Appreciate the Difference: The Role of Different Domestic Norms in Law and Development Reform; Lessons from China and Japan

Graham Mayeda[*]

Institutional models of development consider rule of law reform as one of the keys to improving the economies of developing countries. But the experiences of China and Japan indicate that advocates of this position have oversimplified the complexity of law and development reform. The author counters the view that China and Japan are "Asian exceptions" to the general rule that a Western conception of the rule of law is essential for development. Legal reforms to promote development need not embrace all the institutions that embody the ideals of liberal democracies, such as political freedom and human rights reform. Rule of law reform is effective if new legal institutions build successfully upon existing formal and informal social, political, cultural, and legal institutions.

The author begins with a "thin" conception of the rule of law that is procedural rather than substantive, and indicates how the experiences of China and Japan underscore the importance of identifying domestic institutional norms that can be used as a starting point for designing effective reforms. One of the essential elements of China and Japan's successful economic development is their adaptation of foreign conceptions of the rule of law to ensure compatibility with domestic norms and values. Their experiences suggest that some economies can function well without adopting a Western liberal democratic conception of the rule of law, and indicate the possibility of alternative approaches to development.

Les modèles institutionnels de développement considèrent la réforme de la primauté du droit comme un des éléments déterminants de l'amélioration de l'économie des pays en voie de développement. Cependant, l'expérience de la Chine et du Japon suggère que les partisans de cette position auraient simplifié à excès la complexité de la réforme en droit et développement. L'auteur rejette le point de vue que la Chine et le Japon ne sont que des «exceptions asiatiques» à la règle générale qu'une conception occidentale de la primauté du droit est essentielle au développement. Les réformes juridiques qui favorisent le développement ne doivent pas prôner l'adoption de toutes les institutions qui incarnent les idéaux des démocraties libérales, telles la liberté politique et la réforme des droits de la personne. La réforme de la primauté du droit n'est efficace que dans la mesure où les nouvelles institutions reposent sur les institutions sociales, politiques, culturelles et juridiques existantes, aussi bien formelles qu'informelles.

L'auteur débute avec une conception «mince» de la primauté du droit qui est procédurale plutôt que substantive. Il suggère que l'expérience de la Chine et du Japon souligne à quel point il est important d'identifier des normes institutionnelles domestiques qui peuvent servir de point de départ à l'élaboration de réformes efficaces. Un des éléments essentiels de la réussite du développement économique de la Chine et du Japon est leur adaptation des conceptions étrangères de la primauté du droit de manière à ce qu'elles soient conformes avec les normes et les valeurs domestiques. Ceci suggère que certaines économies peuvent bien fonctionner sans toutefois adopter une conception libérale démocratique et occidentale de la primauté du droit. De même, la démarche signale la possibilité d'approches alternatives au développement.

[*] Graham Mayeda, (B.A., M.A., Ph.D. (Philosophy), Toronto; J.D., Toronto, 2004) is Assistant Professor of Law at the University of Ottawa. My research covers the areas of comparative law, with a focus on East Asia, international trade and investment law, law and developing countries, criminal law and legal theory. I would like to thank Professor Michael Trebilcock for his helpful comments on this article.

To be cited as: (2006) 51 McGill L.J. 547

Mode de référence : (2006) 51 R.D. McGill 547

Introduction

The re-emergence of the law and development movement has had the effect of emphasizing the importance of rule of law reform for improving the economic situation of developing countries.[1] Many advocates of rule of law reform admit that institutions do not exist independently of a cultural or sociological context.[2] But there is as yet no clear articulation of the relationship between culture—understood as the norms and values animating domestic social, cultural, and political institutions—and legal institutions. Consequently, there has been little consideration of the implications of this relationship for the approach to institutional design.[3] My purpose in this paper is to investigate the relationship between culture and legal institutions and to adapt

[1] For instance, Daniel Kaufmann, Art Kraay & Pablo Zoido-Lobatón, point to the rule of law, which includes "perceptions of the incidence of both violent and non-violent crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts," as a factor in determining the growth of developing countries (*Governance Matters* (Washington, D.C.: World Bank, 1999) at 9). Updates of this study are available: Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters III: Governance Indicators for 1996-2002* (Washington, D.C.: World Bank, 2003); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (Washington, D.C., World Bank, 2005) [Kaufmann, Kraay & Mastruzzi, *Governance Matters IV*]. All are available online: World Bank <http://www.worldbank.org/wbi/governance/pubs>. See also Kaufmann's more recent papers, *Rethinking Governance: Empirical Lessons Challenge Orthodoxy* (Washington, D.C., World Bank, 2003), online: World Bank <http://www.worldbank.org/wbi/governance/pubs>; "Governance Redux: The Empirical Challenge" in Michael E. Porter *et al.*, eds., *The Global Competitiveness Report 2003-2004* (New York: Oxford University Press, 2004) 137, draft available online: World Bank: <http://www.worldbank.org/wbi/governance/pubs>. See also Daniel Kaufmann & Aart Kraay, "Growth Without Governance" (2002) 3:1 Economia 169, questioning the assumption that economic growth and institutional quality reinforce each other; Rafael La Porta *et al.*, "Law and Finance" (1998) 106 Journal of Political Economy 1113 at 1152; Simeon Djankov *et al.*, "The New Comparative Economics" (2003) 31 Journal of Comparative Economics 595. Thomas Carothers describes the aim of rule of law reform and points out that "[a]id officials assert that the rule of law is necessary for a full transition to a market economy—foreign investors must believe that they can get justice in local courts, contracts must be taken seriously, property laws must be enforceable, and so on" (*Aiding Democracy Abroad: The Learning Curve* (Washington, D.C.: Carnegie Endowment for International Peace, 1999) at 164). The most recent version of the World Bank's policy document *Initiatives in Legal and Judicial Reform, 2004 Edition* ((Washington, D.C.: World Bank, 2004), online: World Bank <http://www4.worldbank.org/legal/leglr/publications.html>) is a further example of the trend towards seeing legal institutions as the key to development.

[2] Ronald J. Daniels & Michael J. Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries" (2004) 26 Mich. J. Int'l L. 99 at 108; Florencio Lopez-de-Silanes, "The Politics of Legal Reform" (2002) 2:2 Economia 91. See also Lawrence E. Harrison & Samuel P. Huntington, eds., *Culture Matters: How Values Shape Human Progress* (New York: Basic Books, 2000).

[3] Randall Peerenboom points out that proponents of law and development reform have focused on the important metaphors ("transplantation", "selective adaptation", etc.) without considering how to predict which foreign models are likely to be successfully adapted to domestic circumstances ("Regulatory Compliance in the Legal Sector: Induction, Deduction and Above All Pragmatism" [unpublished, on file with author] at 3, 5 [Peerenboom, "Regulatory Compliance"]).

the institutional model of development to recognize the relationship between them. Using the examples of China and Japan, I argue that adopting a Western liberal democratic conception of the rule of law is not a necessary step in the transition from developing to developed nation. As Frank Upham points out, "there may be other paths to development other than through an effective, efficient and fair legal system ..."[4] My gloss on this observation is that there may be many interpretations of what an "effective, efficient and fair legal system" might look like—a nuance that many advocates of the institutional model of development fail to appreciate.[5] For instance, Tu Wei-ming, in discussing modernization in East Asia, points out that modernization can take on many forms. The experience in East Asia indicates that modernization need not be synonymous with homogenization—it does not require the adoption of identical institutions throughout the world. In Tu's view, cultural pluralism is a reality that must be recognized, and the experience in East Asia demonstrates that Asian values are just as universalizable as Western ones.[6]

The unique social, political, economic, and cultural development of China and the similarly unique developments in Japan are two examples of distinct paths to development. They demonstrate how domestic norms and values can be exploited to provide a normative framework conducive to development. Rule of law reform ought to focus on identifying pre-existing systems in developing countries and adopting legal reforms that are compatible with these systems. China and Japan are not exceptional cases, but rather examples of a type that could exist elsewhere.

I. China and Japan Are Not Exceptional Cases

Why choose China and Japan as case studies? The first answer is that there is considerable research on social, cultural, political, and legal institutions in China and Japan prior to their rapid economic development, in contrast to the lack of similar research for many developing countries. However, the choice of China and Japan becomes more difficult to justify when confronted by those who observe that the experiences of these countries cannot be generalized. In their view, China and Japan are examples of "Asian exceptionalism": they are exceptions to the general rule that liberal democratic conceptions of the rule of law and other Western democratic and legal institutions are necessary to promote economic development. Those who hold

---

[4] Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Washington, D.C.: Carnegie Endowment for International Peace, 2002), online: Carnegie Endowment for International Peace <http://www.carnegieendowment.org/files/wp30.pdf> [Upham, *Mythmaking*].

[5] Peerenboom, for instance, advocates that we "must avoid the assumption that rule of law requires particular institutional arrangements, such as U.S.-style separation of powers or a particular type of judicial independence or constitutional review" ("Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China" (1999) 11:3 Cultural Dynamics 315 at 326) [Peerenboom, "Ruling the Country"].

[6] Tu Wei-ming, "Multiple Modernities: A Preliminary Inquiry into the Implications of East Asian Modernity" in Harrison & Huntington, *supra* note 2, 256 at 257, 259, 264.

this view claim that China and Japan were able to provide the economic stability necessary to promote economic growth without a North American or European conception of the rule of law because of the existence of stable networks of close personal and family ties.[7] While I acknowledge that a system of close personal relationships was able to provide the kind of stability necessary for economic development, I do not support the view that this is an example of a unique Asian cultural trait. Instead, similar domestic systems can likely be found in other developing countries and adapted to modern usage, as has been done in China and Japan.

There are a number of reasons for questioning the correctness of the argument about Asian exceptionalism. First, it is difficult to identify a generalizable profile of Asian cultural uniqueness. Max Weber identified Confucianism as a pervasive Asian social value system, but thought it was less conducive to supporting a capitalist economic system than Western Protestantism. Since then, Confucianism has been seen as a boon to economic development. Much of this difference in opinion is based on different views about what constitute Confucian values. Lucian W. Pye characterizes Confucianism as valuing leisure and good luck. He thus questions the conventional view that Confucianism values hard work—a feature generally thought to be causally related to East Asian economic success. For Pye, it is Confucianism's emphasis on luck and self-improvement that have provided the impetus for East Asian success.[8] Francis Fukuyama also points out that culture is not useful for explaining the development of social, political, legal, and economic institutions. He points out that "developed cultural systems like Christianity, Islam, and Confucianism are highly complex. On a theoretical level it is hard to predict how they will lead to particular political or institutional outcomes."[9]

Furthermore, as Gerald L. Curtis notes, East Asia's experience is not about a common culture, but about diversity. In his discussion on the East Asian experience with democracy, he makes the following point:

> The sixth and final lesson to be drawn from East Asia's experience with democracy has to do with what it is *not* about. And what it is not about is culture. The history of democratization in East Asia is one of variation and diversity—and not only across national boundaries, but also within countries. Modern Japan has been characterized at different times by militarism, pacifism, consensus, violent conflict, authoritarianism, and democracy. These varieties of political experience are not explained by "culture," which at best constitutes a broad and changing framework within which a great variety of political regimes and behaviors are possible. This is particularly so in the case of a transnational "culture" like Confucianism. The people who talk most about the

[7] Dwight H. Perkins, "Law, Family Ties, and the East Asian Way of Business" in Harrison & Huntington, *ibid.*, 232 at 233-35.

[8] Lucian W. Pye, "'Asian Values': From Dynamos to Dominoes?" in Harrison & Huntington, *ibid.*, 244 at 249-51.

[9] Francis Fukuyama, "The Illusion of Exceptionalism" (1997) 8:3 Journal of Democracy 146 at 148.

> political consequences of Confucianism tend to be those who are least familiar with its actual practice. A hundred years ago, Confucianism was identified as a root cause of the Chinese failure to modernize; now it is popular to explain the economic development of China (as well as that of Korea and Taiwan and even Japan) in terms of the same Confucianism that previously was confidently identified as responsible for Asian economic backwardness.[10]

Also, cultural exceptionalism depends on the view that culture is a phenomenon that can be isolated from others. Lawrence E. Harrison and Samuel P. Huntington identify culture in "purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society."[11] But culture exists in a nexus of other social, political, and economic factors. In my view, it is problematic to see culture, defined as the subjective beliefs of a people, as causally related to economic success. As Pye says, "[p]roblems arise when an attempt is made to jump all the way from generalized cultural characterizations to economic outcomes without taking into account all the intervening variables and the situational contexts."[12] Instead, it is more useful to consider the norms and values inherent in existing social, political, and legal institutions. The subjective values and norms of individual Chinese and Japanese citizens are diverse and difficult to generalize. But the normative framework of social, political, and legal institutions, and its compatibility with suggested institutional reforms, are easier to investigate.

I thus suggest that China and Japan, though they clearly have institutions with unique characteristics, are not exceptional. Rather, they are case studies that can help to identify domestic institutional norms that might be used to build stable and sustainable legal institutions in other developing countries. They open our eyes to different normative systems that could promote development using alternative trajectories. As Tu Wei-ming points out, a consideration of East Asian "modernization" allows us to think outside the dichotomies of modern/traditional, Western/non-Western.[13] If, as Tu suggests, an "East Asian" view of modernity has emerged, perhaps an Islamic, Hindu, or Buddhist modernity has also or will soon emerge: "There is no reason to doubt that Latin America, Central Asia, Africa, and indigenous traditions throughout the world all have the potential to develop their own alternatives to Western modernism."[14] This idea animates my choice of case studies,

---

[10] Gerald L. Curtis, "A 'Recipe' for Democratic Development" (1997) 8:3 Journal of Democracy 139 at 144 [emphasis in original].

[11] Harrison & Huntington, *supra* note 2 at xv.

[12] Pye, *supra* note 8 at 254.

[13] Tu, *supra* note 6 at 257.

[14] *Ibid.* at 264. Peerenboom points out that many Chinese scholars consider that China, because of its historical development, will have to develop its own independent conception of the rule of law ("Competing Conceptions of Rule of Law in China" [Peerenboom, "Competing Conceptions"] in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (London: Routledge, 2004) 113 at 118 [Peerenboom, *Asian Discourses*]).

and counters the view that China and Japan are exceptions to the general rule that a Western conception of the rule of law is essential for development.

II. Is the Liberal Democratic Conception of the Rule of Law a Good in Itself?

Isn't a liberal democratic conception of the rule of law a good in itself? Can there really be development without legally protected freedom of the press or legal protection of basic human rights? These questions are certainly important for domestic policy-makers. In my mind, however, they are not important questions for law and development reform.[15] By assuming that the rule of law is essential for development, we risk imposing a particular conception of human rights or free speech on countries in the name of development. It turns development into a "thick" concept that encompasses human rights reform, political reform, and so on.[16] While it is important to recognize the relationship between a country's many institutions, legal reforms to promote development do not need to embrace all the institutions that are legally regulated in Western liberal democracies. Such an approach would obscure the very complexity that a multi-faceted conception of development seeks to promote.[17] It does so by failing to recognize the complex relationship between institutions and the diverse normative systems in different countries. From a development perspective, it makes little sense to say that developing countries have nothing to learn from China, since it has failed to "progress" in the area of human rights protections in the same way as it has "progressed" in terms of economic development.

I do not mean to say that reforms in the area of human rights, political freedom, education, et cetera are unimportant. It does mean that development cannot simply mean development towards a predetermined standard. The case studies in this paper suggest that there are other ways than the liberal democratic conception of the rule of law to provide the economic stability necessary for economic growth. As in other fields such as participatory democracy or human rights, there will be alternative ways

---

[15] On the weak correlation between democracy and the rule of law, see Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships* (Cambridge, Mass.: National Bureau of Economic Research, 2004) at 5, online: National Bureau of Economic Research <http://papers.nber.org/papers/w10750.pdf>.

[16] On the distinction between "thin" and "thick" models of the rule of law, see Randall Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion" in Peerenboom, *Asian Discourses*, *supra* note 14, 1 at 2-5 [Peerenboom, "Varieties"]. Peerenboom also discusses the advantage of a thin conception of the rule of law, namely, that it eliminates from proposals about rule of law reform additional concerns that arise about the wisdom of adopting expansive liberal conceptions of civil and political rights (*ibid.* at 10).

