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Asia's Legal Systems in the Wake of the Financial Crisis: Can the Rule of Law Carry any of the Weight?

John K.M. Ohmesorge

Admitting that there are some sciences where a few elementary truths being given, the whole mass of subordinate principles may be readily evolved from them – a proposition which may require further investigation before it is admitted – yet this cannot be the case with jurisprudence which does not deal with abstract propositions simply but with a state of facts where the question is perpetually recurring – what does human experience prove to be the wisest rule which can be adopted? or what does it prove to be the wisest construction of a rule already in existence?

(Grimke 1968: 450–1).¹

Introduction

People have long been interested in the relationships between legal systems and economic performance, and have approached these issues in many different ways. The original American institutional economics produced such works as Ely's *Property and Contract in Their Relations to the Distribution of Wealth* (Ely 1914) and Commons' *The Legal Foundations of Capitalism* (Commons 1924). That law should have occupied a central place in their thinking about economics should come as no surprise, since the study of legal institutions was key to the German historical approach to political economy (Cohn 1894), which strongly influenced many American institutionalists (Kloppenber 1997; Hovenkamp 1991). For Weber, of course, legal, political and economic organization were intimately related, and the rise of a specific style of legality ('formally rational' in his terms) was closely tied to the rise of modern, industrial capitalism (Weber 1968; Trubek 1972). And although he seems not to have elaborated on the theme, law, or rather the lack of a functioning legal system, also played a role in the theorizing of the economic historian Alexander Gerschenkron. In explaining why the modernizing Russian state of the 1890s had to assume capital accumulation and allocation functions

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that had been successfully performed by private universal banks in Germany, Gerschenkron speculated that 'no bank could have successfully engaged in long-term credit policies in an economy where fraudulent bankruptcy had been almost elevated to the rank of a general business practice' (Gerschenkron 1965).

In the United States (USA), the original institutional economics was associated with the rise of the administrative state through the Progressive movement of the late nineteenth century and later the New Deal, and with Sociological Jurisprudence and later Legal Realism² in jurisprudence (Purcell 1973; White 1952; Commager 1950). All of these to some extent represented, or depended upon, a rejection of formalist, deductive reasoning in favour of philosophical Pragmatism, empiricism and institutional innovation. The institutional innovations proposed by the Progressives in pursuit of greater public regulation of the economy had to overcome formalist legal arguments based upon abstract principles such as liberty or freedom of contract, due process, or the separation of powers that were invoked to rule them out *a priori*, thus allowing the courts to avoid rational discussion of the social implications of either the *status quo* or the proposed rule change.³ The fact that the courts often invoked such arguments in justifying decisions that preserved the *status quo* explains the central role that the normally esoteric field of judicial reasoning assumed in the adversarial relationship between conservative courts and those seeking change. Taking the historian Commager to represent the Progressive–New Deal critique,

For half a century the courts. . . abandoned themselves to delusions of mechanical jurisprudence, interpreting the Constitution as a prohibition rather than an instrument, reading into it limitations on the scope of governmental authority which existed only as abstract conclusions of natural law syllogisms. Insisting that they were without discretion and that their functions were purely mechanical and phonographic, judges struck down literally hundreds of state police laws on the theory that they deprived somebody of property or of liberty of contract without due process of law. (Commager 1950)

Wage and hour legislation had to overcome formalist interpretations of liberty, property and freedom of contract, labour unions had to overcome formalist interpretations of antitrust doctrines prohibiting 'combinations' in restraint of trade, workers' compensation schemes had to overcome formalist reasoning from the fault principle in tort, and regulatory bodies such as the Interstate Commerce Commission and the Federal Trade Commission had to overcome formalist interpretations of the separation of powers scheme of our Constitution that would have precluded the delegation to them of effective legislative or adjudicatory powers. The original institutional economics thus combined with Sociological Jurisprudence and later Legal Realism to address

very directly the relationship between law and economic activity, and to their broadly shared political agenda as Progressives the anti-abstractionist, anti-formalist aspects of the new jurisprudential currents contributed an important tool.

The recent law reform initiatives of the international financial institutions (IFIs) – the Asian Development Bank, World Bank and International Monetary Fund (IMF) – as well as many bilateral legal assistance initiatives, also focus on the relationship between legality and economic performance. Indeed, in the case of the IFIs such initiatives must be cast to some degree in the technocratic language of economic performance in order to avoid criticism as unauthorized political interference (Upham 1994). These economically-oriented law reform initiatives (the 'Law & Development movement'⁴) are also informed by institutionalist thinking, this time 'new' or rational choice institutionalism, which finds its jurisprudential counterpart not in Legal Realism but in the Law & Economics movement. Although rational choice institutionalism and Law & Economics are by no means monolithic, their basically pragmatic goal orientation, which they share with early institutionalism and Legal Realism, often succumbs to formalist reasoning and assumptions that make them fundamentally antithetical to the pragmatic approach of the Legal Realists and the early institutionalists. Modern Law & Economics is, like Legal Realism, sceptical of formalist legal reasoning and calls for judges to look to social science to find pragmatic solutions to legal problems (Posner 1990; Arnold 1934). But whereas Legal Realism looked to the old, pragmatic institutional economics, modern Law & Economics, like new institutionalist political science, has relied predominantly on neoclassical economics, with its distinctly un-pragmatic reliance upon reductionist assumptions about human behaviour and its tendency towards formal modelling and deductive reasoning.⁵ Law & Economics shares with rational choice institutionalism not only a distinct bias towards formalist assumptions about human behaviour and institutional frameworks, but also a bias towards model building and refinement at the expense of empirical research (Hovenkamp 1990; Green and Shapiro 1994).⁶

These tendencies in the theoretical underpinnings of today's Law and Development movement are reflected in its reliance on highly abstract notions, from which, it is implied, can be derived particular changes to particular regimes of national law. Like the original Legal Realists, these writers are explicitly instrumental and policy-oriented in their approach to law, but unlike the Realists they tend to ignore the uncertainty and discretion involved in judicial decision making, and tend to exaggerate the determinance of the rule structure, the public's knowledge of the rule structure, and the extent to which private actors orient their behaviour toward the rules even if they are determinable and actually known. They also show no hesitation in assigning functions to, and building theories around, abstractions such as 'secure property rights', 'independent judiciary', 'market economy', or 'civil society'.

