

# ON RULE OF LAW RHETORIC, ECONOMIC DEVELOPMENT, AND NORTHEAST ASIA

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## I. INTRODUCTION

The 1990s saw a remarkable revival of the term “rule of law” in legal and political discourse in the United States and internationally. In 1989, one of America’s premier scholars of constitutional law, Laurence Tribe, could write, “the Rule of Law . . . has precious few sophisticated defenders these days.”<sup>1</sup> But Professor Tribe’s pronouncement did not dissuade American legal scholars and philosophers from undertaking a broad effort to resurrect the rule of law in American legal discourse and to put it to use in various jurisprudential and governance debates.<sup>2</sup> This Paper does not focus on America’s rule of law renaissance, but on the parallel phenomenon that occurred over roughly the same period on the international plane.<sup>3</sup> There the revival was led by international financial institutions (IFIs)—the World Bank, the International Monetary Fund, the Asian Development Bank, etc.—by the aid and development arms of the American government and the European Union, and to a lesser extent by non-governmental organizations. This Paper begins with a short discussion of rule of law rhetoric in American law and politics then discusses the international rule of law renaissance, focusing on the particular roles that rule of law rhetoric has played in economic

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<sup>1</sup> Laurence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726, 726 (1989).

<sup>2</sup> See generally RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001); NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001); *THE RULE OF LAW* (Frederick Schauer ed., 2001); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723; Richard H. Fallon, Jr., “*The Rule of Law*” *As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); *THE RULE OF LAW* (Ian Shapiro ed., 1994); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) (discussing various legal scholars’ effort to resurrect the rule of law in American legal discourse).

<sup>3</sup> Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 97-103 (1998).

development literature. This is followed by an exploration of the extent to which economic development in Northeast Asia conformed to the claims of this new law and development literature. Finally, the Paper examines how the rule of law rhetoric appears to have changed in the last few years.

## II. GENERAL OBSERVATIONS ON ANGLO-AMERICAN RULE OF LAW RHETORIC

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

First, at least in America, the rule of law has been invoked more for political than for analytical purposes and should not be understood as a legal term of art. “When an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it.”<sup>4</sup> Our tradition has produced no agreed definition of the rule of law, and there is no important tradition of academic analysis and explication of the term, as there might be with the German *Rechtsstaat* ideal. Few American law students study jurisprudence (legal philosophy), and the overwhelming majority of American law students never address the rule of law concept in any systematic way. In modern American legal scholarship it is far more damning to demonstrate that a legal rule has negative social effects or, less importantly, that a case decision cannot be reconciled with the governing statute or case precedent than it is to demonstrate that a rule or decision violates some vision of the rule of law.

Given this environment, there is little tangible reward for developing and refining the rule of law as a concept, and the most persuasive attempts to define the term treat it as shorthand for a group of

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<sup>4</sup> Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 (1958).

loosely related aspirations addressing various aspects of a legal system.<sup>5</sup> Definitions typically address the formal characteristics of the materials of the legal system, emphasizing the value of rules rather than discretionary standards and calling for clarity, specificity, and publicity. Definitions address the role of the decision maker as well, typically emphasizing neutrality as between the parties, independence from other arms of the government, the importance of keeping an open mind with respect to any particular case, and fidelity to the law rather than to personal political or social goals. In addition, definitions of the rule of law generally address certain due process or natural justice rights of citizens confronting the legal system, such as the rights to know the legal basis for state action against them, to have a hearing before a neutral decision maker, to present and contest evidence used against them, and to receive reasoned explanations of legal actions affecting them. The overall emphasis is on form and procedure rather than on any particular set of substantive rights or norms, though it is not at all uncommon for definitions of the rule of law to include references to democracy and core human rights. Rule of law rhetoric typically is invoked when a commentator wishes to criticize a particular legal rule or judicial decision, and until recently there has been little effort to use the rule of law as an element of broader social theorizing.

A second fact about the rule of law concept in Anglo-American jurisprudence is that it has often been used to champion our way of doing things over someone else's. Certainly the most famous example of this was A.V. Dicey's use of the rule of law in his argument for the superiority of English common law over French *droit administrative*,<sup>6</sup>

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<sup>5</sup> See, e.g., Lawrence B. Solum, *Equity and the Rule of Law*, in SHAPIRO, *supra* note 3, at 121. For example:

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.

