
Book Review

CURTIS MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (The University of Chicago Press, 2008)

Reviewed by John Ohnesorge

In *Law & Capitalism*, Columbia Law School scholars Curtis Milhaupt and Katharina Pistor argue that failures in corporate law and governance, especially spectacular failures such as the Enron debacle, can be a rich source of material from which to theorize about relations between law and capitalism. In my view, the major flaw in mainstream theorizing about law and economic development, and by extension about law and capitalism, is that it is done with little attention to the actual history of modern economic development. My own suggested alternative has been to build theory from history's success stories;¹ however, the real world is at least as rich in failures as it is in success stories, so first and foremost the authors should be given credit for setting forth a line of inquiry that could produce very interesting insights.

Law & Capitalism opens with two chapters that establish the overall framework for the book. In these chapters the authors describe and criticize what they see as the currently dominant framework for theorizing about law and capitalism, which they trace from Max Weber, through Douglass North, to the currently popular "legal origins" or "law and finance" literature. In their view the dominant tradition treats law as a fixed societal endowment that helps determine economic success or failure, and assumes that law has essentially one function in relation to capitalism, that being to create and protect private property rights in order to facilitate market activity. The authors argue that it is a mistake to treat law as exogenous to economic development, as a static, independent (explanatory) variable, as they believe the mainstream tradition does, and they also believe that it is a mistake to treat law as having only one function in a

1. John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PENN. J. INT'L ECONOMIC L. 219 (2007); John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 91 (Christoph Antons ed., 2003).

market economy. Their alternative framework for understanding law as it relates to capitalism instead sees law as being in a dynamic relationship with society, especially in relation to economic and political interests, and as potentially serving three distinct functions: protection, coordination, and expression. The authors also distinguish themselves from the current trend of the mainstream tradition in their methodological choice of case studies over statistical analysis of “large n ” data sets, which has been the most noteworthy contribution of the “law and finance” or “legal origins” strand of mainstream theory.²

Chapters three through eight contain the case studies that provide the empirical basis for the authors’ theoretical arguments. If the authors are correct that the current fad for “large n ” statistical studies on law and capitalism is seriously misguided, it is also true that case study approaches can suffer from their own methodological shortcomings. If the research question is framed as “what is the role of law in supporting successful capitalism?” then clearly there must be more than one successful economy in the sample. It seems equally clear, given the world’s complexities, that the sample should include countries from both the common law and the civil law traditions, from developed as well as developing economies, from democracies as well as autocracies, and from countries that were formerly socialist and are now something else. Attention should also be paid to the diverse varieties of capitalism observed even within the club of developed, capitalist democracies. We have good reason to believe that factors such as these may have implications for the role law plays in economic activity and economic governance, so even a study utilizing a case-study approach ought to include a number of cases, diverse along such lines.

Fortunately for the authors there have been enough corporate governance fiascos across the globe in the past decade that they were able to select case studies that are diverse along many of the dimensions mentioned above. The collapse of Enron in the U.S. (chapter three) is an example from a developed, common law democracy, while chapter four examines a case from a developed, civilian democracy (Germany and the Mannesmann criminal prosecution). Chapter five, which looks at the Livedoor hostile takeover case from Japan, provides a study from another developed, civilian democracy, but one that is typically held out as quite unique in the “varieties of capitalism” literature. Continuing this diversity, chapter six explores the dispute between SK and Sovereign Asset Management in South Korea, a middle-income, civilian, capitalist economy that is nevertheless still affected by an authoritarian past marked by high degrees of nationalism, protectionism, and active government intervention. Chap-

2. See also Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?* 57 AM. J. COMP. L. 797 (2009). Stripped of its social-scientific overlay, this school’s claims for the superiority of the common law over the civil law tradition is not all that different from the claims of other common law champions such as Dicey and Hayek. John K.M. Ohnesorge, *China’s Economic Transition and the new Legal Origins Literature*, 14 CHINA ECONOMIC REVIEW 485 (2003).

ter seven covers the China Aviation Oil scandal in Singapore, a rare example of a middle-income common law country with an authoritarian, interventionist government. The fact that China Aviation Oil is a Chinese state-owned enterprise also allows the authors to explore what the scandal can tell us about law in China's transition to authoritarian capitalism. Finally, chapter eight, on the Yukos saga in Russia, allows the authors to explore law and capitalism in Russia's transition, which differs from China's both in terms of the state's role in the economy, and in the degree to which the economic transition has been accompanied by political change.

In the final two substantive chapters the authors draw on their case studies to address a set of issues raised by the introductory chapters. One such issue is the categorization of national legal systems, and in chapter nine they use their case studies to elaborate upon a two-dimensional categorizing framework introduced in chapter two. One dimension is the degree to which control over the legal system is centralized or decentralized; the other is the degree to which the legal system functions to protect individual rights, as opposed to functioning as a coordination mechanism more subject to state oversight. On one extreme is the U.S. legal system, characterized as highly decentralized and highly protective of individual rights, and at the other is the highly centralized Russian system, in which the role of law is much more coordinative than protective of individual rights. The other countries covered in their case studies fall at various points between these two extremes. In chapter ten the authors take on the important issue of legal system change, which was raised in their earlier critique of the mainstream "endowment" tradition for treating law as essentially a static factor. The issue of legal system change links to existing literatures on legal transplants and on convergence, and the authors use their case studies and their categorization framework to make several interesting points about legal system change.