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One such abstraction is the Rule of Law, which has become a very powerful term in the new Law & Development literature, a kind of meta-abstraction under which the other abstractions are grouped. This chapter addresses whether the Rule of Law as a concept can provide useful guidance for, or insight into, change to the legal systems of East Asia in the wake of the financial crisis. The next section discusses the Rule of Law concept, contrasting the ways in which it is used in the Law & Development literature and in more mainstream legal discourse. Then we discuss particular aspects of law and legality that have been seen as hallmarks of Northeast Asian societies, how these fit into the Rule of Law as presented in the Law & Development literature, and whether the Rule of Law has anything say with regard to how, or whether, these institutions and practices would change in a transition to more liberal economic regimes.

The Rule of Law

The Rule of Law as a term is highly contested among legal theorists and intellectually inclined judges, but otherwise is not a very central term for rank-and-file American lawyers. It is entirely possible to receive a JD degree from a top-tier US law school and never participate in a sustained, in-depth exploration of the term, its history, or the various definitions that have been offered for it. In other words, the Rule of Law is not a term of art, at least for American lawyers, in the way that other fields of knowledge have terms of art. This point, whether surprising or obvious, is important for understanding how economists, political scientists and others are able to appropriate the term for their own purposes with little notice from the legal profession. Debates among elite legal and political theorists over the meaning of the Rule of Law and the possibility of its attainment have little impact on the rank-and-file lawyers who work on Law & Development projects, and seem to be totally unknown to many of the non-lawyers involved in this work.

Since the concept itself has no highly determinate meaning, and is peripheral to the work of most lawyers, people of all political persuasions quite naturally seek to infuse it with their particular substantive agendas, many of which are entirely admirable, but all of which are fundamentally political. These include interests in human rights protections, in controlling judicial discretion, in controlling bureaucratic discretion, in insulating private property from public regulation, and in ensuring democratic participation in the law-making process. All of these could probably be put under a general umbrella of attempts to shift power from one locus to another, either among branches of government or between public and private spheres, and this is in fact a consistent aspect of Rule of Law writings. For example, calling for a Rule of Law based upon detailed positive rules as opposed to discretionary standards or general principles could be seen as advocating a shift of power from judges or bureaucratic adjudicators to private actors in particular matters,

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and a general systemic shift of authority from the judicial to the legislative branch. By the same token, a Rule of Law agenda seeking to place fundamental substantive rights or principles of justice beyond legislative control, and to anchor them somewhere beyond positive legislative enactments, will tend to place courts at the centre of the vision, and place great emphasis on the quality of the judiciary. For courts to play such a role requires enormous institutional legitimacy, a point we will return to later. There are purely formal definitions of the Rule of Law which emphasize the form of the rule structure, there are definitions that emphasize process over either form or substance, and there are many that include elements of all three (Raz 1977; Bodenheimer 1962). Perhaps the proper metaphor for the Rule of Law concept is not an empty vessel waiting to be filled, but a balloon waiting to be inflated. One who does not want to put much in it can blow the balloon up a little way, while one who wants to put a lot in it can blow it up more. At some point it will pop, but there is great room for variation in the size of the balloon.

I have attempted elsewhere (Ohnesorge 2002) to present a picture of how Rule of Law rhetoric is being used by the IFIs and others in the Law & Development movement, and to contrast that with more traditionally jurisprudential uses of the term. For the purposes of this chapter I will accept the usage of the term, as I see it, by the Law & Development movement. This approach, which I describe as a 'functioning legal infrastructure' approach, but which might also be thought of as the legal theory of the Washington Consensus, can be summarized as follows. The Rule of Law in this vision describes a situation in which a complete system of rules defines and delimits the rights and duties of both private actors, and the state. The approach to the materials of the law is basically positivist in that what counts as law is rules, so that other factors that affect the implementation of rules do not count as law, but as politics, morality, or something else. The approach is also formalist in the sense that the system of rules is imagined to be largely complete, and in general subject to one correct interpretation for every case brought before it. This results in a basically mechanical vision of the role of courts, which are presented as applying single correct rules to the facts presented, and as enforcing rights enshrined in law or in contracts bargained for between market actors. There is neither room for a positivist vision of rules and gaps, with judges being able to fill the gaps according to 'politics' (Hart 1958), nor the more sceptical indeterminacy thesis, championed by the Legal Realists, and later the Critical Legal Studies writers, that in many cases two rules may be equally applicable to particular case, allowing politics, ideology, or bias, to affect the judge's choice of the applicable rule itself (Kennedy 1976). There would also seem to be little room for the 'law as integrity' approach of Ronald Dworkin, relying as it does upon the individual judge accepting the 'Herculean' challenge of filling the gaps, indeterminacies and contradictions existing in the rule structure of any actual legal system by 'trying to find, in some coherent set of principles about people's rights and duties, the best

constructive interpretation of the political structure and legal doctrine of their community' (Dworkin 1986: 225).

The Law & Development vision of the Rule of Law is decidedly not formal, however, in the sense of being neutral with regard to the content of the rules. The core of the entire vision is the protection of private property and freedom of contract, seen as the bases for a market economy, and this substantive agenda informs Law & Development initiatives for private and public law reforms. In comparative historical terms this vision probably corresponds most closely to the 'formal' or Liberal *Rechtsstaat* concept as it developed in late-nineteenth-century Germany (Böckenförde 1991a). The Liberal *Rechtsstaat* provided the basis for the image of law which Weber connected with the rise of modern capitalism, so it is hardly surprising that this image informs much of the Law & Development literature, which remains deeply indebted to Weber, consciously or not.

When the Rule of Law is invoked in the Law & Development literature a standard set of prescriptions thus tends to follow. Private property must be protected first through criminal law, then through private law – the law of property and contract – that will allow 'competent' courts to enforce the rights bargained for between market actors and enshrined in contracts.⁷ 'Competency' is sometimes given a substantive gloss by reminders that these are judges administering the rules of a market economy, suggesting both a recognition of the limits of rule formalism, and a hope that inevitable judicial discretion and judicial rule making can be constrained by invoking the concept of a 'market economy', as if that will supply the determinacy that the materials of the law itself cannot provide. Other statutory regimes such as those creating and protecting intellectual property rights are explained and legitimated in basically the same manner: as creating the property rights incentive structure that will maximize the activities of rational economic actors. The International Country Risk Guide, a privately compiled investment risk ranking used as the 'empirical' foundation for oft-cited economic studies of institutional quality, now uses 'Rule of Law' to describe the variable it used to label 'Law and Order Tradition' (Knack and Keefer 1995: 225). That sums up the vision nicely.

