The Political Economy of Rule of Law in Middle-Income Countries: A Comparison of Eastern Europe and China

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There has been an explosion of interest in rule of law in recent decades and growing interest in middle-income countries (MICs) among economists and development specialists, including the World Bank. However, there has been relatively less work done on rule of law in MICs and the special issues MICs face in developing a functional legal system. We know that rule of law is highly correlated with levels of wealth. We also know that many MICs never become high-income countries (HICs). And we know that MICs face many challenges, some directly related to law and the legal system, others perhaps indirectly related, still others more or less unrelated to law and the legal system.

This is preliminary attempt to understand some of issues facing MICs as they seek to establish rule of law. In low-income countries (LICs), the main obstacles to effective governance are the lack of resources and weak or non-existent institutions. The demand for rule of law may also be low given the nature of the economy. By definition, MICs have some, albeit limited, resources, and most MICs have established the usual institutions associated with modern states and found in HICs. Accordingly, I emphasize political economy issues, how persons and groups with common or competing interests use politics and law to affect change and realize their goals, and in the process facilitate or impede the development of the legal system and the establishment of rule of law, acknowledging that the rule of law is subject to many different interpretations, and consistent with a wide variety of institutional variation.

To keep the scope manageable given the wide diversity of MICs, I compare Eastern European MICs and China. Part I provides a brief introduction to MICs and the general issues they face. Part II provides a broad empirical comparison of Eastern European countries, the Baltics, former soviet republics, and China. Parts III to V discuss rule of law issues in Eastern Europe, with comparisons to China, focusing on lustration issues, implementation gaps, and the very different performance of constitutional and regular courts. Part VI turns to recent debates about the role of courts in China, and the controversial crackdown on social and political cause lawyering. Part VII concludes.

I. An Overview of Middle-Income Countries

There is a general consensus about the goals of law and development programs: sustainable economic growth, establishment of rule of law and good governance, and consolidation of

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2 Understood somewhat more broadly, political economy as intended here refers to the interdisciplinary study of the interplay between economics, law, politics and culture in the creation of policies, institutions and practices and the outcomes they produce.
some form of constitutional democracy that protects human rights. Nevertheless, despite billions of dollars and the best efforts of international and domestic actors, the results of law and development projects have been on the whole poor (Carothers 2006). The World Bank’s ongoing study of good governance concludes that there is no evidence of any significant improvement in governance worldwide (Kaufmann et al. 2009).

While there has been considerable attention to failed and transitional states and the obstacles they face, much less is known about the particular issues facing MICs or what they should do to increase their chances for success. This is unfortunate, as seventy per cent of the world’s population, and one-third of the world’s poor, live in MICs (IEG 2007). There are currently 86 MICs, ranging in per capita income from $850 to $10,000. The number of MICs has grown in recent years, with some low-income countries growing into the category, a handful of MICs growing out of the category, and several MICs dropping out into the low-income category. In East Asia alone, 90% of people are expected to live in MICs by 2010 (World Bank EAP Update 2007).

MICs must overcome a range of technically, politically and socially complex issues: achieving sustainable growth that provides productive employment and protects the environment, while reducing poverty and income inequality; creating social safety nets to protect those disadvantaged by economic reforms and globalization; reducing financial volatility and avoiding the crises that have frequently followed in the wake of financial liberalization; strengthening state institutions and governance structures; and maintaining social and political stability in the face of rising expectations and demands on the state when the state’s ability to respond adequately to such demand is hampered by limited resources and weak institutions (IEG 2007, World Bank 2006, 2001). MICs also face new challenges arising from globalization and an international trade regime that have led to greater global inequality and limited the ability of MIC governments to set and pursue certain policies in their national interest – including some policies pursued by now developed countries during their high growth periods (Chang 2007; Netanel 2009).

A World Bank study (IEG 2007) found that while MICs have grown at an average rate of 3.7% since 1995, they have not been able to achieve sustainable high quality growth. Income inequality rose in over half of the MICs, with regional disparities particularly pronounced in some countries (including China). Aggregate growth has also come at a cost of serious environmental degradation, including rising carbon dioxide emissions, deforestation, and severe air and water pollution (including China). Moreover, while MICs have been relatively more successful in reducing poverty than LICs, poverty remains a serious problem in many MICs (once again including China). MICs also confront critical health challenges (including China). Some 70% of MICS are failing to meet their Millennium Development Goal of reducing child mortality by 2/3 (not the case for China).

While some MICs have improved institutional capacity, institutions remain weak relative to developed countries, particularly in transitional states or states undergoing major political instability. Three out of four MICs showed no improvement in combating corruption. Fifteen MICs are in the bottom quartile of the World Bank’s corruption index, and two out of three are below the global average. Judicial corruption has undermined public trust in the courts and undermined efforts to implement rule of law (Transparency International 2007). Programs to increase judicial independence have proven disappointing (Cuoso 2005; IFES/USAID 2002;
Santiso 2003). Litigation is often expensive and time-consuming. Access to justice remains limited. (How China and Eastern Europe fair along these dimensions is the subject of Parts II to VI).

International development agencies are now beginning to focus on the special challenges MICs confront. The World Bank, for instance, issued a new strategy paper for MICs (World Bank 2006), but the strategy is so new that it has yet to be evaluated (IEG 2007). That this is the Bank’s third strategy paper in six years reflects the difficulty the Bank has had grappling with the complex issues confronting MICs (WB 2001, 2004, 2006).

Attempts to design effective programs for MICs face significant challenges, including the wide diversity of MICs and the lack of models.

MICs are a varied group, socially, culturally, economically and politically. They range in population size from 1.3 billion in China to small islands such as Palau with a population of just 20,000. The per capita income of the wealthiest MIC is ten times that of the lowest. In 10 MICs, 40% of the population lives in poverty; in ten others, less than 5% does. Two out of three MICs have growth rates over 2%, with some enjoying growth rates over 6%; conversely, ten suffer from negative growth rates. The nature of the economies differ in terms of the relative importance of rural agriculture versus urban industry, amount and mix of imports and exports, reliance on natural resources, openness to foreign investment and trade, financial and service sector liberalization, and access to global capital markets. They also vary widely in institutional capacity. A handful are in the top quartile of the rule of law index, others are in the bottom quartile. Some are theocracies; others are atheistic. Some are democratic, or undergoing democratic transition; others are authoritarian, or undergoing reversion to authoritarianism.

One reason so little is known about how to address the problems encountered by MICs is that so few have managed to break into the elite club of wealthy states that enjoy rule of law, good governance and adequate protection of human rights. East Asian countries are the one notable regional exception. Singapore, Japan, Hong Kong, Taiwan and South Korea all rank in the top quartile on the World Bank’s rule of law index. Apart from North American and Western European countries, Australia and Israel, the only other countries in the top quartile are Chile from Latin America, Slovenia, Estonia and Hungary from Eastern Europe, and a handful of small island states and oil-rich Arab countries.3

The seemingly random countries in this odd grouping have (at least) one thing in common: wealth. All of them are high or upper-middle income countries (Peerenboom 2007). This is consistent with the general empirical evidence that rule of law and economic development are closely related ($r = .82, p < .01$), and tend to be mutually reinforcing (Barro 1997; Chang and Calderon 2000; Kaufmann et al. 2007; Knack and Keefer 1995, 1997; North 1990).

These results point to several topics for further exploration. First, apart from wealth,
what, if anything, do these successful countries share? Are there any discernible patterns among the successful MICs with respect to politics, legal systems, cultural characteristics, institutions, colonial history, population size or ethnic diversity? What distinguishes the successful countries from the less successful countries in the same region? What are the obstacles (political, legal, economic, cultural, institutional) to establishing a legal system and governance institutions that would compare favorably with those in the top quartile?

