

The Rule of Law

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Abstract

Rule of Law rhetoric is increasingly common, both in U.S. legal literature and in the realm of international governance. In the field of law and economic development, the Rule of Law revival is lead by the international financial institutions (IFIs). Rule of Law discourse has also come to play an important role in the fields of comparative politics and comparative law, particularly with respect to East Asia. This review begins with a discussion of Rule of Law rhetoric in the Anglo-American tradition. It then discusses the international Rule of Law renaissance, focusing on the roles that Rule of Law rhetoric plays in the development activities of the IFIs. Because the claim is that the Rule of Law is key to economic development, this review explores the extent to which Northeast Asia's outstanding economic development conformed to the Rule of Law. An exploration follows of how the Rule of Law–economic development literature has evolved over time, in line with changing ideas about economics and about development itself. Finally, this review explores how Rule of Law is used in the literatures of comparative politics and comparative law.

INTRODUCTION¹

In 1989, one of America's premier scholars of constitutional law could write, "the Rule of Law . . . has precious few sophisticated defenders these days" (Tribe 1989). But Professor Tribe's pronouncement did not dissuade American legal scholars and philosophers from undertaking a broad resurrection of the Rule of Law in American legal discourse during the 1990s, putting the term to use in a range of jurisprudential and governance debates (Cass 2001, Fallon 1997, Frank 2007, Komesar 2001, Maravall & Przeworski 2003, Radin 1989, Scalia 1989, Shapiro 1994, Tamanaha 2004, Whitford 2000).

At roughly the same time as the Rule of Law was making its comeback in domestic American discourse, a parallel revival was occurring on the international plane. The renewed popularity of the term here far outstrips its previous popularity, in part because of Rule of Law's newly widespread application, by scholars, policy makers, government agencies, and nongovernmental organizations (NGOs), to previously unrelated social science disciplines. In the field of law and economic development, for example, the Rule of Law revival has been led by the international financial institutions (IFIs)—the World Bank, the International Monetary Fund (IMF), the Asian Development Bank, etc.—by the aid and development arms of the U.S. government and the European Union, and to a lesser extent by NGOs (Carothers 1998, 2006; Dezalay & Garth 2002; Domingo & Sieder 2001; Ohnesorge 2003b; Upham 2002; U.S. General Accounting Office 1999). In this context, the Rule of Law is understood as being related to economic development and the workings of a market economy, rather than as a set of normative political commitments (Ohnesorge 2003b). At the same time, and not unrelated to the economic development sphere, Rule of Law discourse has come to

play an important role in the fields of comparative politics and comparative law, particularly with respect to China and East Asia.

The diversification of Rule of Law's applicability across a wider range of academic disciplines has led to an explosion of literature either debating the role of Rule of Law or employing it as a variable in economic and political development models (Hendley 2006, Jensen & Heller 2003). An informal survey shows that articles, books, and other scholarly publications that employ Rule of Law as described above increased at an average rate of approximately 25% annually between 1998 and 2006.² This review therefore examines in broad terms the role Rule of Law rhetoric plays in various practical applications, rather than tracing minute definitional shifts in this ever-expanding field.

This review begins with a short discussion of Rule of Law rhetoric in Anglo-American law and politics, stressing the political uses to which the term has been put, rather than refining the content of the concept itself. It then discusses the international Rule of Law renaissance, focusing on the particular roles that Rule of Law rhetoric plays in the economic development activities of the IFIs and in the academic literature associated those activities. Because the guiding principle is that the Rule of Law is key to economic development, this review includes an exploration of the extent to which the outstanding economic development that occurred in Northeast Asia actually conformed to the Rule of Law claims of this new Law and Development literature. This is followed by an exploration of how the Rule of Law rhetoric of international development has evolved over the past several years, in line with changing ideas about economics and about development itself. Finally, this review explores how Rule of Law is used in the literatures of comparative politics and comparative law, which are often related to the

¹This review draws on the author's earlier essay, Ohnesorge (2003a).

²Survey performed through electronic search engines. Figures on file with author.

economic development literature yet are also distinct.

RULE OF LAW RHETORIC IN THE ANGLO-AMERICAN TRADITION

For an American legal academic observing the IFIs from the outside, it becomes clear that they and their academic supporters define the Rule of Law in very particular ways, often quite differently from how the term has been used by legal thinkers, and that they attempt to use the concept for broader social theorizing, also in contrast to traditional legal scholarship (Ohnesorge 2003b). To highlight these particularities, it will be helpful to explore briefly the Rule of Law rhetoric in mainstream Anglo-American legal scholarship. Three points should be made in this regard.