The power of the Law & Development movement's property rights/Rule of Law rhetoric lies in the fact that it sounds both obvious and reasonable: of course, a market economy cannot operate unless people have rights they can exchange, and of course people should be secure in the ownership of their property. This effect is maintained when writers claim 'broad consensus among economists on secure property and contract rights', while admitting that there is actually great diversity and disagreement on the details of such institutions (Clague 1997: 368–9). The claim of a broad consensus may be entirely right as far as it goes, but the subsequent admission is crucial because legal reform efforts by definition do not leave off at the level of generality of the broad consensus, because legal systems themselves do not and cannot. By examining the rhetoric a bit more closely, moreover, one comes to see that

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'secure property rights' often becomes code for property rights that are regulated by the state in certain ways, but not in others. The law that creates property rights in the first place, and regulates them by setting the boundaries between conflicting rights claims, will be said to 'violate' such rights if it regulates them in ways incompatible with the neoliberal economic orthodoxy. For example, in laying out the methodological framework for the Asian Development Bank's study of legal and economic change in six Asian countries, the study's primary authors write,

[c]learly defined property rights were on the books in 1960 in all countries, except for China. However, they were superseded to a greater or lesser extend (sic) by government regulations limiting the use of land for specific purposes (agriculture), restricting access to land (e.g. by foreigners), or trying to counteract excessive concentration of land or speculative real estate trading. As these rules changed considerably and resulted in *far reaching state interference in private property rights*, it is not possible to assert that clearly defined private property rights over real estate played a key role in Asian economic development. (emphasis added)⁸

There is no suggestion that rights over real property were not clearly defined in these countries in 1960, in fact they had to be clearly defined to be so tightly controlled. Similarly, the IMF's Vito Tanzi, one of that organization's major voices on anti-corruption and 'governance', uses rent control as an example of government acting as a 'major violator of property rights'.⁹ In a mode of thinking highly reminiscent of the formalist judicial opinions attacked by the Progressives and Legal Realists, these writers believe, or at least want us to believe, that there exists a set of property rights that, while obviously created and defined by law, can also be 'violated' by more law if it is of the wrong type ('regulation'). And how is one to tell the good law (that creating and protecting property rights) from the bad law (that regulating and violating property rights)? Reasoning syllogistically from concepts like 'property' or 'freedom of contract' no longer convinces, but neither can the IFIs admit the fundamentally political nature of any attempt to delimit spheres of legitimate versus illegitimate legal regulation of property. Instead the answer seems to come from the Right wing of academic economics, so that 'security of property rights', designed to invoke images of sturdy farmers and hard-working shopkeepers, becomes code for the kind of unregulated capitalism that generally does not exist in the real world, least of all in the democratic, developed West.

The focus on protecting private property extends into public law as well, and in administrative law the approach is distinctly Hayekian. Hayek's influential formulation was that the Rule of Law, 'stripped of all its technicalities', means 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' (Hayek 1944). This vision of the Rule of Law, elaborated in *The Constitution of Liberty* (Hayek 1960), has proven attractive to neoliberal economists and other reformers because it would rule out as illegitimate many intrusions by the state into market activities, thus leaving the maximum free play to the 'invisible hand' (Raz 1977), while also promising to limit opportunities for corruption and rent-seeking on the part of state actors (Ohnesorge 1999). It is worth noting that Hayek himself did not claim to be describing the actual operation of law in the West (we were *on* the 'road to serfdom', after all), but in fact seemed to be presenting a utopian vision of the nineteenth century common law of England and the United States, with some distinctly *Rechtsstaat* overtones. And though he made economic performance claims in terms of a contrast between the Rule of Law and 'planning', his main agenda seems to have been the pursuit of his vision of political liberty. What appears to have happened, however, is that those in the Law & Development movement who now draw on Hayek for ideas about the relationship between law and economic performance seem to believe that legality in the West, or in 'successful market economies', substantially conforms to Hayek's normative vision of the Rule of Law (Dhonte and Kapur 1996).

In constitutional law the focus is on how to create a legal order that will allow the government to 'credibly commit' to rigid protection of private property from public limitation, whether enacted legislatively or undertaken by the executive branch, thus maximizing economic activity by rational private actors (Olson 1993; Weingast 1993). This is presented as the solution to the 'fundamental political dilemma' of having a state that is effective enough to enforce property rights, collect taxes, and generally keep order, but that will not use that strength to go beyond these 'nightwatchman state' functions. Distrust of both the executive and the legislative arms of government, democratic or otherwise,¹⁰ pervades this literature, with the result being a naive-sounding faith in the ability to lock-in expansive private property protections through favourable constitutional language and independent courts. Even outstanding scholars of American law who would count as progressive in the US political spectrum will participate in constitutional 'reform' advocacy, trumpeting the Rule of Law that appears simultaneously anti-democratic, obsessed with property rights, and simplistic when viewed through the lens of America's own historical experience (Elkin *et al.* 1993). The fact that an international Law & Development movement *could* define the Rule of Law in a warm, fuzzy and culturally sensitive way¹¹ may or may not be an answer to Trubek and Galanter's famous 1974 critique (Trubek and Galanter 1974), but it provides no answer to what is happening today.

The Rule of Law as presented in this literature is most certainly a cartoon, then, but it is not a funny one. The idea that it is being forced on countries that find themselves prostrate before the IFIs is far too simplistic, in part

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because there is likely to be a domestic constituency backing, or at least coalescing around, any particular change being advocated, and in part because social change via law reform is notoriously unstable and unpredictable. Nonetheless, attempts to implement the agenda will have enormous social consequences, and the fact that the agenda is both utopian and internally conflicted makes it more disturbing rather than less.

What can the Rule of Law say about legal reform in the wake of the financial crisis?

Even if one adopts the Law & Development movement's limited 'functioning legal infrastructure' ideal of the Rule of Law, outlined above, one has to confront the fact that legal systems in many parts of Asia have failed to conform in important respects to even that limited vision (Ohnesorge 2002; Jayasuriya 1999; Tomasic and Little 1997; Winn 1994; Upham 1994, 1987), let alone more substantive definitions. These 'failures' have not prevented countries in the region from achieving dramatic economic development however, and if one expands the definition of economic development to include national political and strategic concerns, not simply raw gross domestic product (GDP) growth, many of these failures seem less inexplicable or perverse, even admitting that they may have been economically inefficient. Discretion-laced bureaucratic screening systems governing cross-border capital and technology flows, anaemic protection of intellectual property rights, indifference on the part of competition authorities to anti-competitive practices, a tendency towards informality rather than strict enforcement of rights in insolvency administration, weak protections for minority shareholders, constrained or even highly constrained judicial independence, all become more understandable if seen in the context of late economic development under Northeast Asia's post-Second World War circumstances. The remarkable performance of these economies over most of the postwar era suggests that to the 'England problem' that haunted Weber's theorizing – the fact that industrial capitalism had actually arisen in a society that diverged in substantial respects from his model – should be added the 'Asia problem'.¹²

It is nonetheless true that law and economic governance are changing rapidly in the region, most obviously under the pressure of the financial crisis, but perhaps more importantly as a result of longer-term trends, including democratization and economic liberalization, that have been underway since the 1980s. Many of these changes will have important implications for economic performance and for governance more generally, particularly those structural changes that will affect the operation of entire legal systems, and the temptation for those advocating particular changes will be to seek to cast them as steps towards the Rule of Law. In some cases this may be plausible, but in other cases such a claim would simply obscure important social or political consequences that should be openly acknowledged and debated by those who will

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be affected. The following sections focus on legal changes that are taking place, or are likely to take place, in Northeast Asia, and address whether the Rule of Law concept provides useful criteria for directing or evaluating change.

