JAPAN AND LAW & DEVELOPMENT IN ASIA: INTRODUCTION

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On November 5, 2004, a workshop was convened at the University of Wisconsin Law School, under the auspices of the newly-inaugurated Global Legal Studies Initiative, the East Asian Legal Studies Center, and the Institute for Legal Studies. The agenda for the workshop, entitled "Japan and Law & Development in Asia," centered on the following three themes: first, the role of law and legal institutions in Japan's economic development experience; second, the possible relevance of Japan's experience as a model for developing countries in Asia today; and third, the Japanese government's recent initiatives in legal technical assistance in various Asian countries.

The workshop was inspired by two basic convictions. The first of these convictions is that the developed countries in East Asia, such as Japan, must play a more prominent role in our thinking about the interplay between law and economic development, for both theoretical and practical reasons. On the theoretical side, "law and development"[1] initiatives are back in a big way, with rich countries putting enormous resources into them, and poor countries being subjected to their demands for legal change.[2] Whether their tax dollars are used in bilateral assistance, or to support international organizations such as the World Bank, citizens in donor countries should, at a minimum, want their money to be spent on projects that help further "development," however defined.[3] Furthermore, donor country governments control, to a large degree, global attitudes towards the countries and peoples they are elected to represent; in a globalized world we all have an interest in our international reputations. Law reforms are typically couched in technocratic

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[1] "Law and development" is used in the broad sense described by Taylor, *infra* note 15 and accompanying text.

[2] *See* David M. Trubek, Globalization and Legal Institutions: Two Cheers for the Rule of Law (Feb. 7, 2003) (unpublished paper presented at ceremony honoring Brun-Otto Bryde, Giessen, Germany, on file with author) (estimating that billions of dollars are spent annually on law and development projects).

[3] Development can be understood in purely economic terms, such as growth in Gross Domestic Product (GDP), or to include other factors. Amartya Sen, for example, argues that development should be understood in terms of various human liberties, and not in simply economic terms. *See generally* AMARTYA KUMAR SEN, DEVELOPMENT AS FREEDOM (1999).

language, but if the U.S. government, for example, pressures a developing country to reform its bankruptcy regime in a way that is seen to unfairly favor foreign creditors, or to reform its labor laws to facilitate layoffs, or to shut down productive, job providing factories because they ignore intellectual property rights, overall U.S. national interests may very well suffer. On the receiving end, of course, the impact is much more direct. Developing countries are advised, cajoled, and in some cases essentially required, to "reform" their legal rules and institutions, and even if staggering "law in action" problems render the eventual societal impact of such reforms impossible, there is no reason to think that there will be no impact at all.

Because law and development initiatives matter, to those on both the supply side and on the receiving end, they ought to be informed by explicit theory about the relationship between law and development. It is impossible that law and development initiatives will not be informed by some sort of theory, articulated or not, because anyone proposing to change a legal rule or institution will of necessity have an idea about how the current rule or institution causes or contributes to an undesirable social condition, and an idea how the proposed change will function to improve that social condition. Such ideas constitute theory, and articulating that theory, rather than leaving it inchoate, benefits both the proponent and the broader community. Proponents benefit because articulation demands definition, specificity, and at least some self-reflection, while the broader community benefits because articulation facilitates evaluation and critique. Unstated assumptions and inchoate theory can no doubt provide the grist for insightful critique,[4] but if what we want is rational discussion and debate that can only be facilitated by transparency of theory.

If it is true that we can never escape theory, it is equally true that in order for theory about law and development to be convincing, it must be able to make sense of the development miracle of Japan, and East Asia more broadly, which included progress along many dimensions beyond just rapid GDP growth.[5] Japan, together with Taiwan and South Korea, are quite simply

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[4] *See, e.g.,* 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.