Overall, this is an important and very interesting book, both for the case studies, and as a clear, considered statement of the authors' thoughtful approach to the role of law in capitalist economies. The case studies are entertaining as well as enlightening, and virtually any reader is likely to learn something new from at least one of the cases. It is a bit risky for the authors to include so many foreign jurisdictions without co-authors from the relevant countries, but the benefit is that there is a high degree of coherence among the case studies, which is unfortunately too rare in edited volumes with authors from multiple jurisdictions.

Despite its virtues, the book is open to a few criticisms. First, the authors' intellectual framework, which seeks to capture law's multiple functions as it interacts dynamically with economic and political forces, sacrifices a good deal of parsimony in the service of fidelity to the real world. As a professor of mine quipped to a novice graduate student who had just presented a political science model full of variables and crisscrossing cause and effect arrows, "If you're trying to tell me the world's a very complicated place, I already know that."

Some intellectual traditions are comfortable with the world being a very complicated place, but those that are not may have a hard time digesting and incorporating the lessons of this book, even if at some level they agree with its claims. At the same time, the lack of parsimony, of a simple story of corporate law's role in economic development, may actually present a bigger problem for another audience, the people and institutions engaged in law reform efforts around the world. They seem to have an insatiable appetite for simple stories about law and economic activity, but that may be due to the structural exigencies of the work they are doing, not because they are methodological absolutists. Even if they know better than anyone that the world is a very complicated place, which surely some of them do, they are still in the same legal system export business that they have been in since the 1960s.

Another concern with the book is that while in some respects it is a work of legal scholarship, it does not always follow the conventions of the genre. For example, in the case studies the authors are dealing with legal and factual issues that have been written about by others, some of whom have come to quite different conclusions. The established custom in legal scholarship is to include in the footnotes some reference to the fact that others see things differently, both to put readers on notice that the matter is in dispute, and to credit the other scholars. The authors don't always do that. One of the most obvious omissions is in their account of economic governance in high-growth Japan, which proceeds as if the standard keiretsu-main bank-administrative guidance story is just a fact, like the number of members in Japan's Diet (pp. 90-91). The authors know very well that Mark Ramseyer and his collaborators have challenged various aspects the standard story, however, and while they may be right to reject Ramseyer's revisionist attack on what was itself a revisionist story, the lack of a cite to the debate was surprising.³ Perhaps *Law & Capitalism* is intended more for students or the sophisticated lay person than for the scholar, but even if that is the case, those other audiences still ought to know when an aspect of the authors' account is disputed by reputable authorities. The book leaves somewhat the same impression with respect to what could be called the critical tradition in law and development scholarship. The requisite cites are there to the writings of Dave Trubek and Marc Galanter from the early 1970s, but there isn't a lot of engagement with subsequent critical writing on law and development, some of which reaches conclusions very similar to the authors' own.⁴ One gets the sense that while the authors know that their actual conclusions on the role of law in economic development are in some ways quite radical compared to the mainstream, they want to maintain significant distance from the

3. See YOSHIRO MIWA & J. MARK RAMSEYER, *THE FABLE OF THE KEIRETSU: URBAN LEGENDS OF THE JAPANESE ECONOMY* (2006).

4. See *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos, eds., 2006); Frank K. Upham, *Speculations on Legal Informality: On Winn's 'Relational Practices and the Marginalization of Law*, 28(2) *LAW AND SOCIETY REVIEW* 233 (1994).

critical tradition. The same is true of their apparent stance toward the “law & society” tradition, in which it is a matter of common sense that law and legal institutions exist in constant interchange with society, not as static, exogenous endowments. Of course the authors should position themselves as scholars however they are comfortable, but readers might again benefit from a more thorough positioning of the authors’ arguments within the wider relevant literature. Greater linking to other relevant literatures would have also helped combat the serious problem of fragmentation among the separate scholarly traditions that address the general issues of law, capitalism and economic development.

To close, one of the most interesting lessons to draw from *Law & Capitalism* is that when things are going well for an economy, pretty much any modern legal system will do; but any modern legal system can also fail dramatically, though perhaps in its own unique way. This brings to mind the comparative institutional analysis of Neil Komesar, who not only calls for comparative analysis of markets, courts, and the political process as solutions to public policy problems, but also cautions that while at low levels of complexity any of the institutions may do fine, as complexity rises each of the institutions is likely to do less well.⁵ Because important problems in the real world tend to be complex, honest institutional choice often involves trying to figure out which institution will perform least poorly when the going gets tough. The case studies of corporate governance dysfunction at the heart of *Law & Capitalism* don’t give an entirely clear answer to that question in the general context of law and capitalism, but that is probably because there is no clear answer. This also brings to mind the sentiment from the famous opening line of *Anna Karenina* that all happy families are alike, but that every unhappy family is unhappy in its own way. Stories of “unhappy families” in corporate governance make great reading, and I agree with the authors that they can be an excellent intellectual tool for exploring the complexity of the real world, and for exposing the limits of grand theory.

5. See NEIL K. KOMESAR, *LAW’S LIMITS* (2001); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994).