Receptivity of legal systems to private litigation¹³

The attractiveness of a legal system to private litigants will greatly affect the rate of private litigation in a society. Although using litigation rates as a variable for comparing legal systems is fraught with complicating factors (Blankenburg 1997), it seems intuitively obvious that amounts and types of litigation matter for economic performance. The Law & Development literature is often cast at too high a level of generality to address receptivity issues directly, but the claim is often made that the Rule of Law corresponding to a market economy demands courts that are readily accessible to private litigants, especially to enforce contractual and property rights (World Bank 1996). Legal regimes in Northeast Asia have not been seen as friendly for private litigation, however, either overall or with regard to particular sorts of litigation. Neoliberal reformers may well seek to make these legal systems more receptive to litigation, but the Rule of Law as such will not provide much guidance in such efforts, either in terms of how litigation-friendly a system should be overall, or with regard to what particular changes should be made to accomplish whatever effect is desired. The following sections discuss systemic factors that have been identified as discouraging litigation in the region, factors that affect both the way that litigation has been financed, and that affect the way litigation has been conducted.

The nature of the bar will affect the extent to which a legal system is able to approximate traditional Rule of Law ideals such as equal access to justice, and will also effect the extent to which the Law & Development movement's 'functioning legal infrastructure' vision can be attained. One of the main factors affecting the financing of litigation in countries of the region is the very low passage rates for their bar examinations, which keep bars small, competition restrained, and fees high. Interestingly, little attention is paid in the Law & Development literature to domestic legal professions,¹⁴ yet at the same time this is one of the hottest areas of debate and development throughout Northeast Asia. South Korea, Japan, and Taiwan are all considering a range of options for reforming legal education, and all have moved to increase the number of practicing attorneys. These movements began well before the financial crisis, and have potentially wide-ranging social, political and economic consequences, yet these consequences are at the same time quite hard to predict. One could imagine more lawyers resulting in lower legal fees and thus lower transaction costs for business, but one could also imagine more lawyers leading to more litigation, more formalized business relationships, and thus higher transaction costs.

Another common perception is that litigation in the region has also been discouraged by professional rules limiting contingency fee arrangements,

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which allow lawyers in the United States to charge no fixed fee, but instead take a percentage of any eventual award in the client's favour. Contingency fee arrangements allow plaintiffs' attorneys to finance certain cases, with plaintiffs required to pay nothing unless they prevail. A third phenomenon common to the legal systems of the region is the institution of the 'stamp duty', a kind of tax that must be paid in full at the time litigation is initiated, and which also works to discourage litigation. The 'stamp duty' has normally been calculated as a percentage of the claimed amount, rather than being related to the actual costs of administering litigation, and this discourages not only inflated damage claims, but also certain types of litigation. That this works as a negative incentive against shareholder derivative litigation, for example, has been well-documented, and in Japan the law has been amended to make shareholder derivative litigation more attractive to plaintiffs.¹⁵

Rules and practices governing the process of litigation in the region have also been seen to discourage litigation. One such practice is that of spreading out rather than concentrating hearings in a particular case. Rather than the court blocking off a period of time for an individual trial and consolidating hearings within that period, South Korean and Japanese courts have instead conducted trials through a series of brief hearings, spread out over many months, even in simple cases. Another factor some cite as discouraging litigation in the region is that judges, as representatives of the Civil Law tradition, generally lack the broad contempt of court powers that common law judges use to discipline litigants. In the author's experience in South Korea, for example, the fact that a witness simply did not show up to testify at the appointed time did not create a serious problem for the witness, the court, or the lawyers involved. The hearing would simply be rescheduled for the following month. A third factor often cited is the relative weakness of civil 'discovery' provisions in the civil procedure rules of the region, which allow defendants to withhold substantially more evidence from the plaintiff's side than would be possible under US procedural rules. Finally, class action mechanisms, which are very important for making certain kinds of litigation practical, are also absent.

Several aspects of the foregoing discussion are noteworthy. First, the discussion makes little sense unless the implied standard of comparison can be identified. Unfriendly court system – compared to what? Small number of lawyers – compared to what? The Rule of Law concept will not help much in that exercise, with the proviso that if private litigation were so unattractive that no one resorted to the courts, most would probably agree that law had receded to the point of irrelevance. So long as that extreme condition is not approached, the Rule of Law does not provide much guidance, either with regard to overall attractiveness to litigation, or to which particular procedural rules should be adjusted, and in which directions. Yet these mundane structural/procedural changes are exactly the kinds of changes that must be made in any serious effort to affect how a legal system operates, which is why real

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law reform work is intensely political while at the same time remaining 'below the radar' of even most informed observers.

Although the Rule of Law is not of much use in making such decisions, other choices for evaluation are also limited. Law reformers often look to another country, in practice often the United States in spite of the widespread horror in which many hold our legal culture, or to 'international best practices', which may well mean comparison to the United States or to the unconscious model of a 'normal' legal system held in the head of the person making the comparison. But similar procedural provisions do not necessarily yield similar levels of litigation, even between societies that share similar substantive law and many other attributes in common. 'Substantive law, and even procedural codes, might be alike from one country to the next, but they are bad predictors as to how the law is handled' (Blankenburg 1997: 64). Another strategy would be to attempt to ground a judgement about receptivity to litigation in some other objective criteria, such as economic efficiency. This sounds more scientific than either Rule of Law rhetoric or comparison between existing legal systems, but unless one believes that all the variables that influence the performance of a particular legal rule or practice can really be held constant, there must be great doubt that a particular legal rule or practice, even if highly efficient in its home environment, will be the optimal choice for a different environment. Setting aside the effects of social and other non-legal norms on the functioning of legal norms, differences in the surrounding formal legal norms alone will inevitably cast doubt on the optimality of a proposed rule change unless larger parts of the regime are changed as well.