[17] It also overlooks the fact that "justice" or "human rights" mean different things to different people. See Peerenboom, "Regulatory Compliance", *supra* note 3 at 11. See also Randall Peerenboom, "Assessing Human Rights in China: Why the Double Standard?" (2005) 38 Cornell Int'l L.J. 71.

to promote a citizen's interests than to adopt the institutions of liberal democracy informed by a liberal democratic conception of the rule of law.[18]

Furthermore, if we object to the view that liberal democracy is a hindrance to development, or at least not a prerequisite for it, as some proponents of Asian values suggest, in my view, this objection should be addressed outside of the cadre of development. As Amartya Sen points out, "there is no convincing empirical evidence at all which indicates that democracy slows down economic growth (it does not seem to have any clear influence on economic growth one way or the other) ... "[19] But Sen's argument breaks down when he concludes that "democracy is a constitutive part of the process of development itself."[20] This last comment imports into development a whole series of political considerations that are informed by a particular liberal democratic set of values.

III. A "Thin" Model of the Rule of Law Is Preferable to a "Thick" Model

I begin with an overview of different versions of the institutional model of development. Broadly speaking, proponents of the institutional model see legal institutions as a key element in promoting development. There are two main divisions within institutional approaches. Scholars falling within the first division focus primarily on the economy.[21] They consider the improvement of legal institutions to be a means for ensuring that these institutions provide predictable outcomes in the economic sphere.[22] Predictability and the resultant stability are considered necessary in order to motivate economic actors to invest in a developing country. Advocates of

---

[18] See Tu, *supra* note 6.

[19] Amartya Sen, "What Is the Role of Legal and Judicial Reform in the Development Process?" (Lecture presented to the World Bank Legal Conference, Washington, D.C., 5 June 2000) at 14, online: World Bank <http://www1.worldbank.org/publicsector/legal/legalandjudicail.pdf> [Sen, "Legal Reform"].

[20] *Ibid.*

[21] Proponents of the new institutional economics generally fall into this category. See Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); Richard A. Posner, "Creating a Legal Framework for Economic Development" (1998) 13 World Bank Research Observer 1.

[22] For empirical studies concentrating on the relationship between legal institutions and growth, see Aymo Brunetti, Gregory Kisunko & Beatrice Weder, "Credibility of Rules and Economic Growth Evidence from a Worldwide Survey of the Private Sector" (1998) 12 World Bank Economic Review 353, focusing on the relationship between the "credibility" of rules and economic growth; Paolo Mauro, "Corruption and Growth" (1995) 110 Quarterly Journal of Economics 681, which focuses on the effects of corruption, efficiency of legal institutions, and political stability on economic growth; Ross Levine, "Law, Finance, and Economic Growth" (1999) 8 Journal of Financial Intermediation 8, finding that the "exogenous component of financial intermediary development—the component defined by the legal and regulatory environment—is positively associated with economic growth" (Levine, *ibid.* at 33).

this approach encourage the development of a property and contractual rights regime that can support a capitalist economic framework.[23]

In my view, the economic approach overlooks the complexity involved in rule of law reform. Even taking into account only the effects of rule of law reform on economic development, as I do in this article, we cannot establish a direct causal link between the adoption of certain reforms and economic success. As many have argued, the law interacts with multiple cultural and socioeconomic systems. As Sen points out:

> We have to see the role of legal and judicial reform in legal development, while taking into account the plentiful influences that may come from other spheres (economic, political, social, etc.). We must also see the role of legal development in general and of legal and judicial reforms in particular in enhancing development in other spheres (again, economic, political, social, etc.). In both these exercises we have to take adequate note of the causal and conceptual interrelations between these different fields which are significant at different levels of aggregation.[24]

While both China and Japan have had tremendous economic success, it is not correlated with the simple adoption of legal reforms. Instead, as we will see, economic growth in these two countries has been a result of the compatibility between legal reform and other social and cultural institutions (i.e., moral norms and values, social practices, etc.). China and Japan have created a new paradigm for development from which other developing countries can learn.

The approach of scholars falling within the second division of institutional theories is more correctly considered an institutional approach, since it considers the implications of legal reform on a greater number of institutions. This approach does not focus solely on improving legal institutions. Instead, it focuses on legal institutions within a web of other cultural and socioeconomic institutions. In a World Bank Policy Research Paper entitled "Governance Matters",[25] Daniel Kaufmannn, Aart Kraay, and Pablo Zoido-Lobatón identify six factors that contribute to institutional quality: voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption, indicating a broader conception of relevant institutions and their potential impacts. Sen, in

---

[23] Posner, *supra* note 21 at 1; North, *supra* note 21. The idea that legal structure influences economic development originates from Max Weber: *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther Roth & Claus Wittich (Berkeley: University of California Press, 1978). For a commentary on Weber, see David Trubek, "Max Weber on Law and the Rise of Capitalism" [1972] Wis. L. Rev. 720.

[24] Sen, "Legal Reform", *supra* note 19 at 26-27. See also Amartya Sen, *Development As Freedom* (New York: Knopf, 1999) at 14-15.

[25] Kaufmann, Kraay & Zoido-Lobatón, *supra* note 1.

Development As Freedom, also advocates seeing legal reform as part of a nexus of institutions.[26]

Michael Trebilcock and Ronald Daniels argue for a minimalist and procedurally oriented conception of the rule of law.[27] Their focus on a minimalist approach attempts to avoid a "thick", normative concept of development. In their "thin" model, they focus not on institutions as embodiments of liberal democratic ideals, but on the existence of basic institutions essential to development, such as an independent and effective judiciary, the existence of effective law enforcement services, prosecutorial services, a penal system, and the existence of well-functioning government regulatory agencies. By judging the status of development based on the state of these institutions, they seek to avoid imposing a normative framework on their proposals for reform.

This proceduralist approach to legal institutions picks up on the World Bank's emphasis on "governance" in the evaluation of loans to developing countries. For instance, Ibrahim Shihata, in "The World Bank and 'Governance' Issues in Its Borrowing Members," indicates the necessity of a broad conception of legal reform. He states that

> The importance of legal reform to economic development is not limited to the stability it confers on contractual transactions and the predictability it gives to the treatment of property rights and management-labor relations; it extends to the essential requirement in any orderly economic activity of having workable rules and making sure they are objectively complied with.[28]

IV. Adapting the "Thin" Model of the Rule of Law to Account for the Compatibility Between Existing Domestic Norms and Proposed Reforms

I prefer the "thin" model of the rule of law advocated by Daniels and Trebilcock. As Randall Peerenboom notes, a "thin" conception of the rule of law permits political, social, and cultural pluralism. From a pragmatic point of view, it "facilitates focused and productive discussion of certain legal issues among persons of different political persuasions."[29] However, it is worthwhile to question three assumptions that underlie it, in order to understand how to adapt the thin model of rule of law reform to

---

[26] *Supra* note 24. On the usefulness of legal reforms not directly related to economic growth for promoting economic development, see also Daniel A. Farber, "Rights As Signals" (2002) 31 J. Legal Stud. 83. See also Sen, "Legal Reform", *supra* note 19.

[27] Daniels & Trebilcock argue that "a minimalist, procedurally oriented rule of law is a necessary, albeit not sufficient, condition for a just legal system" (*supra* note 2 at 107). See also Brian Tamanaha, "The Lessons of Law and Development Studies" (1995) 89 Am. J. Int'l L. 470 at 483-84; Thomas Carothers, "The Rule of Law Revival" (1998) 77:2 Foreign Affairs 95.

[28] Ibrahim F.I. Shihata, *The World Bank in a Changing World: Selected Essays*, ed. by Franziska Tschofen & Antonio R. Parra (Dordrecht: Martinus Nijhoff, 1991) at 89-90.

[29] Peerenboom, "Varieties", *supra* note 16 at 7.

capture the importance of fit between proposed reforms and existing domestic social, political, cultural, and legal institutions.

A. Institutions Are Intrinsically Normative

First, many institutional approaches to development use the existence of particular institutions as proxies for evaluating the presence or absence of functioning legal institutions. In my view, it is not sufficient to look at the existence or absence of particular institutions.[30] Though it is useful to note the existence of trained judicial officials or an effective police force, since in the absence of these institutions, there is arguably no foundation for development,[31] one must not forget that institutions have ideological and normative foundations.[32] Those adopting an institutional approach do not simply look for the existence of a judiciary, but rather, the existence of an "independent, effective and non-corrupt judiciary,"[33] thus demonstrating that it is really the norms of independence, effectiveness, and non-corruption that they consider essential to effective legal institutions.[34]

Legal institutions are themselves informed and structured by a particular ideology and normative assumptions. Frank Upham, for instance, writes that "[m]uch of the rhetoric from the new rule of law orthodoxy emphasizes the goal of a judiciary that is free from political influence ... "[35] He goes on to say that much of this rhetoric originates in the United States, despite the fact that even the American judiciary is not

---

[30] Carothers also points out that those providing aid in this area have learned that targeting aid at particular legal institutions is not a viable approach unless the connection between these institutions and other social, economic, and cultural institutions are considered. He says that

> aid providers are learning not to treat the target institutions as self-contained entities that can be tinkered with as though they are machines that run on their own. Rather, they are beginning to work with them as institutions connected in manifold ways with the societies of which they are a part, and to make those connections focal points. For rule-of-law work this means seeing justice not merely as something that courts and police deliver but as a set of values, principles, and norms that define the relationship of citizens to their government and to each other (*supra* note 1 at 177).

[31] Rosa Ehrenreich Brooks points out that there is "little correlation between law, order, and violence." In other words, formal legal institutions do not themselves create a well-ordered society ("The New Imperialism: Violence, Norms, and the 'Rule of Law'" (2003) 101 Mich. L. Rev. 2275 at 2305; see also *ibid.* at 2313-14).

[32] Brooks also indicates that many rule of law reformers conflate formal and procedural conceptions of the rule of law with substantive, normative conceptions, focusing development on the formal aspects without considering what might bring about the normative shift required for substantive reform (*ibid.* at 2283-84, 2322).

[33] Daniels & Trebilcock, *supra* note 2 at 110.

[34] Peerenboom points out that "[r]ule of law and other good governance indicators are highly correlated with wealth, as are civil and political rights and social and economic rights," thus indicating that the use of these indicators imports a particular normative perspective ("Regulatory Compliance", *supra* note 3 at 6).

[35] Upham, *Mythmaking*, *supra* note 4 at 7.

free from the political influence that its rule of law rhetoric condemns.[36] This demonstrates what Upham calls "mythmaking", the creation of a mythical conception of the rule of law based on normative prescriptions about what constitutes the rule of law.[37] John Haley, too, sees law as animated by a "spirit", which "comprises the pervasive themes, patterns, or values that appear repeatedly within [a particular legal order] and shape and reshape the rules and processes of law."[38] Finally, Stanley B. Lubman points out the dangers inherent in failing to recognize the cultural embededness of law: "Legal institutions are ... so rooted in local cultural values, that Western scholars and policy-makers often assume their universality and use them as standards in understanding non-Western legal institutions."[39]

B. Law Is Embedded in a Social, Cultural, and Economic Context

Second, it is not beneficial to look at contextual factors such as social and cultural development as impediments that prevent the establishment of functioning institutions, as institutional approaches often do.[40] Because institutions are essentially normative, they must be compatible with contextual factors.[41] Sometimes the institutions that well-meaning advocates of development seek to create are the impediment, due to the incompatibility of the norms underlying these institutions with the social, cultural, and political context of a given developing country.[42]

We must recognize that social, cultural, historical, and political contexts are essential to the design of legal institutions suited to a particular developing country.[43]

---

[36] *Ibid.* at 7, 14-20.

[37] Peerenboom also points to the dangers of comparing countries such as China to an "idealized version of how [the] legal systems [in the U.S. or Europe] function or the utopian perfectionist requirements of human rights activists ... " ("Regulatory Compliance", *supra* note 3 at 10).

[38] John Owen Haley, *The Spirit of Japanese Law* (Athens: University of Georgia Press, 1998) at xvii [Haley, *Spirit of Japanese Law*].

[39] *Bird in a Cage: Legal Reform in China After Mao* (Stanford, Cal.: Stanford University Press, 1999) at 12.

[40] Daniels & Trebilcock, for instance, see social, cultural, and historical factors as "impediments faced by developing countries to rule of law reform" (*supra* note 2 at 108).

[41] Peerenboom points out how the interpretation of law is highly dependent on the "actual practice" in a given country and differs over time even within the same country as the meaning of legal principles change ("Regulatory Compliance", *supra* note 3 at 2). Máximo Langer indicates the inadequacy of the "transplant" metaphor for describing the process of adopting and adapting foreign legal institutions. The inadequacy results from the failure of the metaphor to account for the transformation that imported laws and institutions will undergo in order to function within the cultural, social, and economic framework of the receiving country ("From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure" (2004) 45 Harv. Int'l L.J. 1 at 31).

[42] Brooks points to the importance of understanding indigenous norms before seeking to alter them (*supra* note 31 at 2334).

[43] On the contextual nature of law, see Katharina Pistor in "The Standardization of Law and Its Effect on Developing Economies" (2002) 50 Am. J. Comp. L. 97; Daniel Berkowitz, Katharina Pistor

Matthew Stephenson highlights interesting parallels between the law and development movement of the 1960s and the current interest in the reformation of legal institutions to encourage development.[44] He observes that many of the criticisms leveled at the law and development movement by scholars such as David M. Trubek and Marc Galanter apply equally to recent initiatives. In their much-cited 1974 article, "Scholars in Self-Estrangement", Trubek and Galanter state that one of the characteristics of the liberal legalism promoted by developed countries was the belief that "legal development would foster social development and improve human welfare ... "[45] The line of causality thus ran from legal institutions to social institutions that promoted values such as equality and freedom. My emphasis on context, while it does not reverse this causal arrow, sees in the interaction between legal and social institutions a genitive circularity in which legal institutions at times drive social change, with the opposite being true at other times.[46] Understanding the importance of cultural, social, and economic context means understanding how legal institutions fit into cultural, social, and economic institutions. It also means recognizing the historical stage at which a particular developing country finds itself. In other words, it is important to know whether social change would drive legal reform, or if legal reform would successfully bring about desired social change.[47] An

---

& Jean-Francois Richard, "Economic Development, Legality and the Transplant Effect" (2003) 47 European Economic Review 165; Graham Mayeda, "Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries" (2004) 7 J. Int'l Econ. L. 737. See also Upham, *Mythmaking*, *supra* note 4 at 7. Troy A. Paredes also notes that "a country's legal regime, including the law on the books and formal enforcement mechanisms, is simply one part of a much more complex set of formal and informal institutions. The law must fit with a country's broader institutional mix, and legal reform should therefore be considered in its larger context" ("A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer" (2004) 45 Wm. & Mary L. Rev. 1055 at 1060). On the path dependence of the development of corporate governance and ownership structures, see Lucian Arye Bebchuk & Mark J. Roe, "A Theory of Path Dependence in Corporate Ownership and Governance" (1999) 52 Stan. L. Rev. 127; Mark J. Roe, "Chaos and Evolution in Law and Economics" (1996) 109 Harv. L. Rev. 641.

[44] Matthew C. Stephenson, "A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China" (2000) 18 UCLA Pac. Basin L.J. 64.

[45] David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" [1974] Wis. L. Rev. 1062 at 1074. Trubek & Galanter question this line of causality (*ibid.* at 1083).

[46] Mark J. Roe, in *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton: Princeton University Press, 1994), has pointed out how historical, political, and cultural factors shape corporate governance structures in industrialized countries, countering the view that values such as economic efficiency, promoted through efficient laws, determine corporate governance regimes. John C. Coffee, Jr. argues that the economic growth associated with particular legal rules common to common law jurisdictions may be the result, not of the existence of these rules per se, but of a "series of legally nonenforceable norms" that characterize the culture of business in these jurisdictions ("Do Norms Matter? A Cross-Country Evaluation" (2001) 149 U. Pa. L. Rev. 2151 at 2155 [Coffee, "Norms"]).

[47] Upham, for instance, points out that many traditional approaches to understanding the relationship between culture and law see a "unilateral influence of culture on law." He proposes that we also

appreciation of historical developments in a given country is therefore essential for developing proposals for institutional change.