[5] *See generally* World Bank, The East Asian Miracle: Economic Growth and Public Policy 27–77 (1993).

the best examples we have of existing societies that have enjoyed sustained, broad-based, and yet rapid economic growth. Any theory of law and development that cannot be reconciled with East Asian economic development is at best *partial*. This can be seen by contrasting "dependency theory," which ascribed economic failure in developing countries to the allegedly exploitative structure of the international system and counseled developing countries to de-link from the international economy, with current mainstream approaches emphasizing free markets, free trade, and integration into the international economy. Even a cursory look at Northeast Asian economic development shows that it provides at best limited support for either approach, as Japan, South Korea and Taiwan clearly prospered through their linkages to the global economy, yet managed those linkages in ways inconsistent with free-trade.[6] The same could be said of a theory of law and development that placed a high degree of emphasis on intellectual property rights. There may be some country, somewhere, that experienced rapid economic growth while also aggressively defining and enforcing intellectual property rights, but it was not in East Asia.

On the practical side, as the second and third topics explore, Japan and other developed countries in East Asia are now themselves becoming important exporters of law, particularly to developing countries in Southeast and Central Asia. Not surprisingly given its wealth and international status, Japan is the most active, as will be discussed in the following papers by Taylor and Matsuura. But South Korea is in the game as well, with its Judicial Research and Training Institute conducting legal training

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[6] For seminal explorations of the uneasy fit between East Asian practice and Western-generated theory, see generally Alice H. Amsden, *Taiwan's Economic History: A Case of Etatisme and a Challenge to Dependency Theory*, 5 MODERN CHINA 341 (1979) (arguing that Taiwan's economic development contradicts both critical and mainstream economic theory), ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989) (arguing that the interventionist role of the state in South Korea's economic development contradicts mainstream economic theory), and CHALMERS A. JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975 (1982) (arguing that the interventionist role of the state in Japan's economic development contradicts mainstream economic theory); *see also* Trevor Matthews & John Ravenhill, *Strategic Trade Policy: The Northeast Asian Experience, in* BUSINESS AND GOVERNMENT IN INDUSTRIALISING ASIA 29 (Andrew Macintyre ed., 1994) (exploring the role of interventionist trade policies in the economic development of Japan, South Korea and Taiwan).

programs for developing Asian countries,[7] and its competition authority, the Korean Fair Trade Commission, actively attempting to share its experience in competition law and economic development with China and other developing countries, in Asia and beyond.[8] Taiwan, finally, may turn out to be East Asia's most influential legal "exporter" over the long run, though with the least fanfare. Mainland China's scholars and officials involved in law reform quietly pay a great deal of attention to Taiwan's experience as they consider reforms to their own laws and institutions, and there is now much quiet yet direct exchange in the legal and judicial realms between Taiwan and the mainland.

We are accustomed by now to East Asians being consummate exporters of "hardware," from shoes and textiles to televisions, steel, automobiles, and computers, but should we not be surprised to find them now also exporting legal rules, institutions and practices? After all, have generations of scholars not told us that "Law" is something intrinsically and essentially Western?[9] Traditional non-Western societies such as those in East Asia may have had "Law" in the sense of rules promulgated and enforced by a political authority, but that never seemed to measure up to the Western ideal, in which law is distinct from politics, and organically related to substantive justice. Moreover, did the great sociologist of law Max Weber not tell us that "modern" law, characterized by formal legal rationality, is uniquely a product of Western social development, and that modern law is uniquely suited to the demands of capitalism?[10] And finally, have international business lawyers and trade negotiators not convinced us the East Asians do not believe in law in the same way that we do? Is business in East Asia not done on the basis of relationships rather than well-specified contracts, and are disputes not resolved by compromise and renegotiation, perhaps with the help of a senior third party intermediary, rather than through litigation?

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[7] The Judicial Research Training Institute, http://jrti.scourt.go.kr/english/about_jrti.asp (last visited Sept. 26, 2005).

[8] Nam-Kee Lee, Chairman, Korea Fair Trade Comm'n, Korean Economic Development Policy Lessons: The Shift from Industrial to Competition Policy (July 3, 2002), *available at* http://r0.unctad.org/en/subsites/cpolicy/docs/IGE0702/SpeechByChairman1.pdf.

[9] *See, e.g.,* Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 1-10 (1983).