A second important point is that the new Law & Development literature stresses the need for lawyers, courts and other institutions of a legal system to enforce contract and property rights, but substituting the word 'challenge' for the word 'enforce' opens up whole new lines of enquiry that should at least be considered by those proposing to tinker with legal systems in ways that will affect their receptivity to litigation. What lawyers actually do in a given society will not be limited to the functions assigned to them in a model, even if the model is constructed empirically, based on what lawyers do and have done in other actual societies. But if the model is not constructed in this way, and lawyers are given a limited role of simply facilitating the enforcement of property and contract rights, history suggests that they will not conform to the model.

A common position in the legal education and bar membership debates is that legal education in Northeast Asia is too formalistic, too focused on exegesis of the rule structure, and needs to become more 'pragmatic' and policy-oriented, like American legal education. Licensing more lawyers, especially those trained in this more 'realistic' way, will help meet the demands of business for more sophisticated legal advice, while also making it easier for people generally to pursue their legal rights. The fact is, however, that American legal education is in major respects radically un-pragmatic, with instruction

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in how to actually practice law generally relegated to low-prestige 'clinical' courses, and in any case it involves a great leap of faith to think that the US system of teaching law, which reflects our quite unique intellectual history, can be transformed from a reflection of one society into an instrument for bringing about predictable change in another. It is likewise unclear what having more licensed lawyers will do for Northeast Asia. Business interests might find transaction costs, including legal fees, rising instead of falling with additional licensed lawyers, and human rights advocates may find that having more lawyers does not translate directly into better representation for the poor.

Finally, many of these rules and practices are in fact contested, controversial and subject to change in their countries of origin, with well developed arguments for and against many of them. For example, after much controversy England is now experimenting with certain forms of contingency or 'conditional' fee arrangements (Mears 2000; Levin 1998), thus appearing to move toward the US practice, but retains the 'loser pays' principle under which the unsuccessful litigant must generally pay the victor's attorney fees as well as litigation costs. US anti-litigation 'law reform' groups, and some noted academics, advocate the 'loser pays' principle for this country, where the basic practice is that each side pays its own attorney fees, except where attorney fees are 'shifted' in favour of successful plaintiffs for public policy reasons, and only some litigation costs are likely to be recoverable by a successful defendant.¹⁶ A conservative Japanese Supreme Court justice likewise advocated a 'loser pays' system for that country in the 1950s, to dampen a tendency to litigate that was growing, but that in comparative perspective appears somewhat quaint (Tanaka 1959). Discovery provisions are also contested ground in the United States, with the relevant procedural rules being amended periodically. The latest amendments to the Federal Rules of Civil Procedure tinker with the statutory language in an attempt to narrow the scope of discovery that will be available to a plaintiff as a matter of right, but then add an element of judicial discretion by allowing the court to reimpose the current, broader standard 'for good cause'. As one commentator candidly notes, 'it seems inevitable that we will have hundreds of new federal court discovery decisions to review in the coming years' (Herr 2000).

Independent judiciaries and the development of legal doctrine

One of the mantras of the Law & Development literature is that target countries need independent judiciaries, with independence being basically a proxy for how freely and effectively the courts can act to protect private rights, especially property rights, against expropriation or inefficient regulatory initiatives by the executive or legislative branches. This fits well with the literature's mechanistic assumptions about what judges do in deciding cases, since in the vision private rights are created and protected by rules, so being an effective independent court can be assumed to a matter of non-political, non-arbitrary,

rule enforcement. Given that the IFIs and other international proponents of legal change will exercise influence primarily over the written rules themselves, and will often need to worry about political backlash against their policy prescriptions, it is understandable why they advocate judicial independence largely in terms of enforcing written rules, and as a check on populist politics.

Actual judiciaries with a high degree of institutional independence do much more than this, however, so it is hard to see how an instrumentalist law reformer could give a highly independent judiciary more than a lukewarm endorsement. Judges in common law jurisdictions, particularly the United States, are noted for their ability to send legal doctrine spinning off in new and creative directions, but judges in European Civil Law jurisdictions have also developed, in spite of theories of legislative supremacy and judicial restraint, private law causes of action in areas such as tort liability for defective products. The doctrines developed by judges through adjudication can have extremely important economic effects, as witnessed by the controversies in the United States over litigation explosions, excessive damages awards against manufacturers, and the political clout of the Trial Lawyers Association, so if a core element of the Rule of Law is an independent judiciary with at least some ability to independently develop private law, as courts have done both in the United States and in Europe, then Rule of Law advocates must be prepared for the possibility that courts in Northeast Asia will show an increased willingness to expand the tort liability of manufacturers and other businesses. If that occurs, a more robust Rule of Law will impinge directly on the conditions that long made East Asia the envy of US manufacturers, who felt that expansive tort liability in the United States put them at a competitive disadvantage *vis-à-vis* their East Asian competitors, who in turn complained that US tort law constituted a protectionist barrier against imports.

Another doctrinal area ripe for expansion by increasingly independent and assertive courts would be professional malpractice. In Korea, for example, malpractice litigation against lawyers has been basically non-existent, which has meant that Korean lawyers, and thus their clients, have not had to bear the added costs of malpractice insurance, but it has also meant that Korean lawyers have not been disciplined in the manner of their US counterparts. They are less disciplined by the market for legal services, since there are relatively few of them, and they are little disciplined by the threat of malpractice litigation. This absence of professional malpractice litigation is changing now, but neither the Rule of Law nor the lesser included abstractions relied upon in the Law & Development literature are particularly useful in a discussion of whether legal or other professional malpractice should be expanded in Korea, or what the economic and social consequences of that would be.

Insolvency

As will be discussed by Carruthers and Halliday in Chapter 9, insolvency law has become a great focus of attention in the wake of the financial crisis.

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Foreign creditors who lent to Asian parties without proper legal security, assuming sovereign guarantees that had little or no legal basis, now want protection. In addition, foreign investors now want to buy cheap debt in Asia, then be able to foreclose, if necessary. The IMF appears to be leading attempts to change local insolvency regimes, in general by tightening up rules to make regimes more creditor-friendly. In Korea, at least, one of the aims has been to constrain judges who have been seen as being too soft on debtors, but it is hard to constrain judges without limiting their independence, thus infringing the Rule of Law ideal.