In addition to questioning the causal relationship between legal reform and social, political, and economic change, Trubek and Galanter also note that many of the development approaches prevalent in the United States in the 1960s were designed to impose American-style legal institutions on developing countries without considering whether the social, political, and cultural contexts in these countries made American institutions suitable. This is what they point to as the "ethnocentric quality of liberal legalism's model of law in society ... "[48]

Katharina Pistor and Philip A. Wellons similarly challenge the causal relationship between legal reform and economic development. They argue that socioeconomic changes determine to some degree the effectiveness of legal reforms intended to move allocative power to the market. They accordingly demonstrate that "legal forms do not automatically result in economic development."[49] Pistor and Wellons elaborate this view in the context of Asian economic development, partly attributing Asian economic success in the period of 1960 to 1995 to legal reform.[50] In their view, legal reforms that tended to reduce the role of the government in controlling and allocating resources had a positive correlation with economic growth.[51] They admit, however, that in most of the Asian countries they surveyed, economic growth occurred decades after legal reforms had been implemented.[52] Moreover, while pointing out the correlation between economic growth and legal development, they note that the mere shift from interventionist to non-interventionist legal regimes did not necessarily lead to economic growth. Rather, changes had to first occur at the socioeconomic and political levels in order for changing legal policy to have a positive effect.[53] In their view,

---

consider the reverse influence. He suggests we ask "not what kind of society will produce a particularistic and informal legal system like that of Japan, but instead what social values would be encouraged by the type of legal system portrayed in [the] case studies [in this book]" (Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge, Mass.: Harvard University Press, 1987) at 218 [Upham, *Law and Social Change*]. Coffee suggests a similar complex relationship between law and culture, pointing out that "legal rules may sometimes be embedded in a matrix of norms and conventional practices that all interact with and reinforce each other" ("Norms", *ibid.* at 2156; see also 2157).

[48] Trubek & Galanter, *supra* note 45 at 1080. See also Paredes, *supra* note 43.

[49] Katharina Pistor & Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995* (Oxford: Oxford University Press, 1999) at 273.

[50] *Ibid.*

[51] *Ibid.* at 11. In their view, legal changes during this period "began to unravel the existing legal system and led to a chain reaction that resulted in most countries' legal systems being much more market-allocative as well as rule-based in 1995 than they had been before these changes" (*ibid.*).

[52] *Ibid.* at 3.

[53] Pistor & Wellons note that changes to legal institutions influenced economic development only if these legal changes were brought about as a result of economic policy and demand resulting from increased economic development (*ibid.* at 109-11). They found "little empirical evidence of a causal

> legal rules that empower nonstate agents with allocative decision-making powers tend to be less powerful [than laws granting allocative powers to state agents] as tools for implementing socioeconomic change. For these rules to become effective in legal practice there must be a demand.[54]

Despite seeing a correlation between legal reform and economic growth, Pistor and Wellons acknowledge that law interacts with socioeconomic and political culture, which create the context of receptivity for legal reform. Legal change alone, especially without social and political change, does not necessarily facilitate economic growth. Indeed, the conclusions of Pistor and Wellons are significant in determining that laws are part of the social, cultural, and economic framework of a country:

> [L]aw and legal institutions should not be viewed as technical tools that once adopted will produce the desired outcome. The point that law is embedded in culture has often been made especially with respect to the Asian economies. We would add that to be effective law has to be embedded in the overall economic policy framework. This finding cautions against the blind transplantation of legal institutions without due consideration for the relevant economic framework within which they shall operate. It also suggests that law reform projects should be assessed not in isolation, but within a broader context of economic policies.[55]

C. Formal Dispute Resolution Mechanisms Are Not Necessarily More Effective than Informal Ones

Finally, I would like to question the assumption that formalized legal approaches to dispute resolution should be considered more effective than informal ones.[56] As we

---

link running from market-allocative laws and rule-based procedures to economic policy in the six Asian economies. The impetus almost always seemed to go the other way, and economic policies generally prevailed over market-allocative laws and rule-based procedures" (*ibid.* at 111).

[54] *Ibid.* at 13.

[55] *Ibid.* at 19. See also Berkowitz, Pistor & Richard, *supra* note 43.

[56] Many scholars have argued that *formal* legal protection of property rights and enforcement of contracts is necessary for economic development: see North, *supra* note 21; Douglass C. North & Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century Britain" (1989) 4 Journal of Economic History 803; Stephen Knack & Philip Keefer, "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures" (1995) 7 Economics & Politics 207; Rafael La Porta *et al.*, "Legal Determinants of External Finance" (1997) 52 Journal of Finance 1131; La Porta *et al.*, "Law and Finance", *supra* note 1; Barry R. Weingast, "Constitutions As Governance Structures: The Political Foundations of Secure Markets" (1993) 149 Journal of Institutional and Theoretical Economics 286. Some scholars have emphasized the importance of property rights, but not formal legal enforcement of contracts: see Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development* (Cambridge, Mass.: National Bureau of Economic Research, 2002), online: National Bureau of Economic Research <http://papers.nber.org/papers/w9305.pdf>; Daron Acemoglu, Simon Johnson & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91 American Economic Review 1369. Some, however, challenge whether formal Western legal

will see, both Japan and China depend heavily on informal dispute resolution mechanisms to provide the certainty needed for economic growth. Trubek and Galanter also emphasize that informal dispute resolution systems might provide the stability required for economic growth.[57] They argue that one of the flaws of advocates of the 1960s law and development movement was that "[t]he authors of these projects failed to ask themselves such questions as whether equality and participation would not be more effectively fostered by efforts to deformalize or deprofessionalize dispute settlement."[58]

When reviewing economic approaches to development, one often sees a focus on stability. Stability of legal rules and regulations, it is argued, is essential for ensuring the economic growth necessary for development. Putting aside the narrow focus on economic growth, one can be led to question why it is necessary to focus on the stability of *legal* rules and regulations.[59] Surely other, more informal methods of regulating transactions, derived from cultural norms of negotiation and rule setting, should also be given some consideration.[60] Indeed, the value of informal or decentralized decision-making capacity over rigid, centrally determined rules is a key feature of Coase's approach to the role of law in economic decision making.[61] According to proponents of this model, corporate governance is best regulated by a series of contractual relations rather than by a centrally determined set of corporate

---

institutions truly provide the rationality and predictability that they maintain: see *e.g.* Albert Chen, "Rational Law, Economic Development and the Case of China" (1999) 8 Social & Legal Studies 97.

[57] See also Coffee, "Norms", *supra* note 46; Brooks, *supra* note 31 at 2338.

[58] Trubek & Galanter, *supra* note 45 at 1078.

[59] Donald C. Clarke, for instance, points out that "the lack of an effective formal judicial system that enforces contract rights puts definitely out of reach only a relatively small number of growth-enhancing transactions ... " He goes on to state that "fear of confiscation of one's property by government makes a very large number of growth-enhancing investments impossible" ("Economic Development and the Rights Hypothesis: The China Problem" (2003) 51 Am. J. Comp. L. 89 at 96 [Clarke, "Economic Development"]). David Kennedy notes that "[t]he focus on formalisation [in law and development literature] downplays the role of the informal sector in economic life" ("Laws and Developments" in Amanda Perry & John Hatchard, eds., *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish, 2003) at 22. See also Simon Johnson, John McMillan & Christopher Woodruff, "Courts and Relational Contracts" (2002) 18 J. L. Econ. & Org. 221; John McMillan & Christopher Woodruff, "Dispute Prevention Without Courts in Vietnam" (1999) 15 J. L. Econ. & Org. 637; Kathryn Hendley & Peter Murrell, "Which Mechanisms Support the Fulfillment of Sales Agreements? Asking Decision-Makers in Firms" (2003) 78 Economics Letters 49.

[60] Coffee points out that the absence of legal enforcement of informal norms does not mean that there is no sanction for transgressing these norms ("Norms", *supra* note 46 at 2171).

[61] In "The Problem of Social Cost" (1960) 3 J.L. & Econ. 1, R.H. Coase says that injustices in the form of economic inefficiencies can be caused by the rigid application of a legal rule without considering the overall welfare impact of a given arrangement between parties. Individuals will often be able to strike a mutually advantageous bargain that would maximize economic efficiency where deontological rules would achieve a suboptimal result.

governance rules.[62] Some scholars go even further, arguing that norms within a given corporation are an adequate means of governance.[63]

As we will see, informal rules and norms play an important part in ensuring the stability necessary for the success of the Japanese and Chinese economies. It might be argued that legal institutions are superior to informal mechanisms because of the difficulty of changing legal regulations and the publicity surrounding such changes, both of which encourage stability. I argue that social and cultural norms are equally difficult to change, and the changes effectuated in them equally public, thereby providing the same type of certainty required for economic success.

In conclusion, a thin model of the rule of law is acceptable as a paradigm for institutional reform if we remember the danger inherent in assuming the neutrality of the basic legal institutions on which the paradigm focuses. As long as the paradigm acknowledges that the normative foundations of even basic legal reforms must be compatible with those of domestic institutions, that laws exist in a context of other institutions, and that formal dispute-resolution mechanisms are not necessarily preferable to informal ones, the thin model can prove useful. We must constantly keep in mind, however, the need to consider compatibility, rather than presuming it.

V. Case Study 1: Japan

Japan provides a good case study for understanding why it is not the mere existence of legal institutions, but their fit with the normative foundation of the society in a developing country, that is essential for determining economic growth. Japan has a long history of adopting foreign legal models and adapting them to accommodate domestic norms. This latter feature—the process of adapting foreign norms to domestic circumstances—has been the key to the successful implementation of legal reform in Japan.

---

[62] Oliver Williamson, "Corporate Governance" (1984) 93 Yale L.J. 1197; Anup Agrawal & Charles R. Knoeber, "Firm Performance and Mechanisms to Control Agency Problems Between Managers and Shareholders" (1996) 31 Journal of Financial and Quantitative Analysis 377; Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law*, 3d edition (Cambridge, Mass.: Harvard University Press, 1996).

[63] Edward B. Rock & Michael L. Wachter, "Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation" (2001) 149 U. Pa. L. Rev. 1619. *Contra* Paul G. Mahoney & Chris W. Sanchirico, "Competing Norms and Social Evolution: Is the Fittest Norm Efficient?" (2001) 149 U. Pa. L. Rev. 2027, who argue that the norms that develop within a corporation may not be efficient. Despite the apparent advantages of contractual rules determined between parties, one must nevertheless recognize that one of the advantages of a centrally determined model for corporate governance is to provide a framework which parties can adopt at relatively low cost (Esterbrook & Fischel, *ibid.* at 34).

A. Japan Has Not Adopted a Western Conception of the Rule of Law

As Upham has indicated, Japan's post–World War II economic success cannot be attributed to its adoption of a European or North American conception of the rule of law, since such a conception does not exist in Japan. In his view, "the Japanese experience stands ... in sharp contrast to the assumptions of the rule of law development discourse."[64] He points out that modern Japan is characterized by a preference for informal methods for settling disputes, and by a system of policy decision making whose structure is not as highly legalized than in the United States.[65] Furthermore, during the period of Japan's greatest economic and social change, "the number of legal professionals per capita declined, the litigation rate fell, and the size of the formal legal system relative to the economy shrank substantially."[66] These factors put in question any causal relationship between the existence of a Western conception of the rule of law and economic success.

These views are substantiated by Pistor and Wellons. In their characterization of the Japanese legal system in the period from 1960 to 1995, they find that while Japan has a strong formal legal system, much of the interpretation of these laws is left to discretionary decision makers. Administrative guidelines and moral persuasion are frequently used to achieve compliance with non-codified administrative policies. Negotiation between interested parties is often employed to determine a common method of interpreting law and policy. Finally, they demonstrate that the Japanese system operates without significant use of judicial review.[67] All of these characteristics tend to point to an important role for informal decision making and negotiation in the implementation and interpretation of laws and regulations.[68]

---

[64] Upham, *Mythmaking*, *supra* note 4 at 22. Peter Howard Corne also points out that Japan does not have the sort of system of universalistic legal norms characteristic of Talcott Parsons's "modern society" ("The Influence of Traditional Normative Mechanisms of Behaviour on the Japanese Legal System" (1990) 12 Sydney L. Rev. 346 at 350-51 [Corne, "Tradition"]). See also Kahei Rokumoto, "Problems and Methodology of Study of Civil Disputes Part I" (1972) 5 Law in Japan 97 at 98.

[65] Pistor & Wellons also note that "[l]itigation rates in Japan have remained low despite the country's economic development and high levels of division of labor" (*supra* note 49 at 17-18). Also, Japan is characterized by a relatively small number of lawyers in comparison to other developed countries. In 2002, there were 18 851 lawyers in Japan, or 14.8 lawyers per 100 000 people. In contrast, there were 352 lawyers per 100 000 people in the U.S., 141 in Germany, and 52 in France.

[66] Upham, *Mythmaking*, *supra* note 4 at 24.

[67] Pistor & Wellons, *supra* note 49 at 98. See also Dan Fenno Henderson, "The Role of Lawyers in Japan" in Harald Baum, ed., *Japan: Economic Success and Legal System* (Berlin: Walter de Gruyter, 1997) 27 at 40 [Henderson, "Lawyers in Japan"]; Upham, *Law and Social Change*, *supra* note 47 at 22.

[68] Pistor & Wellons, *ibid.* at 279, 280-81. See Henderson, "Lawyers in Japan", *ibid.* at 41.

B. Japan's History of Criminal and Civil Law Reform Is Characterized by an "Adopt and Adapt" Approach to Law Reform

While Upham's approach would tend to confirm my view that the development of a Western conception of the rule of law is not essential for successful economic and social development, his analysis nevertheless overlooks the period between the middle of the nineteenth century and the beginning of World War II, the period when Japan underwent the type of profound changes that we expect developing countries to undergo today. This shift in timelines is important. By World War II, many of the factors that the more liberal approach to the rule of law consider as essential for development—law enforcement and prosecutorial services, an effective penal system, and functional government regulatory agencies—were already in existence.[69] If we are to draw conclusions from the Japanese experience, we must look further back in time.

As Christopher A. Ford points out, the development of the modern Japanese legal system has been characterized by "adoption and adaptation": the adoption of foreign legal models and the adaptation of these models to Japanese needs.[70] We think of development studies as a relatively new phenomenon. But when the Japanese were

---

[69] Many of these systems had been features of Japanese governance since before the Meiji restoration. Jeffrey P. Mass, for instance, points to the Kamakura (1186-1336) period as a period in which significant use was made of the justice system for resolving disputes: *The Development of Kamakura Rule, 1180-1250: A History with Documents* (Stanford: Stanford University Press, 1979). According to Haley, an initial impression that law does not feature highly in Japanese society is dispelled by the recognition that "[l]egal rules effectually govern as many of the basic areas of Japanese life as they do in most contemporary industrial societies" (*Spirit of Japanese Law*, *supra* note 38 at 22).

[70] Christopher A. Ford, "The Indigenization of Constitutionalism in the Japanese Experience" (1996) 28 Case W. Res. J. Int'l L. 3 at 3. Corne points out that "the formal legal system, while being heavily influenced at all levels in its operation by social norms, actually depends upon traditional normative mechanisms of social control for its continued viability" ("Tradition", *supra* note 64 at 346-47, 352). Daniel H. Foote highlights the ongoing Japanese interest in comparative legal studies, remarking that, "[t]hroughout much of its history, Japan has shown a tremendous receptivity to foreign law" ("The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson Professorship in East Asian Legal Studies" (1998) 73 Wash. L. Rev. 25 at 37). Pistor & Wellons also note that "[t]he transplant of judicial procedure codes to East Asia [has been] limited to a transfer of formal rules and institutional structures. When transplanted, they became part of the legal traditions that existed in the law receiving countries" (*supra* note 49 at 284). Haley points out that it is not entirely correct to say that Japan adopted foreign law and simply pruned it "to fit into a very different garden," where it continued "to grow and develop as a unique national system" (*Spirit of Japanese Law*, *ibid.* at xv). Nevertheless,

> Japan has not simply replicated the laws or institutions of any one foreign legal system. If only as a hybrid, the mix of legal rules and legal institutions gives the Japanese legal system a distinguishing cast. More significant, however, is the combination of a continuous process of selective adoption of foreign models and the application of these adopted rules in the Japanese cultural or institutional environment (*ibid.* at xvi).

seeking a suitable European model for their first constitution, they were drawn to the German model partly because of Germany's success in transforming itself from an agrarian economy to a modern economic power.[71] By the middle of the Meiji period (1868 to 1912), dissatisfaction with the traditional *ritsuryo* code (adopted from China in the late seventh century CE)[72] led Japan to look also to Europe for a suitable civil law framework.[73] New Japanese civil codes were drafted based on the French civil code (promulgated in 1890) and later on the German civil code (adopted in 1898), as well as a new criminal code, also based on German law, in 1908 (replacing the old code of 1882).[74]

This process of adoption was accompanied by a process of adaptation. During the debate regarding the adoption of the various Japanese civil codes, for instance, controversy arose about the ideology that the code represented.[75] From a cultural standpoint, conservative nationalists argued that the adoption of foreign law in Japan undermined traditional Japanese morality.[76] Nobushige Hozumi, one of the pioneers of comparative legal studies in Japan, argued for recognizing the unique features of

---

[71] Ford, *ibid.* at 5. See also Fukase Tadakazu & Higuchi Yoichi, *Le constitutionalisme et ses problèmes au Japon: une approche comparative* (Paris: PUF, 1984) at 64-65.