First, at least in the United States, the Rule of Law has been invoked more often for political than for analytical purposes and should not be understood as a legal term of art. Thus, “[w]hen an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it” (Jones 1958). Our tradition has produced no agreed definition of the Rule of Law, and there is no important tradition of academic analysis and explication of the term, as there is with the German *Rechtsstaat* ideal (Böckenförde 1991). Few American law students study jurisprudence (legal philosophy), and it is safe to say that the overwhelming majority of American law students never address the Rule of Law concept in any systematic way. Moreover, in modern American legal scholarship it is far more damning to demonstrate that a legal rule has negative social effects or that a judicial decision cannot be reconciled with the governing statute or existing precedent than to demonstrate that a rule or decision violates some vision of the Rule of Law. Given this environment, scholars have

received little tangible reward for developing and refining the Rule of Law as concept, and the most persuasive attempts to define the term treat it as shorthand for a group of loosely related aspirations addressing various aspects of a legal system (Solum 1994).

Definitions of the Rule of Law typically address the formal characteristics of the materials of the legal system, emphasizing the value of rules rather than discretionary standards, and calling for clarity, specificity, and publicity. In Hayek’s (1944) famous formulation, for example, the Rule of Law means that

Stripped of all technicalities, the government in all actions is bound by rules fixed and announced before-hand—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.

Definitions often also address the role of the adjudicator, typically emphasizing neutrality as between the parties, independence from other arms of the government, an open mind with respect to any particular case, and fidelity to the law rather than to personal political or social goals. Definitions of the Rule of Law generally address as well certain due process or natural justice rights of citizens confronting the legal system, such as rights to know the legal basis for state action against them, to present evidence and to contest evidence used against them, and to receive reasoned explanations of legal actions affecting them. The following example stresses many of these concerns:

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful ‘day in court’; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the

disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation (Jones 1958).

Visions of the Rule of Law that emphasize form and procedure, rather than demanding any particular set of substantive rights or norms, are sometimes referred to as formal, minimalist, or thin theories of the Rule of Law (Hendley 2006, Peerenboom 2003, Raz 1977, Stromseth et al. 2006, Tamanaha 2004). By contrast, theories of the Rule of Law that go beyond such positive aspects of a legal order, to include references to democracy and core human rights, are often referred to as substantive, maximalist, or thick theories (Hendley 2006, Peerenboom 2003, Raz 1977, Stromseth et al. 2006, Tamanaha 2004). Although legal scholarship elaborating the Rule of Law concept is growing, Rule of Law rhetoric is more typically invoked when a commentator wishes to criticize a particular legal rule or judicial decision, and there has been little effort, until recently, to use the Rule of Law as an element of broader social theorizing.

A second fact about the Rule of Law as a concept in Anglo-American jurisprudence is that it has often been used to champion our way of doing things over someone else's. A famous early example of this was the English legal scholar Dicey's use of the Rule of Law in his argument for the superiority of English common law over French *droit administratif* (Dicey 1885), which later scholars suggested he did not understand beyond the most basic level (Hayek 1960, Jennings 1943, Wade 1945). Dicey claimed that England's unwritten constitution was characterized by fidelity to the Rule of Law, which he defined in such a way as to rule out administrative law (*droit administratif*) in the Continental sense. The English legal system as it actually existed did

not meet Dicey's own definition of the Rule of Law in important respects, however, leading critics to view his ostensibly scholarly enterprise as an attempt to privilege his Whig political views against the rising tide of social legislation already remaking English governance at the time (Jennings 1943). This was an early example of Rule of Law rhetoric employing a particular definition of the term in an effort to delegitimize interventionist government, a use to which the term was put again in later eras.