Second, even assuming wealth is closely related to rule of law and good governance, what are the implications for policymakers? The empirical studies do not shed enough light on how to achieve economic development, or the particular institutional arrangements necessary for rule of law or good governance. Nor do they shed much light on the path or sequencing of reforms.4

Third, why have East Asian countries been so successful? Is there an East Asian Model for development? (World Bank 1993; Amsden 1989; Johnson 1987; Wade 1990). I have argued that the East Asian Model (EAM) involves the sequencing of economic growth, legal reforms, democratization and constitutionalism, with different rights being taken seriously at different times in the process (Peerenboom 2007). More specifically, the EAM involves:

(i) an emphasis on economic growth rather than civil and especially political rights during the initial stages of development, with a period of rapid economic growth occurring under authoritarian regimes;

(ii) a pragmatic approach to reforms, with governments following some aspects of the Washington Consensus and rejecting or modifying others; in particular, with governments adopting most of the basic macroeconomic principles of the Washington Consensus for the domestic economy; rejecting or modifying the neoliberal aspects that would greatly reduce the role of the state through rapid privatization and deregulation, with the state also more active in reducing poverty and in ensuring minimal material standards to compete in a more competitive global economy; and modifying the prescribed Washington Consensus relationship between the domestic and global economy by gradually exposing the domestic economy to international competition while offering some protection to key sectors and some support to infant industries;

(iii) as the economy grows and wealth is generated, the government invests in human capital and institutions, including reforms to establish a legal system that meets the basic requirements of a procedural rule of law (Fuller 1976; Peerenboom 2002, 2007); over time, as the legal system becomes more efficient, professional and autonomous, it comes to play a greater role in the economy and society more generally;

(iv) democratization in the sense of freely contested multiple party elections for the highest level of office is postponed until a relatively high level of wealth is attained;

(v) constitutionalism begins to emerge during the authoritarian period, including the

4 Sequencing, in particular prioritizing legal reforms aimed at strengthening rule of law before democratization, has recently come under attack. See, e.g., Carothers (2007). For a contrary view on that issue as well as a discussion of other sequencing issues, see (Peerenboom, forthcoming 2010).
development of constitutional norms and the strengthening of institutions; social organizations start to proliferate and “civil society” begins to develop, albeit often a civil society with a different nature and political orientation than in Western liberal democracies, and with organizations with a political agenda subject to limitations; citizens enjoy economic liberties, rising living standards for the vast majority, and some civil and political rights although with limitations especially on rights that involve political issues and affect the control of the regime; judicial independence remains limited, with the protection of the full range of human rights and in particular civil and political rights suffering accordingly;

(vi) there is greater protection of civil and political rights after democratization, including rights that involve sensitive political issues, although with ongoing abuses of rights in some cases and with rights frequently given a communitarian or collectivist interpretation rather than a liberal interpretation.

This very roughly describes the arc of several Asian states, albeit with countries at various levels of economic wealth and legal system development, and with political regimes ranging from democracies to semi-democracies to socialist states (Peerenboom 2007, Peerenboom and Chen 2008). South Korea and Taiwan have high levels of wealth, rule of law compliant legal systems, democratic government and constitutionalism. Japan does as well, although it is a special case given its early rise economically and the post-War influence of the U.S. on legal and political institutions. Hong Kong, Singapore and Malaysia are also wealthy, with legal systems that fair well in terms of rule of law, but are either not democratic (Hong Kong) or are nonliberal democracies dominated by a single party (Singapore and Malaysia). Thailand, less wealthy than the others, has democratized, but has a weaker legal system and, under Prime Minister Thaksin, adopted policies that emphasize growth and social order rather than civil and political liberties. China and Vietnam are at an earlier stage. They are lower-middle and low-income countries respectively, and have legal systems that outperform the average in their income class but are weaker than the rest.

Again, this brief sketch of the EAM raises several important questions for further exploration. Given the diversity within successful East Asian countries, is there an EAM, and if so, has the EAM been the cause of economic growth and development (Krugman 1994; Ohnesorge 2003)? Assuming there is a definable East Asian Model, is it applicable elsewhere? That the EAM has proven to be a successful model for some countries in some circumstances does not mean that is the model for all countries everywhere regardless of their circumstances. Have globalization, the WTO and the strengthening of the international trade regime undermined countries’ ability to pursue the same policies followed by successful East Asian countries? Does the global economic crisis signal the end of an era where growth was driven by US consumption of exports and cheap financing from Asian savings and hence the end of the EAM of development? Are there ways of mitigating the negative aspects of the EAM, including corruption arising from corporatist relationships between government and business, the postponement of democratization and the limits on civil and political rights in the name of social stability and economic growth?

Eastern Europe provides an interesting contrast to China and the East Asian Model of development. Political reforms proceeded economic reforms, or occurred rapidly with
democratization; in general, economic reforms reflected a neoliberal, “big bang” approach rather the pragmatic, gradualist approach of China; after democratization, there was rapid dismantling or modification of socialist institutions and their replacement, or attempted replacement, by liberal democratic ones; and whereas the regional effects for China pushed in the direction of the EAM, Eastern European countries were significantly influenced by the EU accession process, including efforts to establish a rule of law modeled on the legal systems found in European HICs.

II. A Statistical Overview of Eastern Europe, the Former Soviet Republics and China

The big bang approach has generally been considered to be less successful than China’s gradual approach. The initial result of the big bang approach was much lower GDP per capita, increased poverty, rising inequality, a decline in life expectancy of up to six years, and higher rates of social alienation, depression and alcoholism. Whereas in 1988, only 2% of population in the state-socialist countries of Europe lived in absolute poverty, ten years later more than twenty percent did, with the rapid transition estimated to have led to between 3 and 10 million premature deaths (Drahokoupil and Myant 2009). By the mid-1990s, however, many Eastern and Central European economies had regained lost ground. During the next decade, the region outperformed Latin America by a vast margin, although growth rates and GDP per capita still lagged East Asia (Mody et al. 2009).

These broad regional patterns conceal considerable diversity. As is generally true for MICs, there is a wide disparity of wealth among MICs in Eastern Europe, China and the former soviet republics. At the low end, Kyrgyzstan, Uzbekistan, Tajikistan are LICs; at the other end, Slovenia is a HIC. In general, Eastern European countries are wealthier than the former soviet republics. Among the 18 Eastern Europe countries, in addition to upper income Slovenia, there are 10 upper-middle income countries (UM) and 7 lower-middle income countries (LM). Among the 12 former soviet counties, in addition to the three LICs, there are 8 LMs and just 1 UM (Russia). China is a lower-middle income country.

As noted, there is a high correlation between wealth and rule of law and other good governance indicators, although the correlation is lower between wealth and voice and

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5 Mody et al. (2010) argue in favor of the more open model recently adopted in Eastern Europe, including financial sector liberalization, in contrast to the East Asian model, with more gradual financial liberalization. However, East Asian countries have weathered the global crisis much better than Eastern Europe and Latin American countries. Indeed, although most countries in both Latin America and Eastern Europe experienced deep recessions, the downturn was less severe, and the recovery quicker, in Latin America. Herrero et al. (2010) attribute the better performance of Latin America to improved economic policies which “played a significant role in containing macrofinancial vulnerabilities before the crisis …. The authorities had learned the lessons from past crises and paid substantial policy and regulatory attention to signs of excessive short term capital flows, credit booms and the formation of potential asset price bubbles.” In contrast, Eastern Europe was subject to financial vulnerabilities as a result of growth policies where “large capital inflows and rapid credit growth were perceived as manageable and supportive to the catching-up process, while downside risks were seen as being contained.”
accountability (i.e. civil and political rights) than for other indicators. Thus, as expected, scores in the wealthier Eastern Europe and Baltics are higher for the region as a whole than in the poorer former Soviet republics, with China in the middle on most indicators except voice and accountability.

2008 Worldwide Governance Indicators Percentile Rankings

<table>
<thead>
<tr>
<th>Governance Indicator</th>
<th>Eastern Europe</th>
<th>China</th>
<th>Former Countries</th>
<th>Soviet Countries</th>
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<tbody>
<tr>
<td>Voice and Acct.</td>
<td>63.3</td>
<td>5.8</td>
<td>21.4</td>
<td></td>
</tr>
<tr>
<td>Political Stability</td>
<td>56.1</td>
<td>33.5</td>
<td>35.8</td>
<td></td>
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<tr>
<td>Gov’t Effectiveness</td>
<td>61.3</td>
<td>63.5</td>
<td>31.5</td>
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<tr>
<td>Regulatory Quality</td>
<td>69.2</td>
<td>46.5</td>
<td>34.0</td>
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<tr>
<td>Rule of Law</td>
<td>58.5</td>
<td>45.0</td>
<td>23.5</td>
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<tr>
<td>Control of Corruption</td>
<td>59.1</td>
<td>41.1</td>
<td>21.5</td>
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Looking beyond regional averages, there is considerable diversity within the region, as reflected in the following tables on Voice and Accountability, Rule of Law and Government Effectiveness.

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7 As the focus is on MICs, I include only one LIC – Uzbekistan – for comparative purposes. The rankings are generally similar for Uzbekistan, Kyrgyzstan and Tajikistan except for Kyrgyzstan’s surprisingly high 42nd percentile ranking on regulatory quality. Similarly, I include HIC Slovenia for comparative purposes.
Rule of Law (2008)
Comparison with income category average (lower bar)

Country's Percentile Rank (0-100)

Sources: Kaufmann D., A. Kraay, and M. Mastruzzi 2009: Governance Matters VIII: Governance Indicators for 1996-2008
Note: The governance indicators presented here aggregate the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of surveys, institutes, think tanks, non-governmental organizations, and international organizations. The WGI do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources.
Government Effectiveness (2008)
Comparison with income category average (lower bar)

Country's Percentile Rank (0-100)

Note: The governance indicators presented here aggregate the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organizations, and international organizations. The WGI do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources.

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The former soviet countries (Armenia, Georgia, Russia, Turkmenistan and Uzbekistan) do fairly poorly on all three indicators, with the exception of Georgia and Armenia’s relatively high ranking on government effectiveness. Georgia ranks highest on all three indicators. Russia’s rankings are particularly low relative to its UM income level. Although Turkmenistan is a LM country, it ranks below low income Uzbekistan on all three indicators.