[72] Yoshiyuki Noda sees dissatisfaction with the *ritsuryo* code arising far earlier. In his view,

> The system of *ritsu-ryo* did not stay in favor for long. The cultural milieu of Japan differed considerably from that of China, which made it difficult for the laws to be assimilated. Most of the provisions soon fell into disuse, and around the legislative texts more and more uses of an administrative or judicial nature developed, with the result that the basic text soon became obscure or was forgotten (*Introduction to Japanese Law* (Tokyo: University of Tokyo Press, 1976) at 24).

The changing use of the *ritsuryo* code is an earlier example of adoption and adaptation. Oda notes that the *ritsuryo* code had fallen "behind the developments in the mid-tenth century when the nobles came to rule the country" (Hiroshi Oda, *Japanese Law*, 2d ed. (Oxford: Oxford University Press, 1999) at 14). Haley shows that the *ritsuryo* code fell into disuse by the nineteenth century (*Spirit of Japanese Law*, *supra* note 38 at 8).

[73] J. Mark Ramseyer points out that part of the dissatisfaction with traditional Japanese law and the adoption of Western legal paradigms arose out of the need to "convince Western governments that their courts were both predictable and fair" in order to resist colonization and ensure that Westerners agreed to submit to Japanese laws (*Odd Markets in Japanese History: Law and Economic Growth* (Cambridge: Cambridge University Press, 1996) at 2. Haley considers the lectures given by Hatoyama Kazuoin at Yale Law School in 1901-1902, which reveal that one of the reasons that the Japanese civil code was enacted was "to end the system of extraterritoriality imposed by treaty with the European powers and the United States" (*Spirit of Japanese Law*, *ibid.* at 201).

[74] Ishii Ryosuke, *Japanese Legislation in the Meiji Era*, vol. 10, trans. by William J. Chambliss (Tokyo: Kasai, 1958) at 563-64.

[75] Corne indicates that traditional norms were seen as incompatible with the "confrontationalist" system of litigation that the European civil codes represented ("Tradition", *supra* note 64 at 350). See also J.O. Haley, "The Politics of Informal Justice: The Japanese Experience, 1922-1942" in Richard L. Abel, ed., *The Politics of Informal Justice: Comparative Studies*, vol. 2 (New York: Academic Press, 1982) 125 at 128.

[76] Ishii, *supra* note 74 at 583-84.

Japanese culture in the updated civil codes.[77] Another, more ideological debate occurred between advocates of English and French law among Japanese jurists, the former supporting the English positivist approach and the latter the French natural law approach.[78] For the Japanese, the universalistic natural law approach of the Napoleonic code was not compatible with traditional Japanese and Confucian views on the nature of law and legal rights.[79] The result was the redrafting of the civil code based on the German model. The drafters of the new code, recognizing the need to adapt foreign law to domestic practice, took better account of traditional Japanese custom in their revised draft.[80]

Many examples exist of the modification of foreign civil codes to account for traditional Japanese norms.[81] For example, the Japanese agricultural system depended in large part on the traditional institutions for regulating the family and the village. The civil law had to be adapted to allow for the traditional restraints on the disposition of property, despite the fact that the norms of this system conflicted in part with a regime of pure private property.[82] Reforms were thus aimed at preserving the hierarchical Japanese family system. As Kaino points out:

> Under the pre-war system, the primary unit of Japanese society was the family rather than the individual, and the relationship between parent and child, as well as husband and wife, was that of superior and subordinate. This patriarchal order extended beyond domestic life, up to political organization, which was also hierarchically structured, a type of rule which the government had been attempting to strengthen in order to ensure the stability of the existing social order. This unique feature of the legal and political system was formally incorporated in the Meiji Civil Code of 1898, which replaced the more democratic provisions of the French-style Old Civil Code.[83]

Mark Ramseyer highlights another example of the adaptation of foreign laws to unique domestic circumstances in order to encourage economic growth. He points out that the German-based civil code was effective in protecting private rights to land, but the case was different for water resources. German property law regarding water resources was unhelpful, because of the scarcity of fresh water in Japan in comparison to Germany. Eschewing the adoption of German law in this regard, Japan

---

[77] See Michiatsu Kaino, "Some Introductory Comments on the Historical Background of Japanese Civil Law" (1988) 16 Int'l J. Soc. L. 383 at 385-86.

[78] Ishii, *supra* note 74 at 584-88.

[79] See Kaino, *supra* note 77 at 384-85.

[80] Ishii, *supra* note 74 at 591. See also Henderson, "Lawyers in Japan", *supra* note 67 at 45. On the importance of ensuring the congruence between local culture and transplanted laws, see Berkowitz, Pistor & Richard, *supra* note 43.

[81] Corne suggests that the very concept of a legal right has been adapted in Japan in order to conform with the traditional neo-Confucian value system. The concept of right was modified to take into account the interest of the community ("Tradition", *supra* note 64 at 354).

[82] See Kaino, *supra* note 77 at 389.

[83] *Ibid.* at 387.

relied on traditional property rights regimes to regulate a scarce resource in a manner suitable to local conditions.[84]

C. Japan's Constitutional Law Reform Is Also Characterized by Adoption and Adaptation

In addition to looking for a legal model that might fit their economic goals, Japanese legal reformers also sought a model that would be compatible with the political challenges that the Japanese government faced during the nineteenth century. The centralization of political power in the emperor was an essential part of the institutional restructuring necessary to deal with the emerging crisis of foreign interventionism.[85] As Masao Maruyama points out, the international crisis and the economic difficulties facing Japan at the end of the Tokugawa period "were not the product of mistakes in specific policies or the negligence of certain individuals; they were deeply rooted in the Tokugawa social structure itself ... Consequently, the solution was to be sought, not in the introduction of isolated measures, but in a considerable institutional transformation," of which an essential element was the centralization of political power.[86]

Given the need for centralized power, the Japanese found the German constitutional model particularly attractive, since its emphasis on protecting the kaiser's power was compatible with the Japanese desire to increase the power of the *Tennō* (the Japanese emperor).[87] In contrast to the Anglo-American conception of the rule of law, Japan adopted the German conception of the *Rechtsstaat*, which vests power and rights, not in the individual, but in the government.[88] The position of the emperor was strengthened even further by granting him significant legislative power.[89] Noriho Urabe notes that this view of the rule of law has survived even into the modern era, in which law continues to be seen not as a restriction on government

---

[84] *Supra* note 73 at 12, 23-42.

[85] Richard H. Minear points to the role of *kokugaku* thinking in paving the way for the replacement of the shogunate by the emperor (*Japanese Tradition and Western Law* (Cambridge, Mass.: Harvard University Press, 1970) at 171).

[86] Masao Maruyama, *Studies in the Intellectual History of Tokugawa Japan*, trans. by Mikiso Hane (Princeton: Princeton University Press, 1974) at 346.

[87] Ford, *supra* note 70 at 5; Fukase & Higuchi, *supra* note 71 at 64-65. Ishii points out that Itô Hirobumi, who was appointed to travel to Europe to investigate suitable constitutional models for adoption in Japan, had, through his investigations, perceived "the need for a strong sovereign and a weak assembly" (Ishii, *supra* note 74 at 369).

[88] Noriho Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan" (1990) 53 Law & Contemp. Probs. 61. See also Oda, *supra* note 72 at 34; Henderson points out that "the new civil code [1898] was integrated with the absolutism of the Meiji Constitution based on theocratic imperial sovereignty, a cabinet with military ministers responsible directly to the throne not the Diet, and an elite and aloof civil service, beholden only to the Emperor, not his subjects" ("Lawyers in Japan", *supra* note 67 at 45). Haley states that "[l]aw has long been understood in Japan as an instrument of government control" (*Spirit of Japanese Law*, *supra* note 38 at 2, 4).

[89] Urabe, *ibid.* at 63.

power vis-à-vis the individual, but as a requirement that the people obey the law and reject force as a means of achieving private ends.[90] This conception of the law, placed in the context of Japan's tremendous economic success during the second half of the twentieth century, challenges law and economics theorists who see the individual's ability to restrict government power as crucial for ensuring the predictability of legal relationships necessary for economic growth. If, as in Japan, the rule of law completely submits individuals to government-made law, then legal institutions cannot ensure that government regulation will conform to the needs of economic actors.

The Japanese consciously adapted foreign models in such a way as to support the cultural, political, and social norms of modern Japan. Notions of national sovereignty and the semidivinity of the emperor influenced both the choice of the German constitution as the model for Japan, and the modifications to the German model based on the differences between the secularized, state-centred German system and the emperor-centred Japanese system.[91] The emperor-centred system was seen as an important aspect of modern Japanese intellectual development as well as the Japanese political system following the Meiji Restoration.[92] It resulted in a legal system in which there were few legal limits placed on political action.[93]

As Maruyama has observed, modern Japanese thought emerged in the eighteenth and nineteenth centuries through the development of a distinctly Japanese conception of neo-Confucianism, and subsequent reactions against neo-Confucianism by the nationalist School of Ancient Learning (*kokugaku*).[94] When it came time for legal

---

[90] *Ibid.* at 68-69.

[91] Ford, *supra* note 70 at 7-8.

[92] Masami Ito, "The Modern Development of Law and Constitution in Japan" in Lawrence W. Beer, ed., *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992) 129. Ito points out some of the forces that influenced the drafting the Meiji Constitution:

> The Meiji Constitution adopted both the absolutistic theory that the sovereignty of the Emperor is based on the divine will of a god similar in theory to the divine right of kings on the one hand, and various principles of modern constitutionalism on the other. ... In the background explaining this dualistic nature were the aims of the mainstream of the ruling elite, during the period between the Meiji Restoration and the making of the Constitution, to strengthen the rights of sovereignty, to establish a powerful central government whose authority was based on those rights of sovereignty, and to pursue the basic policy of enriching and strengthening the nation as a whole (*ibid.* at 137).

[93] Dan Fenno Henderson, "Law and Political Modernization in Japan" in Robert E. Ward, ed., *Political Development in Modern Japan* (Princeton, N.J.: Princeton University Press, 1968) 387 [Henderson, "Political Modernization"]. See also Kaino, *supra* note 77 at 386, 391, who observes that the Meiji restoration was not liberal or democratic, since the constitution did not limit imperial sovereignty or the prerogatives of the emperor.

[94] Maruyama points out the emergence of one of the key modern elements in Sorai's philosophy is the characterization of the historical Confucian tradition as a political construct used by Confucian rulers to control society. For Sorai, "the essence of the Way of the Sages, or of the Early Kings, is primarily political, that is, it is the establishment of order in the state and peace in the world." This

reform during the Meiji period (1868-1912), the new legal order had to therefore harmonize with these emergent modern elements in the Japanese intellectual world.

Maruyama explains that Japanese modernity is initiated by a theory of invention, a view that human norms, rather than being a simple reflection of the heavenly order, are in fact inventions created by humans to regulate society.[95] This emphasis on invention, I believe, created an intellectual atmosphere conducive to the reception of foreign legal models and the creative adaptation of these models to suit the political purposes of the Meiji government.[96] A certain intellectual development was needed to pave the way for legal development.[97] Without this development, the transplantation of foreign legal regimes could not integrate effectively with the national political order.

Having considered the historical process of adoption and adaptation by which Japan has instituted reforms of its criminal, civil, and constitutional law, I turn now to some specific ways in which the Japanese legal system continues to exhibit features different from those characteristic of countries with a Western paradigm of the rule of law.

D. Characterization of the Japanese Legal System

1. The Use of Informal Regulation

The informality of the Japanese legal system has been well-documented.[98] Yoshiyuki Noda notes that although a "system of a purely legal nature is penetrating

---

characterization "implied a firm rejection of the mode of thought that implied a continuity of personal morality and government ... " (Maruyama, *supra* note 86 at 81). This development, premised on a distinction between private and public, is, according to Maruyama, a distinctive feature of modern modes of thought (*ibid.* at 103). It is further developed by the School of Ancient Learning, which, in its rejection of the metaphysical views of Japanese neo-Confucianism, "generally tended to nurture a receptive attitude towards natural-scientific cognition" (*ibid.* at 181).

[95] Maruyama points out how "the irresistible spread of the theory of invention after the Meiji Restoration" was a result of the intellectual developments during the late Tokugawa period (*ibid.* at 314).

[96] David A. Funk says that one of the purposes of the revival of Shintoism in the interpretation of Japanese law arose from the "growing movement to restore real governmental power to the Emperor": "Traditional Japanese Jurisprudence: Justifying Loyalty and Law" (1990) 17 S.U.L. Rev. 171 at 210.

[97] Minear, for instance, states that "[t]he recasting of natural order in terms of natural law was one step leading toward the adoption in Japan of Western legal ideas. The second was the establishment of the principle of secularism, the idea that politics was politics, and ethics, ethics; that one could speak of the Japanese emperor in the same analytical terms used of Western monarchs ... " (*supra* note 85 at 191).

[98] Kenneth L. Port & Gerald Paul McAlinn, *Comparative Law: Law and Legal Process in Japan* (Durham, N.C.: Carolina Academic Press, 2003) at 16. While Japan has half the population of the United States, it has only 20 000 lawyers in comparison to 900 000 in the United States (Port & McAlinn, *ibid.* at 131). See also Upham, *Law and Social Change*, *supra* note 47; Christian Wollschläger, "Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics" in Baum, *supra* note 67, 89; Haley, *Spirit of Japanese Law*, *supra* note 38 at 32-33.

gradually deeper into the life of Japan ... "[99] the traditional customary rules that have governed Japanese society continue to play an important role.[100] These customary rules, called rules of *giri*, "are rules of conduct, and do not presuppose the existence of any relationship of clearly defined and quantitatively delimitable rights and duties between the subjects whose conduct they regulate."[101] Henderson further states that "Japan still permits the society to be largely *socially* managed by the decentralization and personal status relationships familiar in the past, but adapted to modern needs."[102]

While maintaining that the "Japanese people prefer extrajudicial, informal means of settling a controversy,"[103] Takeyoshi Kawashima also admits that "[t]here is probably no society in which litigation is the normal means of resolving disputes."[104] Indeed, John Haley challenges the orthodox view that the Japanese are particularly averse to use of the court system, arguing, as Kawashima does, that the aversion to litigation is also part of the Christian tradition.[105] He notes, however, that while there is not necessarily a cultural practice resisting litigation, Japan's legal institutions are structured in such a way as to make litigation an ineffective method of resolving a dispute in many cases.[106] He points out that "[w]hat distinguishes Japan is the successful implementation of this interdiction [against formal legal dispute

---

[99] Noda, *supra* note 72 at 174.

[100] Port & McAlinn use the label "the traditionalist theory" for theories that explain the low levels of Japanese reliance on litigation based on a social custom of avoiding confrontation and promoting harmony (*supra* note 98 at 16).

[101] Noda, *supra* note 72 at 174.

[102] Henderson, "Lawyers in Japan", *supra* note 67 at 46-47 [emphasis in original].

[103] Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan" in Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Cambridge, Mass.: Harvard University Press, 1963) 41 at 43.

[104] Kawashima, *ibid.* at 41. See also Henderson, "Lawyers in Japan", *supra* note 67 at 49; Frank K. Upham, "Weak Legal Consciousness As Invented Tradition" in Stephen Vlastos, ed., *Mirror of Modernity: Invented Traditions of Modern Japan* (Berkeley: University of California Press, 1998) at 48 [Upham, "Weak Legal Consciousness"].

[105] John Owen Haley, "The Myth of the Reluctant Litigant" (1978) 4 Journal of Japanese Studies 359 at 365, 389 [Haley, "Reluctant Litigant"].

