphery,” or “dominant/dependent,” based upon their wealth and power. [*** citations from Alford*****] The core is made up of advanced industrialized nations, the periphery is made up of poor states which often rely on commodity exports for their foreign exchange earnings, while the “semi-periphery” is somewhere in between. This international division of labor, the “international system,”

“favors some countries to the detriment of others and limits the development possibilities of the subordinate economies. . . a situation in which the economy of a certain group of countries is conditioned by the development and expansion of another economy, to which their own is subjected.”⁷³

The modernization approach had seen integration into the international economic order as

⁷⁰ It is useful in this context to remember here that the “developmental state” scholarship that grew out of studies of Northeast Asia in the late 1970s was a reaction to the fact that in their attacks on modernization theory and the Third World state neither the Right nor the Left paid much attention to the role of the state in Northeast Asia. See, e.g., Amsden, *Taiwan’s Economic History*, supra note ____.

⁷¹ Andre Gunder Frank, *The Development of Underdevelopment*, 18(4) MONTHLY REVIEW 17 (1966); Andre Gunder Frank, *The Sociology of Development and the Underdevelopment of Sociology*, __ CATALYST 3 (1967).

⁷² Immanuel Wallerstein, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis*, 16(4) COMPARATIVE STUDIES IN SOCIETY AND HISTORY 387-415 (1974).

⁷³ Theotonio Dos Santos, *The Structure of Dependence*, in READINGS IN U.S. IMPERIALISM 226 (K.T. Fann and Donald C. Hodges, ed., 1971).

basically benign and desirable, though its focus on state-supported industrialization certainly reflected doubt that Ricardian comparative advantage alone would enrich developing countries.⁷⁴ While this doubt was in the air in the 1940s,⁷⁵ it became formalized around 1950 in the Prebisch-Singer thesis, which holds that over the long term the terms of trade favor manufactures over commodities, so that for a developing country to simply rely on its comparative advantage to export commodities, while importing manufactured goods, would be a losing proposition.⁷⁶ But while modernization theory counted on the nation state to play the necessary, interventionist role of fostering industrialization, the dependency theories that followed doubted that the international forces which consign nations to the “periphery” will allow Third World states to play such a constructive role. These forces, which include international commodity markets, the interests of multinational corporations, as well as the interests of Third World comprador elites, will instead conspire to maintain and enforce the international division of labor captured in the core-periphery image. In the words of Andre Frank,

“contemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between the satellite underdeveloped and the now developed metropolitan countries. . . . [t]here relations are an essential part of the capitalist system on a world scale as a whole.”

If this is right, there is little sense in modernization’s strategy of replicating within developing countries the institutions of “modern” societies since modernization was never based on internal characteristics but was instead achieved through the exploitation of poor countries.

74

75 John Toye and Richard Toye, *The Origins and Interpretation of the Prebisch-Singer Thesis*, 35 HISTORY OF POLITICAL ECONOMY 437, 440-441 (2003).

76

Focusing, ala Weber, Parsons, and their followers,⁷⁷ on the internal characteristics of developing countries to explain why they are poor is just a form of blaming the victim, and even if a developing country succeeded in replicating modern institutions internally, this would do nothing to change the country's place in the international order.

While there clearly was a orthodoxy of law and development that corresponded to modernization theory, it is not surprising that no such orthodoxy can be linked to dependency and world systems thinking, which arose in critical reaction to modernization theory, and to the Western exploitation of the developing world to which modernization theory was seen as the handmaiden. Dependency and world system thinking, as facets of the general collapse of modernization thinking, clearly affected some involved in law and development activities,⁷⁸ but the message these approaches would impart would be a deep skepticism towards legal development assistance, rather than providing a hopeful new program.

C. The Washington Consensus Rule of Law

The next real orthodoxy that arose following the demise of the modernization movement was the Rule of Law orthodoxy associated with the Washington Consensus and the energetic neoliberalism of the 1990s. This was the orthodoxy developed to frame and justify the massive law and development agenda that grew out of the collapse of the Soviet Union, and which accompanied the economic globalization of the 1990s. Reference to economist Douglass North's

⁷⁷ The institutional approach of Douglass North, for example, would be open to the same critique. See, *infra* notes

⁷⁸ Trubek and Galanter, *supra* note __, at __.

designation of law as an “institution” with important economic implications⁷⁹ helped justify legal reform initiatives that went far beyond the scope of prior IFI initiatives, and the Rule of Law became the umbrella concept used to rhetorically unify a wide range of legal development initiatives.⁸⁰

While economic thinking about development generally had moved on after the demise of modernization, much of it towards free-market solutions, some in the direction of the dependency critique, it was some time before a new law and development orthodoxy arose. This was likely the result of several factors, but among them two seem especially important. First, one would have to count the tendency, prior to the rise of “new institutional economics,” (“NIE”) for mainstream economics not to think much about private law, essentially assuming smoothly functioning legal systems as the background for theorizing about markets.⁸¹ As neoclassical economics came to dominate development thinking, attention naturally enough shifted away from the “process” or “systemic” concerns important to the modernization era, such as building modern government institutions and ensuring that legal systems could effectively transmit government policies, to a substantive concern with free markets and limited government. Two separate currents seem to have converged in the late 1980s to bring law and legal institutions back into the development picture. One was the increasing influence of NIE, which brings institutional structures and processes back into economic theorizing. The second was the fall of the Berlin Wall and the collapse of the socialist world, which had two effects. First, it quite suddenly presented the development community with the problem of how to nurture market

⁷⁹ See, Douglass North, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990), a book which came to be widely cited in the law and development literature.

⁸⁰ Upham, *supra* note ___ ; Ohnesorge, *supra* note ___.

economies in Eastern and Central Europe, the Baltics, and Central Asia, where legal systems were geared to socialist rather than capitalist economics,⁸² and second, it left developing countries with nowhere to turn for assistance except the U.S.-dominated West, in which views on economics and the role of the state in society had taken a strong turn towards the market.⁸³

Described very simply, NIE refers to the branch of economics that concerns itself with the ways that economic behavior, whether by individuals or by firms, is affected by the institutional setting in which actors find themselves.⁸⁴ The approach is sometimes traced to Ronald Coase's 1934 article, "The Nature of the Firm,"⁸⁵ which argued that a firm's decision to produce an input itself, or instead to obtain it by contracting with an outside producer, should be understood as based upon a consideration of the "transaction costs" involved, mainly the costs involved in

81

82 See, e.g., Cheryl W. Gray, *In Search of Owners: Privatization and Corporate Governance in Developing Economies*, __ WORLD BANK RESEARCH OBSERVER __ (199_) ("[Formerly socialist economies must] establish the institutions of a private market economy. Socialism either crippled or reoriented these institutions to reflect the goals of central planners. Legal frameworks defining property rights, private contract regimes, fiduciary liability, dispute resolution mechanisms, and rules of entry and exit for private firms atrophied. Courts lost much, if not all, of their independence as well as their role as adjudicators of commercial disputes and enforcers of commercial laws. Banks lost their independent monitoring role over firms and became instead passive funnels for channeling state funds. "Watchdog" institutions that provide critical information for markets to function, such as credit-rating and consumer protection services, accounting and legal professions, and independent journalism, had neither reason nor permission to exist. Finally, socialism inhibited (indeed, often classified as illegal) the development of basic norms and ethics of market conduct and fiduciary responsibility on which so much behavior in advanced market economies implicitly rests. These laws, organizations, professions, and commercial norms must now be rebuilt, sometimes from scratch.")

83 Countries wanting to reform within a basically socialist order might turn to China, but China has not shown great interest in exporting its law reform experience, and countries in Southeast Asia such as Vietnam tend to be ambivalent about Chinese influence.

84 Ronald Coase, *The New Institutional Economics*, 88(2) AMERICAN ECONOMIC REVIEW: PAPERS AND PROCEEDINGS OF THE HUNDRED AND TENTH ANNUAL MEETING OF THE AMERICAN ECONOMIC ASSOCIATION 72 (May, 1998).

85 Coase, *The Nature of the Firm*,

creating and enforcing the purchase contract.⁸⁶ Coase's thesis in that article was that a firm will continue to bring production of inputs in-house until the cost of doing so exceeds the cost of obtaining them on the market, and because transaction costs are determined by the institutional environment in which the firm exists, it is this institutional environment that determines in a very real way the scope of any particular firm. From this insight grew the field of "transaction cost economics," associated with Oliver Williamson and others, and the broader NIE tradition. It is important to note that NIE shares with modernization scholarship the goal of unifying social science under one paradigm.⁸⁷ But while Talcott Parsons, at least, dreamed of a unified social theory in which economics would provide but one source of knowledge about human behavior,⁸⁸ NIE's distinctly anti-Parsonian aspiration is to unify the social sciences under the hegemony of economics.⁸⁹

Related to NIE is the "public choice" tradition in economics, which applies the methods of microeconomic to the study of real, especially political, institutions.⁹⁰ Public choice sentiment was already well represented in development economics through the work of Ann Krueger and Jagdish Bhagwati, among others, whose attacks in the 1970s on rent-seeking by Third World governments constituted part of the rejection of the modernization approach.⁹¹

⁸⁶ Id. at ____.

⁸⁷

⁸⁸ Gilman, *supra* note ____; Parsons, *supra* note ____

⁸⁹ Mancur Olson and Satu Kahkonen, *A New Institutional Approach to Economic Development* (advertisement for Olson and Kahkonen, on IRIS Web site 2001) ("Modern economics has had a deep influence on thinking on other social sciences, leading to the theoretical integration of all the social sciences under an overarching paradigm.").

⁹⁰ See generally, Jerry Mashaw, *GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); Daniel A Farber and Philip P. Frickey, *LAW AND PUBLIC CHOICE* (1991).

⁹¹ See, Krueger, Theory rent-seeking article; Bhagwati, unproductive activities article

Although these could be thought of as separate traditions, one studying the behavior of institutions, the other studying how institutions structure individual behavior, this is not the place to disentangle the two. People who are important to the two traditions and to their impact on law and development, North and Mancur Olson⁹² in particular, are connected to both traditions. In addition, one can say that both started with a strong commitment to “methodological individualism” and rational actor assumptions,⁹³ though broadening the definition of an institution to include social and cultural norms, as both Coase and North do,⁹⁴ looses the rational actor assumption from its traditional mooring in narrow economic terms. Second, in their prescriptive modes, at least as absorbed by the law and development literature, they combined to support a predictably neoliberal set of policies, focusing on deregulation, privatization, and maximum play for the markets. It could be said that NIE opened the door for economists to concern themselves with pretty much any aspect of a legal system, while the public choice approach helped convince them that governments shouldn’t do much more with these legal systems than to establish rules respecting property and contract, along with courts to enforce them.

With NIE and public choice economics providing the intellectual framework, the specific law and development orthodoxy that developed during this period could be thought of as the

92 See, Olson and Kahkonen, *supra* note __. Olson co-founded the University of Maryland’s IRIS Center, a major participant in U.S. government-funded law and development projects which operates within the NIE rubric.

93 On NIE, See, e.g., Coase, *supra* note; on Public Choice, see Mashaw, *supra* note __; Farber and Frickey, *supra* note __.

94 For Coase the relevant institutional matrix of a particular country includes, “its legal system, its political system, its social system, its educational system, its culture, and so on.” Coase, *supra* note __ at 73.

Washington Consensus or neoliberal Rule of Law.⁹⁵ In accord with NIE thinking, but also certainly responding to the demand for systemic legal change presented by the transitioning socialist legal systems, the orthodoxy sought to provide the answer to legal system needs from bottom to top.⁹⁶ Private property rights were at the center of the approach, making demands both on private and public law to provide clear, predictable “rule of the game” within which private economic activity can take place. On the private law side, the orthodoxy focused on providing clear and enforceable private property rights, and rules-based contract law that would facilitate trade.⁹⁷ Courts and court reform become very important in this orthodoxy, but the concern seems to be mainly with how to make courts “user friendly;” how to make them effective, low-transaction-cost enforcers of private rights.⁹⁸ Legal professions reappear, but, like

⁹⁵ Ohnesorge, “The Rule of Law,” supra note ___. A thorough statement of the approach is found in the World Bank’s *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET*, at 85-97.

For a concise example, see Cheryl W. Gray, *Reforming Legal Systems in Developing and Transition Countries*, 34(3) *FINANCE & DEVELOPMENT* 14 (Sept. 1997) (“Improving the functioning of legal institutions is an essential component of economic development.”).

⁹⁶ This claim of a mandate for total reform is apparent in the following statement by the principal economist in the World Bank’s Policy Research Department: (“[Formerly socialist economies must] establish the institutions of a private market economy. Socialism either crippled or reoriented these institutions to reflect the goals of central planners. Legal frameworks defining property rights, private contract regimes, fiduciary liability, dispute resolution mechanisms, and rules of entry and exit for private firms atrophied. Courts lost much, if not all, of their independence as well as their role as adjudicators of commercial disputes and enforcers of commercial laws. Banks lost their independent monitoring role over firms and became instead passive funnels for channeling state funds. “Watchdog” institutions that provide critical information for markets to function, such as credit-rating and consumer protection services, accounting and legal professions, and independent journalism, had neither reason nor permission to exist. Finally, socialism inhibited (indeed, often classified as illegal) the development of basic norms and ethics of market conduct and fiduciary responsibility on which so much behavior in advanced market economies implicitly rests. These laws, organizations, professions, and commercial norms must now be rebuilt, sometimes from scratch.” Gray, *In Search of Owners: Privatization and Corporate Governance in Transition Economies*, supra note ___, at 181.

⁹⁷

⁹⁸ Gray, *Reforming Legal Systems*, supra note ___, at 14) (“If a dense and efficient network of

courts, mainly as reducers of the costs of transacting.⁹⁹

Private property is also protected by criminal law, of course, and economists demonstrated mathematically that law and order is important to a functioning economy, though a bit of re-branding turned “law and order” into the Rule of Law.¹⁰⁰ More importantly, though, private property is also protected by public law, and it was here that public choice economics and the economics-based critique of regulation made their greatest impact on the law and development orthodoxy. In looking at references to constitutional law in the literature of the time, the main concern seems to have been with trying to overcome the “credible commitments” puzzle: how to engineer constitutional law so that the same governments that were creating and defining private property rights would not subsequently be able to “infringe” them. With respect to administrative law, the main claim of the orthodoxy was again that economic development required a system of administrative law that could tightly constrain government actors within a system of clear rules, which would facilitate freedom of action by private economic actors, as well as reduce opportunities for rent-seeking (which would also be reduced by deregulation). This reflected a Hayekian commitment to maximizing the clarity and predictability of the regulatory environment, thus maximizing the extent to which private actors can plan their activities,¹⁰¹ as well as reflecting the public choice position that the incentives of bureaucrats lead to rent-seeking and bureaucratic imperialism.¹⁰²

commercial relationships is to flourish in an economy, it needs a credible and low-cost formal legal process to which aggrieved parties can turn when all else fails.”).