Rule of Law rhetoric was put to similar use during the Cold War, when Western politicians and lawyers were actively searching for principled distinctions between Western and communist legal systems, whether Soviet or Chinese (Berman 1950; Hayek 1944, 1960; Int. Assoc. Legal Sci. 1957; Int. Comm. Jurists 1959; Michael 1962). Communist legal systems were in many ways similar to those of the West in that they contained rules and standards creating rights and obligations, and they were operated by people called judges, prosecutors, and lawyers (Hendley 2006). The Rule of Law concept became a vehicle used by Western scholars to explain how this all differed in some fundamental way from legality in the West (Berman 1992). Although the collapse of the socialist world made this enterprise largely moot, Rule of Law rhetoric is still used in this way with respect to the legal system of the People's Republic of China (Corne 1997). The Cold War context also provided the backdrop for Hayek's invocation of the Rule of Law, which, like Dicey's, was designed as a rhetorical weapon in the battle against interventionist government (Hayek 1944, 1960).

Rule of Law rhetoric revived for a similar purpose during the Asian financial crisis that began in 1997, as a way to distinguish Western capitalism from the "crony capitalism" practiced by Asians (Greenspan 1998). This had the effect of locating the source of the financial crisis in Asia itself, rather than, to cite one possibility, in flows of "hot money" resulting from Western demands that Asian countries open

their financial markets to global capital flows (Stiglitz 2002). In retrospect, Malaysia's decision to restrict such capital flows in the face of the crisis appears to have been a good idea (Stiglitz 2002), whereas the subsequent collapses of Enron, Arthur Andersen, and other pillars of corporate America have shown that crony capitalism can thrive in what is often described as an overly legalized society.

A final point concerns the use of Rule of Law rhetoric to mask profound political differences in foreign affairs. For example, the Clinton administration made extensive use of this tactic to blunt opposition from American progressives and human rights activists to China joining the World Trade Organization (WTO), even launching a "U.S.-China Rule of Law Initiative" (Gewirtz 2003). The argument went essentially as follows: WTO membership will force China to become a more legalized society in areas affecting international trade and economic governance, and this Rule of Law in trade and commerce will spill over into the realms of politics and individual rights (Barshefsky 2000, Ma 2007, Ohnesorge 2003b, Orts 2001). Americans should therefore all unite under the slogan that what China needs is the Rule of Law, and stop worrying about giving up the threat of trade sanctions as a tool for pressuring China on human rights issues. Capitalist development in China will take care of everything. The accuracy of this prediction, with its resemblance to the "all good things go together" aspects of 1950s and 1960s modernization theory, remains in doubt (Ma 2007).

RULE OF LAW AND DEVELOPMENT ASSISTANCE

Rule of Law rhetoric in international development dates roughly from the fall of the Berlin Wall and likely grew out of a combination of circumstances. Since their creation in the years after World War II, the charters of the IFIs have contained general restrictions on political interference in the affairs of borrower countries. In a suddenly unipolar world,

in which developing and transition countries had nowhere to turn for help but to the West, these restrictions apparently became a hindrance to the IFIs and the governments they serve. As a consequence, although these provisions in the constitutions of the IFIs were never removed, they were strategically reinterpreted so as not to rule out IFI demands for specific changes to the legal systems of borrower countries (Dañino 2007, Effros 2001, Upham 1994).

Theoretical justification for this expansion of IFI activities has been provided by the rise of New Institutionalism in economics, which argues that legal rules and institutions can profoundly affect economic performance (Coase 1998; North 1990, 1992). Although this is clearly true, and often just a restatement of Max Weber's ideas of a century ago (Trubek 1972), the economic importance of legal rules and institutions does not render them nonpolitical. The discovery that legal systems matter for economic performance is, however, the official IFI explanation for their newfound willingness to insist on changes in the legal systems of their borrowers (Dakolias 1999, Hassan 1999). The process by which the IFIs strategically reinterpreted their charters, clearly driven by changes in the wider geopolitical context in which they operate, used to be kept relatively quiet by the institutions themselves. Now, however, one finds in print an IMF lawyer publicly praising the World Bank's General Counsel for this bit of creative lawyering, without seeming to recognize the irony of all this from those who would preach the Rule of Law (Effros 2001).