Within Eastern Europe, performance generally tracks wealth, with UM countries generally outperforming LM countries. High income Slovenia, and UM Estonia, Czech Republic and Hungary stand out on all three indicators, followed by UM Latvia, Poland and Croatia. UM Turkey does reasonably well on rule of law and government effectiveness relative to wealth but significantly less well on voice and accountability. UM Romania is about average for its income class.

Among LM countries, Bulgaria outperforms the average country in its income class on all three indicators. Its rankings are similar to the lower end of the UM countries. Serbia, Albania and Bosnia-Herzegovina outperform the average in their income class on voice and accountability, but are about average on rule of law and government effectiveness. Kosovo is a laggard across the board, with scores similar to or worse than those of the former soviet republics.

China, as noted, ranks very low on voice and accountability, but slightly outperforms the average LM country on rule of law and does significantly better in terms of government effectiveness. It is therefore similar to UM Eastern European countries in government effectiveness and similar to LM Eastern European countries on rule of law, but much lower than even the lowest scoring Eastern European country on voice and accountability.

The diversity of performance within Eastern Europe, and the generally inferior performance of the former soviet countries, calls into question theories that would attribute ongoing problems in some countries to the legacy of socialism alone. The results also suggest that there is no single development path for former socialist states, much less for all MICs, thus calling into question one-size-fits-all approaches to development based on rule of law toolkits that seek to transplant the values, institutions and practices found in high-income

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8 See Balcerowicz (2009) (using different indicators but reaching a similar conclusion). See also Krygier (2009), noting that “although communism imposed common and crucial systemic features on every country in the bloc, communism was not identical in every country.”

9 There is a growing “varieties of capitalism” literature that seeks to chart the various development paths in the region. Most commentators agree that neither the “Liberal Market Economy,” represented by the US and the UK, nor the “Coordinated Market Economy,” represented by Germany, accurately reflects the situation in the region. They differ, however, over how best to describe and conceptualize the various development paths. Nolke and Vliegenthart (2007) prefer Dependent Market Economies. King (2007) favors “Liberal Dependent Post-Communist Capitalism” in CEE and “Patrimonial Post-Communist Capitalism” in the rest of the post-communist world. Myant and Drahokoupil (2010) distinguish between FDI-based (second rank) market economies, peripheral market economies, oligarchic or clientist economies, remittance and aid-based economies, and order states (which applies to CIS countries that underwent the most limited reforms, where it is not even clear that they should be classified as capitalist). See also Lane and Myant (2007).
Euro-America. A closer examination of several issues highlights certain common issues and the diversity of responses within Eastern Europe.

III. Transitional Justice: Decommunization and Lustration

Transitional justice issues arise whenever there is a dramatic change in the ruling regime. A key issue is how to square the new regime’s commitment to the principle of nulla poena sine lega with the desire to rectify past injustices by holding people liable for something that was not illegal under the previous regime. Other issues include the tension between individual and collective guilt, how far responsibility should be pursued up the chain of command, and the appropriateness of amnesties. These issues bear directly on the rule of law, and implicate “three different, and difficult to harmonise, demands of seeking to instantiate the rule of law in the present, to repair consequences of its absence in the past, and to establish conditions for it in the future” (Czarnota 2009). The difficulty of reconciling these competing demands suggests that conventional thin conceptions of rule of law that emphasize legal continuity and certainty are at best only partially applicable to the special circumstances of regime change from authoritarianism to democracy.

While the rapid and dramatic changes in Eastern Europe gave rise to all of these issues, transitional justice in post-communist countries differed from transitional justice in other places in the emphasis on lustration and decommunization. Although the terms are often conflated, lustration refers to the screening of persons seeking certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), whereas decommunization refers to all political and legal strategies the aim of which is eradication of the legacies of communism, including eradication or modification of Party organizations, dismantling of the secret police, creation of new institutions, and amendment of existing laws and passage of new laws.

Initially, there was not much emphasis on transitional justice issues as a result of the peaceful transfer of power pursuant to a negotiated agreement among the political elite via the “round table talks” (the exception being the violent demise of the ruling regime in Romania). However, almost all countries passed ultimately some form of lustration law, and most laws were later amended, although the laws varied significantly in terms of the scope of people covered, sanctions and the offices subject to restriction.

Some countries opted for a substantive or thick conception of rule of law that rejected the “unjust laws” of the former regime and prioritized rectification of past justice over the principle of nulla poena sine lega. Other countries adopted a more formalistic, procedural or thin conception of rule of law that emphasized legal continuity and legal certainty, rejecting retroactive application of law even to allow punishment of state-sanctioned murderers.

The Eastern European experience with lustration laws is too diverse and normatively contested for a simple final assessment. Critics charge that lustration laws reflect a concept of collective rather than individual guilt, are based on a presumption of guilt rather than innocence, and have led to witch hunts and been abused for political motives, as when candidates for office are “outed” on the eve of elections or alleged to have been informers. On the other hand, advocates argue that the new regime must distinguish itself from the previous regime; rule of law and democracy must be defended even if at the price of
tolerating certain exceptions to the “rules of game” as they exist in established democracies; and the debates over lustration laws and their applications contributed to a more informed citizenry and the development of a rule of law culture.

Significantly for present purposes, although the particular path a country took depended on various factors, in all cases the outcomes were heavily shaped by politics and the struggle over political and economic power:

Lustration and decommunisation in all post-communist countries became an issue when a real struggle for the future social and institutional structure of the country began. Apart from showing that these issues are not backward looking but forward looking, this fact also shows that lustration and decommunisation were and are part of the political process and political struggle. The debate about lustration and decommunisation is generated by the contemporary political positions of actors involved in this battle. Lustration became a part of the pursuit of historical justice, but more importantly part of the struggle over social justice, over the criteria and rules of redistribution of the national product and national assets, when the losers of the economic transformation, who not long before comprised the main force in fighting against communism, discovered that many of the main beneficiaries of the transformation were former nomenklatura and members of security apparatuses. (Czarnota 2009).

**Implications for China**

China’s gradualist approach to economic and political reform has prevented or at least postponed the addressing of transitional justice issues. To be sure, the end of the Mao era did lead to the rehabilitation (often posthumous) of some individuals convicted of politicized crimes or purged as a result of various political movements, the restoration of property or payment of compensation in some cases, and the highly publicized if rule-of-law-challenged trial of the Gang of Four. Moreover, the gradual transition has led to a slow transformation of state and Party organs, thus anticipating to some extent the “decommunization” that followed regime change in Eastern Europe.

Nevertheless, a number of issues might still prove controversial. Most notably, the government has so far refused to reconsider the Tiananmen incident, to address the demands of the “Tiananmen mothers” and others seeking information about and justice for their children who lost their lives, or to release some people still imprisoned for their part in the incident despite calls from human rights organizations to do so. In addition, as China’s low score on Voice and Accountability suggests, a number of people have been arrested on a variety of charges, including subversion and endangering the state, and sentenced to administrative detention or prison, for what many citizens might consider to be legitimate exercise of their rights under international and even domestic law. Examples include the arrests and detention of Falungong disciples, Internet users, whistleblowers who expose government corruption and malfeasance, petitioners and demonstrators protesting alleged violations of their rights in land taking cases, labor disputes, or disputes between homeowners and developers or their affiliated management companies, and the detention or harassment of activist “weiquan” lawyers who engage in social and political cause lawyering. Regardless of
the substantive merits of these cases, many cases involve procedural irregularities, including in some cases torture, coercion and physical abuse. In addition, although perhaps not to be compared to the infamous secret police of the former Soviet Union, a large and powerful national security and public security apparatus continues to engage in extensive monitoring of individuals.

Whether such issues will lead to the same concerns over transitional justice and the passage of lustration laws as in Eastern Europe remains to be seen. Most of the main parties involved in the fateful decisions about the Tiananmen incident in 1989 are now dead or will be soon. While a number of groups are very vocal in their demands for a reappraisal, many citizens, including many young people, seem to have moved on and to be focused on other concerns.

The experiences of other successful East Asian countries also suggest that transitional justice concerns may play a less prominent role in China than in Eastern Europe. One study attributed the relatively low concern over transitional justice issues to various factors, including “(1) relatively low levels of public awareness, especially in countries like South Korea where a Confucian mentality prevents many from demanding the punishment of past rulers; (2) Buddhist populations that object to ideas of revenge; (3) populations concerned more with the capability of the new government to improve the quality of life by revitalizing the devastated economy than rectifying the past; (4) weak civil societies and an unmet need for new leadership; (5) the lack of historical examples in the region; and (6) the absence of regional human rights mechanisms and regional cohesion.”