The insolvency law regime, on paper and in practice, will greatly influence the degree of 'creative destruction' that will occur in an economy, but the Rule of Law says little about what level of 'creative destruction' a society should aim for, and even a more focused concept such as 'secure property rights' really does not get to the details of how an insolvency regime actually functions. East Asian economies have not been known for high levels of creative destruction, being noted instead for 'convoy systems', managed competition and reliance on informal alternatives to formal, legal insolvency procedures (Tomasic and Little 1997). Neoliberal bankruptcy reforms will certainly occur in those countries that are subject to IMF discipline as a result of the financial crisis, but most of the institutional changes will involve particular rule changes not derivable from the Rule of Law or any other general concept. In addition, the desire to use insolvency law in an instrumental way to achieve a higher degree of 'creative destruction', to the extent it relies upon disciplining judges to enforce statutes in desired ways, may run up against the Rule of Law goal of judicial independence.

The historical development of administrative law in Northeast Asia

In order to provide context for a discussion of neoliberal reforms to public law and regulatory practices in Northeast Asia it may be useful to put administrative law and regulation in comparative perspective by looking at the sequence in which liberal legality, industrialization, and regulatory government have occurred in different societies. This clearly requires some broad generalizations, but may nonetheless yield useful insights.

In the United States liberal legality was well established prior to industrialization, and industrialization was well underway prior to the rise of administrative government at the end of the nineteenth century (Skowronek 1982). In this sequence, one could say that the establishment of liberal legality and a relative separation of the state from private interests meant that industrialization was generally carried out by private entrepreneurs, who in a democratic polity amassed great power to resist regulatory government, and to ensure that administrative law, as the law governing the regulatory relationship between the state and private interests, was highly protective of the latter.

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The fact that judicial independence and the private legal profession were well-instituted in the United States meant that the courts and the private bar were positioned to resist those aspects of administrative governance that would limit their roles, and opponents of regulatory government could rely on deeply held societal commitments to liberal legality and private property when crafting their arguments for the courts, or for the public arena.

Germany provides an example of a somewhat different sequence, though not so different as some would argue. In important German polities, such as Prussia, bureaucratically organized governments with relatively ambitious regulatory agendas arose prior to the rise of liberal legality, and both of these arose prior to industrialization. The Liberal *Rechtsstaat* that became the goal of many German liberals during the nineteenth century was based on ideas of individual rights and formal legality, but in general was not as hostile to the rising tide of regulatory government as liberal legality in the US context, and important German liberal administrative law theorists became supporters of an interventionist state in response to the social problems associated with industrialization (Böckenförde 1991b; Hahn 1971). At least by comparison to the United States, administrative law as it developed in Germany focused more on controlling how the state carried out its governance tasks, on insuring that governance was in accordance with law, and less on trying to handicap the state's substantive regulatory agenda.

In Northeast Asia, one could say that a third sequence has been followed, according to which the interventionist state arose prior to, but really in conjunction with, industrialization. With these two established first, and established in a manner that left the state and private industry in a complex and mutually dependent relationship, liberal legality and liberal administrative law have been struggling to establish themselves ever since. Judicial independence has been problematic, even in Japan, which meant that judiciaries were not going to be able to do much in the way of creating and enforcing systems of liberal administrative law on their own, even if they saw that as an appropriate task. The states did not regulate all areas of the economy, but what they did regulate, such as the interface between their domestic economies and the international economy, or the structure of important national industries, they regulated with comparatively little interference from the courts. Two points are important here, however. First, this is not an argument for the autonomy of the Northeast Asian state from private interests, but rather an argument that the relationship between the state and private interests was relatively unconstrained by legality. The fact that the relationship was so little governed by law has laid the groundwork for years of debate about state autonomy, because so much must be inferred. In the cases of South Korea and Taiwan it is easy to understand why private interests did not effectively push for a more legalized relationship with the state, but in the case of Japan, where democracy and political corruption scandals have been the norm since the end of the Second World War, one must assume that they did not

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do so because they did not feel that it would benefit them economically. The second point is that governance was not necessarily arbitrary, or even un-law like, despite the fact that the courts were kept at a distance. Administration may be highly rule-bound, and discretion highly constrained, by internal bureaucratic norms, processes and procedures, with little or no supervision by the courts.

The liberalization of economic controls that has been going on in Northeast Asia is well known, but this has also been accompanied by steps to introduce more liberal administrative law regimes, specifically by adopting statutes governing the internal decision-making processes of administrative agencies, so-called administrative procedure laws. The United States adopted its Administrative Procedure Act in 1946, West Germany adopted a version of such a statute in 1976, and there had been calls for such statutes within Asia for decades. Those calls are now being met, with administrative procedure laws being adopted in all three jurisdictions. In South Korea and Taiwan political democratization has been accompanied by enhanced judicial independence, so that the administrative law reforms that have been enacted will play out in the context of judiciaries that are more independent from the executive, and that perhaps wish to take on a more active role in mediating state-private interactions. In Japan, the judiciary itself has not changed, so changes in administrative law there will be implemented by a judiciary that still faces the same structural challenges to its independence.

The timing of these initiatives, once they finally achieved some success, may be useful for evaluating some of the claims of the Law and Development literature. One such claim, which smacks of the sort of formalist reasoning discussed earlier, is that 'civil society', in particular private owners of capital, can be assigned the function of providing demand for the Rule of Law and liberal legality, in much the same way as an increasingly wealthy middle class is assigned the function of demanding democracy in modernization models. Although one might simply look at the economic oligarchy in Russia for yet another example of how extensive private property cannot be assumed to result in a demand for the Rule of Law, one could also look at the problematic history of private capital in Japan in relation to liberal administrative law. It may be that private capital interests now feel that they want to extricate themselves from existing relationships with governments and ruling parties, but that does not mean they want the Rule of Law in society generally, only a more law-governed relationship with the state.

But even such potentially important administrative law reforms as are going on in Northeast Asia will remain highly dependent upon particular circumstances, and there will be many important issues that cannot be resolved by invoking Rule of Law rhetoric, or the rhetoric of liberal legality. As Frank Upham has demonstrated so well in the case of Japan (Upham 1987), one key issue will involve the doctrine of standing to challenge administrative decisions. Generous standing doctrine will tend to slow down administrative

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action by facilitating legal challenges, while narrow standing doctrine could keep judicial review far in the background in spite of reforms to the statutory law. The Rule of Law concept is not very useful in the debate over scope of standing, though if the Rule of Law is achieved in terms of the courts becoming more firmly independent it will likely be they who determine the scope of standing, within broad limits. Likewise the issue of justiciability – whether the government agency has undertaken the requisite ‘administrative act’ that will allow a citizen to obtain judicial review. This is a notoriously malleable doctrine, and Rule of Law ideals arguably provide only a bottom limit on how restrictively the ‘administrative act’ requirement might be interpreted. This is a key doctrine in administrative law, with important economic governance implications, the detailed interpretation of which would typically lie within the authority of an independent judiciary. Yet despite the fact that there would seem to be clear economic governance effects from enhanced judicial independence, as part of the Rule of Law, the raw economic effects would not be subject to easy generalization, as the impact of broad or narrow standing or justiciability doctrines would vary depending upon what sort of regulatory initiative was involved.