The IFIs and the Neoliberal Rule of Law of the 1990s

As for the Rule of Law vision put forth by the IFIs during the 1990s, the basic approach can be summarized as follows. Although the Rule of Law rhetoric of the IFIs echoed to some extent traditional definitions of the Rule of Law, emphasizing form, procedure, and process, the substantive core of the IFI law reform

efforts was to convince borrower countries to adopt sets of rules that would enshrine the policy prescriptions of the Washington Consensus in their legal systems (Trubek & Santos 2006). Deregulation, privatization, tight restrictions on bureaucratic discretion, stringent property rights protections, especially for intellectual property, enhanced protections for minority shareholders, and aggressive antitrust regulation provided the substantive core of many Rule of Law efforts (Ohnesorge 2003b). The vision of law was simultaneously positivist and formalist: positivist in the sense that law consists of a set of rules created by the state and applied to particular cases, and formalist in the sense that this set of rules, applied in the technically correct way, will provide one correct answer in the vast majority of cases. Although sophisticated students of jurisprudence may contest positivist accounts of law and formalist accounts of law application, both phenomena are probably inherent in efforts, like those of the IFIs, to fundamentally remake societies through instrumentalist use of law. In any case, this was all presented as a package of technical changes necessary for economic development, perhaps out of a sense that there were still some limits on what the IFIs could demand in terms of political change in borrower nations.

There were always problems with aspects of the IFI Rule of Law agenda, however, a few of which are discussed here. To take one example, with respect to the role of courts, the rhetoric faced at least three identifiable problems: one of public relations, one logical, and one empirical. The public relations problem was (and is) that the IFIs want courts to “just enforce the rules,” to function as courts do in Weber’s ideal type of formal, legal rationality. To call this the Rule of Law, however, is to strip away nearly all normative appeal the concept may have. People care about the Rule of Law primarily because they believe it will protect them from the state, and where the state is democratic this sometimes means protection from the will of the democratic majority. Simple “law and order,” a “dictatorship of

law” in Russia’s President Putin’s terms, may be sufficient to protect them from their fellow citizens in the course of their daily lives, but it is too thin to be normatively satisfying. Thus, for the Rule of Law to have normative appeal it must be somewhat thick, including some substantive content that courts can draw upon to shape and limit the law enacted by other state organs, whether this substantive content is conceived of in terms of universal human rights norms, natural law, or natural justice.

In a legal order in which courts lacked this authority, the Rule of Law could be consistent with the worst sorts of state-imposed totalitarianism, but where courts do have authority to locate and invoke legal norms beyond the positive law, they cannot be limited to mechanistic enforcement of the rules. The reason that Law and Economics scholars in the U.S. context are often considered hostile to the Rule of Law is that they champion neither formalist rule application nor traditional rights-centered analysis by judges, but instead champion judicial activism to reshape the rule structure toward economically efficient outcomes (Tribe 1989). This may help explain the relative absence of these scholars from the IFI Rule of Law initiatives, despite their basic agreement with the free market, antiregulatory agenda of the IFIs. One could argue that they are intellectually more consistent than the IFI Rule of Law advocates, who are engaged in a fundamentally instrumentalist use of law but who still want to don the Rule of Law mantle. If pressed, perhaps those who mastermind IFI Rule of Law initiatives would admit that they believe law can be changed instrumentally until it reflects their preferred set of norms and functions but can then be somehow insulated from further instrumental manipulation. This type of thinking is not new in the history of legal aid to the developing world, but the lessons of history are not encouraging (Trubek & Galanter 1974, Trubek & Santos 2006). Legal instrumentalism is not a tool that is limited to the service of any particular ends.

The logical problem arises out of the mechanistic role assigned to courts in the IFI Rule of Law literature, which would, in the IFI view, maximize the ability of private actors to understand the legal rules and to understand how the rules would be applied to their economic activities, thus maximizing predictability. In a good number of cases, however, a court's blindly formalist rule application, like the blind enforcement of contract language, would not in fact result in a predictable outcome because such application would cut against common sense, or the common sense of the particular industry or business community whose dispute is before the court. This problem can be avoided by saying that courts should enforce rules against the basic background context of a market economy, but such a statement opens up the empirical problem, discussed below, that in fact market economies display great diversity in terms of legal rules and legal system performance.