⁹⁹

¹⁰⁰ Stephen Knack and Philip Keefer, *Institutions and Economic Performance*, 7 *ECONOMICS AND POLITICS* 207 (1995).

¹⁰¹

¹⁰² See, e.g., William A. Niskanen, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT*

In addition to claiming that this strong framework for private property and contract enforcement was crucial for economic development, the orthodoxy included strong claims with respect to several specific areas of law. Broadly defined and vigorously enforced intellectual property rights, for example, were said to be important for economic development, as without them locals would not invent, and foreign intellectual property owners would not invest or make their technology available through licensing.¹⁰³ Developing countries needed to have effective competition law so that markets would be competitive,¹⁰⁴ and effective insolvency regimes to make sure that creditors could enforce their rights.¹⁰⁵ Effective corporate law protecting shareholders was also claimed to be important, either to protect minority from majority shareholders,¹⁰⁶ or to protect shareholders for managers based upon the assumption of a separation of ownership and control.¹⁰⁷

It is obvious that much of this reform energy was highly instrumental, directed not merely at “reforming” legal systems, whatever that might mean, but at getting them to meet substantive performance criteria along specified dimensions. The goal was not just some general level of performance, but to achieve “a well-functioning legal system in a market economy,” which required “a supply of market-friendly laws, adequate institutions to implement and enforce them,

(1971).

103

104

105

106 See, e.g., Gray, *Reforming Legal Systems*, supra note __ at 15 (describing the extensive system of shareholder protections built into the 1995 Russian company law to allow minority shareholders to protect themselves against dominant shareholders

107 See, e.g., Gray, *In Search of Owners*, supra note __. (“Typically, in small firms the owners and managers are one and the same; in large firms, however, ownership and management are usually separate, creating the need for monitoring.”).

and a demand for those laws from market participants.”¹⁰⁸ The idea seems to have been to set in motion a virtuous cycle, in which demand and supply would feed off one another until the neoliberal Rule of (market-friendly) Law was achieved. Demand was to be supplied via privatization in former socialist countries, so the orthodoxy functioned as a justification for rapid, wholesale privatization, which the neoliberal Rule of Law, had the model worked, would have rendered irreversible. As will be discussed below, that goal, like the idea of a “modern” society, tended to reproduce an idealized picture of how law operated in the U.S. or perhaps Western Europe, but was not well supported by the roles that law played in Northeast Asia’s successful market economies. Before that discussion, however, it is important to note the wrapping in which this gift came to the world, a highly particular Rule of Law rhetoric.¹⁰⁹

There are several aspects of the turn to the Rule of Law that are worth reflecting upon,¹¹⁰ but for purposes of this paper the most important is the way it was used to present a fairly particular set of substantive goals as general, neutral legal framework. In this the relationship between rule of law rhetoric and NIE ala Douglas North is quite clear. NIE tells us that the functioning of an economy will depend upon the effectiveness of its institutional matrix, while rule of law rhetoric tries to fill in the legal component of that effective framework. At this level of generality they both tend to depoliticize what actually needs to happen to “reform” institutions, especially law, which is that somebody needs to change a whole raft of rules, both general legal rules and rules respecting legal actors such as courts and lawyers, and that when those rules change there are going to be winners and losers. Because the earlier law and development era

¹⁰⁸ Gray, *Reforming Legal Systems*, supra note ___, at 14-15.

¹⁰⁹

¹¹⁰ See generally, Ohnesorge, *On Rule of Law Rhetoric* supra note ___.

had been dominated by bilateral assistance efforts, whether national or private, the problem of political interference had a different valence.¹¹¹ Now that the IFIs were taking a much larger role they had to deal with the fact that their foundational documents tell them they are supposed to refrain from political interference, and invoking the rule of law appears to have been part of the strategy.

The World Bank and the IMF differ formally in this regard, though whether that matters is questionable. The IMF Articles of Association contain no explicit general prohibition against political interference, though IV.3.b does prohibit political considerations in connection with certain decisions. The IMF legal staff interprets its Articles like a corporate charter, however, looking to the Articles, particularly Article 1, to assess whether a proposed activity would be ultra vires. As IMF General Counsel Francois Gianviti recently noted, however, because the IMF has ultimate authority to interpret its own “charter,” the openness of the text leaves no doubt that this is a matter of self-policing,¹¹² constrained of course by power politics. The World Bank, on the other hand, has to deal with Article IV, Section 10 of the IBRD Articles of Agreement, which provides:

“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighted impartially in order to achieve the purposes stated in Article 1.”

In the early 1990s World Bank General Counsel Ibrahim Shihata issued a legal opinion that

¹¹¹ See, e.g., John Henry Merryman, *Law & Development Memoirs I: The Chile Law Program*, 48 AM. J. COMP. L. 481(2000) [discussing Chile program in 1960s]; James A. Gardner, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

¹¹² Francois Gianviti, *Evolving Role and Challenges for the International Monetary Fund*, 35

essentially defined this prohibition away, at least with respect to law and development activities.¹¹³ Signaling that the Bank’s lawyers were not going to get in the way of a new law and development agenda dominated by NIE thinking, Shihata characterized the “rule of law” as basic to the “governance” structure that is necessary for a successful economy.¹¹⁴ This seems to sanction any law and development project that could be cast as furthering the “rule of law,” which turns out to be a pretty big set. In a memorial for Mr. Shihata IMF Senior Counsel Robert Effros singled out this memo as important in legitimating IFI law and development activities,¹¹⁵ demonstrating a strange commitment to formal legal regularity by organizations that, at least on this issue, are really checked only by power, not by law.

Although many criticisms have been leveled at the Washington Consensus and the Neoliberal Rule of Law orthodoxy that accompanied it, it would be wrong to say that that orthodoxy was repudiated as dramatically as was the modernization approach. Instead, as evidence mounted that the world was more complex than that approach contemplated, and that many people in poor countries were not necessarily benefiting from Neoliberal economic and legal reforms, the Neoliberal rule of law seemed to evolve in two distinct directions. Those two strains, “proto-orthodoxies” of law and development, represent the dominant discourse today.

D. The Legal Origins Orthodoxy: Law and Finance, Legal Origins, and the Common Law – Civil Law Divide

INTERNATIONAL LAWYER 1371, ____ (2001).

113 See, Robert C. Effros, *The World Bank in a Changing World: The Role of Legal Construction*, 35 INTERNATIONAL LAWYER 1341, 1345-47 (2001).

114 Id.

115 Effros, supra note ____.

The first of the two current proto-orthodoxies is based upon the “legal origins” literature, which grew out of work in the mid-1990s by a group of financial economists interested in the effects of legal systems on financial system performance.¹¹⁶ Their initial focus was on financial markets and minority shareholder protections in legal systems around the world, hence the name “law and finance,” but the legal origins approach is now much broader than those initial beginnings.¹¹⁷ The basic method of the literature is formal and analytic, seeking to test statistically various hypotheses concerning differences between Common and Civil law traditions, for example. Various aspects of national legal systems are given numeric scores, which are then combined with scores from other countries and used as the data for statistical testing of hypotheses concerning legal systems and socio-economic outcomes.¹¹⁸

The literature can also serve as a source of policy prescriptions, however, and it is clear that the approach is having a major impact within at least some at the World Bank. “Doing Business 2004: Understanding Regulation,”¹¹⁹ produced by one group within the Bank, presents this “disciplinary” side of the legal origins/law and finance literature, converting the academic literature into a program for encouraging private sector growth in developing countries. Whatever the literature’s analytic merit, the relationship between its analytic and prescriptive aspects seems highly problematic. The vast majority of lawyers and legal academics will not have the expertise to question the statistical methods used by the authors of these studies, nor

¹¹⁶ See, Ohnesorge, *supra* note ____.

¹¹⁷ *Id.* See also, Emma Phillips, *The War on the Civil Law?: The Common Law as a Proxy for the Global Ambition of Law and Economics* (forthcoming, WISCONSIN INTERNATIONAL LAW JOURNAL) (copy on file with author).

¹¹⁸ Holger Spamaan, *On the Insignificance and/or Endogeneity of LaPorta et al’s ‘Anti-Director Rights Index’ Under Consistent Coding*, Harvard Law School, Olin Center, Discussion Paper No. 7 (March, 2006).

will they have the resources to challenge the data that provides the grist for the statistical mill. This is not to defend intellectual laziness, but argue that as a source of policy prescriptions this literature seems particularly prone to reductionism.

Looking to the findings of the literature, one might expect that equity markets would play an important role in financing the businesses that must lead development, and that legal protections for minority shareholders, which allegedly support such markets, would therefore also be important.¹²⁰ Developing countries with Common Law systems should therefore outperform Civilian regimes, as Common law regimes are associated with more developed equity markets and better protection of shareholders.¹²¹ Common law regimes should also outperform Civilian regimes because governance in Civilian regimes is associated with high levels of formalities, seen as stifling private initiative and encouraging bureaucratic rent-seeking.¹²² Finally, Civilian adjudication is also inferior to Common law, in that it is less able to bring about flexible refinements to legal rules that need to be changed,¹²³ while Civilian regimes are also associated with generally Statist orientations, as opposed to the liberty-regarding, market-friendly Common law.¹²⁴ As should be apparent, there is an obvious overlap between the prescriptions of the Legal Origins approach and the earlier Neoliberal rule of law orthodoxy, though the former is built upon a much more intimidating analytical foundation.

119

120 Hideki Kanda, *A Note on the "Law Matters" Debate in Corporate Governance*, 1 UNIVERSITY OF TOKYO JOURNAL OF LAW AND POLITICS 87 (Spring, 2004)

121 *Id.*

122

123

124

E. The “Comprehensive Development” Rule of Law

“[E]nsuring human rights and freedoms is critical both for the development of the economy and for the social and political life of Russia.”

Vladimir Putin, April 25, 2005¹²⁵

While the legal origins literature offers a social-scientific basis for policy prescriptions that largely track the Washington Consensus, the current alternative proto-orthodoxy seeks to define itself by its rejection of the Washington Consensus approach. Associated with the Comprehensive Development agenda articulated by World Bank President James Wolfensohn, the Comprehensive Development approach predictably claims that legal system functioning is somehow intimately connected with economic development, but expands the claim to include human as well as property rights, and labor and personal rights laws as well as property, contract, bankruptcy and other commercial law.¹²⁶ The following attempt to articulate a role for law reform in this broader development approach is typical:

“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, contract, *labor*, bankruptcy, commercial codes, *personal rights* laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.”¹²⁷ (emphasis added).

The Rule of Law, revived in the earlier Washington Consensus orthodoxy, is still the unifying

¹²⁵ Peter Finn, “Putin Touts Rule of Law to Reassure Investors,” Washington Post Foreign Service, April 25, 2005.

¹²⁶ Kerry Rittich, _____; Ohnesorge, *État de droit (rule of law) et développement économique*, supra note ____.

¹²⁷ World Bank, 1999

rhetorical concept (“the sine qua non of development” in the word’s of the World Bank), but what developing countries need now is the “comprehensive development” Rule of Law, which

“prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the *human dignity of each individual* is recognized and protected by law; and (4) *justice is accessible* to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, *fight poverty* , and have *legitimacy*.”¹²⁸

The World Bank’s justification for a recent loan to the Venezuela Supreme Court loan, for example, is that an “improved judicial system will help enhance *social and economic* development through improvement in the enabling environment for private investment and building confidence in the judiciary.”¹²⁹

As if designed to insulate the Bank from criticism from any quarter, this approach suggests that nearly anything we typically hope to get from a legal system – justice, fairness, equality, vindication of our rights - is somehow importantly related to development. NIE is still available for the proposition that all governance is somehow economic governance,¹³⁰ and if the Washington Consensus Rule of Law spoke mostly to the neoliberal agenda for property rights and a non-interventionist state, the Comprehensive Development orthodoxy would fill in the

¹²⁸ World Bank, Initiatives in Legal and Judicial Reform 2-3 (2004).

¹²⁹ World Bank, Report No: 17212-VE, “Project Appraisal Document on a Proposed Learning and Innovation Loan in the Amount of US\$4.7 Million to the Republic of Venezuela for a Supreme Court Modernization Project,” at p. 16 (December 9, 1997), available at < http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/09/17/000009265_3980217140241/Rendered/PDF/multi_page.pdf > (emphasis added) At Annex 1, p. 1.

¹³⁰ Id. at ___ [“Lessons derived from ‘New Development Economics’ indicate that it takes time for modernizing societies to learn and internalize new rules of the game, and that institutional change is incremental.”].

other half of the circle by including a focus on “the social,” as Kerry Rittich puts it.¹³¹

In doing so, the Comprehensive Development approach effectively returns to a “modernization” mentality with respect to the scope of the law and development agenda, as it revives the modernization tendency to define development much more broadly than simple economic development. Unfortunately, it also revives the modernizer’s confident tone of standing at that Archimedian point from which power and knowledge can be deployed, via legal technical assistance, to remake (somebody else’s) society. For example, in a project involving a loan to the Supreme Court of Venezuela intended to help it improve itself, the Bank employed a “participatory —” approach to designing the project itself, under which “stakeholders” are brought in to the process to help define goal and implementation, not merely as sources of information, as under the “external experts” approach.¹³² Although on the face of it this “stakeholder” approach seems obviously preferable to the “external experts” approach, it also looks like an attempt to preempt criticism of political interference by getting all the potential complaining parties to the table. This resembles the logic of negotiated rulemaking and other “new governance” experiments in the U.S., but our own experience suggests that this is no guarantee that outcomes will be perceived as legitimate, as parties that lose in this process are not likely to disappear quietly, unless their opportunity to object is somehow cut off.¹³³ Another example can be found in USAID’s Public Interest Legal Advocacy Project (PILAP) in Cambodia,¹³⁴ which seems to have embraced an impact litigation model and sense of certitude

131

132 Id. at 18.

133 Cary Coglianese research on post-Neg Reg litigation.

134

right out of the 1960s.¹³⁵

III. Testing the Orthodoxies against Northeast Asia

Assuming that the foregoing represents a reasonably accurate and complete statement of the dominant theoretical approaches to law and development, the next task is to test the claims of those approaches against common understandings of the ways in which law functioned in Northeast Asia during the decades of rapid economic development. As will become clear, none of these theoretical approaches was developed empirically from study of Northeast Asia, nor do any of them fare very well when their claims are tested against Northeast Asia as a case study.