Similar problems arise if we look at other basic areas of administrative law, such as the intensity of judicial review of agency factual determinations, of agency compliance with procedural requirements, or of agency interpretations of law. These and other doctrinal areas are subject to continuing debate and development in the United States, and with certain exceptions the Rule of Law is not at the core of contemporary debates. To the extent that administrative law in Northeast Asia comes to resemble administrative law in the United States, and to the extent that judiciaries in Northeast Asia are given autonomy to develop administrative law doctrines, what can be expected is not tight convergence to the United States or any other model, but rather that legal debates and doctrinal shifts will occur within broadly similar parameters, and will be conducted on broadly similar rhetorical grounds. After a century of debate we in the United States have not settled fundamental issues concerning the respective roles of the President and Congress in supervising administrative agency activities, the extent to which Congress may delegate its legislative authority to administrative agencies, and the extent to which Federal government agencies may regulate matters not obviously within Federal authority. Leaving aside such legal issues, we have yet to reach settlement on even the most basic questions of political theory raised by the coexistence of democracy and bureaucracy – the desired balance between bureaucratic expertise and public participation in administrative agency decision making, and how to best achieve that balance. From the outside US administrative law may appear to comprise a model that might be imported, but from the inside the system appears dynamic along several different dimensions, and intimately connected with broader political concerns and debates.

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Administrative guidance and the legality of South Korea's Big Deal

One notorious facet of regulatory practice in Northeast Asia, administrative guidance, could be quite dramatically affected by a shift towards a stronger Rule of Law in administrative law, but this will likely depend upon the courts. Administrative guidance has probably been over-conceptualized in some senses, but in one important sense it has not. Although not all administrative guidance would fall into this category, it is quite clear that in many instances informal requests or suggestions emanating from the government were in fact backed up by threats of retaliation, and thus were voluntary only in the most formal sense. These threats of retaliation were facilitated by the fact that many areas of regulatory control fell within the jurisdiction of mainline, hierarchically organized ministries, as opposed to the US model of independent regulatory commissions and single function agencies, so that cross-jurisdiction retaliation was facilitated. A company that did not heed an informal government request or suggestion could suffer unfavourable treatment in a later, formally unrelated matter coming before the same ministry.

Nearly any conception of the Rule of Law would seem to render this illegitimate, as an abuse of the authority given to the retaliating authority. For example, for tax authorities to audit a company because that company ignored a government campaign against imports of luxury goods, or for a company to be denied an import license, a license to enter a line of business, or permission to access international capital markets because it ignored guidance in a legally unrelated matter, would mean that such later decision was based on factors inappropriate to the agency's decision making process. Courts in many jurisdictions have developed administrative law doctrines to combat this sort of practice as an abuse of otherwise lawful discretion (Singh 1985; Hamson 1954), but the development and enforcement of such doctrines require aggressive courts willing to explore the actual, subjective motives of government actors, since the later retaliatory action might very well fall within the scope of the legitimate regulatory authority of that government body. In other words, effective administrative law in this context requires courts that will go beyond a review for formal compliance with the rules, but there is no guarantee that more independent courts will actually heighten their scrutiny of government actions in this way. To the extent that neoliberal economic reforms do away with capital controls and other controls over domestic industrial structures such reforms would seem to complement and support a stronger Rule of Law in administrative law, though governments might try to maintain extra-legally the legal control measures they have lost. Reforms that involve creating quasi-independent regulatory bodies should tend to reduce the abuse of discretion problems that have been discussed here, though efforts to export this US innovation have not fared well in the past.

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The story of administrative guidance and the Rule of Law can be complicated, however, as exemplified by the South Korean government's desire to push through *chaebol* reforms known as the 'Big Deal'. The Law & Development literature's core Rule of Law concern is with the protection of private property rights against government interference, yet constitutional protection of private property could be interpreted in such a way as to call into question the legality of the means by which the Kim Dae Jung government is pushing the Big Deal. South Korea's Constitutional Court ruled that government restrictions on bank lending to the *Kukje chaebol* in the 1980s, and the resulting forced sale of *Kukje* assets by the owner, was an unconstitutional infringement upon private property rights (Hong 2000; West 1998). To the extent that the Big Deal relies on similar government leverage over bank lending policies, a legacy of Korea's developmental state that has been hard to relinquish, the outcome of the Big Deal could be subject to future legal challenges (Kim 2000). Yet the overwhelming power of the *chaebol* in the South Korean economic and political environment may also hinder the long-run development of the Rule of Law in South Korea, in addition to being economically questionable. If that is the case, perhaps achieving the Rule of Law in the long run will require a violation of the property rights – Rule of Law in the short run, just as a rationalized economic structure may require some substantial pressure on private property to push through the Big Deal. This is hardly ideal, but neither is it ideal to see property rights and Rule of Law rhetoric stand in the way of initiatives such as *chaebol* reform, or land reform in some developing countries, which can improve societies in very fundamental ways, both economically and politically. In any case, while the South Korean judiciary may now enjoy the stature in that society that is required when constitutional norms are invoked to limit popular political initiatives, courts in many developing countries simply cannot be assumed to possess such authority.

Conclusion

Legal systems, from their broadest structural arrangements down to their most detailed procedural rules, certainly affect economic performance, yet the real-world economic effects of legal system change are not easy to study. The dominant theoretical approach of the Law & Development movement, based on rational choice institutionalism and Law & Economics, has advantages in terms of theoretical rigour and is backed by the work of several Nobel laureates, but it may involve costs of its own in terms of an overreliance on abstract modelling and deductive reasoning invoking concepts like the Rule of Law. The financial crisis has demonstrated to many the dangers of financial deregulation without re-regulation, confirming the insight that freer markets may indeed require more rules (Vogel 1996). Yet comparative studies of regulatory styles and administrative law suggest that 'rules' are really not the answer – that

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successful regulatory systems mix rule, discretion and judicial review to varying degrees, and that discretion is both inevitable and desirable (Kagan and Axelrad 2000; Rubin 1997; Kagan 1991). Rule of Law advocates that forget this fact in the effort to provide the tightly rule-based environment that will maximize predictability and certainty for the private sector are not only out of touch with the realities of regulation and administrative law in actual existing market democracies, but are selling a one-sided and potentially unsustainable vision.