The empirical problem is that the judiciaries in Northeast Asia, particularly during the high-growth decades of the 1960s, 1970s, and 1980s, did not perform as the Rule of Law rhetoric imagines (Ohnesorge 2003b, 2007a). To paint with a broad brush, Northeast Asia's judiciaries were surrounded by procedural rules and incentive structures that made civil litigation comparatively unattractive to plaintiffs, they were slow in adjudicating the cases that were brought, they were staffed by judges with little or no practical training in legal practice or in business, and at least in South Korea and Taiwan judicial corruption was a serious problem. Whether cultural factors also contributed to low rates of civil litigation is not addressed here, but these objective factors certainly contributed to a low propensity to litigate. Did the fact that Northeast Asia's judiciaries operated in this way negatively affect economic growth? We do not really know. We do know, however, that American industry used to view the nonlitigiousness of Northeast Asia as providing Asian manufacturers with a competitive advantage, and it may also be the case that a user-unfriendly judicial system

encourages the settlement of commercial disputes that would end in wasteful litigation in a system more receptive to litigation. This hypothesis at least resonates with our own critiques of American litigiousness and is more plausible than the counterfactual—that East Asia would have grown even faster had its courts been more receptive to litigation.

In theory there should be some ideal level of judicial receptivity to litigation, yielding the optimal balance between litigation and settlement. In fact, we have no clear idea where this point would lie and no real idea how to get there given the numerous legal and non-legal factors that affect decisions to litigate or to settle. What we know, however, is that high-growth Northeast Asia's judiciaries did not conform to the IFI Rule of Law model, and that Northeast Asia's economic regulation likewise did not conform to the model with respect to corporate governance, administrative law, intellectual property law, financial market regulation, the regulation of foreign investments, and a host of other areas (Ohnesorge 2003b, 2007a). The 1997 financial crisis certainly exposed weaknesses in Northeast Asia's economies that had not been widely acknowledged previously, but to say that the 1997 crisis requires that Northeast Asia abandon what it had been doing to adopt the Washington Consensus would be simply ideology. One could just as well argue that the collapse of Enron and the bursting of the stock market bubble of the 1990s requires the adoption of the Northeast Asian model here.

The Ever-Expanding Rule of Law: From the Washington Consensus to Comprehensive Development

As of the late 1990s, the IFI vision of the Rule of Law seemed very narrow, essentially an image of a functioning legal infrastructure that would enforce the substantive rules corresponding to the neoliberal orthodoxy. This meant a legal system that would strictly enforce contract and property rights, especially intellectual property rights and

creditors' rights, and strictly limit the discretionary authority of bureaucratic officials (Ohnesorge 2003b). Although this is still true to a point, the Rule of Law rhetoric of the IFIs has clearly changed with the times. In 1999, World Bank President James Wolfensohn proposed a new Comprehensive Development Framework, which addressed legal reform issues in the following terms:

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 (Wolfensohn 1999, p. 10–11, emphasis added).

This reflects both a broadened definition of what development is, exemplified in the work of Amartya Sen (see Sen 1999), as well as a growing questioning of the neoliberal orthodoxy associated with the Washington Consensus. Former World Bank Chief Economist Joseph Stiglitz has both a Nobel Prize and a popular book entitled *Globalization and Its Discontents* (Stiglitz 2002), a book that is highly critical of rigid adherence to the Washington Consensus, particularly by the IMF. Perhaps reflecting the changing climate in the field of development, the IMF felt that it had to demonstrate that it cared about the world's poor as much as Stiglitz, so it posted on its website an extraordinary open letter to Stiglitz from one of its economists, attempting to refute Stiglitz's charges of rigid adherence to neoliberal orthodoxy (see the 2002 letter from Kenneth Rogoff at <http://www.imf.org/external/np/vc/2002/070202.htm>).

Corresponding to this changing climate, the recent tendency has been for IFI Rule of Law rhetoric to become dramatically more

thick, to expand to the point where it becomes a term to express just about everything one might associate with fair and just governance. Democracy, justice, human rights, and clean government are now layered on top of thin Rule of Law attributes such as clarity and predictability, the enforcement of property and contract rights, and the control of bureaucratic discretion. Reflecting this trend, the World Bank's 2002 *Initiatives in Legal and Judicial Reform* defined the Rule of Law as a condition that prevails when

- (1) the government itself is bound by the law;
- (2) all in society are treated equally under the law;
- (3) the government authorities, including the judiciary, *protect the human dignity of its citizens*; and
- (4) *justice is accessible* for its citizens. 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*. Legal and judicial reform is a means to promote the rule of law (World Bank 2002, p. 3, emphasis added).