Jones, *supra* note 4, at 145.

<sup>6</sup> ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (9th ed. 1945) (1885).

which he did not bother to understand beyond the most basic level.<sup>7</sup> Dicey claimed that England's unwritten constitution was characterized by fidelity to the rule of law, which he defined in such a way as to rule out administrative law in the continental sense. The English legal system as it actually existed did not meet Dicey's own definition of the rule of law in important respects, leading critics to view his ostensibly academic enterprise as an attempt to privilege his Whig political views against the rising tide of social legislation already remaking English governance when he wrote.<sup>8</sup>

Rule of law rhetoric was put to similar use during the Cold War when Western politicians and lawyers were actively searching for principled distinctions between Western and Soviet legal systems.<sup>9</sup> Soviet legal systems were similar to those of the West in that they contained rules and standards creating rights and obligations and they were operated by people called judges, prosecutors, and lawyers. Rule of law rhetoric became a vehicle for trying to explain how this all differed in some fundamental way from legality in the West. Although the collapse of the socialist world made this enterprise largely moot, rule of law rhetoric is still used in this way with respect to the legal system of the People's Republic of China.<sup>10</sup>

Rule of law rhetoric was revived for a similar purpose during the Asian Financial Crisis that began in 1997 as a way to distinguish Western capitalism from the "crony capitalism" practiced by Asians.<sup>11</sup> This had the effect of locating the source of the problem in Asia itself rather than in, to cite one possibility, the flows of "hot money" resulting from Western demands that Asian countries open their financial markets to global capital flows. In retrospect, Malaysia's decision to restrict such

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<sup>7</sup> F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 203-04 (1960); see SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 214-222 (4th ed. 1952); see also DICEY, *supra* note 6, at 475-77.

<sup>8</sup> See JENNINGS, *supra* note 7, at 52-59.

<sup>9</sup> HAROLD J. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* 190-95 (1950); Milton Katz, *The Rule of Law as Understood in the West*, 6 AM. J. COMP. L. 518, 518-19 (1957); see also INT'L COMM'N OF JURISTS, *THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS*, JAN. 5-10, 1959, at 187-321 (1959); see generally HAYEK, *supra* note 7; GOVERNMENT UNDER LAW: A CONFERENCE HELD AT HARVARD LAW SCHOOL ON THE OCCASION OF THE BICENTENNIAL OF JOHN MARSHALL, CHIEF JUSTICE OF THE UNITED STATES, 1801-1835 (Arthur E. Sutherland ed., 1956); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

<sup>10</sup> See generally PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* (1997).

<sup>11</sup> See, e.g., Alan Greenspan, Chairman, Fed. Reserve Bd., *The Ascendance of Market Capitalism* (Apr. 2, 1998), available at <http://www.federalreserve.gov/boarddocs/speeches/1998/19980402.htm>.

capital flows in the face of the crisis appears to have been a good idea, while the recent collapses of Enron, Arthur Andersen, and other pillars of corporate America have shown that “crony capitalism” can thrive in a highly (some would say overly) legalized society.

A final point concerns the use of rule of law rhetoric to mask profound political differences in foreign affairs. The Clinton administration made extensive use of this tactic to blunt opposition from American progressives and human rights activists to China joining the WTO. The argument went essentially as follows: WTO membership will force China to become a more legalized society in areas affecting international trade and economic governance, and this rule of law in trade and commerce will spill over into the realms of politics and individual rights. We Americans should therefore all unite under the slogan that what China needs is the rule of law, and stop worrying about giving up the threat of trade sanctions as a tool for pressuring China on human rights issues. Capitalist development in China will take care of everything. The accuracy of this prediction, with its resemblance to the modernization theory of the 1950s and 1960s, remains to be seen.