A. Modernization and its Discontents Meet Northeast Asia

If the foregoing is a reasonable summary of the orthodoxy of the first law and development movement, what do we find if we examine its claims through the lens of the Northeast Asian experience? Looking at the performance of Northeast Asia's legal systems over the past several decades, there is no doubt that legal instrumentalism was ever-present, in authoritarian South Korea and Taiwan, as well as in democratic Japan. Governing elites saw law

¹³⁵ "PILAP selects legal cases that have strong potential to generate publicity and debate, and that demand broader accountability and respect for legal norms— beyond the mere bounds of the case. Thus, while protecting individual clients' rights, PILAP also hopes to demonstrate the legal system's viability as an instrument to generate greater transparency and respect for the rule of law." *Rule of Law: Success Stories: Legal Advocacy Project Wins Against Government Municipality in Cambodia*. USAID web page, last visited

as a tool with which to control their societies,¹³⁶ and retained levers with which to exert political control over their judiciaries that extended even to decisions in particular cases.¹³⁷ Northeast Asia thus took the instrumentalism of modernization's "liberal legality" one step further, as the instrumentalism envisioned by legal legality involved enacting general laws with instrumental purposes, but then leaving enforcement in particular cases up to the judiciary, essentially trusting that it would keep consequences and instrumental aims appropriately in mind, while still deciding individual cases in ways that would seem free from too strong an instrumentalist taint.¹³⁸ Instead, even in Japan, where judicial independence was best institutionalized, individual judges were sometimes disciplined for particular decisions that displeased their superiors within the judicial bureaucracy.¹³⁹ Although the noteworthy instances of such discipline were generally politically charged cases, especially in Japan, those cases were highly publicized, so any judge would have known of the possibility of punishment in case he decided "wrongly" according to those above. Law thus did not achieve the degree of autonomy called for even in the instrumental vision of liberal legality, and certainly not the level called for in later Rule of Law orthodoxies.

136

137 David M. O'Brien and Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in _____ (____). On Taiwan, see Wang, Hsiao-Ming and Leanne Fiftal Alarid, *Judicial Sentencing Decisions in Taiwanese Economic Crimes: Consequences of Swift Justice*, LAW & SOCIETY REVIEW (2001) ("By law, judges in Taiwan, like their American counterparts, should make their judgment independently. However, the promotion and transfer of Taiwanese judges are controlled by the Judicial Yuan, the highest authority of judicial administration in Taiwan. Hence, this chain of command may impact judicial decisionmaking . . ."). On Korea see, Dae-kyu Yoon, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA (1990).

138 Trubek and Galanter, *supra* note __ at __.

139 O'Brien and Ohkoshi, *supra* note __; Frank K. Upham, *Political Lackeys or Faithful Public Servants?: Two Views of the Japanese Judiciary*, 30 LAW & SOCIAL INQUIRY 421 (2005); John O. Haley; Miyazawa; Ramseyer and Rasmussen

What about other aspects of the “modern” legal system called for in the 1960s? During their highest growth decades all of the countries in Northeast Asia limited the numbers of fully licensed lawyers to a tiny fraction of what an American, at least, would consider normal.¹⁴⁰ No doubt the existing lawyers tended to favor this protectionism, but in at least in authoritarian Taiwan and Korea we normally don’t think of the legal professions as having sufficient political clout to obtain such a privileged position unless it happened to also benefit the political leadership, in which lawyers did not generally play a central role. At least in Korea and Taiwan, then, the extreme paucity of lawyers seems best explained as resulting from political choices to limit lawyers’ social role and influence, while in the case of Japan the private interests of the Bar or of industry probably played a bigger role in that policy outcome. In any case, though, lawyers in Northeast Asia even now have not become the general, free-ranging problem solvers of the modernization model, greasing the wheels of commerce one moment, protecting citizens from arbitrary state action the next. It is fair to say that they never really transcended the limited, formalist mode that offended liberal legalist sensibilities in the 1960s, nor for the most part did the judiciaries.

Again, as discussed above, judicial formalism in Taiwan and Korea should be understood in the context of political authoritarianism, in which assertions of power by the judiciary could be career ending, or perhaps worse. In such an environment, formalist reasoning probably feels like the safest course to the judge, as technically competent formalist reasoning will be convincing enough to get the job done in a considerable number of cases, especially since the legal profession and legal academy share the formalist mindset. And in “hard” cases, where the law is

140 [numbers from Korea, Taiwan, Japan]

obviously in doubt, or which involve obviously political concerns, formalism offers a refuge that the “modern” practices of open-ended policy analysis and the balancing of interests do not. In the Japanese context there is debate over whether politicians should be seen as the ultimate “principals” disciplining judges,¹⁴¹ or whether the judicial bureaucracy was essentially independent from the political side of government, with the top of the judiciary disciplining lower judges based upon its own criteria.¹⁴² Perhaps contributing to the continued formalism in Northeast Asia’s legal professions and judiciaries was the fact that legal education in Northeast Asia remained highly formalist, centered on learning the provisions of the fundamental statutes, and their interrelations with one another. Yet all this “backwardness” coincided with not only rapid economic growth, but also with dramatic improvements in broader “modernization” indices such as education levels, life expectancies, crime rates.

Having satisfied ourselves that Northeast Asia got the best of the liberal legality and modernization theory, we should now ask ourselves why Northeast Asians now seem bent on finally establishing long absent pillars of the “modern” legal systems many of us weren’t sure they needed. Beginning around 1990, the countries of Northeast Asia have entered into a multi-pronged effort at legal reform that seems driven by something very much like the modernization ethos. Starting, where else, with legal education, Japan, South Korea and Taiwan are all in the process of introducing “American-style” law schools. Japan has gone the furthest to date, licensing over seventy graduate-level “law schools,” nearly all of which are located at

141 See, Upham, *supra* note ____ [discussing this debate]; O'Brien and Ohkoshi, *supra* note ____, summarizing the debate.

142 The position of Haley. See, e.g., John Owen Haley, Upham, *supra* note __; O'Brien and Ohkoshi, *supra* note ____.

universities with existing undergraduate and graduate law faculties.¹⁴³ South Korea is currently planning to open graduate level law schools at eight to ten universities by 2008,¹⁴⁴ and Taiwan is actively studying the experiments of the other two.¹⁴⁵ Though the actual motives of the many parties involved in these processes will vary, a central stated purpose of these schools is to improve legal education by getting away from the abstract, doctrinal teaching that has characterized undergraduate legal education in the region,¹⁴⁶ as in the Civil law world generally (according to the American view). For example, to become more practically-oriented the new schools in Japan are experimenting with clinical legal education and inviting practitioners and judges to teach,¹⁴⁷ and this more practical education is supposed to turn out lawyers closer to the pragmatic problem-solvers of the modernization model.¹⁴⁸ Getting students to pay attention to this new, practical curriculum requires changing the national bar exams, which have focused heavily on mastery of doctrine, much of it learned from cram schools and extra-university study.¹⁴⁹ Japan is therefore changing its bar examination, [.....], while Koreans are also discussing an “American style” bar exam to accompany the “American style” law schools.¹⁵⁰

Coming in tandem with the creation of the new schools are moves to raising passing rates on national bar exams, so that the graduates of these new schools should enjoy a much greater

143 Sixty-eight were licensed to open in April, 2004, and four more were licensed to open in April, 2005.

144 Chung, Ah-young, “American-Style Law School to Debut in 2008,” Korea Times, April 22, 2005; Shin, Hae-in, “American-style Law School Plan Causes Controversy,” Korea Herald, May 19, 2005.

145

146

147

148

149 For a penetrating discussion of the relationship between Korean legal education and the Korean bar exam, see, James M. West, EDUCATION OF THE LEGAL PROFESSION IN KOREA (199_).

chance of actually joining the bar than undergraduate law majors previously had.¹⁵¹ While in the case of Korea it might be possible to achieve high passage rates for new law school graduates without increasing the total admitted to the bar per year by limiting the number of new schools and students,¹⁵² the Judicial Reform Commission's proposal along these lines was immediately criticized for abandoning real reform in the face of protectionist pressures from the legal establishment.¹⁵³ Although it may take some time, it seems clear that increasing the total numbers passing the bar will have to be part of the overall reforms. An increase in the size of the Japanese bar is much more certain. Having already allowed sixty-___ new law schools to open in spring 2004, with ___ more opening in 200_, and enrolling approximately ___ students set to graduate in 200_, Japan will not be able to reach the high passage rates that were originally part of its new law school plan unless the annual quota is increased substantially. Given the high opportunity costs for many "new law school" students as compared with undergraduate law students, low passage rates would upset a lot of people, and the current plan calls for ___ per year by 20__.

With more lawyers, the story goes, societies will become more law governed, and more oriented towards the assertion of rights via litigation, in a word, more "rule of law."¹⁵⁴

Reforming legal education should also get at the "problem" of judicial formalism, at least in the

150 Shin, supra note ___

151 It is actually misleading to talk about passing rates for bar exams as they have functioned in Northeast Asia. What they had were in fact numerical quotas, rather than passing rates.

152 Korea, which licenses approximately 1,200 new lawyers per year, is reportedly aiming for an 80% passage rate for graduates of the new law schools, but is contemplating in the range of 150 students at each of the 8 to 10 schools, Shin, supra note ___, in which case no dramatic increase in the total number passing the exam should be necessary.

153 "Editorial: Bigger Quotas Needed at New 'Law Schools'," *Hankyoreh Shinmun*, April 23, 2005.

long term, though to expedite the process Japan and Korea are also planning to introduce lay participation in some areas of adjudication, interjecting potentially counter-formalist forces into the process.¹⁵⁵

All these new, practically oriented lawyers have to have something to do, and rather than wait to see whether they can create demand for their own services, governments in the region have simultaneously been engaged in a series of law reforms that depend upon increased private litigation. Specifically, all three countries have, over the past ten to fifteen years, amended their corporate and administrative law regimes to encourage, respectively, litigation by corporate shareholders against management, and by private parties against government agencies.¹⁵⁶ Like other civilian legal systems,¹⁵⁷ those of Northeast Asia have not relied heavily on such “private” enforcement to achieve systemic goals such as constraining corporate management or government agencies. In keeping with the current trend, however, shareholder litigation is being

154

155 Using the term “jury” is potentially misleading given differences between these proposed institutions and the Anglo-American ideal type. They are also not modeled exactly on Germany’s “lay assessors,” however, so using the English translation of the Civil law’s main example of lay participation would also be misleading. On Korea, See, Kim, Jong-moon, “Reform Panel Sees Juries in Place by 2007,” *JoongAng Daily*, May 18, 2005, p. 1, col. 6; Chi-hyoung Cho, “Judicial Reform: Proposed Civil Participation in Criminal Justice Process,” *Korea Herald*, May 31, 2005. On Japan, see, Kent Anderson and Mark Nolan, *Lay Participation in the Japanese Justice System*, 37 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 935 (2004). [Taiwan . . .]

156 For more specifics on these reforms, see Ohnesorge, *supra* note __. On shareholder litigation, see Curtis Milhaupt, On administrative law reforms, see John K.M. Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist’s History*, unpublished S.J.D. dissertation, Harvard Law School, 2002; Tom Ginsburg, *Dismantling the ‘Developmental State’? Administrative Procedure Reform in Japan and Korea*, 49 *AMERICAN JOURNAL OF COMPARATIVE LAW* 585 (2001).

157 See, Guido Gerrarini and Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case*, European Corporate Governance Institute, Law Working Paper No. 40/2005 (May, 2005).

actively encouraged by various technical fixes, including easing standing requirements,¹⁵⁸ and easing court costs requirements placed on shareholder plaintiffs,¹⁵⁹ as well as enacting general shareholder class action statutes.¹⁶⁰ Administrative litigation is being encouraged by the enactment of general administrative procedure statutes, which include some citizen participation in rulemaking,¹⁶¹ information disclosure laws,¹⁶² amendments to “administrative litigation” statutes,¹⁶³ and the creation of dedicated administrative courts or benches.¹⁶⁴ In doing so they are opting to move towards the very “modern” idea of enlisting private interest, channeled through private litigation, in the public task of regulating corporate and government bureaucracies.¹⁶⁵

In doing so, moreover, these societies are moving in a direction that may have represented the consensus view circa 1970, but which, in the U.S. at least, has become very much contested terrain. Shareholder litigation as actually practiced in the United States is under constant attack from academics,¹⁶⁶ politicians,¹⁶⁷ and even newspaper columnists,¹⁶⁸ as is the “adversarial

158

159

160

161

162

163 Amendments to Japan’s Administrative Litigation Act came into force April, __, 2005.

164

165 See, Ohnesorge, “Politics...., supra note __.

166 Roberta Romano, “ “

167 During the 1990s Congress enacted the Private Securities Litigation Reform Act,, and the Securities Litigation Uniform Standards Act,, both designed to constrain shareholder litigation.

168 George F. Will, “Bull Market in Innuendo,” Washington Post, June 12, 2005, at B09 [defending President Bush’s nomination of Representative Christopher Cox to chair the Securities and Exchange Commission].

legalism” of America’s regulatory culture,¹⁶⁹ and the idea of administrative law plaintiffs functioning as “private attorneys general.”¹⁷⁰ While it might be possible to develop interest group explanations for all these reform initiatives, to attribute shareholder litigation reforms to local plaintiffs bars or institutional investors, for example, it is hard to avoid the sense of a “modernization” ethos at work, with an idealized version of the U.S. system again providing the model. Shareholder litigation is considered a much more central part of corporate governance in the U.S. than in other influential corporate governance regimes,¹⁷¹ and with respect to administrative law, reforms such as information disclosure laws and rights of public participation in administrative rule making clearly have U.S. roots. But if we actually look at how shareholder and administrative litigation function in the U.S., which as Trubek and Galanter¹⁷² and others¹⁷³ pointed out long ago is exactly what the modernization ethos biases us against, we might ask whether our “modern” system has resulted in stellar performance by either corporate management or by administrative agencies. American corporate management may be more sensitive to short term shareholder interests as a result of our active shareholder litigation culture,

169 Robert A. Kagan, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); Jerry L. Mashaw and David L. Harfst, *THE STRUGGLE FOR AUTO SAFETY* (1990).