What we see now, at least from the World Bank, perhaps represents the revenge of the strategy that inspired the use of the term Rule of Law to describe neoliberal legal changes in the first place. By expanding the definition to include things dear to democracy and human rights activists and the international NGO community, things like human dignity, fighting poverty, and legitimacy, the IFI Rule of Law has become a banner under which all right-minded internationalists can march. The IFI Rule of Law has truly become, in the words of legal philosopher Raz (1977), the Rule of Good Law, which represents a natural extension of the logic of New Institutionalist economics. If all aspects of a country's legal system are relevant for economic development, and thus within the legitimate scope of IFI scrutiny, then there is no reason why the narrow neoliberal emphases on privatization, deregulation, property rights protection, and

controlled bureaucracy cannot be augmented by demands for human rights protections, a social safety net, and other elements of social democracy (Dañino 2007).

What is lacking, however, is a sense that, despite their ability to reinterpret their own charters, the IFIs should really not be in the role of micromanaging national political and social systems. To make such an argument, however, puts one in the position of defending the principle of national sovereignty, which has fallen dramatically out of favor. At this point, then, the IFI Rule of Law seems to represent a consensus among both the NGO Left and Washington Consensus Right that they should be able to use the power of the IFIs, which is of course based on the often dire economic needs of borrowing countries, to impose their policy preferences.

Empirically, too, the claim that this new Comprehensive Development Rule of Law is necessary for economic development is proven false by an examination of the economic development history of Northeast Asia. Although it remains true that Northeast Asia in the high-growth decades violated many tenets of the Washington Consensus Rule of Law, it violated even more tenets of the 2002 Comprehensive Development Rule of Law. Human rights protections, especially in areas such as labor organization, workplace safety, and the environment, were minimal at best, and social safety nets were thin or nonexistent. For those who care about these things, these failings may be an unattractive truth to confront, but in the interest of clear thinking about the Rule of Law, international governance, and the role of the IFIs, a bit of skepticism may be in order.

Rule of Law in the Economic Development Literature

The Rule of Law initiatives of the IFIs have supported, and been supported by, a rapidly growing academic literature that uses the Rule of Law concept in theorizing about legal systems and economic growth (Carothers

2006, Gillespie 2006, Hendley 2006, Jensen & Heller 2003). This literature and scholarship has grown largely out of a link between definitions of the Rule of Law and two economic concerns: defining and enforcing private property rights and reducing bureaucratic discretion in economic governance. The first, enforcement of property rights, is understood to be a linchpin of free market economies; thus the integration of Rule of Law and economic development builds in an assumption about economic values in developing countries that is often left unexamined. The second Rule of Law—economic development concern is with the limitation of bureaucratic discretion, supporting efforts to bind official action within the strictures of the law and the machinery of justice. In this sense, it tends to overlap with contemporaneous discussions of transparency, anticorruption, and good governance. It also harkens back to Hayek's original Rule of Law definition and its concern with promoting predictability for private economic actors.

A useful way to think about the Rule of Law as used in this literature is to think of the classic gap of law and society scholarship: the gap between law on the books and law in action. If one thinks about the efforts of the early 1990s to transform Russia into a market economy, those early efforts focused primarily on the creation of private property through rapid, mass privatization. If one is guided only by the thinking of neoclassical economics, which tends to proceed on the assumption that property and contractual rights are clear and enforceable (Coase 1998, North 1992), there is little need to focus on the legal system, beyond putting good laws in place. Simply creating private property and putting in place the laws of a market economy did not prove sufficient, however, introducing the would-be reformers of the Russian economy to the gap problem on a dramatic scale (Hendley 2001, Sachs & Pistor 1997). This realization likely helped drive the turn by 1990s law and development practice to North and New Institutional

Economics, which at least recognizes that attention must be paid to the entire institutional setting within which legal rules operate. But what if seemingly reformed legal institutions themselves do not solve the gap problem? Or, put another way, what is lacking in a legal system that has good law and seemingly reformed institutions, but that still does not produce the desired result? In much of the literature, the Rule of Law concept seems to provide the answer to this gap problem, serving either as the magic something that animates the rules and institutions of a well-functioning legal system, or as the X factor that is missing in legal systems in which good law and seemingly adequate formal institutions nevertheless resist reform. Describing the problem in terms of the Rule of Law does not solve it, of course.