### III. THE IFIS AND THE NEOLIBERAL RULE OF LAW OF THE 1990S

Rule of law rhetoric in international development dates roughly from the fall of the Berlin Wall and likely grew out of a combination of circumstances. Since the creation of IFIs in the years after World War II, their charters have contained general restrictions on political interference in the affairs of borrower countries. In a suddenly unipolar world in which developing and “transition” countries had nowhere to turn for help but to the West, these restrictions apparently became a hindrance to the IFIs and the governments they served. As a consequence, while these provisions in the “constitutions” of the IFIs were never removed, they were strategically reinterpreted so as not to rule out IFI demands for specific changes to the legal systems of borrower countries.<sup>12</sup>

Intellectual justification for this expansion of IFI activities was provided by the rise of neo-institutionalism in economics, which argues that legal rules and institutions can profoundly affect economic

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<sup>12</sup> See Robert C. Effros, *The World Bank in a Changing World: The Role of Legal Construction*, 35 INT’L LAW. 1341, 1346 (2001).

performance.<sup>13</sup> While this is clearly true, and often just a restatement of Max Weber's ideas of a century ago, legal rules and institutions do not thereby become non-political. The "discovery" that legal systems matter for economic performance is, however, the official IFI explanation for their newfound willingness to insist on changes in the legal systems of their borrowers.<sup>14</sup> The process by which the IFIs strategically reinterpreted their charters, clearly driven by changes in the wider geopolitical context in which they operated, used to be kept relatively quiet by the institutions themselves. Now, however, one finds in print an IMF lawyer publicly praising the World Bank's general counsel for this bit of creative lawyering without seeming to recognize the irony of all this from those who would preach the rule of law.<sup>15</sup>

As for the rule of law vision put forth by the IFIs during the 1990s, the basic approach can be summarized as follows. Although the rule of law rhetoric of the IFIs echoed to some extent traditional definitions of the rule of law, emphasizing form, procedure, and process, the substantive core of the IFI law reform efforts was to convince borrower countries to adopt sets of rules that would enshrine the Washington Consensus in their legal systems. Deregulation, privatization, tight restrictions on bureaucratic discretion, stringent property rights protections (especially for intellectual property), enhanced protections for minority shareholders, and aggressive antitrust regulation provided the substantive core of many rule of law efforts.

The vision of law was simultaneously positivist and formalist: positivist in the sense that law consists essentially of a comprehensive set of rules to be applied to particular cases, and formalist in the sense that this set of rules, applied in a technically correct way, will provide one correct answer in the vast majority of cases. While sophisticated

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<sup>13</sup> See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

<sup>14</sup> See Sherif Omar Hassan, *Foreword*, in MARIA DAKOLIAS, COURT PERFORMANCE AROUND THE WORLD: A COMPARATIVE PERSPECTIVE v (World Bank Technical Paper No. 430, 1999). Hassan observes that:

Many countries around the world are undertaking legal and judicial reforms as part of their overall development programs. This has resulted from growing recognition that economic and social progress cannot sustainably be achieved without respect for the rule of law, democratic consolidation, and effective protection of human rights broadly defined; each of which requires a well-functioning judiciary that can interpret and enforce the laws equitably and efficiently. An effective judiciary is predictable, resolves cases in a reasonable time frame, and is accessible to the public.

*Id.* at 1.

<sup>15</sup> See Effros, *supra* note 12, at 1348.

students of jurisprudence may ridicule positivist accounts of law and formalist accounts of law application, both phenomena may be inherent in efforts, like those of the IFIs, to fundamentally remake societies through instrumentalist use of law. In any case, this was all presented as a package of technical changes necessary for *economic* development, perhaps out of a sense that there were still some limits on what the IFIs could demand in terms of political change from borrower nations.