170 In the federal courts, the battle has played out in the domain of standing doctrine, with critics of the private attorney general model, led by Justice Scalia, seeking to limit the ability of Congress to expand standing via “citizen suit” provisions. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), was a clear defeat for Scalia, but he and his allies have been fighting this battle since the 1980s, and there is no reason to think they will give up now, especially since Bush appointees Roberts and Alito have joined the Court. For an overview, see Buzbee, William W., “The Story of *Laidlaw*, Standing and Citizen Enforcement,” Emory University School of Law, Public Law & Legal Theory Research Paper Series, no. 05-13. For a resounding defense of the idea, see May, James R., “Now More Than Ever: Trends in Environmental Citizen Suits at 30,” 10 *Widener Law Review* 1 (2003).

171 Gerrarini and Giudici, *supra* note ____.

172

173

but that may come at the expense of longer-term outlooks that might benefit shareholders over the longer term, may make management too risk-averse, and perversely, might also pressure management to try to cover up negative financial results, resulting in real fraud.¹⁷⁴ Our administrative litigation culture, by the same token, is hard to translate into better performance in specific regulatory fields, environmental and workplace safety regulation being primary examples, or into public legitimacy for the regulatory state.¹⁷⁵

What this all suggests is a different possible validation of modernization thinking, based on the idea that there is a logic of convergence that drives national legal systems towards a common set of characteristics. But this is not a simple economic logic, like some contemporary convergence arguments, because it is clearly driven only in part, if at all, by economic forces. Rather, the logic of this convergence is more cultural, in the sense of being driven by the spread around the globe of a set of common ideals with respect to the performance of national legal systems.¹⁷⁶ While this mechanism is much more contingent and diffuse than the elite led transition from traditional to modern in modernization thinking, this may make it all the more irresistible. But whatever drives current Northeast Asian reforms, the fact that these systems are moving toward aspects of legal “modernity” at this late date does not change the fact that their most successful development decades coincided with decidedly un-“modern” legal systems.

If modernization theory does not hold up well when confronted with the Northeast Asian experience, however, its chief antagonists, the dependency and world systems approaches, do not fare all that much better. Despite the fact that dependency and world systems thinking produced

174 See, *infra* note ____.

175 See, *infra* note ____

176 Lawrence Friedman [].

no specific legal orthodoxy, for the same reasons that it is instructive to test law and development orthodoxies against Northeast Asian realities, it is also instructive to line up the broader economic and political claims of dependency and world systems theory against the Northeast Asian record. At one level, the Northeast Asian experience can serve as Exhibit A for those seeking to demonstrate the fallacies of these approaches.¹⁷⁷ As a descriptive matter, Northeast Asian states, beginning with Japan in the late 19th century and followed by Taiwan and Korea after 1950, were not consigned by the world capitalist system to permanent membership in the periphery. Rather, while the world capitalist system was in full force the three all moved from the periphery to either the core (Japan), or close to it (Korea, Taiwan). This suggests that even if the categories of periphery, semi-periphery, and core capture basic descriptive truths about the world, to deny that their borders are permeable, at least under some conditions, is overly deterministic. In addition, if the developmental state theorists are correct, then dependency theory's specific distrust of the Third World state, one of its critiques of the modernization school, must be tempered. Furthermore, Northeast Asia's climb up the world systems hierarchy did not merely coincide with a global economy; rather there is near universal agreement that engaging in world markets was key to their achievements. Thus, if a prescriptive aspect of dependency and world systems approaches is that the global capitalist order produces the categories of the world system and that countries should therefore "de-link" from the international system in some systematic way,¹⁷⁸ the Northeast Asian experience can again provide a counter story. In fact, while one would have to search long and hard to find a country

¹⁷⁷ See, e.g., Richard E. Barrett and Martin King Whyte, *Dependency Theory and Taiwan: Analysis of a Deviant Case*, 87 AMERICAN JOURNAL OF SOCIOLOGY 1064 (1982); Amsden, *Taiwan's Economic History*, supra note ____.

that has moved up the hierarchy by religiously following a free-market, free-trade orthodoxy, it would be equally hard to find lasting success among countries that have taken the “de-linking” advice of the dependency school very seriously. In any case, however, in our post-WTO, globalizing world “de-linking” hardly seems possible or normatively attractive to developing country policy makers, whereas the countries of Northeast Asia, which have made arguably the greatest advances within the world systems framework, have in fact been tightly integrated into the international trading system.¹⁷⁹

If one looks a bit deeper, however, one finds substantial points of connection between dependency theory and the Northeast Asian experience. First, it seems clear that to many Northeast Asians the picture of the world presented by dependency and world systems theorists seemed largely accurate. The world actually *is* divided between the “haves,” who command the industrial, technological, financial and military heights, and the “have nots.” Furthermore, as inheritors of proud cultures and histories, many Northeast Asians seem to have shared with dependency theorists the notion that they were among the “have nots” largely as a result of imperialism, though perhaps combined with some poor decisions on their own part. Although this mindset sees the possibility of movement up the world systems ladder, rejects the idea of de-linking, and in fact sees the possibility of progress only in aggressive engagement with the global economy, to many observers it is essentially mercantilist rather than liberal. The global economic order is treated with caution, and while widespread import substitution was of limited

178 For a de-linking argument, see Samir Amin, “ “

179 International financial markets are a different story, however. See, Russell Mardon, *The State and the Effective Control of Foreign Capital: The Case of South Korea*, 43 *WORLD POLITICS* 111 (1990); Robert Wade, *East Asian Financial Systems as a Challenge to Economics: Lessons from Taiwan*, 27(4) *CALIFORNIA MANAGEMENT REVIEW* 106 (Summer, 1985)

duration in Northeast Asia, a concern for self-reliance was reflected in the creation of elaborate mechanisms to channel and moderate connections with the international economy.¹⁸⁰ Because while Northeast Asian governments behaved as if the levels of the international economic order were permeable upwards, they also behaved as if they were permeable downwards, if international economic forces were left unmediated. Northeast Asian economic development may present a “challenge to dependency theory,” in economist Alice Amsden’s phrase from an early essay on Taiwan,¹⁸¹ but that challenge is based on a different set of solutions more than on a different diagnosis of the essential problem facing poor countries. For this reason, scholars of Northeast Asian economic thought have long explored the influence of Friedrich List, the nineteenth century German theorist, on Northeast Asian economic thinking.¹⁸² List’s nationalist prescriptions for late-industrializing Germany, and his critique of the cosmopolitan free-trade advocated by Adam Smith, bears a much closer resemblance to Northeast Asian trade practices than do the prescriptions of dependency theory.¹⁸³

B. Northeast Asia and the Neoliberal Rule of Law?

Leaving aside the question of rhetoric masking power politics, or whether the mistakes of

¹⁸⁰ For further discussion of controls over foreign investment see, *infra* notes _____. Appeals to self-reliance are of course used to justify simple interest-group protectionism, but particularly in the case of South Korea, the drive for national technological competence seems clearly in part based on national concerns for self-reliance.

¹⁸¹ Amsden, *supra* note ____.

¹⁸² Ohnesorge, *States, Industrial Policies, and Anti-Dumping Enforcement in Japan, South Korea and Taiwan*, *supra* note ____; Crawcour; Hein

the modernization era were being repeated, how did the claims of the new orthodoxy fare when compared with the Northeast Asian experience? It turns out that none of them fare very well, at least not if presented in a strong form. This in turn serves to highlight the political nature of the effort, and perhaps one justification for having non-interference norms in the first place. If, beneath the general rhetoric, the prescriptions of an orthodoxy turn out not to be based on successful market economies generally, but only the Anglo-American subset, for example, then the project really becomes one of Americanization. Although the non-interference norm exists for reasons having to do with the Cold War, the norm could serve a useful purpose now if it could help keep law and development efforts from doing what this article accuses them of, which is ignoring alternative possible approaches to the problems they seek to address. In other words, if a reinvigorated non-intervention norm meant that development institutions presented developing countries with menus instead of box lunches, essentially the approach argued for in Part IV, it would be worth reconsidering.¹⁸⁴

And how exactly did the Neoliberal rule of law orthodoxy fail the Northeast Asia test? First, on the level of private law and private property rights, the Northeast Asian experience provides good reason to think that constitutional law protecting property rights is not crucial to the overall development picture. The dictators who oversaw private-led development in Korea and Taiwan were unconstrained by constitutional law in any direct sense, showing it not to be necessary even to the relatively equitable economic growth that should please progressives. Clearly a political commitment to capitalism is enough, both for local entrepreneurs and for

¹⁸³ See, Friedrich List, *The National System of Political Economy* (Sampson S. Lloyd, trans., 1885) (available in electronic form from McMaster University's Archive for the History of Economic Thought, <<http://www.economics.mcmaster.ca/ugcm/3113/list/index.html>>

foreign investors, as China is demonstrating once again.¹⁸⁵ Furthermore, as we know from the U.S. experience, even a firmly established system of constitutional law is also not really sufficient to protect private property, if protect means insulation from regulation or compensated taking, as well as uncompensated takings. Property rights absolutism in the U.S. is a political agenda that is simply not reflected in constitutional law, as the Supreme Court’s “regulatory takings” jurisprudence and recent eminent domain decision show.¹⁸⁶ The Court has proven unwilling to expand the regulatory takings doctrine to protect property rights from anything but the most extreme economic destruction via regulation,¹⁸⁷ but has also never provided property owners with clear guidance as to what the scope of the doctrine actually is.¹⁸⁸ Likewise, in *Kelo* the majority of the Court extended its century-long generous interpretation of “public use” under the Fifth Amendment, facilitating the taking of property by government via eminent domain, while also highlighting the extent to which the narrow position advocated by the plaintiffs, and accepted by the dissenters, has its basis more in political ideology than in American economic history. This is not to suggest that property rights in the U.S. are an illusion, or that developing countries shouldn’t have constitutional law. But whether a country is a dictatorship, like Korea and Taiwan were in their high-growth eras, or a democracy, like the U.S. and post-WWII Japan, the idea that law and development activities can lead to the locking in of “rules of the game” protecting private property is fanciful, and perhaps downright dangerous. Because so much neoliberal Rule of Law theorizing seems to have been driven by the problems

184 See Section IV, *infra*.

185

186 *Kelo v. City of New London*

187 Neil K. Komesar, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 88-112 (2001).

of post-Soviet Russia,¹⁸⁹ it is useful to consider subsequent events there. It is unclear how far President Putin will go in reasserting the powers of the Russian State to undo the “reform” privatizations of the early 1990s, which Russia analyst Anatol Lieven calls “the single greatest example of such plundering in the whole of modern history,” . . . which “crippled the ability of the Russian state to provide basic services to its population - including for long periods even wages and pensions.”¹⁹⁰ But Putin’s rise is clearly a reaction to the neo-liberal hubris of that period,¹⁹¹ and we (and, most importantly, the Russians) will now just be very lucky if his counterrevolution stops short of real authoritarianism.

The story with administrative law is much the same, with even democratic Japan contradicting the orthodoxy in important ways. For one thing, all three countries maintained extensive regulatory screening systems to modulate cross border flows of technology and capital, and the bureaucracies responsible for these screens had a great deal of discretion to operate them free from the fear of judicial challenge.¹⁹² In the words of an American lawyer practicing in Japan in the early 1960s,

“[I]t might be well to state explicitly that the “rule of law,” insofar as it is intended to connote judicial review of economic determinations of governmental agencies, is virtually nonexistent in Japan. [With respect to foreign exchange and foreign investment control laws] the criteria for administrative decision are nothing but restatements of the broadest policy considerations. Beyond this there is nothing, and an appeal for judicial review of a decision of the Ministry of International Trade and Industry to allow, say, a twenty-five per cent foreign equity holding in a joint venture corporation instead of a forty-nine percent holding, or a Ministry of Finance

188 Id.

189 See, e.g., Gray, *supra* note __; Shleifer, *supra* note __; World Bank, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (1997).

190 Anatol Lieven, *Is Khodorkovsky Really the Victim?*, *International Herald Tribune*, June 10, 2005.

191 Id.

192 Kung-Chung Liu, *Legal Environment for Technology Transfer in Taiwan*, 36 *INTERNATIONAL LAWYER* 1145 (2002); On Japan, *New York Law Journal* article; Korea

determination to allow only a five per cent rate of interest on a validated loan from abroad instead of an eight per cent rate, would be unprecedented; the mere suggestion of it, in fact, sounds fatuous.”¹⁹³

These screening mechanisms the Northeast Asian governments erected between their economies and the international economy drove the industrial policy debate of the 1980s as well as the developmental state tradition in economics and political science, and it is no coincidence that “administrative guidance,” the tendency of Northeast Asian administrators to rely on unwritten suggestions instead of formal dispositions, became the aspect of Northeast Asian administrative law that really interested the West.¹⁹⁴ But on purely domestic matters, as well, there is broad agreement among observers that government-business relations were comparatively unstructured by formal administrative law. So even if the Hayekian picture put forth in the orthodoxy is a largely fantasy with respect to the U.S., which it certainly is, it even less accurately describes administrative law in the Northeast Asian miracle. This seems clear, moreover, whether one accepts the “developmental state” claim that it was the state that maintained the upper hand in these relationships, or whether one believes with either the traditional Left or with rational choice observers that the state essentially served focused private interests. From either angle the relationships did not fit the rule of law orthodoxy.

As for the alleged centrality of modern property and contract law to the functioning of the market, Japan and Taiwan, and arguably to a lesser degree Korea, all had highly evolved commercial traditions prior to the importation of Western legal rules and institutions, and the legal rules and institutions were imported en masse, more or less simultaneously with the

¹⁹³ Carl J. Bradshaw, *Selected Aspects of Business in Japan*, 14 STANFORD LAW REVIEW 639, 680-81 (1961-62).

importation of Western communications, transportation, manufacturing and organizational technologies. To borrow from the lingo of modernization theory, there occurred a “Big Push” in importing social and mechanical technologies, and under those circumstances attempts to isolate and value the contribution to development of some particular legal system innovation are likely to be unconvincing. Moreover, two of the oldest stories on the Asian law shelf concern the lack of formality in private contracting relations – short contracts, relationships matter more than form anyway, etc.¹⁹⁵ – and the low incidence of litigation.¹⁹⁶ Informality in contracting isn’t so much a problem for law and development theory, as NIE includes social and cultural norms within the institutional matrix, and the literature contains numerous references to non-contractual relations,¹⁹⁷ relational contracting,¹⁹⁸ trading networks,¹⁹⁹ and the usefulness of alternative dispute resolution.²⁰⁰ The problem comes more at the level of practice, where calls to pay attention to all these non-legal realities, which might differ from country to country, ethnic group to ethnic group, or industry to industry, seem to give way to the perceived need for top-down reform.²⁰¹ But if social norms really do matter, yet if law is also potentially potent, then it is not hard to imagine fouling up well-functioning markets by ill-conceived law reforms.