Rule of Law in Postconflict Nation Building

In the past few years, the Rule of Law has been invoked in a new arena even more contested than the field of economic development: the realm of nation building in the wake of military intervention (Stromseth et al. 2006). The prolonged U.S. military presence in Iraq and Afghanistan following the ousting of the governments in those nations has created an extraordinarily urgent need to develop legal nation building expertise. Secretary of State Colin Powell's insight that "if you break it, you own it" continues to resonate. The United States and its allies displaced existing legal and political orders in Iraq and Afghanistan, and now that they are seeking to reestablish such orders, they have turned to the Rule of Law as a concept to structure and to legitimate their efforts. This need for legal nation building mirrors efforts in other postconflict societies around the world, from East Timor to Somalia to Kosovo (Stromseth et al. 2006).

In societies such as Iraq and Afghanistan, which are under the military control of the United States and its allies, the U.S. mili-

tary has taken on much of this role, and the military, too, has decided to invoke the Rule of Law as the overarching theme to describe what has fallen under the rubric of civil affairs activities (Gordon 2006). The military has organized a series of Rule of Law conferences, such as the September 2006 conference "Implementing the Rule of Law and Human Rights in Stability Operations," jointly sponsored by the U.S. Army Judge Advocate General's Legal Center and School and Harvard University's Carr Center for Human Rights Policy (Gordon 2006). The fact that these legal nation building efforts are taking place in Muslim countries means that Islamic law will have to be accommodated within a liberal, secular Rule of Law ideology, which is going to be no easy task, so leading U.S. scholars of Islamic law are being invited to participate as well (Gordon 2006).

Like others who have made the move to Rule of Law rhetoric, these postconflict nation builders invoke the term liberally, while simultaneously struggling to define what it actually means (Gordon 2006). Thus, Stromseth et al. (2006) devote an entire chapter of their book, *Can Might Make Rights?* to explicating the Rule of Law as a concept, while at the same time using the term Rule of Law in the titles to two separate chapters. In practice, the Rule of Law here is used to cover most aspects of a justice system; for example the job description in a recent State Department effort to recruit military personnel to serve as Rule of Law advisors in Iraq included "judiciary and prosecutorial development, law enforcement, corrections and detention, anticorruption, court administration, crime lab trainers and legislation promulgations" (U.S. Dep. State 2007). This mirrors the integration of various legal system attributes into the Rule of Law variable in the social science literature, discussed above, which can serve a public relations purpose. For example, the Rule of Law variable used in the influential study by Knack & Keefer (1995) on institutions and economic performance was originally termed "law and order tradition" by the International Country

Risk Guide. While law and order may in fact be a more accurate description of what the variable is supposed to capture, it clearly does not carry the legitimating cachet of the Rule of Law.

RULE OF LAW IN COMPARATIVE LAW AND POLITICS

The Rule of Law concept is also closely related to the judicialization thesis—the idea that societies in many parts of the world are relying more and more on their judiciaries, and the adjudication process, in governance (Hertogh & Halliday 2004, Hirschl 2004, Ohnesorge 2007b, Shapiro & Stone Sweet 2002, Tate & Vallinder 1995). In the words of Hertogh & Halliday (2004, p. 277), “[i]n many countries, judicial review has become immensely popular as a treatment for the pains of modern government.” Judicialization discussions often focus on the judicialization of politics, which results most obviously when a Supreme Court, or often a special constitutional court, establishes its authority to effectively review acts of the legislative and executive branches (Ginsburg 2003, Gloppen et al. 2004). But even the judicialization of politics is not limited to the constitutional plane, as invigorating administrative law to facilitate judicial review of administrative action also results in judicialization of governance (Hertogh & Halliday 2004, Shapiro & Stone Sweet 2002). Furthermore, judicialization is being extended to governance in areas that are not directly political, such as corporate law, where private shareholder litigation is promoted as a tool for governing corporate owners and managers (Ohnesorge 2007b). In this judicialization discourse, Rule of Law is often used to describe legal systems characterized by a high degree of judicialization. Although judicialization can be a good thing, an association of judicialization with the Rule of Law has a somewhat pre-Legal Realist, American tinge to it in the sense that it assumes that judges are more law-bound (less political)

in their decision making than are actors in the other branches, and thus a country more ruled by judges is more ruled by law (and less by politics). Although judiciaries obviously operate according to different principles than those governing policymaking by the other branches of government, to the extent that Rule of Law rhetoric suggests that judicialization means an escape from politics, it is bound to disappoint.