There are many ways to think about law and economic activity, and perhaps especially when trying to transplant new legal institutions into existing legal and social systems, it might be useful to resurrect some of the pragmatic, anti-abstractionist sentiments of the old institutionalist economics and Legal Realism. In a wonderful essay entitled *The Supreme Court and American Capitalism* Max Lerner captured this sensibility when he wrote:

It is generally accepted that one of the essential elements of law is certainty, and that it is especially essential for the development of capitalism. It encourages accumulation and investment by certifying the stability of the contractual relations. But it is to be conjectured that a speculative period in capitalist development thrives equally or better on uncertainty in the law. And in periods of economic collapse the crystallized certainty of capitalist law acts as an element of inflexibility in delaying adjustments to new conditions. (Lerner 1933)

The one thing we can probably be sure of when gearing up to tinker with a legal system is that nothing is going to work out exactly as planned, so why not begin with a less parsimonious but more pragmatic and empirical approach? Whether concerning the relative attractiveness of the legal system to private litigation, the ability of independent courts to develop new substantive law, the degree of 'creative destruction' produced by the insolvency law regime, or the development of administrative law that interjects law and courts more deeply into government-private sector relations, the Rule of Law, for all its virtues, does not provide ready answers to many of the important legal reform questions now facing Northeast Asia. Unfortunately, however, neither does any competing approach. Although this chapter has focused on the errors of those selling the Rule of Law as one of the 'good things' (property rights, democracy, the Rule of Law, economic growth) that 'all go together', one could make the same category of error in the opposite direction, and with equal certainty claim that the results of the new Law and Development initiatives will be inevitably perverse, and that market liberalism will never contribute to political liberty. This would be equally unwarranted, but as has been noted, '[a] tendency to resort to dogmatism is particularly noticeable in situations where the supply of evidence is scarcest, which in itself should be evidence enough against such claims' (Pepper 1961). This is one of those situations.

Notes

- 1 Frederick Grimke was a state court judge in Ohio from shortly before 1830 until 1842, and served his last six years on the bench as a member of the Supreme Court of Ohio (Grimke 1848: 5–6).
- 2 Important Legal Realist works are excerpted and discussed in Fisher *et al.* (1993). For a brief but thorough example of Legal Realism's critique of traditional jurisprudence, see Cook (1928).
- 3 A highlight of this genre is the decision of Supreme Court of Illinois striking down a state statute mandating washing facilities at coalmines so that miners could wash and change into dry clothes before leaving the mines. The court found that the statute, democratically enacted and indisputably intended to protect the health of miners during cold weather, was an example of unconstitutional 'class' legislation because '[t]he evil at which this statute is aimed is one that is not visited alone upon persons employed in coal mines. The legislature cannot ameliorate the coal miners' condition under the guise of an exercise of the police power and leave others unaided who suffer from like causes', *Starnes v People*, 222 Ill.189, 195 (1906).
- 4 On the rise and fall of the Law and Development movement of the 1960s, see Trubek and Galanter (1974).
- 5 The idea that federal judge and Law & Economics scholar Richard Posner is a pragmatist (Ryerson 2000) therefore requires one to ask, pragmatic about what? For example, Posner concludes an otherwise sensible excursion into the Law & Development themes with a thoughtless and totally unsupported claim that in countries 'such as Russia' . . . 'a strict criminal law and a corresponding de-emphasis on the protection of civil liberties may be an important part of legal reform and an important tool for the protection of property and contract rights' (Posner 1998: 8–9).
- 6 It is now typical for Law & Economics scholars to readily admit the reductionism and formalism of early Law & Economics, and that empirical verification has been far outstripped by model building and refinement (see, for example, Korobkin and Ulen 2000: 1053–4), while simultaneously touting the great contributions Law & Economics has made to 'understanding the interaction between legal rules and society' (ibid.: 1055). One might be tempted to ask why we should believe that the early contributions were so important scientifically, as opposed to socially or politically, if the foundations upon which they were based were fundamentally flawed.
- 7 In some writings contract law seems to become a mere subset of criminal law, as if courts deciding contract disputes are analogous to state authorities prosecuting property crimes. See, for example, Clague (1997: 373). ('The victim of theft or contract nonfulfillment is usually willing to provide information to government authorities in their efforts to enforce the laws.')
- 8 Unpublished memorandum dated 13 May 1997, on file with author.
- 9 Tanzi (1997: 18, n. 32). Mr. Tanzi's paper is well worth reading for the window it provides on the politics behind the technocratic rhetoric. Tanzi suggests, absent any evidence or even reasoned argument, that 'in many countries' crime rose because governments had taken on too wide a regulatory agenda (ibid.: 15–16), and later indicts regulations having 'purely social, and somewhat debatable, objectives, such as those that control working hours, minimum wages, and length of work week' (ibid.: 20).
- 10 As in the broader rational choice tradition, this literature seems able to address and to justify democracy only as a means to an end, not as an end in itself.

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- 11 See, for example, Tamanaha (1995: 476). 'A minimalist account of the rule of law would require only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries. . . After many decades of work by people in developing countries, the end result [of Law & Development work informed by Tamanaha's vision] may be the achievement around the world of successful, indigenous permutations of the rule of law, maintaining its core elements yet altering it to fit local circumstances.'
- 12 For purposes of sensible debate it is unfortunate that some sought to transform this 'Northeast Asian problem' into a single model, an alternative Asian End of History to challenge triumphal Western neoliberalism. That tendency, which thrives on images of economic models struggling for global supremacy, meant that when the financial crisis hit the political-economic systems of the entire region would be written off as complete failures, incapable of providing insights that might challenge a victorious neoliberalism.
- 13 This section is indebted to the pioneering work of John Haley on Japanese law (Haley 1978), which regrettably has been too little pursued in writings on law in Korea or Taiwan.
- 14 One sometimes sees hints of long-standing populist sentiments that lawyers as such are really part of the problem, and would play a greatly reduced role of the Rule of Law were properly implemented (Clague *et al.* 1997: 82–3, n. 15).
- 15 Japan's Liberal Democratic Party and Ministry of Justice now support legislation to rein back in shareholder litigation. 'LDP planning review of Commercial Code,' Daily Yomiuri On-Line, <http://www.yomiuri.co.jp/newse/0924po03.htm>.
- 16 The interplay of fee arrangements between lawyers and their clients, fee and cost allocations between litigants, and such other institutions as the English practice of 'payment into court', render it notoriously difficult to make sensible comparative assessments even between the English and US systems (Napier and Armstrong 1993). For a useful comparative survey see Davis (1999).

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