The prosecution of two former presidents in South Korea is a notable exception. However, even the implications of that case are ambiguous with respect to a broader movement toward social justice in the region. Although both Chun Doo Hwan and Roh Tae Woo were convicted, many citizens and commentators viewed the trials as a politically motivated show trial. Despite longstanding calls for prosecution from victims of the Kwangju massacre, President Kim Young Sam decided to prosecute only after Roh’s hidden assets came to light. Moreover, the investigations revealed little new information; the prosecutions were limited in scope; and many victims were never compensated, including “over 8,601 public officers and employees of state enterprises who were forced to resign or the 38,259 victims of Samchung Training Camp who were arrested, detained, and put to forced labor without any due process, or the 717 journalists who were dismissed for reporting the truth” (Park 1997).

Assuming that the CCP will not remain in power forever, whether transitional justice issues will become an issue in China will depend on several factors, including the nature and timing of regime change and political realities at the time. On the one hand, the long and gradual reform process, the significant efforts to professionalize and depoliticize the judiciary and other state organs, the implicit social contract where civil and political liberties are restricted in the name of social stability and economic development, as well as other regional factors cited above, may diminish the intensity of the demands to rectify past injustices or limit the scope of the transitional justice issues that are pursued. On the other hand, as in Eastern Europe, political economy issues may be determinative, with some factions or groups pressing transitional justice claims as a way of pursuing political or economic power and

advantage.

IV. Legal Transplants and Implementation Gaps

In addition to calls for transitional justice, the sudden transition in Eastern Europe resulted in rapid and wide-ranging reforms of the political, economic, and legal system, as well as the social order and the relationship of individuals to the state and to each other. Initial designers of the new order debated the merits of a limited form of constitutionalism that emphasized traditional negative (civil and political rights) and limits on the ability of the state and citizens to challenge property rights through the establishment of an expansive welfare state; others emphasized the need for broad political participation in determining the allocation of resources and the protection of basic social rights as necessary protections against social exclusion and civic passivity (Skapska 2009). Notwithstanding the differences, the new order was modeled on the values, institutions, and rules of wealthy liberal democracies.

The initial design phase was then followed by a period when Eastern European countries competed in a “regatta” to see which could be the first to join the European Union. During this phase, the emphasis shifted from broad systemic design issues to compliance with more than 80,000 pages of highly specific technical requirements (Priban 2009). The accession process has been widely criticized. Martin Krygier (2006), for instance, described the process as elite driven, instrumentalist, technocratic, undemocratic, and formalistic in the extreme. Not only were the criteria fixed and imposed without regard to existing local conditions, many of the criteria did not even apply to existing members. There was a double democracy deficit. On the one hand, the criteria were determined without much political participation from the new entrants. On the other, governments in the new entrants agreed to the terms without much domestic discussion.

Critics and skeptics accused the designers and technocrats of ignoring law and development lessons about legal transplants and creating Potemkin villages (Priban 2009). Even those who believe there was little choice but to push for radical, top-down reforms acknowledge that this approach has led to implementation problems and a significant gap between law on the books and actual practice (Balcerowicz 2009).

There is no doubt that it is easier to pass laws modeled on those of high-income Euro-American liberal democracies than to implement them. Implementation is problematic because institutions are lacking or weaker in developing countries. Moreover, resistance to, and local adaptation of, transplanted institutions, norms, and rules is most prevalent in the implementation phase.

Nevertheless, the problems should not be overstated. Over time, the implementation gap has narrowed and is likely to narrow further, at least in some areas, as institutions grow stronger and citizens and government officials adapt to the new rules of the game. As we have seen, notwithstanding widespread complaints and high levels of public dissatisfaction with the legal and political system, Eastern European countries on the whole rank higher than China and the former Soviet republics on rule of law and good governance indicators. Moreover, even critics of the accession process acknowledge macro-level benefits in terms of political stability: “the very existence of EU political conditions constituted a specific
limitation of postcommunist political power and successfully contained some excesses of political populism … the conditionality process weakened democratic deliberation but strengthened democratic institutional designs in those countries” (Priban 2009). This “democracy dividend” offsets to some extent the aforementioned democracy deficits.

Notwithstanding ongoing problems, citizens of Eastern Europe enjoy greater personal and political security (Ganev 2009):

The probability that ordinary citizens in Eastern Europe might be subjected to arbitrary arrests or unlawful police harassment is, lamentably, not zero – but it is not considerably higher than elsewhere in the European Union. It would take a great deal of paranoid imagining to conjure up a scenario where ruling parties in the region cancel elections, imprison opposition activists on trumped up charges, and suppress the democratic process. And that power-holders in the EU’s newest members will suspend their country’s constitution, dismantle the fundaments of democratic governance and unleash large-scale repressive measures against the citizenry is as remote a possibility as it is in the “core Western democracies” where the Rule of Law originated.

A Comparison with China

China has also looked extensively to foreign models. However, as with economic reforms, legal reforms have been more gradual, and above all, pragmatic. At the broadest level, China has rejected liberal democratic rule of law in favor of socialist rule of law. Legal reforms have also drawn on and adapted existing institutions and practices such as the Political-Legal Committee, adjudicative committees and individual case supervision by the procuracy and people’s congresses. In contrast to the Eastern European experience, where legislators copied EU member laws “by the yard” (Pistor 2004), the general principle for legislators in China has been to study, refer to and adopt foreign laws where they are useful, but to modify and adapt them to China’s “national conditions” (guoqing) as needed.

There are still implementation gaps, particularly in some areas of law (most notably with respect to civil and political rights and the implementation of criminal procedure laws) and in some regions, particularly less developed areas where institutions are weaker. Implementation problems are due to a variety of causes, including insufficient resources and relatively weak institutions as generally found in comparable lower-middle income countries. Nevertheless, China’s rankings on rule of law and government effectiveness and its rapid

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12 See also Sadurski (2004).
13 The Political-Legal Committee is a Party organization that oversees the courts, procuracy and public security. Adjudicative committees are a panel of senior judges in every court that review and decide important and controversial cases heard by the collegial panel of three judges. PRC law allows the procuracy to supervise both civil and criminal cases decided the courts through a procedure known as kangsu. Until recently, people’s congresses were also able to supervise individual cases. See generally Peerenboom (2002).
economic growth suggest that its gradualist, more pragmatic strategy, has worked reasonably well to this point in some respects, albeit at a cost of severe restrictions on civil and political rights.

China’s low score on civil and political rights suggests that one advantage of the Eastern European approach is that the costs of fundamental political reforms are front-loaded.\(^{15}\) In contrast, as with lustration and transitional justice issues, China has postponed fundamental political reforms. This is not necessarily a bad strategy. South Korea and Taiwan also restricted civil and political rights during the rapid growth phase, and democratized at a higher level of development as a result of a peaceful, negotiated transition. Although the transition still resulted in dramatic changes in laws and institutional orientation, many of the institutions were already more developed and professionalized. Thus, they were prepared and able to assume their new roles and responsibilities - including greater protection of civil and political rights - thereby contributing to a smoother transition than seems to have occurred in Eastern Europe, and certainly than has occurred in the former soviet countries.

Moreover, many skeptics challenge the more rosy picture presented above where Eastern European institutions and practices converge over time toward those in found in high income liberal democracies. They suggest that regime change combined with early privatization has resulted in a form of elite-dominated political capitalism that undermines rule of law.

V. Economic Transition and the Ongoing Effects of Rapid Privatization on Rule of Law

One of the striking features of Eastern Europe is that constitutional courts are often held in high regard while regular courts are not.\(^{16}\) As summarized by Ganev (2009, footnotes omitted):

By the end of the decade Constitutional Courts throughout the region established themselves as a formidable political factor – and their interventions structured political processes in a decisive manner. The Courts contributed to the consolidation of the Rule of Law in Eastern Europe in two ways. Firstly, they successfully used judicial review to constrain political elites and create a political milieu where every politician is forced to realize that constitutional provisions matter…. [S]urely analysts who chronicle the rise of judicial review in the contemporary world should mention the Hungarian Court’s decision on social rights, the Bulgarian Court’s decision on the Law on Judicial Power, the Romanian Court’s decision on the constitutionality of parliamentary rules, or the series of decisions whereby the Slovak Constitutional Court blocked Vladimir Meciar’s repeated attempts to subvert the constitutional order in Slovakia. Each of these decisions shed light on this key Rule of Law question: what is it that political majorities can and cannot do in a democratic political system? They also marked the emergence of the Courts as autonomous political institutions able to resist the encroachments of power-maximizing politicians, and boosted the Justices’ reputation as defenders of the

\(^{15}\) Similar arguments are made regarding India. See Peerenboom (2009c).

\(^{16}\) Bugarić (2008) points out that constitutional courts, subject to populist criticisms in several countries, have lost some of their luster and authority.
Constitution. Secondly, the Courts also intervened in, defined the constitutional content of, and guided their countries’ “mega-politics,” or “the core political controversies that define (and often divide) whole polities.” Their jurisprudence not only set the parameters of the constitutional game played by political elites, but also reverberated throughout society and provoked citizens to think about the nature of the political community to which they belong.