[106] Port & McAlinn call Haley's argument the "revisionist theory", which claims that "the Japanese system is full of institutional disincentives to prosecuting a lawsuit" (*supra* note 98 at 17). Upham, in "Weak Legal Consciousness", points out that the Japanese government has had a considerable role in keeping "litigation difficult and relatively inaccessible while providing free and readily available informal means of dispute resolution" (*supra* note 104 at 62). Herbert F. Bolz, in "Judicial Review in Japan: The Strategy of Restraint" (1980) 4 Hastings Int'l & Comp. L. Rev. 87, discusses the following institutional characteristics of the Japanese legal system that make litigation an ineffective means of dispute resolution: the small number of lawyers (Bolz, *ibid.* at 121) and judges (Bolz, *ibid.* at 122-23); the civil custom of scheduling trials one day at a time at monthly intervals, which lengthens the process of dispute resolution (Bolz, *ibid.* at 123); the heavy administrative burden of the Supreme Court, which keeps it from adjudication (Bolz, *ibid.* at 129); the lack of contempt power of Japanese courts to enforce their decisions (Bolz, *ibid.* at 132-33); and the limited remedies available to plaintiffs (Bolz, *ibid.* at 133). Many changes are currently being debated to make Japanese legal institutions more accessible.

resolution] through institutional arrangements."[107] Henderson, too, discusses a number of institutional and procedural features of the Japanese legal system that discourage the use of law to resolve disputes.[108] In a subsequent article, however, Haley argues that barriers to formal legal dispute resolution can be sustained because of the availability of informal mechanisms based on cultural norms, such as reputation.[109] For Haley, the lack of formal legal institutions has not impaired social, political, and economic functions in Japan because of the effectiveness of informal institutions for regulating behaviour.[110] Indeed, some scholars hold that given the structure of Japanese legal institutions, using informal dispute resolution mechanisms is more likely to provide a wealth-maximizing outcome than using formalized methods.[111]

Noda attributes the uniqueness of the Japanese legal system, not just to different cultural and social norms, but also, as noted above, to the fact that law in Japan developed as a means of consolidating political power for ruling authorities. He states that "the law for most Japanese meant little else than the means of constraint used by the authorities to achieve government purposes."[112] This characteristic fits together well with the other aspect of modern Japanese law that legal comparativists have noted: the reliance on an informal system of administrative decrees to regulate political and economic actors.[113] Far from being opposed to the informality of traditional Japanese approaches to dispute resolution, Japanese law has a built-in

---

[107] Haley, "Reluctant Litigant", *supra* note 105 at 389. See also John O. Haley, "Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions" (1982) 8 Journal of Japanese Studies 265 at 273-74 [Haley, "Sheathing the Sword"].

[108] Henderson, "Lawyers in Japan", *supra* note 67 at 53-55, 61. Corne points to the relatively small number of lawyers and judges, the length of time it takes to complete a hearing, high fees, and the types of damage awards available ("Tradition", *supra* note 64 at 359). Recent reforms, such as the revision of the Civil Procedures Law in 1996, are designed "to rationalize and to speed up court business and to make litigation more accessible to potential litigants" (Kahei Rokumoto, "Law and Culture in Transition" (2001) 49 Am. J. Comp. L. 545 at 550 [Rokumoto, "Law and Culture"]).

[109] Haley, "Sheathing the Sword", *supra* note 107 at 275-76.

[110] *Ibid.* at 276. Haley points to informal sanctions such as ostracism and expulsion from group membership: "[b]oycotts, refusals to deal, and other forms of modern *murahachibu* are among the most prevalent means by which social order is maintained" (*ibid.* at 277). See also Hiroshi Wagatsuma & Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20 Law & Soc'y Rev. 461; Wollschläger, *supra* note 98 at 133, 134-35.

[111] Port & McAlinn, *supra* note 98 at 18.

[112] Noda, *supra* note 72 at 37.

[113] See Meryll Dean, "Administrative Guidance in Japanese Law: A Threat to the Rule of Law" (1991) J. Bus. L. 398. She notes that "apart from the basic laws and regulations governing business transactions, there is what some consider to be the secret weapon of the Japanese economic miracle ... administrative guidance (*gyosei-shido*)" (*ibid.* at 398). See also Muneyuki Shindo, "Administrative Guidance: Securities Scandals Resulting from Administrative Guidelines" (1992) 20:4 Japanese Economic Studies 69; Henderson, "Lawyers in Japan", *supra* note 67 at 47; Haley, *Spirit of Japanese Law*, *supra* note 38, noting that "[i]nformality characterized the interaction between government officials and industry in formulating and implementing policies to promote economic growth and deal with the inexorable conflicts such growth produced" (Haley, *Spirit of Japanese Law*, *ibid.* at 28).

system for promoting informal dispute resolution. Haley has pointed out that Japanese laws often give wide discretionary decision-making power to government authorities.[114] While some designate the system of administrative decrees as a "threat to the rule of law," others see it as "an example of effective government intervention in economic management."[115] While law and economics scholars such as Richard Posner have emphasized the predictability of legal regulation as essential for promoting economic growth,[116] Muneyuki Shindo notes that informal regulation also has its advantages: "If ... corporate activities were always controlled using literal readings of every public law, then the flexibility of corporate activities would be necessarily restricted."[117] Studies in Japan have demonstrated that, far from injecting uncertainty into business relationships, informal business relationships tend to create more certainty. For instance, Japanese courts have generally refused to allow parties seeking to renew a long-term contract to unilaterally refuse without just cause.[118]

While Shindo outlines the critique of the administrative guidance system, which has been seen as "a type of bureaucratic pressure or threat,"[119] one advantage of administrative guidance is that it encourages consultation and negotiation between bureaucrats and regulated organizations.[120] Henderson suggests that Japanese alternatives to litigation are "quicker, cheaper, and leave less rancor with the disputants."[121] Michael K. Young indicates that the limited judicial review of administrative guidance has helped to facilitate communication between bureaucrats and regulated institutions, thereby facilitating the flexibility inherent in the system, while minimizing the ability of regulators to force negotiation or compliance.[122]

---

[114] Haley, *Spirit of Japanese Law*, *ibid.* at 13. See also Susan Maslen, "Japan & the Rule of Law" (1998) 16 Pacific Basin L.J. 281.

[115] Meryll Dean, *Japanese Legal System*, 2d ed. (London: Cavendish, 2002) at 180. Rokumoto points out the potential for abuse in a system of administrative guidance: "The problem with administrative guidance is, of course, that it can easily become a means of coercive control, especially when it is conducted informally and hidden from outside view, though it is based on the principle of voluntary consent given by the party who receives the guidance" (Rokumoto, "Law and Culture", *supra* note 108 at 552).

[116] *Supra* note 21.

[117] Shindo, *supra* note 113 at 77. See also Henderson, "Lawyers in Japan", *supra* note 67 at 47. See also Haley, *Spirit of Japanese Law*, *supra* note 38 at 13.

[118] John O. Haley, "Relational Contracting: Does Community Count?" in Baum, *supra* note 67, 167 at 178. On the importance of informal relationships for enforcing otherwise vague Japanese contracts, see Corne, "Tradition", *supra* note 64 at 349.

[119] Shindo, *supra* note 113 at 82. See also Karen van Wolferen, *The Enigma of Japanese Power: People and Politics in a Stateless Nation* (New York: Knopf, 1989); Michael K. Young, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan" (1984) 84 Colum. L. Rev. 923 at 934.

[120] Young, *ibid.* at 935, 941, 946, 980. See also Henderson, "Lawyers in Japan", *supra* note 67 at 47.

[121] Henderson, "Lawyers in Japan", *ibid.* at 48.

[122] Young, *supra* note 119 at 977-80, 982-83.

Extralegal methods of regulating relationships, in addition to offering flexibility, also offer the certainty necessary for business.[123]

Western legal reformers generally fear that the discretion given to administrative decision makers in Japan through informal regulatory mechanisms is likely to give rise to corruption. The East Asian financial crisis of 1997-1998 has often been tendered as evidence that the East Asian system of government's involvement in investment and industrial policy can lead to corruption and financial collapse, or "crony capitalism".[124] As Robert Wade has argued, however, Japan has a number of systems in place to discourage corruption. He points out that much of the contact between industry and administrative officials in Japan does not involve direct contact between bureaucrats and private firms, but rather, relations between bureaucrats and industry associations.[125] The greatest danger of corruption occurs when administrative decision makers are in contact with individual firms. The Japanese arrangement tends to avoid such contact. As well, social forces tend to work against corruption—there is considerable prestige in a successful bureaucratic career, and accepting bribes would tarnish this prestige.[126] Finally, "the tradition of group work within the bureaucracy makes it difficult for a boss to behave corruptly without his juniors finding out, which serves as a powerful deterrent."[127]

2. The Role of Informal Dispute Resolution in the Preservation of Community Relationships

It is important to note that the Japanese legal system is characterized by informality partly because it serves to maintain particular relationships. As Haley argues, while a legal system premised on universal principles is appropriate for an individualistically based society, a principled legal system can be detrimental in a society in which relationships, rather than individuals, are given priority.[128] In Upham's words, "[e]ven when the rule embodies an appropriate norm, the process of its application denies the value of emotion and circumstance, both of which are essential to the survival of relationships among potentially antagonistic groups and to

---

[123] "Business dealing in Japan ... occurs in an environment that encourages relational contracting and provides a system of ordering that effectively substitutes for the formal legal system" (Haley, *Spirit of Japanese Law*, *supra* note 38 at 210).

[124] Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002) at 460 [Peerenboom, *Long March*].

[125] Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization*, 2d ed. (Princeton, N.J.: Princeton University Press, 2004) at 328.

[126] *Ibid.*

[127] *Ibid.*

[128] On the Japanese orientation towards community, see Haley, *Spirit of Japanese Law*, *supra* note 38 at 13-19, 205.

the normative dominance of consensus in the processes of social conflict and change."[129]

In their article on the role of apology in the resolution of wrongdoing in Japan, Hiroshi Wagatsuma and Arthur Rosett describe the important role of apology in Japanese culture in "repairing the injured relationship between the parties and between the offending individual and the social order that has been disturbed."[130] Achieving social order in this manner is also recognized as an effective approach in proposals for alternative methods of legal dispute resolution in Canadian aboriginal communities. This similarity demonstrates the potential effectiveness of informal social institutions in resolving legal disputes in consistent, predictable, and effective ways. Indeed, as Haley notes, "[c]ommunity enforcement enables a system of private ordering as an alternative to the state—a system of private ordering that in the abstract is as much beyond the control of the parties as the system of legal ordering by the state."[131]

3. A Close Relationship Between Judicial and Administrative Branches

As in the case of China, there is much greater continuity between Japanese administrative, political, and judicial decision makers than is tolerated in most Western models of the rule of law. As Upham has indicated, the administrative branch of government has always maintained tremendous influence over the trajectory of Japanese social change: "[T]he [Japanese] bureaucracy [retains] a surprising degree of control over the pace and course, if not the substance, of social change in Japan, and one of its major instruments for such control is the manipulation of the legal framework within which social change and its harbinger, social conflict, occur."[132]

---

[129] Upham, *Law and Social Change*, *supra* note 47 at 207. Upham does not claim that the Japanese legal system is not able to meet the needs of individuals. On the contrary, he points out that while a consensus-based dispute-resolution system does not depend on abstract principles, focusing on particularistic relationships nonetheless enables the system "to satisfy the legitimate needs of particular individuals and groups" (*ibid.* at 207).

[130] Wagatsuma & Rosett, *supra* note 110 at 492. See Haley, *Spirit of Japanese Law*, *supra* note 38 at 17-18, 33-34; Corne, "Tradition", *supra* note 64 at 355-57.

[131] *Spirit of Japanese Law*, *ibid.* at 206-207. He goes on to note that

> the "social density" of Japanese society, especially within its various communities, contributes substantially to the capacity of the community to enforce effectively accepted community norms. Repeated transactions over long periods of time among the same persons not only facilitate communication and enhance the flow of information, they also foster trust, cooperation, and interdependence, which combine to strengthen even further the bonds and cohesion among the participants (*ibid.* at 208).

[132] Upham, *Law and Social Change*, *supra* note 47 at 17. The last 15 years have, however, challenged the supremacy of administrative decision makers. Rokumoto, for instance, sees the 1990s as a period in which "[v]arious efforts began in order to change the power relation between the

In their study of judicial independence in Japan, J. Mark Ramseyer and Eric B. Rasmusen conclude that a judge with the following characteristics was likely to suffer in terms of job assignments and career advancement:[133] judges who belonged to left-leaning political organizations;[134] judges who decide cases contrary to government policy;[135] judges who decide against the government in significant politically charged cases.[136] These factors, which would be considered evidence of a negative influence of non-judicial decision makers on judges, are balanced by certain advantageous features of a close relationship between judicial, administrative, and political officials. Ramseyer and Rasmusen indicate that while political pressure is exerted on judges in significant, politicized cases, in routine cases the lack of judicial independence helps to weed out incompetent and unproductive judges:

> In simple routine cases ... [the Secretariat's ability to reassign and manipulate the promotion of judges] facilitates pressure toward enhancing quality: judges who are talented and hard working and who decide difficult cases correctly receive better jobs and greater responsibilities. Such would not be the case in a system in which judges are independent of rewards and punishments based on their performance.[137]

Given the relatively greater power that Japanese administrators possess in comparison to their Western counterparts, political control over the judiciary serves a role which it does not need to serve in other countries. Skillful and efficient decision making is rewarded in mundane administrative law disputes. This mechanism allows the political branch in Japan to ensure that powerful administrative decision makers implement the policies of democratically elected politicians: "By helping to keep bureaucrats in line, independent judges help politicians deliver what they promised to the voters."[138] Ramseyer and Rasmusen go on to theorize that the relative continuity between administrative, political, and judicial decision makers in Japan is a reflection of the nature of Japanese democracy. In the United States, the two parties expect that democratic elections will continue, but it is unlikely that a given party will be in control of the administration for long. As a result, there is a benefit to an independent judiciary, because it will frustrate attempts by a subsequent administration to undo or thwart reforms introduced by the present administration.[139] By contrast, in Japan,

---

politicians and bureaucrats and to establish—or, as they say, 'reestablish'—the upper hand of politicians in policy making" ("Law and Culture", *supra* note 108 at 548).

[133] *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago: University of Chicago Press, 2003) [Ramseyer & Rasmusen, *Measuring Judicial Independence*]. See also their earlier article, "Judicial Independence in a Civil Law Regime: The Evidence from Japan" (1997) 13 J.L. Econ. & Org. 259.

[134] Ramseyer & Rasmusen, *Measuring Judicial Independence*, *ibid.* at 47.

[135] *Ibid.* at 60.

[136] *Ibid.* at 80-81.

[137] *Ibid.* at 95.

[138] *Ibid.* at 123, 140 [reference omitted].

[139] *Ibid.* at 139-40. See also Oliver E. Williamson, "Transaction Cost Economics and Organization Theory" (1993) 2 Industrial and Corporate Change 107; Terry M. Moe, "Politics and the Theory of

while democratic institutions are as entrenched as in the United States, it is rational for Liberal Democratic Party ("LDP") members to expect to be the governing party after every election. While there might be a political cost to directly influencing judicial decision making, this cost can be offset against the relatively higher likelihood in Japan of the LDP returning to power.[140]

The American concept of the rule of law, which is often identified with judicial independence from the political and administrative branches, can be explained in part by the nature of American democracy. Ramseyer and Rasmusen provide a similar explanation for the relationship between political, administrative, and judicial decision makers in Japan. This demonstrates the importance for legal institutions, including the incentive and administrative structures of courts, to be compatible with other institutional features of the country's political and social structure.

E. Summary

There is no clear link between Japan's economic growth and the adoption of a Western conception of the rule of law. The law has not been the dominant method for constraining the discretionary power of the state in Japan as in Europe and North America. Instead, foreign laws and legal institutions have been adopted and adapted to fit into the socio-cultural context of Japanese society. My brief survey of the intellectual history of Japan leading up to the adoption of Western law demonstrates how significant shifts in socio-political thought were necessary in order to pave the way for a pragmatic approach to Western law—one which saw Western law as a tool to be used for domestic purposes of consolidating the emperor's power and improving economic performance. Through this analysis, I have pointed out that the transplantation of foreign laws and institutions will only be effective where the domestic context is prepared to integrate foreign models through a process of adaptation and modification.[141]

While political circumstances in the middle of the nineteenth century might have prompted the adoption of foreign laws and institutions, an important aspect of successful integration of these laws with domestic institutions was the freedom of the Japanese to choose compatible legal models, rather than having models forced on them. This experience suggests that when considering legal reform as a tool for facilitating economic development, it is important to preserve the agency of developing countries, that is, to ensure that legal reform is motivated from the bottom up rather than the top down.

Particular aspects of the Japanese legal system, *viz.* its toleration of informal dispute resolution and community-oriented decision making, have provided an

---

Organization" (1991) 7: Special Issue J.L. Econ. & Org. 106; William M. Landes & Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective" (1975) 18 J.L. & Econ. 875.

[140] Ramseyer & Rasmusen, *Measuring Judicial Independence*, *ibid.* at 141.

[141] See also Berkowitz, Pistor & Richard, *supra* note 43.

environment suitable for economic growth. The lesson for developing countries is that the fit between proposed legal reforms and domestic social, cultural, and political institutions is important for producing the kind of stability necessary for economic growth. Furthermore, the example of Japan demonstrates that informal dispute-resolution mechanisms can be effective in providing the certainty necessary to encourage economic activity, if the law can structure them effectively. Certainty can be produced through socio-cultural practices, and need not be state generated.