Northeast Asia’s low litigation rates presents more of a problem because the orthodoxy

194

195 See, e.g., Bradshaw, *supra* note __, at 680.

196 Kawashima; Miyazawa; Haley on Rational Litigant

197 See, e.g., (citing Macaulay, Stewart “Non-contractual Relations in Business: a Preliminary Enquiry,”)

198 See, e.g., (citing Macneil, Ian, ,)

199 See, e.g., (citing Greif, Avner, ,)

200 See, e.g.,

201 See, e.g., the unenthusiastic response of World Bank economist Cheryl Gray to Robert Cooter’s call for law reforms based upon existing practices. Cheryl _- Gray, “ ,” _- World Bank Research Observer __ (19__). On the difficulty of fully incorporating North’s framework into

seemed to make strong claims for the necessity of competent, efficient, user-friendly courts to a successful market economy.²⁰² This is not the image of Northeast Asia's courts that has prevailed among observers, however, where the practitioners have long bemoaned the situation,²⁰³ and the main academic discussion has been over whether low litigation rates were culturally or structurally driven.²⁰⁴ This is a bit misleading, however, as Northeast Asian business people certainly took legal disputes to court, but the reality of that litigation is quite far removed from the rhetoric of the orthodoxy. Northeast Asians may have now decided to encourage litigiousness, but that doesn't change the reality of the earlier era.

Finally, if one examines the specific legal fields that loom large in the orthodoxy, areas such as insolvency law, competition law, corporate law, it is not hard to show how the roles claimed for them in the orthodoxy don't match the roles they played in Northeast Asian economic development. The most glaring example is intellectual property law, which in Northeast Asia has failed, and continues to fail, to live up to the demands that mainstream law and development literature would place on developing countries. Korea and Taiwan are still perpetual offenders under U.S. trade laws designed to pursue foreign governments that don't effectively protect U.S. intellectual property rights,²⁰⁵ and while Japan lives up in everything but some aspects of its patent process, during its high growth periods Japan's legal system faced many of the same complaints.²⁰⁶ [domestic v. international protection] Formal insolvency

law and development work, see *infra* note ____.

202

203

204 See the Kawashima, rational litigant exchanges.

205 301 "Watch Lists"

206

regimes were relatively little used,²⁰⁷ for example, at least for large firms, and competition law was notoriously unsuccessful as a tool for combating cartels.²⁰⁸ Although Japan's Fair Trade Commission (and prosecutors?) are now undertaking a high-profile attack on a bid-rigging cartel among specialized bridge building firms,²⁰⁹ this cartel existed for over forty years, and was so little concerned with the law that it published and distributed rule books to relevant employees from member companies. Japan may now be using the law more aggressively to enforce competition, but it has been a long time coming.²¹⁰ And while corporate law completely penetrated these economies in the sense that the important firms were organized and operated as corporations, or networks of corporations, the reality was far from the model. In Taiwan the most important corporations were either owned by families or by the Party-state apparatus of the Kuomintang,²¹¹ while in Korea the important corporations were virtually all family or state controlled.²¹² Minority shareholder rights existed on paper, of course, but judicial enforcement of those rights did not play a serious role in corporate governance.²¹³ Even in Japan, where

207 Terence Halliday and Bruce Carrothers,

208 Kozo Yamamura, *The Development of Anti-Monopoly Policy in Japan: The Erosion of Japanese Anti-Monopoly Policy, 1947-1967*, 2 STUDIES IN LEGAL AND ECONOMIC DEVELOPMENT 1, at 22 (1967-68) (concluding that "the present Japanese *pro-monopoly* policy has successfully emasculated all but a few remnants of (U.S. Occupation Government) anti-monopoly legislation as it existed after World War II." (emphasis added)).

209

210 Japan's Fair Trade Commission can take a comparatively aggressive stance when it wants to, as it has in taking action against Intel for "exclusionary pricing" policies that may not be actionable in the U.S. See, Ante, Spencer, "AMD Hauls Intel Back to Court," Business Week Online, June 28, 2005.

211 Hamilton, Biggart

212

213 *Family Control and Corporate Governance: Evidence from Taiwan*, with Yin-Hua Yeh and Tsun-Siou Lee, INTERNATIONAL REVIEW OF FINANCE, Volume 2:1/2 (2001); *Commitment or Entrenchment?: Controlling Shareholders and Board Composition*, with Yin-Hua Yeh, forthcoming JOURNAL OF BANKING AND FINANCE (2004).

corporate law mattered more to the reality of corporate governance, shareholders exercised control mainly through the size of their holdings and the threat of sale, not through litigation to enforce their legal rights.²¹⁴

C. Legal Origins and Northeast Asia's Development

As noted above, although the neoliberal rule of law vision remains part of the picture, the center of gravity in the law and development world has shifted in the direction of two very different “proto”-orthodoxies, the legal origins and the comprehensive development approaches. As with the modernization and Neoliberal rule of law orthodoxies, it is instructive to compare the claims of these approaches with the Northeast Asian experience. Turning to the legal origins approach first, the most obvious thing to say about this literature if one thinks about the Northeast Asian experience is that these were all fundamentally Civilian legal regimes, whether in the formal attributes of the law, or in the organization and functioning of institutions such as the judiciary, the legal profession, or legal education. Whatever advantage can be proven for the Common law through the use of statistical models, having a structurally Civilian legal system cannot be much of a handicap. But even though these were all structurally Civilian systems, they were also all hybrids to one degree or another with respect to corporate and securities law, which had been influenced by U.S. norms, so “coding” them presents serious problems. In addition, however, the history of Northeast Asian law is replete with “legal transplant” failures, in which the imported rule or institution didn't function as hoped. “Coding” these legal systems, or any

214

other for that matter, therefore cannot be fixed by just paying attention to legal hybridization, but could only be plausible if supported by sustained research into actual legal system functioning, the law “in action.”

Turning to more specific issues, Northeast Asian corporations have succeeded under very different models of corporate governance, in none of which did corporate law provide extensive protections for minority shareholder rights. The prototypical corporation in Taiwan and Korea was dominated by controlling shareholders, with no separation of ownership and control. These owners were in turn checked by a variety of forces, including the competition of product markets, the “exit” option enjoyed by shareholders, and interventionist governments controlling the banks from which they borrowed. Legal rights of minority shareholders were inconsequential. As is well known, the dominant pattern in Japan was different, with ownership and management separated, but with monitoring of management again provided largely through forces other than minority shareholder rights to sue management. Given the central role domestic corporations have played in Northeast Asian economic development, it is hard to argue for the importance of minority shareholder rights on development grounds, unless one is already assuming the superiority of stylized Anglo-American capitalism, which of course faces its own Northeast Asia problem.

Other policy prescriptions one might draw from the legal organs literature fare little better. The deep and liquid financial markets that the early law and finance studies associated with Common law jurisdictions can be efficient allocators of capital, but bank-centered financial systems are clearly compatible with successful economic development. Likewise activist, interventionist governments, which this literature associates with the Civil law tradition, can

clearly go hand in hand with astounding economic development, even if they can also be prone to red-tape and rent seeking, as the literature tries so hard to demonstrate. Finally, judicial independence, for which this literature seeks to provide an economic development rationale, hardly thrived during Northeast Asia's most rapid economic development. Like other elements of the legal origins policy package, the argument for judicial independence seems to rely on background assumptions about the superiority of a stylized Anglo-American political economic tradition, assumptions which Northeast Asia's economic miracle should call into question.

It is telling that in its eight pages the References section of *Doing Business 2004: Understanding Regulation*²¹⁵ contains not a single reference to scholarship on Northeast Asian economic development in any field, let alone scholarship on the role of law in Northeast Asian development, and only one piece authored (co-authored, actually) by a serious student of Northeast Asian law.²¹⁶ Perhaps the bias this proto-orthodoxy displays against Civilian jurisdictions is simply a failure in sample selection, but that seems unlikely given the technical sophistication of the scholarship, and the stakes involved. Whether the selection bias was outcome driven, or due to some morbid tendency to study failure, it is glaring considering Northeast Asia's dramatic success.

D. Comprehensive Development and Northeast Asia

The comprehensive development approach has much to commend it, at least to those who

215 See, *Doing Business 2004*, supra note __, at _____. Available at <<http://rru.worldbank.org/Documents/DoingBusiness/2004/db2004-references.pdf>>

216 Katharina Pistor, et al., *Innovation in Corporate Law*, JOURNAL OF COMPARATIVE

share its underlying assumption that having a decent society involves more than just “getting the rights right,” and the approach may help insulate law and development projects from criticism, at least from the Left. But a clear-eyed look at Northeast Asia’s experience suggests that the approach is either wrong, however, or succeeds only through redefining development in a way that risks the ethno-centrism of the modernization approach. Part III. __, above, catalogues how Northeast Asian legal systems failed important aspects of the neoliberal Rule of Law orthodoxy, but comprehensive development fares even worse, though this is not surprising since in many ways it just represents an addition of additional items to the laundry list, rather than a fundamentally different approach. When we look at some of these additional items, their failures become equally clear.

Labor rights in Northeast Asia have long been criticized by local and foreign observers,²¹⁷ for example, and the Korean case is particularly interesting for being criticized by both the Left and the Right. The Left claimed, accurately, that the government cooperated with business in using illegal means to suppress truly independent unions, trying to instead coerce a system of company (not trade) unions, which would all belong to the docile, government-approved national peak union.²¹⁸ Business groups, meanwhile, complained that Korean labor markets were insufficiently flexible because of the protections the law provided to individual workers. To give but one example, Korea, like Japan,²¹⁹ does not allow at-will termination,²²⁰

ECONOMICS (forthcoming) (co-authored by Japan law scholar Mark West).

²¹⁷ See, e.g., Frederic C. Deyo, *BENEATH THE MIRACLE: LABOR SUBORDINATION IN THE NEW ASIAN INDUSTRIALISM* (1989).

²¹⁸ James M. West, *South Korea’s Entry into the International Labor Organization*, 23 *STANFORD INTERNATIONAL LAW JOURNAL* 477 (1987).

²¹⁹ Ryuichi Yamakawa, *Labor Law Reform in Japan: A Response to Recent Socio-Economic Changes*, 49 *AMERICAN JOURNAL OF COMPARATIVE LAW* 627, 645 (2001).

a provision that particularly baffled American investors. Perhaps the simplest way to understand Korean labor regulation is as paternalist, meaning that it rejected a free-market model by including comparatively rigid protections for those worker interests that it recognized, but at the same time discouraged litigation to enforce these rights, and also discouraged labor from organizing in ways that would allow it to become a political force in its own right, participating in the definition of its interests²²¹ It seems likely that replicating Japan's labor situation was the goal of this system, as after the 1950s Japan enjoyed relative labor peace, while also keeping labor's role in setting the terms of the overall political economy comparatively limited.²²² Particularly in Korea and Taiwan,²²³ the state did not stop with merely legal means to enforce this regime, but also resorted to illegal measures to keep labor under control.

With respect to civil and political rights, social justice, sustainable development, access to justice, or the other add-ons found in the Comprehensive Development approach, Northeast Asia fared little better during its high-growth decades, and not everything has changed. In the spirit of Comprehensive Development, the World Economic Forum

“has begun to explicitly incorporate in its measures of competitiveness aspects of gender equality, recognizing that, far from being a matter of mere political correctness, the advancement of women is an important strategic issue. Countries which do not capitalize in the full potential of one half of their societies are misallocating their human resources and compromising their competitive potential.”²²⁴

220

221 West, *supra* note ____.

222 T.J. Pempel and Keiichi Tsunekawa, *Corporatism Without Labor?: The Japanese Anomaly*, in *TRENDS TOWARD CORPORATIST INTERMEDIATION* (Philippe C. Schmitter and Gerhard Lehbruch, eds., 1979); Deyo, *supra* note ____.

223 T.K., *LETTERS FROM SOUTH KOREA* (David L. Swain, trans., 1976).

224 World Economic Forum, “Women’s Empowerment: Measuring the Global Gender Gap,” at 2 (2005).

http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/gender_gap.pdf

While it is hard to disagree with the proposition that misallocating its resources makes a country less competitive, the fact that Korea ranked 54th out of 58 countries in the WEF's 2005 gender equality study, while Japan came in at 38th,²²⁵ suggests that the subjugation of women in Northeast Asia has not been a source of significant economic problems, though that is no reason not to treat it as a very serious human rights problem. Ideas like "misallocating resources" get harnessed to concerns such as gender equality because they evoke the apolitical, technocratic authority of economics, but the result can be intellectual mush. Women have obviously played enormously important roles in Northeast Asian economic development, but if we claim that those roles resulted in the "misallocation of resources" then it seems that what we have done is to turn resource allocation into a normative question, and then to answer it by asserting our own values. That is not the answer to the problems of law and development.

The same argument applies to civil and political rights more generally, which were severely curtailed in Korea and Taiwan for decades, with martial law, restrictions on the press, restrictions on travel, and quasi-police state measures to penetrate all levels of society.²²⁶ Social safety nets were very thin by Western standards,²²⁷ and to the extent that "sustainable" development means environmental protection and forcing manufacturers to internalize the costs

225 Id. at 9. The World Economic Forum excludes Taiwan in favor of China, so Taiwan was spared inclusion. Taiwan would probably do better than Japan or Korea, though there is no reason to think that has helped it out-compete the other two in any respect.

226 Taiwan's one-party rule under the Kuomintang, Roy, *supra* note __. On Korea, see John Kie-Chiang Oh, *KOREA: DEMOCRACY ON TRIAL* (1968); T.K., *supra* note __.

227 Robert Wade, in an early article on Northeast Asian financial systems, pointed out a possible function for thin social safety nets in Northeast Asia, which is that they probably boosted savings rates, feeding funds to the state-controlled banking system, which governments could then use to fund targeted industries. See Robert Wade, *East Asian Financial Systems as a Challenge to Economics: Lessons from Taiwan*, 27(4) CALIFORNIA MANAGEMENT REVIEW 106 (Summer, 1985).

of the pollution they produce, growth was put over sustainability.²²⁸ Nor was “access to justice” ever given much emphasis in Northeast Asia, as the formal legal system remained relatively distant from the lives of ordinary citizens. Bars were intentionally kept tiny compared to general populations, as were judiciaries, and while other law-related professions and non-judicial dispute settlement took up some of the unmet demand, nobody has ever argued that Northeast Asian citizenries were given easy access to their formal legal systems.