Although much of the judicialization literature is comparative, the Rule of Law concept plays an even more expansive role in the comparative law scholarship on East Asia and China. In trying to explain this, one should probably consider three distinct contributing causes. The first cause is China’s legal modernization efforts, which spawned a great deal of discussion within China concerning the difference between rule *of* law and rule *by* law and concerning which combination of Chinese characters accurately conveys which concept (Orts 2001, Peerenboom 2003). The Chinese government has committed itself to one of these concepts, so although one might be tempted to dismiss the *of/by* debate as arid scholasticism, it is clearly about something very important. Rule by law can be considered a formal or thin Rule of Law, whereas Rule of Law for many conveys a sense of something thicker, imbued with substantive values such as democracy or human rights. The Chinese government is clearly much more tolerant of legal theory debates than of debates over fundamental political reform, so *of/by* debates seem to serve as a proxy forum for debating things that really do matter. As a result, leading Chinese legal scholars treat the Rule of Law concept with a seriousness that more skeptical Americans might find surprising (Chen 2006, Zhang 2002).

This domestic Chinese discourse is paralleled in the work of U.S. legal scholar Randall Peerenboom, who invokes the thick versus thin Rule of Law paradigm in many of his writings on Chinese law (Peerenboom 1999, 2002, 2003). Peerenboom trained in philosophy before studying law (Peerenboom 1993), and

his writings display a pronounced willingness to engage conceptualist jurisprudence. However, as with the Chinese scholars engaged in their of/by debates, Peerenboom's elaboration of concepts is related to underlying political concerns, in his case an argument that the Chinese government has made substantial progress toward the establishment of a Rule of Law, albeit on the thin side, and should be given more credit for this internationally. His argument draws on observed correlations between the Rule of Law and levels of economic development, particularly in East Asia, from which he derives the idea that it is unfair and perhaps counterproductive to criticize a government such as China's as long as its Rule of Law performance is appropriate to its level of economic development. Peerenboom, however, is hardly the only foreign commentator on Chinese law to be drawn to Rule of Law rhetoric. In environmental law, and many other areas, saying that China lacks the Rule of Law provides an easy shorthand to describe the enormous gap between the law on the books, which often appears adequate, and the subpar functioning of the legal system (Ferris & Zhang 2003, Turner-Gottschang et al. 2000).

At the same time that Rule of Law conceptualism was being revived in scholarship on Chinese law, the term was also rising in importance in discussion of law in Japan. Since the 1990s, Japan has been engaged in a major restructuring of its civil justice system (Rokumoto 2007, Taylor 2005), and the Rule of Law concept plays an important part, at least rhetorically, in that restructuring (Haley & Taylor 2004, Hamano 2007). Courts have played a comparatively limited role in Japanese governance, particularly with respect to reviewing administrative action, and those who would like to remedy this situation can refer to a lack of a Rule of Law to describe this situation (Oda 1996). The restructuring in which Japan is now engaged involves a significant degree of judicialization (Ohnesorge 2007b), with the promise that Japan will finally become a Rule of Law

society. That this restructuring draws support throughout Japanese society testifies to the seductiveness of Rule of Law ideology, as Japan already appears to be among the world's best governed societies, not one in which judicialization offers obvious governance advantages.

CONCLUSION

Over a relatively short period of time, the Rule of Law concept has experienced a dramatic rehabilitation. Although this rehabilitation is reflected to some extent in mainstream legal scholarship, where the Rule of Law is discussed mainly as a set of normative concerns, it is in the international governance sphere, and in supporting disciplines such as economics and political science, that the rehabilitation is having the most real world impact. At this international governance level, which extends from economic development assistance by the IFIs to the policing activities of the U.S. military in Iraq, the Rule of Law has become a fixture of the discourse, rivaling democracy in its potency.

Ironically, it is in these high-stakes arenas that the actual meaning of the Rule of Law matters less; rather, what matters is how the Rule of Law can be used. For the social scientists interested in law in development and transition, the Rule of Law is a variable that often seems to fill the infamous gap of law and society scholarship. How do we describe societies in which the gap between law on the books and law in action is comparatively small? As Rule of Law societies. What do we need to do to fix legal systems in which the gap is large, in which the law and institutions that we have helped put on the books do not function the way we would like them to? Help them develop the Rule of Law, of course. Likewise for the actors in international governance, clarifying the meaning of the Rule of Law probably serves no particular purpose and might even prove a hindrance to the pragmatic, instrumentalist uses of law that their preferred governance reforms require.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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