In summarizing my analysis of the relationship between law and economic growth in Japan, it may appear that I reject the view that certain incentives—secure property rights and contractual certainty—are needed in order to promote economic growth. This is not the case. Indeed, as William Easterly observes, many of the panaceas for curing the problems of developing countries *viz.* focusing on issues such as education, investment, population control, debt forgiveness, and development aid, are ineffective precisely because they overlook the primary economic principle that "people respond to incentives."[142] Instead, recognizing this fundamental principle, I have tried to demonstrate that a wide variety of legal frameworks are able to provide the incentives for economic growth. To understand what incentives are needed, it is necessary to understand the way in which social and cultural norms shape responses to incentives. In the case of Japan, the adoption of a European or North American conception of the rule of law alone has not provided the proper incentives for growth. I have illustrated the culture of adoption and adaptation that has characterized the Japanese legal system in the last 150 years. The adaptation of foreign laws to Japanese needs has been key in using legal institutions to encourage economic growth.

VI. Case Study 2: China

In the most recent iteration of their study "Governance Matters", Kaufmann, Kraay, and Zoido-Lobatón rank China in the 40.6 percentile under "rule of law".[143] "Rule of law" encompasses "the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence."[144] This result is an improvement over 1996 (37.3 percentile), but a regression from 1998 (52.4 percentile), 2000 (48.7 percentile), and 2002 (48.5 percentile). As Kevin Davis has noted, there are problems with the methodology employed in obtaining these and similar data. For instance, in examining the International Country Risk Guide, one of the indicators employed by Kaufmann, Kraay, and Zoido-Lobatón in preparation of their governance data, Davis notes that "[g]iven the way that ... [the law and order]

---

[142] William Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (Cambridge, Mass.: MIT Press, 2001) at 143.

[143] Updated indicators for the 209 countries studied are available on the World Bank website: World Bank, "Worldwide Governance Indicators: 1996-2004", online: World Bank, <http://www.worldbank.org/wbi/governance/govdata>.

[144] Kaufmann, Kraay & Mastruzzi, *Governance Matters IV*, *supra* note 1 at 4.

variable is defined, the widely observed statistical relationship between the rule of law and development may boil down to a relationship between crime rates and development."[145] In particular, because the variable accounts for the behaviour of both legal personnel and members of the public not directly involved in the legal system, it tells us little about the design of legal institutions in the country. Nonetheless, the governance statistics indicate that China is perceived as a country in which adherence to the rule of law (as defined by the study) is much lower than, for example, the United States (91.8 percentile in 2000). Despite the lower ranking indicating an apparent divergence from an ideal model of the rule of law, the United Nations Conference on Trade and Development ("UNCTAD") has listed China as one of the leading "bright spots" for foreign direct investment from 2004 to 2007.[146] Many lessons about the sources of this success can be applied in other developing countries. In particular, Chinese economic success puts into question the link between a Western conception of the rule of law and economic development.

A. Historical Background

The pre-communist Chinese legal paradigm is primarily characterized by a continuity between morality and legality,[147] thereby demonstrating the inherent normativity of law. Continuity with a historical mandate (the mandate of heaven, or *tian ming*) was the traditional standard for judgment, and this historical analysis provided certainty from generation to generation that the law would continue to be applied consistently with the original mandate.[148] To achieve this aim, the Chinese imperial bureaucracy implemented extensive bodies of law throughout its long history to regulate the manner in which officials administered government control.[149]

In selecting foreign paradigms to emulate, China, like Japan, had the luxury of choice. It was not forced into the adoption of particular models.[150] It has benefited

---

[145] Kevin E. Davis, "What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?" (2005) [unpublished, on file with author] at 11.

[146] UNCTAD, *Prospects for FDI Flows, Transnational Corporation Strategies and Promotion Policies: 2004-2007*, UN Doc. TD(XI)/BP/5 (2004) at 5.

[147] For a philosophical analysis of this continuity in historical context, see Graham Mayeda, "The Wisdom Behind the Law: The Implications of Yang-ming Philosophy for the Law" in Willard Oxtoby & Vincent Shen, eds., *Wisdom in China and the West* (Washington, D.C.: Council for Research in Values and Philosophy, 2004). See also Lubman, *supra* note 39 at 14.

[148] See Wm. Theodore de Bary, "The 'Constitutional Tradition' in China" (1995) 9 J. Chinese L. 7 at 12-13, 18-19. de Bary states that the foundation of Chinese law is the idea that human law is a reflection of heaven-ordained moral law or *tian ming*. This heaven-ordained law is articulated in the decisions of ministers, and justified popular revolution. Even reformer Wang Anshi felt it necessary to base his reforms on historical authority, reaching further back in the tradition in order to demonstrate that his view was in fact supported by more ancient authority than ancestral precedents. See also Peerenboom, *Long March*, *supra* note 124 at 41.

[149] See Lucie Cheng & Arthur Rosett, "Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989" (1991) 5 J. Chinese L. 143 at 159.

[150] Haley, *Spirit of Japanese Law*, *supra* note 38 at 11.

from selective adoption of foreign legal models and adaptation of these models to domestic circumstances.[151] In the republican period (1911-1949), China borrowed from European and Japanese civil law during its process of modernization.[152] In the early communist period (1949-1978), Chinese laws were primarily modeled on those of the U.S.S.R. and other eastern European countries.[153] Beginning in the 1980s and continuing until today, China has increasingly drawn on Western European and North American resources.[154] Taiwanese civil law has also provided a useful guide.[155]

Unlike Japan, China's government is centralized.[156] The Japanese system of government has always been somewhat diffuse, despite reforms during the Meiji period placing greater power in the hands of the emperor.[157] China has historically been characterized by a strong central government with a definite link between the legal and administrative branches of government.[158] These features continue to characterize China today,[159] although unlike the Soviet system, local government has increasingly taken on an important role. The legal and economic reforms that have taken place since the late 1970s have given local governments "the power to promote local policies more intensively and effectively than before reform."[160]

The Chinese legal system, in particular the code of the Tang dynasty (618-906 CE), was used in many Southeast Asian and East Asian countries and modified to suit the particular needs of these countries.[161] This fact demonstrates that a code based on morality, which lends itself to different interpretations in different contexts, provides a good model for a project of institutional reform. Institutions and legal frameworks that are flexible enough to be congruent with different cultural contexts will be adopted more successfully than ones without such flexibility.

---

[151] *Ibid.* at xvi; Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (London: Routledge, 2001) at 4-5 [Potter, *Chinese Legal System*]. This is, of course, only valid in recent times. Foreign laws were earlier imposed on China by both the west and Japan (Lubman, *supra* note 39 at 1-2).

[152] See Cheng & Rosett, *supra* note 149 at 160.

[153] Potter, *Chinese Legal System*, *supra* note 151 at 4.

[154] Peerenboom notes that China's civil and criminal law systems have drawn on civil law, socialist law, and traditional Chinese legal sources ("Regulatory Compliance", *supra* note 3 at 5).

[155] Potter, *Chinese Legal System*, *supra* note 151 at 4-5.

[156] I am not denying that local governments in China have considerable power. This power is, however, exercised within the cadre of a centrally organized system. I discuss the power exercised by local governments below.

[157] Ramseyer describes it as a federal system, in which "[t]he national government only indirectly controlled most domains," which were instead governed by independent families (*Odd Markets*, *supra* note 73 at 18). See also Haley, who states that "Japan did not develop into a[n] imperial state governed by a centralized officialdom selected by examination with legal rules designed to order and regulate the behaviour of both ruled and ruler" (*Spirit of Japanese Law*, *supra* note 38 at 6-7).

[158] See Zhiwu Chen, "Capital Markets and Legal Development: The China Case" (2003) 14 China Economic Review 451 at 453 [Chen, "Capital Markets"]; Lubman, *supra* note 39 at 22.

[159] See Chen, "Capital Markets", *ibid.* at 454.

[160] Lubman, *supra* note 39 at 105.

[161] de Bary, *supra* note 148 at 13.

B. Characterization of the Chinese Legal System

1. Little Protection of Private Property Rights

Some commentators have noted that China does not have robust protection of property rights.[162] In the face of this fact, Chinese economic success can be hard to explain.[163] The absence of a strong property rights regime is partly due to the lack of coherence between property rights and other legal institutions and regulations that interact with these rights,[164] in stark contrast to Japan. As noted above, however, it is possible to effectively regulate traditional legal rights through other, less formal mechanisms. Donald Clarke states that it is possible to order incentives in such a way as to protect against expropriation even in the absence of formalized legal enforcement of private property rights. As an illustration of this phenomena, he points to Township and Village Enterprises ("TVEs"), in which ownership resides in local government. The greatest danger of expropriation in China comes from the level of local government. TVEs do not risk expropriation, because they are owned by the very level of government that is most likely to expropriate property. While the Chinese TVE system may not effectively protect private property *rights*, it nonetheless structures ownership in such a way that expropriation can be avoided. Without the threat of expropriation, the TVE system is able to provide the type of predictability necessary to encourage economic development.[165] Admittedly, this type of predictability will not protect private economic actors. As noted by Clarke,

---

[162] Potter, *Chinese Legal System*, *supra* note 151 at 61, 68; Pitman B. Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2004) 29 Law & Soc. Inquiry 465 at 471 [Potter, "Legal Reform in China"]; Lubman, *supra* note 39 at 116-17; Jean C. Oi & Andrew G. Walder, eds., *Property Rights and Economic Reform in China* (Stanford: Stanford University Press, 1999); Gary H. Jefferson, "China's Evolving (Implicit) Economic Constitution" (2002) 13 China Economic Review 394 at 396. With regard to property rights in agriculture, see Clarke, "Economic Development", *supra* note 59 at 102-103; Roy L. Prosterman, Tim Hanstad & Li Ping, "Can China Feed Itself?" *Scientific American* 275:5 (November 1996) 90 at 93. With regard to property rights of TVEs, see Martin L. Weitzman & Chenggang Xu, "Chinese Township-Village Enterprises as Vaguely Defined Cooperatives" (1994) 18 Journal of Comparative Economics 121; David D. Li, "A Theory of Ambiguous Property Rights in Transition Economies: The Case of the Chinese Non-State Sector" (1996) 23 Journal of Comparative Economics 1. Compare James Kai-sing Kung & Shouying Liu, "Farmers' Preferences Regarding Ownership and Land Tenure in Post-Mao China: Unexpected Evidence from Eight Counties" (1997) 38 China Journal 33; Scott Rozelle, Jikuy Huang & Linxiu Zhang, "Emerging Markets, Evolving Institutions, and the New Opportunities for Growth in China's Rural Economy" (2002) 13 China Economic Review 345.

[163] Lubman, *supra* note 39 at 117.

[164] Joyce Palomar asserts that "risks to purchasers' land rights and investors' security interests in land exist when various institutions in an emerging economy implement policies and practices that inadvertently oppose the laws, enforcement mechanisms, and supporting institutions of its property rights institution" ("Contributions Legal Scholars Can Make to Development Economics: Examples from China" (2004) 45 Wm. & Mary L. Rev. 1011 at 1052). In her view, regulation of property in China exhibits such an incoherent regulatory framework.

[165] *Ibid.*

however, the TVE system demonstrates that "non-private actors *do* have predictability and can create flourishing markets and economic growth."[166]

According to Clarke, the TVE system demonstrates that critics of the Chinese property system are wrong to focus solely on the problems posed by the lack of formalized legal enforcement of property rights.[167] In his view, "the question should be not whether China possesses or lacks courts that enforce rights, but simply whether investors and others engaged in business in China have adequate predictability for their needs."[168] The TVE system, by aligning the interests of government with ownership, provides the certainty necessary for promoting investment, thereby demonstrating that while "property rights matter, ... other institutions matter too, including banks, capital markets, labor markets, product markets, political structure, and norms. These interact in complicated ways to foster, or hinder, good corporate governance and economic development."[169]

It is also interesting to note that the TVE system exemplifies one characteristic of the Chinese legal regime generally, *viz.* its focus on group rather than individual rights.[170] This tradition has been carried into the post-Mao legal framework, in which, despite reforms to the property regime giving greater autonomy to non-state actors, the state has maintained a dominant role in property relations. As Pitman Potter notes,

> Constitutional requirements that the exercise of citizens' rights, including the right to own property, not conflict with the state or social interest effectively grant the state a monopoly on interpreting that interest and on determining the extent to which private property rights that might possibly conflict with it will be recognized and enforced.[171]

Suggested changes to the property regime set out in proposed civil code reforms continue to be subject to the "general tenor of the Constitution, which currently favors socialist public ownership over private property rights."[172] The 1999 revisions to the constitution provide that the state would protect the lawful rights and interests of certain non-state economic actors. Nevertheless, commentators have noted that "the reference to state protection of lawful rights and interests signals that the private sector will remain subject to significant state control."[173]

---

[166] *Ibid.* at 109 [emphasis in original].

[167] *Contra* Peerenboom, *Long March*, *supra* note 124, who argues that "[t]he dramatic reversal of the fortunes of TVEs raises doubts about the benefits of clientelism, and supports the view that clientelism is to a large extent a short-term reaction to an undeveloped and immature market economy and weak legal system" (*ibid.* at 486-87).

[168] Clarke, "Economic Development", *supra* note 59 at 108

[169] Brett H. McDonnell, "Lessons from the Rise and (Possible) Fall of Chinese Township-Village Enterprises" (2004) 45 Wm. & Mary L. Rev. 953 at 996.

[170] On the traditional Chinese emphasis on collective—rather than individual—rights, see Potter, *Chinese Legal System*, *supra* note 151 at 62.

[171] *Ibid.* at 62.

[172] *Ibid.* at 65.

[173] *Ibid.* at 66.

2. Absence of a Western Model of Private Contract Law

With regard to contract law, commentators have indicated the deficiencies in Chinese law in comparison to the law of other countries. For instance, Clarke points to its vagueness. In his view, Chinese contract legislation "is full of statements saying that such-and-such 'should in principle' or 'should generally' be done."[174] However, he goes on to argue that such legislation must be placed in its proper context. The instructions for contracting provided in this legislation are intended to be used by officials in the approval of contracts. As Clarke states:

> The "laws" of contract are not aimed at individual contracting parties; they do not speak to such parties. Instead, they are essentially instructions ... [about the] task of [administrative officials in] approving contracts. Using this model, it is not at all surprising to see such terms as "in general" or "in principle." The important issue is not one of rights or statutory interpretation; the important issue is whether a kind of statistical regularity is achieved. The drafters recognize that not all contracts need the particular provisions in question. They want *most* contracts to have these provisions, but do not want to tie their own hands.[175]

While a casual reading of contract legislation might suggest a dysfunctional contract regime incapable of providing the certainty needed for economic development, when viewed in the context of social and economic institutions, the same system appears to provide certainty in contracts. Indeed, the formalist approach to the interpretation of legal contracts in Chinese courts is evidence of their emphasis on "uniformity and consistency in judicial decisions."[176]

The current contract law regime in China is not the result of neglect on the part of Chinese legal reformers. In fact, it underwent serious reform during the 1990s, resulting in the adaptation of legal frameworks from other countries to domestic needs and circumstances.[177] The regulation of contracts in China demonstrates a blending of the desire for greater participation of individuals in the contract regime with the retention of significant state discretion in the interpretation of contracts.[178] As Potter writes, "[p]rovisions requiring that contracts satisfy the requirements of 'good faith' and 'social public morality' permit government officials wide discretion in determining which contracts are lawful and which are not."[179]

---

[174] Donald C. Clarke, "Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?" in C. Stephen Hsu, ed., *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York: New York University Press, 2003) 93 at 102 [Clarke, "Puzzling Observations"].

[175] *Ibid.* at 103.

[176] Potter, *Chinese Legal System*, *supra* note 151 at 54.

[177] *Ibid.* at 38, 51-52.

[178] On the traditional role of contracts in Maoist China, see Lubman, *supra* note 39 at 93-100. Lubman points out the administrative and managerial use of contracts that are used to concretize the obligations imposed on individuals by the state. This feature is retained in China's reformed contract law.

[179] Potter, *Chinese Legal System*, *supra* note 151 at 47 [references omitted].