One can say, therefore, that if the claim is that economic development, as traditionally understood, requires the comprehensive development Rule of Law, then the claim is just wrong. The record, in fact, better supports the older argument that it is the suppression of individual rights and democracy that is somehow positively related to economic development, and that rights and democracy will come later.²²⁹ Whatever its other faults, that argument at least benefits from an obvious correlation in the Northeast Asia experience, where growth did come before democracy and social advances, whereas the “comprehensive development” approach is directly contradicted. It is clear, though, that development for advocates of the “comprehensive development Rule of Law,” is not limited to economic development, but has been redefined to include a range of social aspects beyond economic growth.²³⁰ It may be that the Rule of Law, whatever that means, is now an end in itself, no longer a means to an end as it had been presented in the neoliberal Rule of Law vision.²³¹ But then there appears to be circularity problem: if we define “development” to include right/value X, then a legal system that enshrines and effectively

228 See, e.g., Norman R. Eder, *POISONED PROSPERITY: DEVELOPMENT, MODERNIZATION, AND THE ENVIRONMENT IN SOUTH KOREA* (1995).

229

230 See, Amartya Sen, *DEVELOPMENT AS FREEDOM* (19__).

231

protects right/value X is almost certainly a prerequisite to development. This does indeed bring us back to the “modernization” mindset, in which development lost any concrete grounding, and came to mean being the way we wished ourselves to be.²³² This is problematic on several grounds, however, some of which have been raised already.

First of all, Northeast Asian societies, despite not living up to any of the law and development orthodoxies, are highly successful societies in many respects, and in fact it often seems to be Northeast Asia’s successes, in building cars, in life expectancy, or in education, for example, that push the West to do better. Thus there is something deeply ethnocentric about any attempt to build a comprehensive (“modern”) socio-legal model to be sold to today’s developing countries that does not take Northeast Asia seriously. Furthermore, given that law and legal systems are intensely political, there are good reasons to be skeptical about ever-expanding definitions of their tasks by law and development practitioners, especially from the IFIs. Any law and development approach is going to be political, and law and development orthodoxies inevitably involve normative pictures of how their creators wish the world were, but limiting the objective to some measure of economic performance seems less imperialistic than an open-ended mandate to remake societies. And even though the law and development practitioners can always fall back on the formal excuse that they are simply doing what’s been requested by the local government, if a legal field is at all important socially, an invitation from the current regime will very likely just mean siding with the winner in very political local debates.²³³ This is not

²³² See, *supra*

²³³ The IMF and World Bank initiatives in Korea resulting from the Asian Financial Crisis certainly had this flavor, as the Left-leaning government of President Kim, Dae-Jung used the opportunity to push through measures against the Korean Chaebol that were opposed by conservatives. See, Kim, *Living with the IMF*, *supra* note __; World Bank Korea project

only playing in local politics in everything but the most formalist sense, but it also means that reforms pushed through in this way will very likely lack the true local ownership that would give them real stability.

IV. Beyond Critique: New Approach to Law and Development from the Northeast Asian Practice

Despite Northeast Asia's unquestioned development success, economic, social and political, and the enormous body of research that success has spawned in other fields, none of the important law and development orthodoxies developed to date comes close to capturing the dynamics of law and development in the region. But this paper is not simply a critique. Part IV, below, suggests a new approach to law and development work, an approach informed by the ways in which the existing orthodoxies have failed the Northeast Asia test.

A. The Limits of Critique

Criticism of law and development orthodoxies is important, both as a way to challenge existing approaches, and as an exercise that can encourage critical thinking about relationships between law, economics, politics and social life. But when new bursts of law and development activity come it often seems as if criticism of the last round, if noted at all, has had limited impact. It seems clear, for example, that Trubek and Galanter's attack on the assumptions of the first law and development movement has had a more lasting effect on legal thought, through its

documents.

contributions to the Critical Legal Studies and Law and Society movements, than it has on the law and development agenda as such. For anyone interested in affecting law and development practices it is important to consider why this might be.

One possibility might be simple political ideology, and some criticisms seem based on the idea that the staff of places like the World Bank or the IMF is the problem.²³⁴ There is certainly some truth to that, for it is clear that currents in the economic academy affect thinking about development, which affects law and development activities. But the World Bank at least appears to be staffed more with moderate, internationalist liberals than with ideologues,²³⁵ so one would expect them to be sympathetic to reasoned arguments that their approach to law and development is not working.²³⁶ Great Power politics also clearly matters, so the goals of the United States in particular are going to be reflected to some extent in law and development activities by the IFIs. But one would have to think that there would be substantial slack in political control over the Bank and other IFIs, which would allow law and development practitioners considerable freedom to take criticism seriously and to experiment with different approaches. Why is it then that external critiques seem to have so little impact on law and development approaches?

There may be several factors at play, but certainly one of the reasons outside critiques have limited bite with respect to the law and development institutions is that the people in these

234 See, e.g. Joseph Stiglitz, *GLOBALIZATION AND ITS DISCONTENTS* (200_) [attributing rigidity of IMF policy prescriptions to ideological zeal].

235 Sebastian Mallaby, "What Wolfowitz Faces," *Washington Post*, Monday, May 30, 2005, at A21 (describing resistance by World Bank staff to new president, Paul Wolfowitz, and estimating that "probably 90 percent of the bank's staff opposes the Iraq war, and a similar proportion regard President Bush as a dumb cowboy.").

236 For proof that this is the case, see Mohan Gopalan Gopal, *Law-Dependent Public Goods: A Proposed Strategic Framework for a Results-Based Approach to Legal and Judicial Reform* (unpublished manuscript, on file with author).

bureaucracies who actually do law and development work are understandably drawn to generally applicable models or frameworks they can understand and work with. Critiques often fail to provide such models or frameworks, exhausting themselves in demonstrations that reforms are political, in the sense that they benefit one social group or another, or that context is everything, so that “transplant” problems are insurmountable. But how is a World Bank, USAID or IMF professional supposed to deal with the idea that legal and institutional forms are potentially meaningless until we know everything about the particular milieu in which they are supposed to operate? They, better than anyone, likely understand the poverty of simplistic transplantation approaches. As a USAID official stated when asked to comment on Douglass North’s approach:

“Although we have long paid lip service to the importance of cultural differences and what we used to refer to as “social soundness analysis,’ we have more often assumed that introducing change based on our own experience will result in a similar outcome in a developing-country environment, where different institutions prevail. And we are very often disappointed with the results.”²³⁷

Yet even if the bureaucrat worries that this may be the case, taking the idea too seriously could be paralyzing, and for people at the working level of a bureaucracy paralysis does not earn stellar performance reviews. This dynamic can be illuminated by looking at the way the law and development literature tends to handle ideas that are too important to ignore, but that also represent fundamental challenges.

The work of Friedrich Hayek provides a wonderful example, as his normative aspirations for administrative law infused the Washington Consensus Rule of Law orthodoxy,²³⁸ yet his

²³⁷ Jonathan Conly, *Comments on Douglass North’s ‘Understanding the Process of Economic Change*, Forum Series on the Role of Institutions in Promoting Economic Growth, Forum 7: Institutional Barriers to Economic Change: Cases Considered (June 24, 2003).

²³⁸ See, *supra* notes

basic theoretical approach, if taken seriously, would be difficult for traditional law and development orthodoxies to digest. To review, Hayek offered a normative vision of the rule of law that he suggested would maximize the predictability of the legal system to private actors, thus facilitating market ordering. Hayek's rule of law demands that "government in all its actions is bound by rules fixed and announced beforehand --- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."²³⁹ "All coercive action of government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible."²⁴⁰ "[D]iscretion left to the executive organs wielding coercive power should be reduced as much as possible,"²⁴¹ so that "[w]ithin the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts."²⁴² Hayek, like his followers in the Neoliberal rule of law tradition, then claims that observation of this rule of law is "a necessary, but not yet a sufficient, condition for the satisfactory working of a free economy."²⁴³ Just as Weber felt that formal rationality would tend to frustrate democratic forces and those who wished to use law to further their substantive commitments,²⁴⁴ so Hayek's rule of law would "preclude[s] all those measures which would be necessary to insure that individuals will be rewarded according to another's conception of merit or desert rather than according to the value that their services have

²³⁹ Friedrich A. Hayek, *THE ROAD TO SERFDOM*, p. 72.

²⁴⁰ Friedrich A. Hayek, *THE CONSTITUTION OF LIBERTY*, at 222.

²⁴¹ *The Road to Serfdom*, 72-73.

²⁴² *The Road to Serfdom*, 73.

²⁴³ *The Constitution of Liberty*, 222.

for their fellows --- or, what amounts to the same thing, it precludes the pursuit of distributive, as opposed to commutative, justice.”²⁴⁵

Even though Hayek’s vision may seem fanciful when one considers the discretion that administrative law allows to government actors even in advanced market economies such as the United States, Britain²⁴⁶ or Germany,²⁴⁷ let alone high-growth Northeast Asia,²⁴⁸ it is easy to see why it is so attractive to law and development practitioners, and not only those of the neoliberal bent.²⁴⁹ But if one takes Hayek a bit more seriously, particularly his theory of knowledge, his ideas should become problematic even to a law and development project that shares his deregulatory, free-market agenda. The problem with the philosophical, as opposed to the normative, Hayek is that he expressed severe doubts about the ability of any person, or small group, to understand social processes well enough to engage in effective planning.²⁵⁰ Market outcomes are much less prone to this epistemological problem because they are “spontaneous orders,” reflecting the aggregation of individual decisions taken with personal knowledge and out of self-interest, and the Common Law is exalted over the Civil Law (and modern statutes) precisely because it develops through a similarly informal, disaggregated process.²⁵¹ Such

244

245 Constitution of Liberty, at 232.

246

247 Edward Rubin, *Discretion and It’s Discontents* 7_C CHICAGO KENT LAW REVIEW __ (199__).

248 See, supra ____.

249 Of course discretion can also be characterized as “flexibility,” which was praised by an earlier studies of Northeast Asian development. See, East Asian Miracle Report, at ____; HIID volume. That flexibility was available because legal systems limited the extent to which administrative law causes of action could be used to intervene to check government decisions at the request of private parties, and, arguably, because relevant government organs enjoyed a relatively high degree of autonomy from interest groups.

250

251 _____. Hayek’s argument is therefore similar to later arguments that the Common Law

skepticism concerning our ability to grasp the workings of society well enough to engage in planning hardly fits with any of the law and development orthodoxies surveyed here, however, as they all assume that putting the correct legal framework in place will bring about the social changes they desire. And it is no escape from this dilemma to propose just putting in place the minimal legal framework of the “night watchman state” and then letting market forces operate, because we are always dealing with real societies, with real histories, and with existing distributions of wealth and power, which would have to be understood in order to predict the outcomes that the market would produce. Although Hayek might not have called this “planning,” it shares the same fundamental difficulty.

One can see the same dynamic with respect to even the work of Douglass North, which provided such a central theoretical justification for the move by the IFIs toward a legal reform agenda of broad, systemic change, rather than more traditional doctrinal adjustment. One can take a very different message from reading North himself, however, a message that in some ways echoes Hayek’s. North’s definition of an institution now includes pretty much everything that anyone thinks might affect behavior, including cultural norms and ideology,²⁵² and the fact that developing countries do not present a tabula rasa means that North’s return to this essentially sociological or anthropological approach²⁵³ makes him a more problematic theorist of law and

evolved towards economically efficient outcomes. See, Rubin, Priest, Posner.

252

253 Early in his career North was interested in the work of sociologist Robert Merton, an important figure in the development of modernization theory. “Douglass C. North – Autobiography,” <<http://nobelprize.org/economics/laureates/1993/north-autobio.html>> Although North seldom cites sociologists, his ideas about social institutions and capitalism are not so far from Weber’s, for example. In his May, 2005 addendum to his autobiography on the Nobelprize.org Web site, North writes as if he has taken on the mantle of Talcott Parsons, searching for a universal paradigm of human action that will unify the social science: “It is clear

development than he was thought to be. For example, in recent years free-market activists at George Mason University's Mercatus Center and at the University of Maryland's IRIS Center have hosted a series of events "to help USAID make its donor assistance more effective and sustainable by incorporating insights from the New Institutional Economics into USAID's programming and delivery of development assistance."²⁵⁴ But a USAID employee asked to comment on North's recent work clearly could not find much of programmatic value in it, politely "join[ing] the author of this stimulating paper, who says at its conclusion that he hopes it will inspire scholarly efforts to carry forward a research agenda essential to improving the performance of economies over time."²⁵⁵ It was clear that he already understood the problem of local context, asking rhetorically "[h]ow often have we tried to assist developing country reformers to introduce new laws to boost free-market competition or to increase transparency or to level a commercial or political playing field only to be stymied by completely ineffective implementation of the news laws? The prevailing institutions – most often informal constraints – beat us most of the time." It seems obvious that he understood the overwhelming importance of local social context, so that what he seemed to take away from his encounter with NIE and North was new lingo to describe what he already understood.

The dynamic can also be seen in the treatment of the research by Stewart Macaulay, Ian

that we ha[ve] to have an explanation for why people make the choices they do; why ideologies such as communism or Muslim fundamentalism can shape the choices people make and direct the way economies evolve through long periods of time. . . . I believe that an understanding of how people make choices; under what conditions the rationality postulate is a useful tool; and how individuals make choices under conditions of uncertainty and ambiguity are fundamental questions that we must address in order to make further progress in the social sciences."

²⁵⁴ Jonathan Conly, "Comments on Douglass North's 'Understanding the Process of Economic Change,'" Forum Series on the Role of Institutions in Promoting Economic Growth, Forum 7: Institutional Barriers to Economic Change: Cases Considered (June 24, 2003).

MacNeil, and others who have long chronicled the presence in the most developed market economies of legal informality, relational contracting, and other realities that aren't captured well in simple models of how law and economy interact.²⁵⁶ They have demonstrated, over several decades of work, that a great deal of American commerce takes place with only tenuous connection to the traditional contract law paradigm of arms-length bargains, resulting in clear contractual rights, which can then be simply enforced by courts. While these writings are cited in the law and development literature, like recent writings on institutions and social norms, each of these literatures, if pushed too far, will present serious challenges to the development bureaucrat, or private sub-contractor consultant, charged with instituting legal system reform in societies and business cultures about which he or she will likely know very little.