In contrast, the regular courts are seen as chronically dysfunctional and strikingly inefficient (Ganev 2009, footnotes omitted):

The evidence is undisputable – and the picture is abysmal. Survey after survey, opinion poll after opinion poll confirm that in Eastern Europe judges (as opposed to Justices) have a reputation as self-interested actors whose moral and professional integrity has been compromised, and courts are perceived as under-performing institutions that basically fail to deliver what is expected of them. In 2005 – i.e. after the first round of EU’s eastward expansion as a result of which most former Soviet satellites gained full membership – Estonia was the only country where more than 50% of firm managers assessed the courts as “honest and uncorrupted.” Since the late 1990s, the number of East Europeans who believed that their courts are “honest” has been declining, and only one in four businessmen expressed the view that judges can be trusted. Levels of dissatisfaction with the way ordinary judiciaries operate are astonishingly high in the EU’s newest members. A stunning 100% of those polled in countries like Bulgaria, Romania and Slovakia complained that they find it difficult to ensure a reliable access to transcripts of court proceedings; 90% reported problems with obtaining judicial decisions, on both trial and appellate level. Less than half of firm managers believe that courts are “able to enforce their decisions” in countries like Hungary, Slovenia, Estonia, Czech Republic; the percentage is less than a third in Lithuania and Poland.

The dominant view attributes the relative success of constitutional courts and the disappointing performance of regular courts to political economy factors. Privatization created a powerful class that found constitutional courts useful in settling major political disputes peacefully but saw rule of law and strong independent regular courts as either unhelpful for, or a threat to, their economic activities and interests. Former communist apparatchiks turned entrepreeneurchiks as a result of privatization “stood to benefit if courts were marginalized, legal norms were not implemented, and the reach of law-enforcement agencies is curtailed” (Ganev 2009).

The pessimistic view is that early decisions regarding privatization effectively undermined hopes for rule of law, at least in the short to mid-term (Skapska 2009):

The sheer amount of property to be privatized, and the strong interests involved make the rule of law toothless, especially if the state is weak. Thus, instead of law-controlled privatization, one observes growing corruption, nepotism and clientelism as important mechanisms of transformation of the state-owned into private property … In this initial period of conquest, the rule of law could have only a purely symbolic meaning, far from
reality…. In … postcommunist states, the object of a quasi-colonial conquest … was – and still is – state-owned, or national, property, and the tools of conquest often became the law, perceived as an instrument for the protection of strong interests. In this context, the principle of a democratic state ruled by law – an opening norm of all postcommunist constitutions – could acquire a quite dubious content.

A somewhat more optimistic view is that the OECD accession process along with ongoing domestic pressure for further reforms have had some positive impact, and may lead to further positive changes. As indicated by the World Bank data, there has been some progress in institutional development. There are also some signs that regular courts in some countries may be able to handle at least run of mill commercial cases effectively.

Hendley (2009), for instance, notes that despite common concerns over political influence and telephone justice in Russia, citizens are increasingly turning to litigation in courts to resolve commercial disputes. Thus the courts appear to be able to handle cases between relatively equal parties reasonably impartially and effectively.

On the other hand, political influence remains a factor when there is a significant differential in power between the parties. More fundamentally, Russia’s extremely low score on rule of law indicators reflects Putin’s politicized, instrumental use of the legal system to curtail the powers of the oligarchs and thus thwart the rise of political capitalism by shifting political and economic control over Russia’s natural resources to the central state. That an overwhelming majority of Russians enthusiastically supported Putin demonstrates once more that rule of law is not the only, or necessarily most important, social good.

Nor is Russia the only country where dissatisfaction with the political and legal systems has led to a populist backlash. Bugaric (2008: 192) points out that while Central and Eastern European democracies are not about to collapse because of populism, persistent populist attacks on legal institutions, including constitutional courts, do present a serious threat to liberal democracy and should be taken seriously. He recommends a strengthening of liberal democratic institutions, including an independent judiciary, independent media, a politically neutral and professional civil service, and independent anti-corruption commissions. Tismaneanu (2007: 37) concurs regarding the threat, but leaves the open the possibility of reversion to authoritarianism, arguing that “political reform in all these post-communist societies has not gone far enough in strengthening counter-majoritarian institutions that would diminish the threat of new authoritarian experiments catering to powerful egalitarian-populist sentiments.”

Comparison to China

Again, the comparison to China is intriguing, where the situation is almost the mirror opposite of that in Eastern Europe. China has yet to establish a constitutional court, and constitutional law remains a relatively undeveloped area. Constitutional law, and constitutional litigation in particular, serves three broad purposes: addressing division of power issues among state organs; resolving conflicts between the central and local government, including inconsistencies between lower level regulations and the constitution; and protecting individual rights. The main role of the constitution to date has been to provide an initial
distribution of power among state organs. This then provides the backdrop against which legal reforms, which frequently affect the balance of power among key state actors, are negotiated. In the absence of a constitutional court, however, most issues involving the balance of power between state organs, such as whether the procuracy and people’s congress should be able to review court decisions, have been left to the political process, with the Party being the ultimate arbitrator when the conflicts become too intense or there appears to be a deadlock.

Constitutional law also provides the basis for addressing conflicts between the central government and lower level governments, which is a form of principal-agent conflict. The 2000 Legislation Law granted citizens and other entities the right to propose to the National People’s Congress Standing Committee (NPCSC) that lower regulations were inconsistent with the constitution or laws.

To what extent this new review mechanism will empower citizens remains to be seen. Citizens have submitted at least 37 requests for review (Hand 2007). However the NPCSC has yet to respond formally to a citizen proposal for review. Moreover, although the NPCSC issued two circulars setting out detailed procedures for handling proposals for NPCSC review of administrative regulations and judicial interpretations, these circulars do not provide much transparency into how the decisions are actually made.

More generally, while the NPCSC review creates a constitutional mechanism for dealing with one type of principal-agent problem, for the most part, principal-agent issues, including the problem of inconsistent regulations, are dealt with through other administrative and political mechanisms. The role of the courts is limited given their inability to strike down abstract acts.

Constitutional litigation to protect individual rights is only just beginning, and future progress is likely to be slow. In addition to the lack of a constitutional review body, the constitution is generally not considered to be directly justiciable. Even if a constitutional review body were to be established with jurisdiction over individual rights claims, progress would likely be slow, as it was in Poland and Hungary in Eastern Europe and South Korea and Taiwan in East Asia prior to democratization. While the courts might be able to address adequately certain discrimination claims, they are likely to be less effective handling civil and political rights cases, which are threatening to the ruling party, or socio-economic cases, for reasons discussed below.

In contrast to the more limited progress in constitutional law and protecting civil and political rights, there has been relatively more progress in improving the judiciary and their capacity to handle commercial disputes as reflected in higher levels of education and professional standards for judges, rising rates of commercial litigation, and public polls. The general trend in the commercial area has been for an increase in litigation with an expansion of the range of justiciable disputes, while mediation has decreased and arbitration has remained relatively stable and limited (Zhu 2007: 21, 26). The number of first-instance economic cases increased from 44,080 in 1983 to 1,519,793 in 1996, while the number of first instance civil cases increased from 300,787 in 1978 to 3,519,244 in 1999.

In contrast to the Eastern European public polls, Chinese citizens have surprisingly positive attitudes toward the courts, although the results vary widely by region, type of case, amount of actual experience with the courts, and the nature of the plaintiff. One large survey using GPS readings to generate a representative sample concluded a “high degree of popular
trust in legal institutions” and the widespread belief that courts are effective and fair (Landry et al. 2009: 12). In a survey of business people in Shanghai and Nanjing between 2002 and 2004, almost three out of four gave the court system a very high to average rating, compared to 25% who rated the system low or very low (Clarke et al. 2006). In another survey of commercial litigation in Shanghai, the vast majority of corporate litigants found judges competent and professional, believed that judges followed procedures and complied with law, and felt that the outcome matched expectations, even though a number of parties admitted to giving gifts or holding dinners for judges. Similarly, two-thirds of private litigants also believed that the outcome met their expectations, while three-quarters believed that judges followed procedures and complied with law (Pei et al. 2009). Still another survey found that Beijing respondents are more trusting of the courts than their Chicago counterparts, and evaluate the performance of the courts more positively. Respondents in Beijing were twice as likely as Chicago residents to agree with the claim that courts are “doing a good job.” Moreover, whereas over 40% of Chicago residents disagreed or strongly disagreed that the courts generally guarantee everyone a fair trial, only 10% of Beijing residents held similar negative views. And whereas 43% of Chicago residents disagreed or strongly disagreed with the statement that judges are basically honest, only 9% of Beijing residents held similar views.

Despite problems with judicial corruption and local protectionism in some cases, empirical studies suggest that local protectionism and the reliance on connections to interfere with a court case are increasingly less significant factors in urban courts in economically advanced areas. In one large empirical study of corporate law cases in Shanghai, Nicholas Howson (2009) found that Shanghai courts decided against politically powerful parties in all of the more than 200 opinions reviewed in full where there was a discernable political interest. Similarly, although foreign investors often worry that PRC courts will be biased toward parties, and that they won’t take IP rights seriously, one study found that Western companies prevail in 90% of IP cases.