3. China's Two Economies—Different Regulatory Environments for Foreign and Domestic Business

Foreign direct investment ("FDI") has grown tremendously in China. UNCTAD's *World Investment Report 2005* indicates that FDI reached US$53 billion in 2003 and that this amount rose to US$60 billion in 2004.[180] If Chinese property and contract rights are not structured as in most developed countries, what accounts for the large foreign interest in investing in China and for China's economic success more generally? During the initial period of openness in the 1980s, much of China's attractiveness to FDI arose out of incentives such as low tax rates.[181] The basis of China's attractiveness to FDI has changed significantly since that time. Four factors have contributed to recent growth in FDI. First, China has healthy levels of competition between market actors, even though many of these actors are publicly owned companies. Second, non-state actors are able to take advantage of the ambiguous property rights regime in order to protect their investments. Third, a large portion of FDI consists of investment either made directly or mediated by Chinese investors who do not live in mainland China. Fourth, the Chinese business environment gives considerable advantages to foreign-owned companies over domestic-owned ones. While the protections available to foreign-owned companies may not be the same as those in developed countries such as the United States or Europe, the advantages provided to foreign-owned companies over domestic companies is sufficient to motivate FDI.

With regard to the first factor, the existence of competition,

> it does not appear to be true that a market requires private actors. What it does generally require in order to have meaningful bargaining over prices is actors that are trying to buy low and sell high. The Chinese case certainly demonstrates that governmental actors such as TVEs are capable of fulfilling this role and that a market can flourish in the absence of significant true private actors.[182]

According to Clarke, economic growth is possible despite the fact that private actors cannot benefit from the predictability systems inherent in China's property regime. A successful market can exist in the absence of these actors.[183]

In terms of the second factor, non-state actors can take advantage of some of the features of the Chinese property regime in order to protect against expropriation. Indeed, it appears that many have done so. Despite the apparent lack of a Western

---

[180] UNCTAD, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* (New York: UN, 2005) at 306, online: UNCTAD <http://www.unctad.org/en/docs/wir2005_en.pdf>.

[181] Organisation for Economic Co-operation and Development, *China: Progress and Reform Challenges* (Paris: OECD Publishing, 2003) at 15, c. 1, online: Organisation for Economic Co-operation and Development <http://www.oecd.org/dataoecd/44/17/33830343.pdf>.

[182] Clarke, "Economic Development", *supra* note 59 at 108-109.

[183] *Ibid.* at 109.

property rights regime, China's non-state sector has demonstrated tremendous growth.[184] David Li points out that this growth is in part due to the effective use of the ambiguous property regime that exists in China. Property rights in the non-state sector are shared between individual entrepreneurs and local government.[185] Li finds that the use of ambiguous property rights is an effective way of dealing with a market in which factors of production are often in control of the local government. In such an environment, "an emerging non-state firm may find it highly beneficial to include the local government as part of the firm."[186] For Li, the Chinese property rights regime is an efficient response to a marketplace in which transaction costs are high. In his view, "when transactions in the marketplace are costly, ambiguous property rights may prove to be more efficient than clearly defined property rights."[187] Li concludes that China demonstrates that "clarifying the ownership and property rights of the enterprise ... may not be appropriate for transition economies. Given the grayness and imperfections of the market, a proper degree of ambiguity of property rights is perhaps necessary."[188]

On the third point, a number of studies have demonstrated the high involvement of non-resident Chinese in FDI in China, both as direct investors and as mediators for non-Chinese foreign investors. Investment from Hong Kong has remained the most important source of FDI in China. In 1992, before repatriation, Hong Kong investments represented sixty-eight per cent of China's total FDI. In 1998, while this amount had decreased, it still represented about forty per cent, with investment from Hong Kong, Macao, and Taiwan representing a total of fifty per cent of FDI in China.[189] The large proportion of investment by non-resident Chinese indicates that foreign investors in China can take advantage of the familiarity of ethnically Chinese business people with the informal norms of Chinese business.

The fourth factor that facilitates FDI is China's dualist regulatory regime, which provides advantages to foreign-owned companies that are not provided to domestic-owned ones. This differential treatment makes investment profitable for foreign investors, even if the businesses located in China are treated less well than businesses

---

[184] See Li, *supra* note 162 at 2; Franklin Allen, Jun Qian & Meijun Qian, "Law, Finance, and Economic Growth in China" (2005) 77 Journal of Financial Economics 57 at 59-61.

[185] Li, *ibid.* at 5.

[186] *Ibid.* at 7.

[187] *Ibid.* at 15.

[188] *Ibid.* at 16.

[189] Yasheng Huang, *Why More Is Actually Less: New Interpretations of China's Labor-Intensive FDI* (Ann Arbor, Mich.: William Davidson Institute Working Paper Series, 2001) at 3, online: William Davidson Institute <http://www.wdi.umich.edu/files/Publications/WorkingPapers/wp375.pdf>. See also Yasheng Huang, "Why More May Be Actually Less: Financial Biases and Labor-Intensive FDI in China" [unpublished] at 2, online: MIT Faculty Webpage <http://web.mit.edu/yshuang/www/research/images/financialbiases%20.pdf>; Yasheng Huang, *Selling China: Foreign Direct Investment During the Reform Era* (New York: Cambridge University Press, 2003).

in developed countries.[190] As Yasheng Huang observes, in comparison to the regulatory regime that applies to foreign-invested enterprises, "the legislative and regulatory treatments of domestic private firms have been far less transparent and more restrictive."[191] The consequence of this differential treatment is that "an American firm can be treated very badly in China as compared with its treatment at home, but it can still do well in China as long as its closest rivals in China are treated even worse."[192] Huang points to the different protections against expropriation afforded by the Chinese constitution to foreign-owned property as opposed to domestic-owned private property.[193] Recent amendments to the constitution in 2004 have improved protection to private property, but it is unclear whether the gap between the treatment of domestic-owned private businesses and foreign-owned ones has yet been filled. Huang also indicates the application of different regulatory legislation to foreign-owned and domestic-owned companies.[194]

As well, the level of capital market integration between provinces in China is quite low in comparison to European and North American countries. Chinese businesses are more dependent on foreign trade than they are on interprovincial trade.[195] Likewise, they are more dependent on foreign investment than on investment from domestic sources as a result of "high internal investment barriers relative to barriers facing FDI."[196]

Huang also indicates that the decisions of legal tribunals provide evidence of the differential treatment of domestic- and foreign-owned firms. For instance, Chinese Labour Dispute Arbitration Committees more often rule in favour of the management of foreign-owned as opposed to domestic-owned companies.[197] The General Auditing Administration audits foreign-owned firms less often than domestic ones.[198] Overall, the result has been the creation of "a business environment that is more 'friendly' to [foreign-invested enterprises] than to domestic private firms."[199]

The four factors canvassed above demonstrate that both domestic Chinese economic growth and growth of FDI can be explained by features of the existing Chinese legal and regulatory system. While there is increasing evidence of integration of the Chinese economy with those of developed countries,[200] Chinese growth in the

---

[190] Yasheng Huang, "One Country, Two Systems: Foreign-Invested Enterprises and Domestic Firms in China" (2003) 14 China Economic Review 404 [Huang, "One Country"].

[191] *Ibid.* at 407.

[192] *Ibid.* at 408.

[193] *Ibid.* at 407, 409.

[194] *Ibid.* at 408-10.

[195] Yasheng Huang, "FDI, Institutional Biases, and Capital Account Convertibility in China" [unpublished, on file with author] at 4-5.

[196] *Ibid.* at 5.

[197] Huang, "One Country", *supra* note 190 at 413.

[198] *Ibid.* at 413-14.

[199] *Ibid.* at 416.

[200] One example is China's accession to the World Trade Organization.

last twenty-five years is not necessarily attributable to the adoption of a liberal democratic conception of the rule of law. China has chosen to continue to promote a Chinese socialist market system while simultaneously ensuring economic success. The creation of competitive markets, the use of informal legal and non-legal norms, and the operation of a two-tiered regulatory system for foreign- and domestic-owned businesses have all been effectively used to promote the two policy goals of Chinese socialism and economic growth.

In the following sections, I elaborate on the informal mechanisms used in China to regulate business, and explore the subservience of law to policy in China, which allows for the coexistence of growth with limited legal reform.

4. Informal Mechanisms for Enforcing Obligations

In the Maoist period, contracts were not intended to outline individual rights and obligations that could be enforced through third parties such as courts.[201] Informal cultural mechanisms, such as moral norms, were used to enforce obligations. We have already noted the somewhat ambiguous system of property rights in China—a system that is a sort of hybrid between state and private ownership and control. Lubman points out the continuing importance of traditional informal mechanisms for enforcing this property regime: "Enforcement mechanisms include strong concepts of personal honor, property, reciprocity, and shame; *guanxi* [personal relationships] and *ganqing* [human feelings], ... and invocation of the state administrative apparatus—while avoiding formal legal institutions."[202] The reliance on informal enforcement methods and appeals to the state in part derive from the low social status of lawyers[203] and the contrasting traditional legitimacy of the process of petitioning government.[204]

Many commentators have noted the importance of informal relationships for conducting business in China and East Asia more generally.[205] As Lubman argues, "[i]n China, rights and duties are contextual, depending on the relationship of individuals to each other, and each conflict must be addressed in terms of the alternative consequences with a view to finding a basis for cooperation and harmony."[206] The result is that "[n]egotiation and compromise are preferable to insistence on one's own rights."[207] The importance of personal relationships (*guanxi*) in the conduct of business in China and other East Asian countries, as well as in the diaspora, is governed by a non-instrumentalist normative system. "It has involved the

---

[201] Lubman, *supra* note 39 at 100.
[202] *Ibid.* at 117.
[203] Peerenboom, "Regulatory Compliance", *supra* note 3 at 27.
[204] *Ibid.* at 26.
[205] See *e.g.* Peerenboom, *Long March*, *supra* note 124 at 402; Potter, "Legal Reform in China", *supra* note 162 at 473. See also Thomas Gold, Doug Guthrie & David Wank, eds., *Social Connections in China* (New York: Cambridge University Press, 2002).
[206] Lubman, *supra* note 39 at 19.
[207] *Ibid.* at 19.

entire web of family, kin, and communal relationships in which persons are ordinarily involved and has been based not on instrumental conduct but on *renqing* or 'human feelings.'"[208] It thus constitutes a "local moral world"[209] that in some cases provides effective informal regulation of business relations.

China does not provide outstanding protection for investors. Franklin Allen, Jun Qian, and Meijun Qian find that Chinese legal protection for creditors and shareholders falls into the lower middle portion of the forty-nine countries sampled by La Porta *et al.*[210] Sixty-eight per cent of the countries surveyed by La Porta *et al.* have the same or better creditor protection, while sixty-five per cent have the same or better shareholder protection.[211] Despite the low level of protection, other non-legal means exist for protecting investment. Allen, Qian and Qian see the Confucian system as the basic structure of social institutions in China.[212] They suggest that reputational effects, derived from this Confucian system, can substitute for formal, legally determined governance structures.[213] Chinese firms compensate for a weak legal regulatory environment by using family reputational and relational structures to encourage investment.[214] Family-owned firms in which ownership is highly concentrated in one family is the norm both in China and other Asian countries.[215] This pattern allows for reputational and relational factors to structure the economic environment in China. Familiarity with these informal systems and their ability to ensure good corporate governance has attracted investment from Hong Kong and Taiwan in Chinese enterprises.[216]

I have demonstrated the important systems that function to provide certainty in contract and property rights. It is possible, however, that while these systems provide sufficient certainty to encourage investment by insiders of the system—that is, those who are familiar with Chinese systems of contracting and the Chinese property regime—these systems do little to provide the certainty necessary to encourage outsiders to invest. As Lubman notes, "[l]aws and regulations on foreign investment ... share important characteristics with other Chinese legislation and administrative

---

[208] *Ibid.* at 114.

[209] *Ibid.*

[210] For a list of the studies conducted by La Porta *et al.*, see s*upra* note 1.

[211] Allen, Qian & Qian, *supra* note 184 at 8.

[212] *Ibid.* at 32.

[213] *Ibid.* at 2, 33, 36. *Contra* Peerenboom, *Long March*, *supra* note 124 at 467-69, who argues that "as the economy grows, reliance on relationships rather than generally applicable laws and formal legal institutions becomes less effective" (*ibid.* at 467).

[214] *Ibid.* at 33-34.

[215] For data on East Asian countries other than China, see Stijn Claessens, Simeon Djankov & Larry H.P. Lang, "The Separation of Ownership and Control in East Asian Corporations" (2000) 58 Journal of Financial Economics 81; Stijn Claessens *et al.*, "Disentangling the Incentive and Entrenchment Effects of Large Shareholdings" (2002) 57 Journal of Finance 2741. For data on China, see Qiao Yu & Jianbo Chen, "Investment Patterns of Firms in an Emerging Market: Evidence from China" working paper, Fudan University, cited in Allen, Qian & Qian, *ibid.*

[216] Allen, Qian & Qian, *ibid.* at 35.

rules. FDI regulations are usually drafted in general language and are often followed by incomplete implementation guidelines."[217] These regulations allow significant leeway for administrative interpretation and the exercise of administrative discretion.

In assessing the environment for foreign investment in China, one must acknowledge the possibility that foreign investors will have to establish connections to local administrators to tap into informal networks for controlling business in China. The need for establishing these contacts in order to provide greater certainty in contracts and property rights is, in some ways, no different than the need to establish such networks in North American or European countries.[218] Western law has long recognized the role of politics and moral norms in the regulation of international affairs, for example.[219] As well, given the existence of large communities of overseas Chinese who are knowledgeable about doing business in China and East Asia more generally, it appears that there are significant opportunities for Western investors to access domestic Chinese systems for the enforcement of property and contractual interests.

5. Legitimacy of Legal and Administrative Institutions Is Based on Utilitarian Ideals Rather than Western Conceptions of Justice and Division of Powers

China differs from Japan and North American and European countries in the source of legitimacy of its government. Much of the legitimacy of Western governments is derived from compliance with norms enshrined in constitutions. In Japan, much of the legitimacy of government decisions is derived from the use of a consensus-based system which, although it does not achieve unanimity, does maximize participation of interested groups in the decision-making process.[220] In contrast, the legitimacy of the Chinese government derives from the effectiveness of its policies in making China wealthy and strong.[221] In other words, law is subservient to policy, which continues to form the basis of the legitimacy of the Chinese government.[222] Chinese courts cannot serve as a source of legitimacy for law, because they exist at the same level of power as other bureaucratic agencies, without the

---

[217] Lubman, *supra* note 39 at 193.

[218] *Ibid.* at 304.

[219] Brooks, *supra* note 31 at 2287.

[220] Upham sees consensus building, initiated by the administration, as wide-ranging, involving all levels of society: "the bureaucracy tries to gauge the fundamental direction of social change, compares it with the best interests of society from the perspective of the ruling coalition of which it is a part, and then attempts to stimulate and facilitate the creation of a national consensus that supports its own vision of correct national policy" (*Law and Social Change*, *supra* note 47 at 21).

[221] Clarke, "Puzzling Observations", *supra* note 174 at 106.

[222] Lubman, *supra* note 39 at 130-37, 139-40. On the instrumental use of law in China, see also Peerenboom, "Ruling the Country", *supra* note 5 at 327-28; Peerenboom, *Long March*, *supra* note 124 at 46, 466; Potter, "Legal Reform in China", *supra* note 162 at 472.

ability to exert control over them.[223] In Clarke's view, "[t]here is no place for special legal expertise in judging what will promote the development of productive forces or serve the basic interests of the state and the people."[224] It makes little sense to point to the absence of an independent court that protects individuals against state violations of constitutional principles when evaluating the legitimacy of Chinese policies.

Similarly to Japan, Chinese legal institutions are often structured so as to permit significant discretion on the part of government decision makers in both interpreting and implementing law.[225] The Administration Litigation Law was passed in 1989, allowing greater leeway for challenges to the decisions of administrative decision makers. Some view it and other similar laws as important steps in achieving the accountability of government decision makers to the people.[226] Peerenboom notes, however, that "problems remain both in the laws themselves and even more so in their execution,"[227] while Minxin Pei points out that the new administrative law regime has had mixed success.[228] One notable feature of the Chinese administrative law system is the large proportion of cases that are withdrawn, many of which represent out-of-court settlements.[229] Legal institutions thus facilitate the informality of dispute resolution in China, as they do in Japan and Western countries.

William Alford writes that

> To date, the Constitution has yet to be successfully invoked to constrain the exercise of governmental or party power, the Supreme People's Court has instructed lower-level courts not to rely on it in deciding cases, and the body

---

[223] Lubman, *ibid.* at 3.

[224] Clarke, "Puzzling Observations", *supra* note 174 at 108.