In the marketplace of law and development ideas, then, there seems to be a real need for simple sets of prescriptions that affirm the importance of legal system performance to economic development, yet do so in language that is technocratic rather than overtly political, while also conforming to the affirmative political view of law normally held by donor countries. Thus, even if one accepts the accuracy of the critique contained in Part III, there are structural reasons why the law and development industry will remain impervious to criticism by counter-example if the counter-examples cannot be packaged into some sort of coherent alternative program. What follows is a preliminary effort to show how such a package might be constructed, based upon fairly well recognized aspects of law in modern Northeast Asia. Part VI.B. reviews areas of law and legal system performance that are generally viewed as important for economic development,

255 Id.

256 See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business*, AMERICAN SOCIOLOGICAL REVIEW 55 (1963); Ian R. Macneil, *Relational Contract: What We Do and Do Not*

yet which in Northeast Asia have often failed to function in ways demanded by the law and development literature. These “failures” of reality to conform to theory should lead to reevaluation of the theory, and Part IV.C. builds upon these “failures” to offer an alternative approach to law and development work, an approach that better fits the Northeast Asian experience, while also representing an realistic alternative to current law and development approaches.

B. Cabbages to Kimchee: Constructing an Alternative Approach to Legal Development Assistance from Northeast Asia’s Legal “Failures”

If we look at all the ways in which Northeast Asia’s legal systems during the development experience fail to meet the claims of the law and development orthodoxies, we are confronted with quite a catalogue of failures. Legal systems in high growth Northeast Asia failed in many ways to move beyond formalism, failed to put judiciaries and entrepreneurial lawyers at the center of the governance process, failed to serve as convenient fora for private litigation to enforce property and contract rights, failed to protect minority shareholder rights, failed to take intellectual property rights, competition law, or insolvency law very seriously, and failed to legalize state-private sector relations. This creates a serious problem if, like each of the law and development orthodoxies discussed here, one wants to claim that a well-functioning anything is really necessary for development. Because this paper seeks instead to develop theory inductively, by looking at how law actually functioned in Northeast Asia during high-speed economic growth, these “failures” disappear, replaced by dimensions and degrees of performance

which are amenable to functional analysis in ways that the “failures” approach is not. The Northeast Asian experience counsels, however, that the functions of various areas of law cannot not be simply assumed, but must themselves be opened up to redefinition based upon empirical study.

1. Northeast Asian Instrumentalism and the Compartmentalization of Law

With respect to instrumentalism, Northeast Asia’s experience establishes a couple of facts. First, instrumentalism beyond the American “liberal legality” norm, whether of the relatively benign Japanese variety or the virulent Korean style, is perfectly compatible with rapid economic growth. While this may cause problems for those committed to traditional legal values, another strand of the modernization tradition was always a bit skeptical of lawyers and legality hamstringing the state as it pursued its modernizing mission.²⁵⁷ But even if one defines development more broadly, as under the modernization and comprehensive development approaches, the Japanese experience shows that a thoroughly modern society can allow a degree of legal instrumentalism beyond even the modernization model, accomplished through constraining judges to decide individual cases according to the political norms of the bureaucracies within which they work. Whether the ultimate principals were Japan’s politicians or the judges at the top of the judicial bureaucracy, the result for Japan has been that the judiciary has not become an active participant in the overall governance system to anything like the degree federal courts are in the U.S. But as has become very clear now in the U.S., the idea of a non-

²⁵⁷ Gilman, *supra* note __, at __ (citing Huntington?).

political consensus on the independence of our judiciaries, federal as well as state, was one of those attractive fictions from a less polarized era.²⁵⁸ While this might have disappointed the law and development practitioners of the 1960s, as it has disappointed many American scholars of Japanese public law,²⁵⁹ it would probably not have disappointed the Americans who drafted the Japanese constitution during the occupation era, whose sensibilities about judicial versus executive and legislative power were more like those that have prevailed in Japan.²⁶⁰

Finally, if we remain uncomfortable with legal instrumentalism in the Third World, or at home, it is worth asking whether legal reform programs can be presented in a truly non-instrumental way. This is an attractive idea, which recurs in places like the “credible commitments” literature, as it adopts a pre-Realist faith in the ability of constitutional text and institutional arrangements to insulate property from politics.²⁶¹ But from the jaded perspective of 2006 it is hard to imagine how this could have been persuasive to Third World elites: “We’re here to help you rearrange your legal system to bring about concrete societal changes (which, you’ll notice, have political and distributional ramifications), but don’t try this yourself because law is not an instrument!”

2. Legal Education, Legal Professions, and the Social Role of the Formal Legal System

Several other aspects of Northeast Asia’s legal systems that contradict claims of the law and development orthodoxies can be understood as relating to the general role of law and the

258

259

260 Haley, *supra* note __, at __.

formal legal systems during the high-growth periods. As we have seen, legal education remained far too doctrinal and formal to satisfy the modernizers of the 1960s, while local bars were kept tiny because governments set very low quotas that would be allowed to pass the licensing exams in any given year. Thuswhile the people who became fully licensed lawyers had received traditional Civil law training and had been forced to memorize enormous amounts of doctrine in order to pass the doctrine-based exams, they were both extremely capable,²⁶² and extremely hard working. Governments also kept their judiciaries very small by international standards, but being a judge was attractive enough as a career option to guarantee that very capable people staffed the bench. While the judges who staffed these judiciaries were on the whole highly competent, however, they were subjected to supervision and control by superiors who held fundamentally conservative, pro-development political views, and who believed in a restrained role for the judiciary in the governance system.

Undergraduate law departments were numerous, however, turning out thousands of law-trained graduates each year who had no hope of becoming fully licensed lawyers, but who instead went into government service, worked in the legal departments of businesses, or worked in one of the law-related professions. Small bars helped guarantee that legal services necessary to access the formal system would be expensive, despite the fact that many people received training in law. Furthermore, access to the formal system was discouraged by professional rules concerning legal fee arrangements, procedural rules concerning such things as the posting of court costs, and the fact that litigation consisted not of “trials” in the U.S. sense, but of a series of

261 See *infra*, notes ____ .

262 This is true even if one believes that there are different ways to define intelligence, and that ability to memorize and regurgitate material is only one of them.

hearings that could drag on for years even in simple cases. While recent developments suggest that many in Northeast Asia are no longer satisfied with this long-standing settlement,²⁶³ the question is whether it might have played any positive role in the development process.

One possibility has to do with the allocation of scarce resources. A possible virtue of this structure is that it helped guarantee that law would be “potent” in that it permeated the internal workings of both government bureaucracies and business organizations, a desire that will probably accompany any law and development effort. It is arguable that this “potency” was achieved at a relative bargain price, however. Providing undergraduate legal education through lecturing to large classes was comparatively cheap, with more labor intensive training reserved for those very few who had passed the bar exam and would staff the formal system, either as judges, lawyers or prosecutors.

The system’s approach to the judiciary might also be seen as a rational approach to the “potency” problem in conditions of limited resources. Because the systems generally discouraged both private and public law litigation it was possible to spend relatively little on the judiciaries, yet still have them produce coherent, technically competent adjudication in those comparatively few cases that they decided.²⁶⁴ Furthermore, while many would object to the control that could be exercised within these systems with respect to the decisions of individual judges, one effect of that control was to maintain and enforce a relatively limited role for law and the courts in the broader political economy. Leaving aside the dangers of judiciaries subservient to political control, if we engage in a comparative institutional analysis, considering the courts

²⁶³ Thus the reform movements discussed at supra notes ____.

²⁶⁴ This appears to be the consensus view of the Japanese judiciary, for example, despite other differences among commentators. See, e.g.,

alongside the other organs of government, it certainly seems plausible that from a purely economic point of view the judiciary should be limited in its ability to define its own social role. [*** expand ***] Of course the body doing the controlling could normally let the individual case decision stand, then act politically to limit the undesired extension of law, but there are reasons that might be difficult. If the decision is on constitutional grounds even an authoritarian political system may feel constrained in its ability to change the constitution, or if, as Haley argues was the case in Japan, the controlling body is the head of the judicial bureaucracy rather than a political branch, then that body may have no statutory authority, and may prefer to keep the political branches away from its domain.²⁶⁵ The style of legality it produced, however, was more constrained than would be produced by the more “modern” ideal type of large and competitive bars, larger and less disciplined judiciaries, and greater incentives to litigate.

3. Contract and Property Rights Enforcement

It would be extreme to suggest that a modern market economy could function without a body of positive law to define property and contract rights, and without courts available to adjudicate disputes that will inevitably arise as market actors transact based upon these rights. Unfortunately, however, the law and development literature too often speaks of judicial dispute settlement in binary terms: it is either available to enforce contracts and property rights, or it is weak, corrupt, ineffective, or something equally repugnant. A better way to look at the issue

²⁶⁵ If this view is correct, then the fact that individual Diet members are now drafting pieces of legislation in Japan suggests that the judiciary has lost some of its bureaucratic autonomy. Individual Diet members reportedly drafted new Commercial Code provisions on

would be to start with the view that any functioning legal system will again present a trade-off, or continuum, with respect to its attractiveness to litigants. A legal system that makes it too easy to resort to litigation will destroy a certain number of beneficial business relationships that are under stress, but that might be salvaged by the parties were litigation a less attractive alternative. In other words, judicial dispute settlement may “crowd out” private dispute settlement at a cost to the economy. A legal system that makes private litigation entirely implausible, on the other hand, would leave enforcement of contracts to the parties, and property rights to the criminal law.

The Northeast Asian systems have been consistently described as unfriendly to litigation, a characteristic that was certainly responsible, at least in part, for relatively low litigation rates and a perceived tendency to rely on non-judicial settlement of business disputes. While it may be that this approach hindered economic development in Northeast Asia, or was simply irrelevant, it is at least possible that they settled closer to the ideal point on the continuum than the U.S., for example. In any case, the question needs to be asked whether the legal system creates roughly appropriate incentives to private litigation, yet this question seems absent from much law and development writing.

4. Intellectual Property Law

Protection of intellectual property rights presents all societies with tradeoffs. An important tradeoff is that between encouraging investment in research and development, which is normally understood to be furthered by rigorous IPR protection,²⁶⁶ and in encouraging the

diffusion of technology, and the resulting competition, which argues for more limited IPR protection. That this tension between incentive-producing and anti-competitive aspects of intellectual property protection is not easily resolved is shown by the fact that the U.S. Supreme Court has recently agreed to revisit a key issue concerning the relationship between patent and antitrust law.²⁶⁷

For developing countries, which by definition have few or no industries operating at the technological frontier and few industries with substantial R&D capabilities, an important tradeoff concerns the cost of acquiring technology from abroad.²⁶⁸ Lax protection for foreign-owned IPR, which can be achieved by the formal IPR rules, the procedural rules, the technology importing regime, or their enforcement, will make it cheaper for local entrepreneurs to “localize” many technologies useful to a developing economy. Whether or not this will benefit the developing economy as a whole will depend upon whether there are good reasons to favor local ownership over foreign investment, whether there local businesses capable of using the technology, and if so, whether they use it well.

An admittedly favorable interpretation of the Northeast Asian experience is that lax protection of foreign-owner IPR can be successful, though success may have to be defined in part economically and in part nationalistically. Investment in domestic educational systems, and the ability to lure back foreign-educated nationals, provided the necessary technological base for using foreign technology, while competition, sometimes in export markets, sometimes in

²⁶⁷ See, *Illinois Tool Works v. Independent Ink*, cert granted; Tony Mauro, *Supreme Court Considers Limiting Antitrust Suits Against Patent Holders*, Legal Times, June 21, 2005.

²⁶⁸ For a discussion of these dynamics in the case of China, see, Alan Cox and Kristina Sepetys, *Intellectual Property Rights Protection in China*, in *ECONOMIC APPROACHES TO INTELLECTUAL PROPERTY* (Gregory K. Leonard and Lauren J. Stiroh, eds., 200_).

domestic markets, pressured the domestic technology importers to use the technology productively. Pressure to export seems to be an important part of the equation, however, as does a potentially suspect judgment in favor of national over foreign ownership. In addition, the costs of weak IPR enforcement, which can include exclusion of products from export markets,²⁶⁹ as well as reduced incentives to local R&D, would have to be taken into account.

Despite the complexity inherent in this view of IPR protection by developing countries, it seems preferable to mainstream law and development approaches. First, it is a view that at least attempts to make sense of the coexistence of weak IPR and economic and technological success in Northeast Asia. Second, it seeks to get beyond the binary “strong” versus “weak” view of IPR protection, a view that appears too often in the literature despite its obvious weaknesses. Finally, it is a view that leaves some room for national government agency. For those who mistrust government this may be a bad thing, and maybe individuals in Northeast Asia would be better off now if their national governments had vigorously and evenly protected local and foreign IPR. But that’s not what those governments did, nor did they seek to insulate the legal regime so that IPR could be enforced by courts or other institutions divorced from politics.

5. Additional Examples

The ability of minority shareholders in publicly traded corporations to use the legal system to sue managers or majority shareholders again presents us with a continuum and potential trade-offs. At one extreme, litigation would be an entirely ineffective threat, either

²⁶⁹ For example, U.S. intellectual property rights holders may petition to block the importation

because of limited legal theories or because of unfriendly procedural rules, while at the other extreme management and majority owners would be inhibited from desirable risk-taking for fear of being second-guessed via shareholder litigation. The Northeast Asian approach was clearly far toward the non-threat end of this continuum, which arguably makes a good deal of sense for a developing country. Shareholders in publicly traded companies always have the “Wall St. option” of selling their shares, and one could argue that the last thing corporate managers in developing countries need is to be monitored by courts entertaining shareholder litigation, so long as they are monitored via the criminal law, tax law, by their creditors, or in some other non-trivial way.

Insolvency law is another example of a body of law that would have to be deemed a failure in Northeast according to the law and development orthodoxies. An “effective” insolvency law regime became part of the neoliberal orthodoxy of the 1990s, but Northeast Asia’s insolvency regimes also would have been failures in the modernization mindset because they represented bodies of “modern” law that functioned only minimally, or not in accordance with their proper purpose.²⁷⁰ With respect to insolvency law, the obvious tradeoff involve balancing the benefits of “creative destruction” and the protection of creditors against potential costs to industrial development and social stability. It is not, as the law and development literature typically assumes, simply a matter of effectively enforcing creditors’ rights.