There were always problems with various aspects of the IFI rule of law agenda, however. To take one example with respect to the role of courts, the rhetoric faced at least three identifiable problems: one of public relations, one of logic, and one empirical. The public relations problem was (and is) that the IFIs want courts to “just enforce the rules,” to function as courts do in Weber’s ideal type of formal, legal rationality. To call this the rule of law, however, is to strip away nearly all normative appeal the concept may have. People care about the rule of law primarily because they believe it will protect them from the state, and where the state is democratic this sometimes means protection from the will of the democratic majority. Simple “law and order,” a “dictatorship of law” in President Putin’s terms, is sufficient to protect them from their fellow citizens in the course of their daily lives but is not normatively satisfying. Thus, for the rule of law to have normative appeal, it must include some substantive content that courts can draw upon to shape and limit the positive law enacted by other state organs, whether this substantive content is conceived of in terms of universal human rights norms, natural law, or natural justice. In a legal order in which courts lacked this authority, the rule of law could be consistent with the worst sorts of state-imposed totalitarianism, and nobody is going to stand up and toast a rule of law in that sense.

Where courts do have authority to locate and invoke legal norms beyond the positive law, however, they cannot be forced to perform only a mechanistic, Weberian function. The reason that conservative law and economics scholars in the American context are considered hostile to the rule of law is that they champion neither formalist rule following nor traditional rights-centered analysis by judges, but instead champion judicial activism to reshape the rule structure toward economically efficient outcomes.<sup>16</sup> This may explain the relative absence of these scholars from the IFI rule of law initiatives, despite their normal willingness to display their professed expertise in practical economic

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<sup>16</sup> Tribe, *supra* note 1, at 726.

matters and their basic agreement with the free-market, anti-regulatory agenda of the IFIs. One could probably argue that they are intellectually more consistent than the IFI rule of law advocates, who are engaged in a fundamentally instrumentalist use of law, but who still want to don the rule of law mantle. Perhaps, if pressed, those who mastermind IFI rule of law initiatives would admit that they believe law can be changed instrumentally until it reflects their preferred set of norms and functions, but can then be somehow insulated from further instrumental manipulation. This type of thinking is not new in the history of legal aid to the developing world, however, and the lessons of history are not encouraging.<sup>17</sup>

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

The empirical problem, on which my own work has focused,<sup>18</sup> is that the judiciaries in Northeast Asia, particularly during the high-growth decades of the 1960s, 70s, and 80s, did not perform as the rule of law rhetoric imagines.<sup>19</sup> To paint with a broad brush, Northeast Asia's judiciaries were surrounded by procedural rules that made civil litigation unattractive to plaintiffs: they were slow in adjudicating the cases that were brought, they were staffed by judges with little or no practical

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<sup>17</sup> See generally 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.

<sup>18</sup> See John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA 91 (Christoph Antons ed., 2003).

<sup>19</sup> See *id.* (providing an in-depth discussion of the empirical problem of the rule of law concept in the judiciary).

training in legal practice or in business, and (at least in South Korea and Taiwan) judicial corruption was a serious problem. Whether cultural factors also contributed to low rates of civil litigation will not be addressed here, but these objective factors certainly contributed to a low propensity to litigate. Did the fact that Northeast Asia's judiciaries operated in this way negatively affect economic growth? We don't really know. We do know, however, that American industry used to view the limited scope of tort law in Northeast Asia as providing Asian manufacturers with a competitive advantage. It may also be the case that a user-*unfriendly* judicial system encourages the settlement of commercial disputes that would end in wasteful litigation in a system more receptive to litigation.

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

#### **IV. THE EVER-EXPANDING RULE OF LAW: FROM THE WASHINGTON CONSENSUS TO COMPREHENSIVE DEVELOPMENT**

When I first addressed this topic in 1997 and 1998, it seemed to me that the IFI vision of the rule of law was something very narrow, essentially an image of a functioning legal infrastructure that would

enforce the substantive rules corresponding to the neoliberal orthodoxy.<sup>20</sup> This meant a legal system that would strictly enforce contract and property rights, especially intellectual property rights and creditors' rights, and strictly limit the discretionary authority of bureaucratic officials.<sup>21</sup>

While this is still true to a point, the rule of law rhetoric of the IFIs has clearly changed with the times. In 1999 World Bank President James Wolfensohn proposed a new "Comprehensive Development Framework," which addressed legal reform issues in the following terms:

Without the protection of *human and* property rights, and a comprehensive framework of laws, no *equitable* development is possible. A government must ensure that it has an effective system of property, contract, *labor*, bankruptcy, commercial codes, *personal rights* laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.<sup>22</sup>