The main reasons for diminished local protectionism and better enforcement are changes in the nature of the economy; general judicial reforms aimed at institution building and increasing the professionalism of the judiciary; and specific measures to strengthen enforcement. The economy in many urban areas is now more diversified, in sharp contrast to the natural resource dominated economy in Russia. The fate of a single company is less important to the local government in major urban areas, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for

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17 Email from Ethan Michelson, Associate Professor of Sociology and East Asian Languages and Cultures, Adjunct Professor of Law, Indiana University–Bloomington, to author (Apr. 24, 2007) (basing results on a 2001 survey of 1,300 Beijing residents that he conducted with sociologists from Renmin University).
18 He (2007) (finding high rates of enforcement, comparable if not superior to other countries, in urban courts in the Pearl Delta, which includes Guangdong Province where the courts in this case are located); Gechlik (2006) (study of more than 20,000 cases in Shanghai found that less than 0.14% involved attempts to use outside connections to interfere with the court). .
governments to engage in local protectionism has diminished. Moreover, as a result of privatization and state-owned enterprise reform, state-owned enterprises are a significantly smaller part of the economy than in the past.

China’s courts are far from perfect, even when it comes to the handling of commercial disputes. The economic transition and privatization have undoubtedly enriched past and present government officials and their relatives. A 2006 study found that almost 90 percent of the country's top leaders in key sectors such as banking and finance, foreign trade, property development, construction and stock trading were princelings (i.e. children of high-ranking officials), and that princelings constituted 90 percent of China’s billionaires, although they have been less successful in politics.20 Although economic reforms have given rise to a growing private sector, the CCP has co-opted private entrepreneurs by inviting them, after vetting, into the Party, thus preventing the emergence of an independent capitalist class that could threaten the Party’s political rule. Rather than demanding greater political freedom and democracy, the new economic elite come to share the Party’s interest in maintaining economic growth and socio-political stability, even if at a cost of restrictions on civil and political rights and the postponement of democracy (Dickson 2008).

China’s gradual process of privatization and state-owned enterprise reform, more diversified economy including a significant number of foreign invested enterprises, and the continuation of CCP rule have seemingly limited to some extent the type of political capitalism that has threatened to undermine the rule of law in Eastern Europe.

The imperative of sustaining economic growth for legitimacy purposes has placed some outer limits on corruption and political capitalism. On the other hand, just as political imperatives have imposed a certain amount of market discipline on the economy and the courts, political imperatives have also shaped legal reforms and set the outer limits for the independence, authority and role of the judiciary.

VI. The Role of the Judiciary in China and the Limits of Social and Political Cause Lawyering

There has been considerable debate in recent years over the proper role of the judiciary in China. Taking note of the Color Revolutions in the former soviet republics where foreign governments supported international and domestic NGOs that used the courts to push for democratization and political reforms, Party leaders have expressed concern that foreign parties may use legal institutions to undermine Party power. As a result, they have been adamant in insisting that Chinese courts will not simply mimic courts in Western liberal democracies (as if that were possible anyway). These announcements have been coupled with an ongoing effort to shore up loyalty in the courts, procuracy, and public security institutions.

At the same time, the Politburo has reconfirmed its commitment to rule of law, Hu Jintao emphasized in a major speech to mark the thirtieth anniversary of opening and reforms that the only way forward is to deepen reforms, and senior leaders within and outside the judiciary have repeatedly called for changes that would increase the competence, independence and authority of the courts. The ideological and practical tension in these goals and approaches is reflected in the recent slogan of the “three supremes”: the supremacy of the CCP, of the

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20 China’s corporate world ruled by princes, Singapore Straits Times, July 25, 2009.
people, and of the constitution and laws.

This is clearly a crucial time for judicial reforms. For much of the last thirty years, China was a low-income country and the judiciary was weak and being rebuilt. The basic task was institution building, to increase the overall professional capacity of judges and courts, and to increase efficiency. However, as countries enter in the middle-income stage, political economy issues become more important. What will the role of the judiciary be in policy making? Over what types of cases will courts exercise jurisdiction? On what basis will judges decide them? What will the judiciary’s relations be with other political organs? Will the procuracy and people’s congress continue to be able to review final court decisions? Will the court be able to determine its own budget? How much say will the judiciary have in promotions and appointments? What will the role of the court be vis-à-vis Party organs and the Political-Legal Committee? These are precisely the issues that the Chinese courts are confronting now.

The recent arrests of activist lawyers and the closure of a leading public interest organization illustrate the tensions and challenges. Activist lawyers may be classified as moderate, critical or radical depending on the type of cases they handle, their objectives, and their approach. In the past, problems were mostly limited to radical lawyers who took on highly sensitive political cases involving dissidents and the regime-challenging outlawed religious sect Falun Gong. Their methods are more extreme, including organizing mass demonstrations and social movements, and may include advocating the overthrow of the CCP. However, the recent detentions include moderate and critical lawyers. Moderate lawyers are not overtly political. They select cases such as consumer protection, labor rights, or discrimination cases that are not terribly politically sensitive. They operate within the limits

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21 Xu Zhiyong and Zhang Lu were detained, and Open Constitution Initiative (Gongmeng), shut down, for failing to pay taxes on a $100,000 gift from Yale University. Both were released on bail, along with a Xinjiang political activist, the day after the new US ambassador arrived in Beijing. Although some commentators have speculated that the arrests were a temporary precaution in the run-up to the October 1st 60th anniversary of the PRC, it would appear that the detentions are part of a much broader crackdown that reflects structural concerns about social and political activism. According to reports, more than 50 activist lawyers lost their license to practice law. In addition, a number of non-lawyer activists have been detained, most notably Hu Jia and Liu Xiaobo. Both have been prominently involved in a wide range of issues, and were signatories of the Charter ’08 petition, a manifesto calling for democracy, human rights and the end of CCP dominance, which was modeled on Charter 77, a petition written in 1977 by Czech intellectuals and artists that helped to undermine the Soviet empire in Eastern Europe. See generally China Human Rights Defenders, China Human Rights Briefing, August 3-9, 2009; Chinese legal activist held for tax evasion, Associated Press, Aug. 4, 2009; China’s Lonely Heretic, The Australian, July 3, 2009.

22 Fu and Cullen (2008). In practice, the distinctions are more fluid, in part because leading activist lawyers and organizations almost inevitably are faced with mission creep. They often begin with cases that are politically acceptable but ultimately become involved with cases or causes that cross the line into what is not politically acceptable and off limits. They may feel “compelled” to expand the range of cases/causes for various reasons, including personal beliefs and commitments, the nature of their support and their constituencies (including foreign organizations whose mission may include a wider range of issues than is politically acceptable in China), the inability to draw a morally principled (as opposed to strategic or pragmatic) line between the cases they are handling and other cases/causes, and the lack of others willing or able to do anything about the problems.
of law and rely on legal arguments, and seek to promote rule of law. Critical lawyers are often more critical of the political system, but they are also pragmatic in their acceptance of the lack of viable alternatives. They want to ensure that the system lives up to expressed ideals, often pushing for systemic reforms. They are willing to take on somewhat more politically sensitive cases involving free speech, religious freedom and freedom of association, but not cases that are politically prohibited such as Falun Gong or to represent dissidents calling for the overthrow of the CCP. They rely on both legal and political methods, including greater mobilization of the domestic and international media, support from foreign NGOs and petitions addressed to the Chinese leadership but equally aimed at obtaining popular support from the general public.

The recent developments suggest that judicialization of two types of disputes in particular have not been successful: (i) political disputes that challenge, or are perceived to challenge, the ruling regime; (ii) certain socio-economic disputes, particularly involving a large number of plaintiffs.

In political cases, the people involved and many citizens are often not satisfied with the substantive results of the cases, and even those who might think the outcomes are justified on substantive grounds in light of China’s current circumstances must acknowledge that the way the cases are handled procedurally is problematic and deviates from standard thin rule of law criteria codified in PRC and international law. These cases reflect the nature of the regime and the limits of political cause lawyering in China and in effectively single-party authoritarian states generally, the current state of socio-political stability, the dominant conception of law/rule of law, China’s model of development and the political contract between central and local governments.

The second type of socio-economic case reflects the realities in a lower-middle income country such as China, and the fact that in many cases the courts are not able to provide parties with legitimate complains an effective remedy for various reasons - most notably resources are insufficient and institutions such as the social welfare system are too weak. Unable to obtain relief in courts, disgruntled parties then take to the streets to demonstrate, threatening social stability. With tens of thousands of protests every year, many of them turning violent, the authorities in recent years have tried to limit access to the courts and steer disputes into other, often administrative or political, channels. Notable examples include the administrative rather than judicial settlement of melamine poison milk cases and the claims arising from the Sichuan earthquake. But the courts have also been reluctant to hear cases that threaten social stability such as land taking cases or labor cases that involve tens or even hundreds of plaintiffs.