[225] *Ibid.* at 110; Peerenboom, "Ruling the Country", *supra* note 5 at 327. In another article, Peerenboom points out that the close relationship between the judicial and executive branches in China has "made possible some institutions and practices such as review by adjudicative committees and individual case supervision by the procuracy and people's congress that would be difficult to reconcile with conceptions of judicial independence and separation of power principles in liberal democracies" ("Regulatory Compliance", *supra* note 3 at 9). With regard to the adjudicative committee procedure, however, he says that there are still a number of problems, both in the administration of the process and its usefulness in separating administrative and judicial action ("Regulatory Compliance", *ibid.* at 22-23). Similar problems exist with the individual case supervision system ("Regulatory Compliance", *ibid*. at 24-25).

[226] Peerenboom, "Regulatory Compliance", *ibid.* at 10.

[227] Peerenboom, "Ruling the Country", *supra* note 5 at 322. These problems include doctrinal shortcomings in the law (certain organizations such as "the CCP, the Procuracy, state-owned enterprises, and quasi-administrative units ... are not considered administrative entities under the ALL [Administrative Litigation Law]"); standing requirements (which limit standing to those suffering injuries to personal or property rights and exclude parties with "only indirect or tangential interests in an act from bringing suit"); and "institutional or systemic obstacles ... including the low level of legal consciousness and unwillingness of many citizens to bring suit, a culture of deference to authority, and a weak judiciary" (Peerenboom, *Long March*, *supra* note 124 at 420-21).

[228] Minxin Pei, "Citizens v. Mandarins: Administrative Litigation in China" (1997) 152 China Quarterly 832.

[229] *Ibid.* at 842-44.

> that enacted it—the National People's Congress—is, through its Standing Committee, the body ultimately charged with interpreting it.[230]

Commentators have observed that the Chinese legal regime is characterized by uncertainty over which officials are to interpret regulations and what review processes should be used to review these interpretations.[231] For instance, Alford remarks that the Chinese judiciary, rather than being separate from the executive branch, is one among many administrative bodies[232] without the ability to bind political bodies.[233] Jerome Cohen has also pointed to this characteristic of Chinese adjudicators, citing the fact that the membership of judges in the Communist Party means that their judgments are significantly influenced by party policy.[234]

In Clarke's opinion, while the apparent identity between the adjudicative and the political branches in China might lead an observer to criticize the Chinese system for lacking an American-style separation of powers, it is possible to come to another conclusion. In his view, the proper question in the Chinese context is not whether there is an effective system of checks and balances between the judicial, legislative, and executive branches, but whether the allocation of administrative discretion is legitimate. If we accept the context in which the Chinese system has emerged, we are led to question the relationship between higher and lower levels of bureaucracy, rather than the relationship between legislative organs (that delegate power) and bureaucratic organs (that implement legislation within the bounds of this power).[235] There is thus nothing inherently wrong with the lack of judicial supervision of administrative decision makers if a legitimate supervisory role can be exercised by higher levels of the bureaucracy.

Moreover, changes to disassociate the administrative and judicial systems are being implemented. For example, judicial panels have increasingly been given greater independence from the administrative bureaucracy, and more emphasis has been placed on the importance of promoting judges on the basis of judicial skill and knowledge.[236]

---

[230] William P. Alford, "A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction" (1999) 11 Cultural Dynamics 193 at 196 [reference omitted].

[231] See Alford, *ibid.* Qingjiang Kong also notes the lack of transparency in Chinese government ("China's WTO Accession: Commitments and Implications" (2000) 3 J. Int'l Econ. L. 655 at 673-74).

[232] Alford, *ibid.* at 197. See also Donald C. Clarke, "The Execution of Civil Judgments in China" (1995) 141: Special Issue China Quarterly 65; Donald C. Clarke, "Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments" (1996) 10 Colum. J. Asian Law 1.

[233] Alford, *ibid.* See also Anthony R. Dicks, "Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform" (1995) 141: Special Issue China Quarterly 82 at 109.

[234] Jerome A. Cohen, "Reforming China's Civil Procedure: Judging the Courts" (1997) 45 Am. J. Comp. L. 793 at 794-95, 797.

[235] Clarke, "Puzzling Observations", *supra* note 174 at 112.

[236] Peerenboom, "Regulatory Compliance", *supra* note 3 at 10.

C. Summary

One of the important lessons to be learned from China is that while protection of property interests is necessary for economic development, it is not necessarily true that these rules must be formal legal rules, or that these interests must be protected through private property rights. Government bodies are just as capable as private individuals of functioning as economic actors.[237] Furthermore, the predictability necessary to make contracting feasible need not be provided through formal legal regulation. As noted by Clarke, "third-party enforcement through government coercion is not in fact the only effective enforcement mechanism available, because one-shot deals between people who are and intend to remain strangers are in practice not of great importance in modern capitalist economies."[238]

China, like Japan, appears to depend heavily on non-formalized normative systems for regulating economic activity. While this does not indicate that law will be irrelevant for future economic development, it does tend to show, first, that informal norms can promote economic growth, and second, that legal reforms should be compatible with existing normative systems. As Lubman states, "research into traditional custom and practice [in China] has yielded additional evidence that these informal institutions protected ... claims ... that could be characterized as functional equivalents of the rights created by Western jurisprudence."[239]

We have also seen that in evaluating the existence of the rule of law, it is necessary to remove the blinders of Western rule of law paradigms. In the context of China, for instance, while a distinct separation between the bureaucracy and the law has never been maintained, this does not mean that there is no accountability for administrative decision makers. Rather, an evaluation of these accountability mechanisms must broaden the search from identifying distinctive signs of Western accountability—for example, the power of review that the judiciary exercises on the administration—to identifying alternative accountability mechanisms that exist in developing countries, such as the checks between various levels of bureaucratic decision makers in the Chinese system.

Finally, China offers some evidence of the causal relationship between legal reform and economic growth. The traditional view has been that legal reform will engender economic growth. John C. Coffee has suggested that legal reform is not a necessary condition for economic success. Rather, regulatory change results from economic success, because such success creates a constituency that can advocate for regulatory change.[240] In examining securities markets, for instance, he points out that "private action, through bonding and signaling measures, may be the critical first step

---

[237] Clarke, "Economic Development", *supra* note 59 at 109.

[238] *Ibid.* at 110.

[239] Lubman, *supra* note 39 at 33.

[240] John C. Coffee, Jr., "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control" (2001) 111 Yale L.J. 1 at 7, 81 [Coffee, "Dispersed Ownership"].

toward stronger securities markets."[241] Zhiwu Chen has found that Coffee's thesis accurately portrays the situation in China. Chen notes that economic growth generated demand for legal regulation, rather than legal regulation creating an environment for economic growth.[242] We can conclude, as Coffee does, that legal reform is not the sole determinant of economic success.

It would be wrong, however, to conclude that law does not play an important role in promoting economic growth. What is important is that legal reform be based on laws compatible with emerging domestic practice. Markets could begin by being self-regulated. The norms of the self-regulated environment will be transformed into legal rules once economic actors demand that standards that have proven to be successful in the market be imposed on those firms that still do not comply with them.[243]

VII. Comparing China and Japan

Although Japan and China have traditionally had different forms of government, with a preference in China for a centralized, bureaucratic government in comparison to Japan's preference for a diffuse and consensus-based approach, both countries' paths to economic development have many things in common. Both have relied on personal relationships and informal dispute-resolution mechanisms to provide the predictability necessary for economic growth. Both exhibit a weaker commitment to the division of powers, with significant intermingling of the administrative and judicial branches. Differences also exist. Despite unclear demarcations between the administrative and judicial branches, the Japanese system is far more differentiated than the Chinese system. Japanese judicial and legal actors are more professionalized. The similarity in the approach to rule of law reform in both countries, however, characterized as a process of adoption and adaptation of foreign models, indicates the existence of an East Asian paradigm of rule of law reform that is transferable to developing countries.

As I mentioned previously, the thin conception of the rule of law can be adapted to explain the path of development of China and Japan. Both countries adopted many of the institutions that Trebilcock and Daniels identified as essential for development: the use of a judiciary to resolve disputes, a system of law enforcement and an effective penal system, tax administration, and so on. As we have seen, these institutions in some cases are based on a different normative foundation than comparable European and North American institutions. Furthermore, the fact that China has achieved significant economic development in the absence of some of the factors listed by Trebilcock and Daniels, such as access to justice, judicial

---

[241] *Ibid.* at 9.

[242] Chen, "Capital Markets", *supra* note 158 at 470. Similarly, in the area of property rights, McDonnell finds that "property rights reform in China was both the effect and the cause of economic development" (*supra* note 169 at 1000).

[243] See Coffee, "Dispersed Ownership", *supra* note 240 at 60.

independence grounded in the ideal of fairness, an independent and professionalized bar association, and a pervasive and effective system of legal education,[244] highlights the cultural specificity of even a minimalist conception of the rule of law. Daniels and Trebilcock see these elements as essential for an effective rule of law regime, but the experience in China raises questions about the essential nature of these institutions.

Conclusion

One lesson to be learned from this brief survey of the relationship between economic development and legal reform in Japan and China is the need for legal institutions to be compatible with socioeconomic, cultural, and political factors in order to have legitimacy, and ultimately, a role in shaping economic development.[245] As Coffee has remarked, without this compatibility, a law transplanted from one jurisdiction to another "may not 'take,' possibly because it conflicts with the host country's own norms and customs."[246] The transplantation of legal institutions will only be effective where the normative foundation of these institutions is compatible with the normative structures of developing countries. The experience in both Japan and China also points to the adaptability of social and cultural institutions. While legal reform should be compatible with local conditions, compatibility should not be based on a stereotype of local culture.[247]

Legal reform is most successful in encouraging economic development where political actors are amenable to the aims of new legal institutions. As Pistor and Wellons note, entrenched interests prevented the initial reform of antimonopoly laws in Japan.[248] They also point out that one of the factors in encouraging legal reform was a changing perception of the role of the state in economic development, from an interventionist to a non-interventionist role.[249]

The lesson to be learned from Japan and China is that legal reform will have little effect on economic growth if it does not take into account compatibility with existing

---

[244] Many of these elements are in the process of being developed in China to varying degrees. As discussed above, Chinese courts lack the sort of independence with which we are familiar in North America and Europe (Peerenboom, "Competing Conceptions", *supra* note 14 at 116). Peerenboom also points out that the legal profession in China is "still plagued by both quantitative (particularly in rural areas) and qualitative shortcomings. Many lawyers have received little if any formal legal training, though recent changes have raised the standards and now require a four-year degree in law and passage of a unified national exam for lawyers, procuratorates, and judges" (*ibid.* at 117).

[245] In the case of China, see Potter, "Legal Reform in China", *supra* note 162. Potter points out that the reception of imported legal norms "by Chinese legal actors may ... depend on the extent to which these accommodate rather than displace the legacy of local norms" (*ibid.* at 476).

[246] Coffee, "Norms", *supra* note 46 at 2162. See also Berkowitz, Pistor & Richard, *supra* note 43.

[247] Peerenboom, "Ruling the Country", *supra* note 5 at 344.

[248] Pistor & Wellons, *supra* note 49 at 12. As Ramseyer has put it, in order for governments to facilitate economic growth, they must be "strong enough to specify and enforce property rights" but "too weak to regulate excessively" (*supra* note 73 at 18).

[249] Pistor & Wellons, *ibid.* at 14.

legal, social, and economic institutions and the demand for these reforms.[250] In both countries, relatively advanced legal systems existed well before periods of significant economic growth. This demonstrates that law reform and legal institutions only lead to economic growth where there is demand for effective implementation of existing laws and regulations, and where this demand leads to further growth-inducing legal reforms.

If socioeconomic and political change must occur in order to pave the way for legal development, thereby securing economic development, another factor must be taken into account: government policies that prevent the development of a positive socioeconomic environment. I have already mentioned some of the internal blocks to reform, such as corruption and the power of entrenched political and economic interests.[251] There are also external factors to take into account, including the foreign political and economic policy of developed countries. Ramseyer shows that, in the context of Japanese development, one of the positive motivators for legal reform was the threat of Western colonialism.[252] He should have added that Japan also had the good fortune to be able to adapt its legal institutions in order to resist this colonialism. As David Kennedy has pointed out, debate about the rule of law often obscures political choices made by developed countries about the worldwide distribution of wealth.[253] Barriers to development exist both within developing countries, but also, in the policies of developed countries.

Timing is crucial. It is important that legal reforms be timed properly so as to reinforce, rather than detract, from ongoing change in economic and social institutions. As Pistor and Wellons have noted,

> Where institutions are established in an environment that is not conducive to the economic activities they are to support, they are likely not only to be dysfunctional but inappropriate for their purpose; the chances are that they will

---

[250] Carothers, in discussing legislative assistance, points to the importance of taking advantage of the connections between legal institutions and other social institutions:

> Rather than seeing the task as legislative assistance per se, it is more useful to think in terms of helping a society develop the capacity to enact laws that incorporate citizens' interests and reflect sophisticated knowledge of the policy landscape. Ultimately, helping bolster this capacity will mean working with many people and groups outside the legislature, including political parties, citizens groups, the media, officials from the executive branch, jurists, and others (*supra* note 1 at 186).

Peerenboom also points to the importance of a "[g]reater appreciation of differences in local circumstances, including levels of wealth, popular attitudes and existing political institutions and cultures ..." in order to ensure that legal reform succeeds (Peerenboom, "Regulatory Compliance", *supra* note 3 at 29).

[251] McDonnell highlights the role that groups with sufficient political power can play in blocking reform to property rights regimes (*supra* note 169 at 998-1000). Daniels & Trebilcock also point out that "political economy-based impediments" can block effective reform in developing countries (*supra* note 2 at 109).

[252] Ramseyer, *supra* note 73 at 2.

[253] Kennedy, *supra* note 59 at 11.

> be structured to comply with policies that exist at the time they are established. Because of institutional inertia, these structures tend to survive future policy change and may skew subsequent economic development.[254]

It is not necessary for developing countries to set up formalized third-party mechanisms (such as courts) to enforce contracts and property rights. It is possible, as the example of TVEs in China shows, to align property rights and profit interests in such a way as to avoid expropriation. Arbitrary confiscation of property rights must be avoided if private investment is to be encouraged, but institutions with the power of state coercion may not be necessary to achieve this end.[255] What is necessary is a manner of signaling compliance with non-legal norms.[256] This could mean either binding economic actors in developing countries to the norms of Western business,[257] or preferably, encouraging organizations in developed countries to learn the signs of compliance with indigenous norms by organizations in developing countries.[258] Coffee points out that "[t]rust is a learned behavior,"[259] which means that developed countries, if they are to take seriously the task of integrating developing countries into the international economic system, must put some work into learning norms that can help build these bonds of trust. As Lubman has suggested, it is time for the West, and Americans in particular, to "reappraise the tone and aggressiveness of American insistence on rights-based solutions to problems that trouble Sino-American relations."[260]

My criticism of recent law and development projects is not intended to undermine the view that adoption of effective legal institutions is important for development. Rather, I point to the importance of adapting legal institutions to domestic circumstances. American corporate law, for instance, succeeds partly because of its compatibility with other American institutions: "When complementary parts fit together, they create a system that, because of synergies, is greater than the sum of its parts."[261] The complementarity between legal reforms in developing

---

[254] Pistor & Wellons, *supra* note 49 at 284; see also Coffee, "Norms", *supra* note 46 at 2168-69, who points out that a weak system of social organization resulting from historical factors such as political instability may influence norms of corporate governance. Corporate governance structures conducive to economic growth may only develop when social cohesion rather than social instability prevails.

[255] Clarke, "Economic Development", *supra* note 59 at 111.

[256] Coffee, "Norms", *supra* note 46 at 2172-74.

[257] Coffee points out that cross-listing of shares on the New York Stock Exchange ("NYSE") is a way of assuring domestic investors that the company will comply with NYSE norms (such as disclosure rules) and is improving its corporate governance (*ibid.* at 2174).

[258] Farber suggests that "legal reform is a good signal of being truly committed to economic reform" (*supra* note 26 at 84). In particular, the protection of human rights may signal that countries are "willing to sacrifice short-term advantages to obtain long-term benefits such as economic growth" (*ibid.* at 98).

[259] Coffee, "Norms", *supra* note 46 at 2176.

[260] Lubman, *supra* note 39 at 9.

[261] Paredes, *supra* note 43 at 1108.

countries and existing non-legal practices is an important determinant of the success of legal reform in bringing about positive economic development. If a minimalist model of rule of law reform, such as that proposed by Trebilcock and Daniels, is modified to ensure that existing local norms and values form the basis of rule of law reform, the adoption of at least the minimal institutions to which they point may well lead to development. Willingness to see the experience of Japan and China as a new paradigm of development is essential to ensure the successful application of this model in other countries.