[10] *See* David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720, 721–25.

While there is no doubt some truth to every one of these caricatures of East Asian legality, there may, on the other hand, be good reasons why this latest East Asian advance into international markets will succeed, if perhaps not as well as export drives in ships, semiconductors and flat-screen TVs. First of all, the idea of an unbridgeable gap between traditional East Asian legality and modern Western law has been overstated. Assuming for the sake of argument that such ideological traditions matter at all, longstanding tropes about traditional Asia law are being challenged. For example, the idea that traditional Chinese law was entirely criminal and administrative, and thus lacked a body of private law so important in the Western legal tradition, is being challenged by the first group of historians doing systematic archival research.[11] As for the charge that the East Asian political tradition saw law in purely instrumental terms, as simply a set of tools to serve political authority,[12] even if this is entirely accurate,[13] it may not be a very damning charge in the law and development realm. In fact, it is hard to imagine that law importers in a developing country wanting to think about law in anything but instrumental terms. If that is true, an East Asian law exporter, whose own country imported the relevant body of law and had to consciously confront the problem of how it would operate in the local social context, might actually be ideal. As Frank Upham pointed out nicely in response to a question from the workshop audience, insisting on importing law directly from the society in which it developed, as opposed to getting it "second hand" from an earlier importer such as Japan, would seem to be based on a misguided search for authenticity, when it is functionality that matters. And in spite of the pitfalls of thinking in terms of functionality, it is probably safe to assume that the more disparate the social contexts of the exporter and the importer, the harder it will

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[11] *See generally,* PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING (1996) (arguing that private law, in something close to the Western sense, did exist in Qing dynasty China); *see also* CIVIL LAW IN QING AND REPUBLICAN CHINA (Kathryn Bernhardt & Philip C.C. Huang eds., 1994) (exploring the question whether private law in the Western sense existed in Qing dynasty China).

[12] *See, e.g.,* JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 32 (1991) ("[t]he principal legacy of Chinese law (when imported by Japan) may have been a notion of law itself as an essential instrument of control in an administrative state.").

[13] *But see* John O. Haley & Veronica Taylor, *Rule of Law in Japan*, *in* ASIAN DISCOURSES OF RULE OF LAW 446 (Randall Peerenboom ed., 2004) (contesting the idea that Japan has lacked a true Rule of Law).

be to know how the import will function. For a developing country in Asia, then, does it make more sense to get Germanic commercial law from Germany, or from Japan (or Korea, or Taiwan), which appears somehow culturally closer, and which provides the most relevant development experience? And what of Weber, and the connection between modern Western law and capitalism?

First, even if Weber's historical claim is beyond dispute (i.e., modern law in fact did develop in conjunction with industrial capitalism in the West), it has not resolved easily into universal truths about law and market activity. For example, the relative informality that is so often said to characterize business relationships in East Asia suggests that social institutions can provide at least a substantial portion of whatever stability and predictability capitalist development requires. But even if the Weberian idea is entirely correct, and formally rational "modern" law will best facilitate economic development, the law and legal institutions that East Asia would be exporting today arguably fit Weber's ideal type better than do U.S. counterparts. In short, maybe one day we will talk about law as yet another technology that was invented in the West, but successfully commercialized in East Asia.

The second basic conviction that drove the design of this workshop was that the field of law and development tends toward the pathology that those who talk do not know, and those who know do not talk, at least not in sufficient detail. Law and development scholarship appears to be increasingly abstract and model-driven, focused on concepts such as the "rule of law," judicial independence, the security of property rights, or the Civil-Common law divide.[14] That sort of scholarship can be valuable, but it tends to be far removed from the realities of how legal rules and institutions have interacted with economic interests in any particular developing country, and how reforms might be implemented. As for the other side of the equation, the fact that those who know tend not to really talk is important because it is

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[14] *See generally* John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, *in* LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA 91-127 (Christoph Antons ed., 2003) (arguing that the Rule of Law, as defined in mainstream literature on law and economic development, was not present during Northeast Asia's rapid economic development); *see also* John K.M. Ohnesorge, *China's Economic Transition and the New Legal Origins Literature*, 14 CHINA ECON. REV. 485 (2003) (arguing that the Common-Civil law divide is not a useful angle from which to understand law and economic development in Northeast Asia).