Whether this strategy will enhance social stability, or further undermine it, remains to be seen. As the complaints are often legitimate, much will depend on the ability of non-judicial mechanisms to resolve disputes effectively. There have already been numerous attempts to address disputes in other ways: mediation, arbitration, administrative reconsideration,

23 Political lawyering emphasizes first generation, civil and political rights - the negative rights of freedom of speech, thought, religion, movement and association – and the political institutions of (primarily economically advanced western) liberal democracies that protect these rights. See Scheingold and Sarat 2004; Halliday et al. 2007.

24 For an elaboration of these points, see Fu and Peerenboom (2009).

25 See Fu and Peerenboom (2009).
increased political participation (hearings, notice-and-comment opportunities, public opinion polls to assess the performance of government officials, etc.) and just throwing money at problems as they arise to make them (and the protesters) go away.\textsuperscript{26}

There is no reason to expect that the courts in LM China should play the same role as in HICs, or even other MICs. There is considerable diversity in the allocation of decision making powers among the legislature, executive branch and judiciary both globally and within Asia, notwithstanding a general trend toward juridification and the judicialization of disputes.\textsuperscript{27} The rule of law promotion industry and many human rights organizations tend to emphasize the U.S. model of highly decentralized dispute resolution where a wide array of private and public actors have access to a wide range of courts with broad jurisdiction rules and great powers, with a prominent role for a huge and active legal profession highly mobilized to increase its importance and economic benefits by promoting rules such as class actions, punitive damages and contingency fees. Yet this model is an outlier globally.\textsuperscript{28} European and East Asian countries have generally adopted a more centralized,

\textsuperscript{26} I have discussed a number of suggestions elsewhere, many of which reflect ongoing trends in the reform process. These reforms will not be easy, they will be opposed by various groups, and even if adopted they will not solve all problems. But at least the suggested reforms will help in some cases. See Fu and Peerenboom (2009).

\textsuperscript{27} Juridification refers to an expansion of legal discourse and modes of analysis into other spheres (e.g., economics, politics), whereas judicialization refers to an expanded role for the courts in deciding a wider range of social, political and economic issues. Summarizing the results of a recent study, Albert Chen (2009) finds that juridification and judicialization have increased in general within Asia; nevertheless, the degree varies among countries, with for example Japan at the lower end of judicialization, and Indonesia and Vietnam at the lower end of both judicialization and juridification.

\textsuperscript{28} Even in the US, there are often more centralized, government led responses to problems. The Enron scandal and the current financial crisis have resulted in increased regulation that recentralizes government control over the economy. After September 11, the federal government established a Victim Compensation Fund to process more than 7,300 claims for death and personal injury. The victims could accept compensation and release their claims against the airlines (with the Special Master’s determination of the amount of compensation being final and not subject to judicial review), or sue for damages. Over 97% opted to accept compensation through the fund. According to the administrator of the fund, “The success of the Fund was directly attributable to the unprecedented cooperation from the legal and financial communities, the judiciary, federal and state agencies, state governments, public and private sector employers, individual citizens, and of course, the victims and their families.” In particular, he noted that victims were compensated quickly, while “litigation presented both uncertainty and delay.” Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001. Moreover, jurisdiction rules limiting or expanding access to the courts are always being fine-tuned. See e.g., Siegel (2009) (the United States Supreme Court has over the last quarter-century grown increasingly skeptical about the efficacy of litigation, increasingly parsimonious in construing federal statutes that facilitate litigation, and increasingly uninterested in insuring the availability of functional remedies for the violation of federal rights”). See also Issacharoof and Miller (2008) (noting that European countries have been much more restrictive than the U.S. with respect to class actions on the grounds, among others, that the U.S. system creates entrepreneurial lawyers who generate litigation in
A co-ordinative approach, although they are now starting to shift toward a more decentralized system that emphasizes adversarial protection of rights rather than coordination of conflicting interests (Milhaupt and Pistor 2009; Ginsburg 2009).

A more centralized and co-ordinative approach in China is neither surprising nor necessarily inappropriate given the political system, level of economic and institutional development, nature and limits of civil society, and the traditional, civil (via Germany and Japan) and socialist origins of the legal system.

Nevertheless, the recent crackdown appears to have overshot the mark. It will not be possible to simply close off the courts or to prevent all social or political cause lawyering. There will always be some areas that are allowed and some brave individuals who will try to push the envelope. Because there will always be new people to replace the Xu Zhiyongs or Gao Zhishengs - even acknowledging the huge self-sacrifice these lawyers make and the hardships they face – a strategy that relies only or primarily on detentions, harassment and denial of lawyers’ licenses to practice is not likely to be effective. There is a pressing need for clearer rules, guidelines or policies on what law firms, legal aid centers, social organizations - and individual lawyers and other activists - can and cannot do “to promote a harmonious society,” including some guidance on acceptable substantive issues for political and cause lawyering as well as further clarification of what methods are acceptable.

**A Comparison to Eastern Europe**

Democratic states also react to social instability and perceived threats to national security. A number of quantitative studies demonstrate that the third wave of democratization has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s (McCann and Gibney 1996; Reilly 2003). Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein (1996) described this phenomenon as “more murder in the middle” – as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence. More recent studies have also concluded that the level of democracy matters: below a certain level democratic regimes oppress as much as non-democratic regimes (Bueno de Mesquita et al. 2005; Davenport and Armstrong 2002). Moreover, the recent war on terror in the US, England

the hopes of reaching settlement, most of which goes to the lawyers, some lawyers are corrupt, and class action suits exacerbate social and economic instability). Judge Weinstein (2009) has pointed out that even in the U.S. “There is a general hostility ... particularly at the appellate level, to class actions and other devices for efficient administration of mass litigation.”

29 Milhaupt and Pistor (2008), whose study focuses on corporate governance, attribute the shift to the change in the nature of the economy due to globalization, particularly the entry of new foreign actors; the Asian Financial crisis and economic slowdown discredited centralized/coordination approach in South Korea and Japan respectively; and the rise of civil society. Other factors include the influence of the human rights movement and the rule of law promotion industry, which have promoted access to justice, a more robust role for NGOs and civil society, and the more decentralized US approach, even allowing some competition for influence between the US and other countries to promote their own systems.
and Europe demonstrates that even in consolidated democracies the legislative and executive branch, often supported by a compliant or intimidated judiciary, will not hesitate to restrict civil liberties when national security is perceived to be threatened.

Nevertheless, as noted above, Eastern European countries generally score highly on civil and political rights, and there is little if any arbitrary detention of political activists or restrictions on political lawyering.

To some extent, the greater wealth in most Eastern European countries reduces the need, or at least the intensity of the demand, for social cause lawyering, while making it possible for courts in some cases to provide adequate remedies. To be sure, Eastern European social cause lawyers inevitably still confront numerous challenges, just as they do in consolidated HIC democracies. But they generally need not fear disbarment or detention – a significant advantage over their counterparts in China.

VII. Conclusion

A threshold question is why we should focus on MICs? LICs are worse off. Arguably, we should concentrate our intellectual and financial resources on solving their problems first. Paul Collier (2007: 190) for instance argues that the result of defining development more broadly to include MICs is that “our efforts are spread too thin, and the strategies that are appropriate only for the countries at the bottom get lost in the general babble.” Yet the problems of LICs have dominated both academics and international donor agencies for decades. Moreover, despite billions of dollars spent, the results have been poor. Thanks to Collier and others, we are beginning to recognize that new, more nuanced approaches are needed. Simply increasing aid is not sufficient, though aid can be effective in the right circumstances and certainly should be part of the answer (Easterly 2006; Sachs 2005). The pressing needs of LICs certainly merit further attention.

But we do not need to turn our backs on LICs to attend to the problems of MICs. Nor are the problems in MICs any less pressing. Many more people live in MICs than in LICs. Yet in many MICs, reforms have stalled; people are trapped in a cycle of dehumanizing poverty, growing income inequality, environmental degradation, weak and dysfunctional institutions, and government malfeasance - and the prescriptions for addressing these challenges so far have proven inadequate.

Obviously neither Eastern European countries nor China are representative of all MICs. Nevertheless, a comparison is illuminating given their communist histories and their different development trajectories since the fall of the wall. Their very different development paths reflect the diversity that is typical of MICs and the need for more region and country-specific studies. At the same time, their experiences also reflect common features of MICs.

In contrast to LICs, MICs are generally more stable; they have more, albeit still limited resources, and stronger, albeit still weak, institutions. They face different challenges than LICs whose main tasks may be peacekeeping, basic state-building such as restoration of law and order, and addressing extreme poverty. Conversely, relative to developed countries, MICs face resource constraints and suffer from weaker institutions, as to be expected given the close correlation between wealth and institutional capacity (and human wellbeing and the protection of rights more generally). Thus, simply recommending that MICs import the
institutions and practices of developed countries is not sufficient, as amply demonstrated by the many failures of law and development programs to date.