Three years later, former World Bank Chief Economist Joseph Stiglitz has both a Nobel Prize and a popular book entitled *Globalization and Its Discontents*, a book that is highly critical of rigid adherence to the Washington Consensus, particularly by the IMF.<sup>23</sup> Apparently the IMF felt that it could not let Stiglitz' critique go unanswered and that it must demonstrate that it cared even more about the world's poor than did Mr. Stiglitz. So in response it posted on its website an extraordinary open letter to Stiglitz from one of its economists, attempting to refute Stiglitz' charges of rigid adherence to neoliberal orthodoxy.<sup>24</sup>

Corresponding to this changing climate, the recent tendency has been for IFI rule of law rhetoric to expand to the point where it becomes a term to express just about everything one might associate with fair and just governance, including democracy, justice, human rights, and clean government, as well as clarity and predictability, the enforcement of property and contract rights, deregulation, and the control of bureaucratic

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 94-98.

<sup>22</sup> Memorandum from James D. Wolfensohn, President, World Bank Group, to the Board, Management, and Staff of the World Bank Group, A Proposal for a Comprehensive Development Framework 10-11 (Jan. 21, 1999), available at <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf> (emphasis added).

<sup>23</sup> JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS passim* (2002).

<sup>24</sup> See Kenneth Rogoff, Economic Counselor and Director of Research, International Monetary Fund, An Open Letter to Joseph Stiglitz (July 2, 2002), <http://imf.org/external/np/vc/2002/070202.htm>.

discretion. For example, the World Bank's 2004 *Initiatives in Legal and Judicial Reform* defines the rule of law as a condition that prevails when

(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the *human dignity of each individual is recognized and protected* by law; and (4) justice is *accessible* to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, *fight poverty*, and have *legitimacy*. Legal and judicial reform is a means to promote the rule of law.<sup>25</sup>

What we see now, at least from the World Bank, perhaps represents the revenge of the strategy that inspired the use of the term rule of law to describe neoliberal legal changes in the first place. By expanding the definition to include things dear to democracy, human rights activists, and the international NGO community (for example human dignity, fighting poverty, and legitimacy), the IFI rule of law has become a banner under which all right-minded internationalists can march. The IFI rule of law has truly become, in the words of legal philosopher Joseph Raz, the "rule of the good law,"<sup>26</sup> which represents a natural extension of the logic of neoinstitutionalist economics. If all aspects of a country's legal system are relevant for economic development, and thus within the legitimate scope of IFI scrutiny, then there is no reason why the narrow neoliberal emphasis on privatization, deregulation, property rights protection, and controlled bureaucracy cannot be augmented by demands for human rights protections, a social safety net, and other elements of social democracy.

What is lacking, however, is a sense that despite their ability to reinterpret their own charters, it should really not be the role of the IFIs to micro-manage national political and social systems. To make such an argument, however, puts one in the position of defending the principle of national sovereignty, which has fallen dramatically out of favor. As of 2002, the IFI rule of law represents the consensus among both the NGO Left and Washington Consensus Right that they should be able to use the power of the IFIs, which is of course based on the often dire economic needs of borrowing countries, to impose their policy preferences.

Empirically, the claim that this new Comprehensive Development rule of law is necessary for economic development is

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<sup>25</sup> LEGAL VICE PRESIDENCY, THE WORLD BANK, *INITIATIVES IN LEGAL AND JUDICIAL REFORM* 2-3 (2004) (emphasis added).

<sup>26</sup> Joseph Raz, *The Rule of Law and its Virtue*, 93 *LAW Q. REV.* 195, 195, 209 (1977).

proven false by an examination of the economic development history of Northeast Asia. While it remains true that Northeast Asia in the high-growth decades violated many tenets of the Washington Consensus rule of law, it violated even more tenets of 2002's Comprehensive Development rule of law. Human rights protections, especially in areas such as labor organization, workplace safety, and the environment were minimal at best, and social safety nets were thin or non-existent. For those of us who care about these things this may be an unattractive truth to confront. However, in the interest of clear thinking about international governance and the role of the IFIs, a bit of skepticism may be in order.