just too common to hear, off the record, that this or that initiative makes no sense in Country X due to conditions on the ground, or that something is being done at the insistence of International Financial Institution Y, or Big Donor Z, even though it will likely prove useless, or even counterproductive, in the context of the developing country concerned. Even if we assume that everyone is acting in good faith, the fact that legal technical assistance tends to be undertaken by bureaucracies suggests that those at the implementation level, who are most likely to understand how the programs really work (or do not), may not be able to share what they know publicly, especially if it is bad news. In inviting Yoshi Matsuura, Veronica Taylor, and Frank Upham, we sought to assemble a group of people who both know a great deal about law and development issues, in Japan and beyond, and who also show a willingness to share what they know by participating in the general discussions and debates surrounding law and development.[15] That expectation proved justified during the workshop, and in the papers which follow.

Turning to those papers, and the selection of topics, Frank Upham's presentation addressed Japan's experience of law and development by exploring the position and role of the judiciary in postwar Japan. He then used that as a platform to explore topic two, Japan as a model for today's developing countries, by relating the Japanese experience to current debates in mainland China over the proper organization of the judiciary there. Yoshi Matsuura and Veronica Taylor in turn focused mainly on topic three, Japan's recent initiatives in legal technical assistance, and their approaches and conclusions can be seen in the papers that follow. Although each of the three topics could be studied in isolation, there are clearly virtues to considering them together. Japan's experience with law and economic development, for example, takes on more then historical importance if Chinese policymakers decide that their country should pursue the kind of "governed-market" industrial policy often associated with Japan

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[15] *See, e.g.,* Veronica Taylor, *Beyond Legal Orientalism*, *in* ASIAN LAWS THROUGH AUSTRALIAN EYES 47 (Veronica Taylor ed., 1997); Frank K. Upham, *Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of Law,"* 28 L. & SOC'Y REV. 233 (1994) (questioning orthodox views on law and economic development); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Rule of Law Series, Working Paper No. 30, 2002) (also questioning orthodox views on law and economic development).

during its high-growth era, topic two.[16] Japan's economic success, part of the broader East Asian Miracle, has been described, analyzed and debated for decades by economists and political economists, but that literature pays very little attention to law and legal system performance, and the East Asian Miracle has been largely overlooked in the literature focusing on law and development.[17] Yet in fact law and legality in Japan, like in Taiwan and South Korea, was intimately related to the political economy of rapid economic development, and if China were bent upon adopting a Japanese or South Korean approach to economic development, that would certainly have implications for Chinese law.

To give another example, an inquiry into topic three, the Japanese government's recent initiatives in legal technical assistance in Asia, will be enriched if it explores whether such initiatives are informed by Japan's own experience, or whether they instead are based on models and approaches with no particular connection to Japan.[18] While it would be unfair to hold Japan's law and development efforts to a higher standard, it would be a wasted opportunity if Japan were not able to draw on its own unique experience in designing such efforts, and instead simply drew on the standard law and development tropes that circulate in international circles.

In the papers that follow, Professors Matsuura and Taylor go far to vindicate the conviction on which the conference was based, that on purely practical grounds Japan's law and development initiatives indeed are too significant to ignore, but that also Japan has much to offer to ongoing theorizing about law and development.

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[16] For an extended example of the governed market, or "developmental state" thesis with respect to Taiwan and South Korea, as well as Japan in the 1960s, 1970s, and 1980s, see generally Robert Wade, Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization (1990).

[17] In addition to the works by Upham and Taylor, *supra* note 15, exceptions include the essays collected in Law and Development in East and Southeast Asia, *supra* note 14, Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions (Kanishka Jayasuriya ed., 1999), and Katharina Pistor et al., The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995 (1999).

[18] For a criticism of "do as we say, not as we did" approaches to law and development assistance, see both pieces by Upham, *supra* note 15.