Antitrust enforcement again presents a potential continuum, and the Northeast Asian approach has been neither “effective,” in the sense of rigorously attacking anti competitive

of goods manufactured abroad in violation of their intellectual property rights. See, ...
270 For Japan, see, Ron W. Harmer, *Comparison of Trends in National Law: The Pacific Rim*,
23 BROOKLYN JOURNAL OF INTERNATIONAL LAW 139 (Symposium Bankruptcy in the Global

practices, nor has it been left free to operate on its own, separate from larger concerns of political economy. Rigorous enforcement potentially favors competition, and thus consumers, but overly rigorous enforcement could limit the ability of domestic companies to achieve the scale necessary to compete internationally. As noted earlier with respect to the comprehensive development Rule of Law, labor law regimes in Northeast Asia have also long been criticized by local and foreign observers. While this is not a call for developing countries to violently suppress labor, as the Korean government was known to do, an empirical approach to law and development based on Northeast Asia's practices cannot ignore the realities of the region's labor law. Moreover, these regimes were in place when Northeast was achieving not only growth, but "growth with equity," in the World Bank's phrase. Finally, the limited role of administrative law during rapid development in Northeast Asia prompts one to weigh the costs of such an approach against the costs of a more expansive role. If the key task of administrative law is to ensure a basically law-governed bureaucracy, then Northeast Asia's bias in favor of internal bureaucratic controls, including legal education for many bureaucrats and comparatively high status, may be a reasonable alternative to facilitating external control via judicial review. But while keeping the courts in such a limited posture vis-à-vis the bureaucracy may help facilitate the flexibility for which Northeast Asia's economic bureaucracies have been praised, there are obvious costs. Judicial review can be a useful force for bureaucratic rationality if it forces the bureaucracy to publicly explain and justify its actions, and of course internal controls on a bureaucracy may suffer from being enforced by the bureaucracy itself.

Reducing the foregoing analysis to a "Northeast Asian Law and Development Chart"

would result in something like the following:

Northeast Asia's Legal "Failures" in Development Perspective			
	Low Functioning (Possible Advantages):	Northeast Asia's Performance:	High Functioning (Possible Advantages):
Public Resources Devoted to Courts and Facilitating Litigation	Courts and litigation expensive	Low (few judges, lawyers, but lots of legally trained in biz and gov.)	Facilitates rights-based market, business planning
Contract and Property Formality	May encourage negotiated settlement, relational contracting	Low	Limits abuse by economically strong
Intellectual Property Rights	Facilitates acquisition and diffusion of knowledge	Low	Discourages investment in R&D
Shareholder litigation	Allows management to take risks, invest long-term	Low	Helps keep management focused on interests of shareholders; facilitates external finance
Bankruptcy	Preserves value of businesses; encourages negotiated solutions	Low	Facilitates "creative destruction;" encourages extension of credit
Antitrust	Allows coordination to avoid "overheated competition;" facilitates economies of scale ²⁷¹	Low (more a policy of regulating cartels than combating them)	Forces competitive focus;
Administrative Law (scope and judicial enforcement)	Frees agencies to exercise expertise in public interest	Low (comparatively narrow coverage; limited judicial role)	Combats agency capture, arbitrariness; protects citizens from abuse by bureaucracy

²⁷¹ Mark Tilton, Japan Cartels Book, p. 29; Amsden, ASIA'S NEXT GIANT, supra note __, at 8.

C. Putting Substance Over Form in Legal Technical Assistance

Now that these individual shortcomings of Northeast Asian legality have been recast as points on a series of policy continua, is it possible to forge from it something that can contribute positively to the law and development literature, rather than serving simply as material for critique? The answer is yes, but to do so it will be helpful to see mainstream law and development literature as overly influenced by Max Weber's ideal type of formal legal rationality, which he argued was bound up in important ways with the development of modern capitalism.²⁷² For Weber, the "formal" in formal legal rationality meant that legal reasoning referred only to the internal logic of the legal system itself, not to "substantive" value systems or ideologies.²⁷³ This resulted in a high degree of autonomy for law, and maximized the predictability of legal outcomes to private actors.²⁷⁴ Substantive rationality, on the other hand, prevailed when non-legal value systems, such as Confucianism, informed the reasoning of legal decision makers.²⁷⁵ Although not exactly reproducing Weber's ideal-types, each of the law and development orthodoxies discussed here betrays its own variant of formalism which renders it incompatible with the Northeast Asian experience.

The modernization school has been criticized for formalist assumptions about law, though in its understanding of formalism as a problem it evidenced much more sophistication about how legal systems work than its successors. More important was the formalism that

²⁷² Trubek, *Max Weber on Law and the Rise of Capitalism*, supra note ____.

²⁷³ Id.

²⁷⁴ Id.

approach displayed in its idea that modernized institutions, staffed by modernized people, would produce reliably modern outcomes, with “modern” meaning outcomes that essentially conformed to mid-twentieth century American ideals. The formalism inherent in the Washington Consensus rule of law orthodoxy shares some of the aspects of its predecessor, in the idea that “getting the rights right” is the key to thriving markets, for example, but also takes a much more formalist approach to law itself, thus conforming more closely to Weber’s formal legal rationality.²⁷⁶ Formal rationality would call for legal systems to operate and evolve with no particular substantive societal goal, guided only by the internal logic of the legal order, as understood by the trained adept. Even if the rule structure were set up in a way that would seem conducive to market-oriented growth, however, given the indeterminacy inherent in any legal order, the internal logic of the legal order cannot be trusted to keep the operation of the system oriented toward growth. And while property rights were obviously important in the market economies of Northeast Asia, given the diminished role for litigation as the “enforcer” of property rights as well as the noted tendency towards informality in contracting behavior and in organizational form, it is clear that the relationship between the written law and the behavior of economic actors was far more complex than the orthodoxy.

The legal origins proto-orthodoxy is prone to similarly formalist tendencies, as it radically overestimates the closeness of the fit between formal rules and structures and real economic behavior, an overestimation on which the plausibility of its formalist methodology depends. Finally, like the modernization approach, the comprehensive development approach assumes that the social outcomes it desires will be obtained if the specific legal rules and institutions it

²⁷⁵ Id. See also, Max Weber, *THE RELIGION OF CHINA* (Hans H. Gerth, trans., 1951).

supports will perform the functions assigned to them in the theory.

The existing orthodoxies are prone to these kinds of formalism for two reasons. The first, discussed above, is the organizations that do law and development work are staffed by people who need generally applicable frameworks that they can apply around the world, and frameworks of that sort are prone to formalism. It is not simply the need for generally applicable ideas that is the problem, however, but the fact that the actual substantive results, the societal ends which law and development activities should be serving, become secondary to the task of creating of the legal rules and institutions which the various orthodoxies claim produce those outcomes.

What is needed, then, is not a new orthodoxy based on what we think happened in Northeast Asia, but a new approach to law and development. That new approach would reject the existing practice, in which successive models are presented as the solutions to the development problem, an inescapably formalist approach. Rather than presenting yet another model, the new approach would be to present developing countries with something like the chart in IV.B., recasting areas of legal doctrine as continua along which successful legal systems vary, and offering realistic appraisals of the tradeoffs that are endemic to law. In other words, legal technical assistance would consist of presenting legal reform issues *as we actually think about them ourselves*, as ridden with tradeoffs, so that where country falls on a particular dimension is important, not whether property rights are “secure,” or some other abstraction. The presentation would include such evidence as we have about how successful economies have approached these tradeoffs, and it would be through these appraisals that Northeast Asia’s experience could make an enormous contribution, rather than as the basis for yet another falsifiable orthodoxy. And

276 See, supra

because individual legal fields are very often related, the approach would include such evidence as we have of the ways that choices about one area of law or legal institution might affect others, or the entire system.

In a macro sense, what the Northeast Asian experience suggests is that if the goal is economic development, then the legal system should as a whole operate in a mode more similar to Weber's *substantiv* than to his formal rationality, with the "substance" provided by a political commitment to industrialization and economic growth. This does not mean copying the specific policy decisions of Northeast Asian economies, because the realm of available policy options is constantly changing, and because that would constitute yet another questionable orthodoxy. It would mean, however, approaching the legal system as a tool that should be operated to achieve rapid economic development, which would tend to shift the focus from rules and institutions to outcomes. Such outcomes might be seen as "conservative" in the sense of favoring accumulation over redistribution, management over shareholders, and industrialization over the environment, but perhaps not. At least these important distributional questions would be out in the open, rather than being clouded by rhetoric.

What changes would be required under this new approach? The most important would be for law and development activities to move back (up?) one level of engagement, to focus on providing a menu of options instead of providing answers. In order to do this, it would be very useful to take a team approach to staffing law and development projects. Teams should obviously include both common law and civilian lawyers, but lawyers from Northeast Asia could play a particularly valuable role. It would also be crucial for legal assistance providers to abandon the idea that their job includes pursuing some broader agenda, such as maintaining the

international financial system or the WTO. There is a tendency to want all good things to go together, to want what is good for any particular developing country to also be good for the world. It is clear from the Northeast Asian experience that sometimes countries benefit from behaving strategically in their interactions with the world, however, so if we really want to help them we should focus on that, and let someone else worry about maintaining the international economic order. Even if strategic behavior is never actually helpful, however, it seems that economic nationalism has played an important role in Northeast Asia's success. Most developing countries are too insignificant economically for a bit of nationalism to endanger the world economy, and the big countries such as China can largely ignore legal assistance efforts that they think are not in their interests. The world should encourage developing country governments that are concerned, first and foremost, about their own development, even at the expense of their trading partners or the international economic order. Finally, legal assistance practitioners would need to be able to separate themselves from their own national experience, to be open to the fact that something might be useful to a developing country even though their own country has moved away from that practice. This rejects simple "best practices" approaches, which assume all countries of the world have essentially the same needs, in which case there might actually be a set of non-controversial, apolitical, scientifically-verifiable "best practices." Best practice for a developing country today might be the Korean corporate governance in the 1970s, for example, not Korean corporate law as of 2005, let alone U.S. corporate law.

Moving up a level of generality and adopting a "substantive rationality" approach would also help ameliorate the legal transplant problem that bedeviled law and development activities from the beginning. Outsiders would be out of the business of advocating particular rules with

particular results in mind, so the problem of rules not “taking” would disappear. And while outsiders would still advocate for basic institutions such as courts, securities regulators, patent offices or antitrust authorities, it would be recognized that such institutions can play a variety of roles even in successful market economies. The question then becomes whether the various institutions are functioning so as to support or to impede economic growth, not whether they have been effectively “transplanted.” New rules and institutions will often not function as anticipated, and while being aware of the transplant problem is useful, the new model’s “substantive rationality” calls for continuous monitoring and adjustment, rather than rigidity followed by exasperation.

Putting this approach into practice would place serious demands on those involved, because a substantive rationality approach would require accurate and continuing monitoring of affected legal systems, to see whether the goals of particular areas of law were being met, and to facilitate intelligent adjustments if not. Adjustment would necessarily involve learning by doing, not by rote, or by hectoring. If donor governments or organizations want to place conditions on their law and development assistance, the appropriate condition would also become “substantive” rather than formal, being based not on whether the new rule or institutions existed on paper, but on whether the recipient government was taking seriously the task of monitoring and adjusting the new legal rules or institutions so as to facilitate economic growth. Because one of the dimensions along which all legal systems fluctuate involves the twin concerns of stability, to facilitate private planning, and flexibility, to allow necessary change, the processes by which adjustments would be made would also be open to evaluation.

Finally, moving up a level would help solve the intractable problem of political

interference by allowing the local political process to take responsibility for making the decisions that will affect where the legal system will land on the various continua. Law and development orthodoxies contain within them political choices, and offering an empirically-based menu of options rather than yet another orthodoxy puts the politics squarely in view. As the example of Korea's post-Financial Crisis reforms show, the fact that international institutions get invited in by a particular government does not make reforms non-political, it just means that the foreign organization is acting in league with the particular faction holding power, but perhaps completely against the wishes of the domestic opposition. When South Korea needed to be bailed out by the IMF and World Bank in 1998, President Kim Dae-Jung, a life-long opponent of authoritarian politics and the Chaebol-dominated economy, was trying to transition to an entirely new political economy, transitioning from bank to financial market financing, to anti cartel policies rather than cartel supervision, to corporate governance reforms to limit the powers of chaebol families, and to bankruptcy reform to try to make the formal legal system more relevant. While this was all obviously economic, essentially trying to move Korea closer to the U.S. economic governance picture, it was also highly political because it meant a direct attack on the powerbase of the political opposition, the conservatives and their chaebol supporters. Not only is this "political interference" in anything but a very formal sense, it makes one wonder about the "participatory" or "ownership" claims of the legal assistance providers. Lining up a coalition of local politicians and civil society groups to enact, over the objections of a sizeable political opposition, a particular set of rules makes the legal assistance providers direct players in local politics. Given the fact that law and development orthodoxies can't seem to make sense of the Northeast Asian development miracle, there is reason to doubt that just getting the right set of rules in place is

ever going to be the answer. Moreover, unless local politics can be permanently suppressed, a method that crams down a set of rules or institutions over the objection of a significant opposition cannot achieve “ownership,” but is likely to be either subverted in implementation, or reversed when political fortunes change.

V. Conclusion

Northeast Asia’s legal systems have conformed to none of the orthodoxies of law and development, yet they have been in place while their societies underwent the most successful episodes of economic development in modern history. This is obviously a problem with the ways in which the theories have been produced, which have not included careful study of Northeast Asia. Yet what is needed is not a new orthodoxy, in which whatever we think Northeast Asia did would be reduced to a template, to be imposed on today’s developing countries. Rather, what is needed is a new approach that learns from Northeast Asia, but which also recognizes the limits of the ways in which past law and development orthodoxies were used.

But can law and development providers such as the IFIs, USAID or JICA adopt the approach suggested here, to help developing countries orient their legal systems toward a substantively rational emphasis as outlined above? One precondition would seem to be that the IFIs adopt a perspective that allows them to advance the interests of particular developing countries even if those interests conflict with interests of developed countries, or of the international community. The points at which Northeast Asia’s legal systems settled on the continua discussed above have been problematic from the perspective of foreigners wanting to

participate in their economies, and the globalization of investment and finance only makes this worse. Local disregard for minority shareholder rights, for example, weren't really a problem for foreign investors in high-growth Northeast Asia because their access to portfolio investment was limited for so long. Likewise, foreign lenders to the region weren't that concerned about local insolvency regimes until they started lending to local private borrowers, not governments, and until governments stopped supervising the process and providing explicit or implicit guarantees.

At present the dominant mindset seems to be that there can be no conflict between local and foreign interests because foreign interests represent the market, so their wishes become the benchmark for proper market economy regulation. With something as technical as economic law reform, however, it seems likely that there will be many specifics that can be handled so as to promote local investment and industrialization that will not matter much to foreign actors. The IFIs must at least be able to focus on what's best for individual developing countries when looking at these factors. If they and other law and development practitioners can get that far, then they should try to encourage developing countries to orient their legal systems towards assisting economic development in a substantively rational way. This will raise a host of practical problems, but at least these problems will be apparent. The alternative of continuing with approaches that rely on formal models seems to only obscure necessary policy choices in favor of a focus on formal rules and institutions, and the success rate of such approaches has not been particularly high.