The availability of some resources, the many conflicting claims on the inevitably inadequate resources given the wide-ranging challenges, and conflicting interests and goals among various groups, including state organs, suggests that whether MICs graduate into the rarified ranks of HICs will depend in large part on political economy factors, including how the limited resources are allocated, how problems are prioritized and reforms sequenced, which among the many conflicting interests will prevail and how power and responsibilities are allocated among state organs.

Rule of law is consistent with wide institutional variation, including strikingly different roles for law and the legal system and the relationship of courts to other political organs and decision makers. Accordingly, there needs to be more emphasis on local politics and the mechanisms for deciding issues and resolving conflicts of interest.

International donor agencies now regularly acknowledge that there is no magic formula for development, that reforms must be country-owned and country-led, and that one of the key reasons for the failure of previous projects is that recommendations have not been suitable for the level of development and particular circumstances of the target country. This is all the more true for MICs, given their wide diversity (World Bank 2007). Nevertheless, most development agencies continue to prescribe “off the shelf” blueprints, offering developing countries a checklist of international best practices based on summary reports of lessons learned from failed programs in the past. While there is a need to summarize lessons learned and generate menus of options for developing countries that reflect international best practices, the problem to date has been that the knowledge accrued and the analyses of the problems have not been very deep (Carothers 2006), and all too often the prescriptions have not been adequately tailored to local contexts (IEG 2007). In part this is because MICs have had little input into the policymaking process of the World Bank and other international donor agencies (IEG 2007). There is therefore a pressing need for more detailed studies of the particular challenges faced by individual MICs, articulated from the internal perspective of those living in and working on particular regions and countries.

Central to rule of law promotion efforts has been an emphasis on judicialization and the creation of a strong and independent judiciary charged with handling a wide range of controversial cases. Yet the results of such efforts have been disappointing. In many MICs, courts are weak. Judges may be incompetent or corrupt or both. To assume that courts in MICs will be able to play the same role as in HICs is often to expect too much. An IFES/USAID report highlights the many problems confronting judiciaries in developing countries: the citizenry has rising expectations; courts are often asked to handle controversial cases involving social and economic rights; there is generally a rise in crime, including complicated white collar and cross-border crime, as a country moves to a market economy and urbanizes; corruption is often a problem; and the relationship of the courts to other organs of state power is in flux. The report concludes: “It would be unrealistic to think that the judiciaries can carry the full burden for resolving these complex problems” (IFES/USAID 2002: 6).

Judicial independence takes time to establish, and requires competent and honest
judges. Courts must also be able to provide effective remedies, which requires not only wealth per se but the set of complementary institutions that accompany wealth in modern states, such as a functional welfare system.

An approach that emphasizes coordination of the judiciary with other political organs may be more useful in many MICs than an approach that emphasizes judicial independence, broad constitutional and judicial review powers and a more adversarial relationship between a hierarchically superior court and other state organs. Balme and Dowdle (2009: 4) point out that the emphasis on judicial independence obscures the dynamic interaction of the judiciary and other political actors.

This metaphor of “independence” is problematic from the perspective of how constitutions actually operate. At their heart, constitutions are innately cooperative phenomena. However, metaphors of “independence” cloak the cooperative dynamics upon which a Constitution vitally depends for its ultimate effectiveness. It causes us to frame our analyses of court contributions to constitutionalism by seeing courts as (ideally) insular institutions operating (ideally) in their own self-contained universes. When in fact, the courts’ constitutional effectiveness is actually found in its interactions with other institutions rather than in its isolation from them.

They (2009: 2-3, citations omitted) also caution against conflating judicial review with constitutional law in China or elsewhere:

Even in the most effective constitutional systems, significant aspects of constitutional structure are invariably nonjusticiable. Of course, the United Kingdom’s “unwritten constitution” is the paradigmatic example of this. But it is not unique. The Dutch Constitution is also not justiciably reviewable. Although the Swedish Constitution has for long allowed judicial review in theory, even after 200 years the Swedish courts are yet to avail themselves to this power in practice. In both Japan and Italy, courts occasionally...

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30 According to one indicator, China received a 4 on judicial independence and 4.5 on judicial impartiality (on a 1-9 scale). Eastern European countries ranged from 3 for Bulgaria to 7 for Estonia, with most around 4 to 4.5, for judicial independence, and 3-6 for judicial impartiality, with most around 4. There was little change in the scores for Eastern European countries from 1996 to 2008. See Fraser Institute, “Economic Freedom of the World: 2008 Annual Report.” Disagreements over how to conceptualize judicial independence, normative differences over how independent courts should be, and the wide diversity in institutional arrangements have complicated, if not undermined, efforts to measure judicial independence. Thus, one leading recent study found that not a single country in the top 10 of the de jure judicial independence index was in the top 10 of the de facto judicial independence index; not one of the member countries of the Organization for Economic Co-Operation and Development (“OECD”) was in the top 10 of the de jure index, while the U.S. was 30th; and Armenia, Kuwait and Turkey were in the top 10 of the de facto index. There was also a negative correlation between de jure judicial independence, and a very weak positive correlation between de facto judicial independence, and other indexes which measure similar things, such as rule of law, transparency and accountability of the legal system, and protection of civil rights and property rights. The authors concluded that the “irritatingly low correlations” suggest that the relationship between judicial independence and these other important social goods may not be as straightforward as sometimes assumed. See Feld and Voigt (2003, 2006).
engage in judicial review, but the governments have claimed authority to ignore their findings.

Eastern European constitutional courts, despite their differences in institutional configurations and powers,\(^{31}\) were successful in part because the political elite needed a peaceful mechanism for resolving political conflicts and accepted that some form of constitutional democracy was preferable to a reversion to authoritarianism. In authoritarian regimes or democracies where a single party dominates for a long period, the ruling party is likely to remain the ultimate authority for resolving major political disputes. Eastern European courts were also successful in part because they could draw on a pool of well-respected and highly qualified legal scholars and professionals. They also had the advantage of operating in an environment where the downfall of the previous political regime created a more open and even playing field for the new courts to define themselves and establish their role vis-à-vis other political organs, whose role was also being redefined. In MICs where political reform is less rapid, constitutional courts will have to contend with existing institutions that have already established networks of power and patronage, have their own institutional culture and way of doing things and have an institutional interest in protecting their turf.

Nevertheless, despite the enabling circumstances, it is remarkable that Eastern European constitutional courts acted strategically and sought to minimize conflict with possible other state organs in consolidating their power, status and role in the new polity. As Ganev (2009) notes: “Admittedly, this road to consolidation was not marked by dramatic confrontations pitting the friends of judicial review against its foes – perhaps scholars looking for the postcommunist equivalents of *Marbury v Madison*, which marked the birth of judicial review in the US, or *Prussia v the Reich* (*Preussen contra Deutsches Reich*) which marked its death in Weimar Germany would be a tad disappointed by the more mundane stories of how in Eastern Europe Justices issued decisions and politicians complied.”

In some ways, the need to coordinate with other state organs is even greater for ordinary courts than constitutional courts. To be effective, constitutional courts must be supported by the political elite, dominant economic interests and/or a large segment of the public. While a constitutional court cannot enforce its decisions by itself, it relies more on its legitimacy for enforcement of the relatively few high profile decisions than on coercive enforcement by state agencies. In contrast, the regular courts that handle the millions of much more mundane civil, criminal and administrative cases must rely much more heavily on the police, customs, intellectual property agencies, administrative agencies, banks, local government officials, judges in other jurisdictions and even social organizations and the media to ensure that their decisions are enforced. In many MICs, these other institutions or actors are weak, self-interested, corrupt and incompetent, or they lack adequate resources to perform effectively. Particularly in socio-economic cases, courts in MICs have little choice but to adopt a less adversarial and more cooperative approach, working with government agencies to

\(^{31}\) The institutional configurations and powers varied from place to place. While most Eastern European countries established separate constitutional courts, Estonia entrusted judicial review to a chamber of the Supreme Court. In Poland and Romania, parliament initially had the power to overturn decisions of the constitutional court, although that power was subsequently abolished. For a general overview, see Sadurski (2009).
resolve disputes and to satisfy as best they can the legitimate demands of citizens.

In sum, rather than emphasizing judicial independence and judicialization of controversial social, economic and political disputes, the rule of law promotion industry may need to adopt a more pragmatic approach that places greater emphasis on coordination between the judiciary and other political branches. At minimum, there needs to be more attention paid to judicial accountability, and a better allocation of decisionmaking and dispute resolution responsibilities that does not undermine the legitimacy of the courts and efforts to establish the rule of law by forcing the courts to decide cases for which they cannot provide an effective remedy. Moreover, this process is dynamic, and in need of constant management and fine-tuning.

To be sure, much will depend on local circumstances, with the role of the courts varying depending on the type of case. In some countries or for some types of disputes, a more centralized and coordinative approach may be desirable, but in other countries or for other types of cases, a more decentralized approach with a greater role for courts may be more appropriate. Unfortunately, there is no single development path or set of institutional arrangements guaranteed to ensure high growth, political stability and social justice.

The Eastern European experience highlights how rapid regime change and the capture of economic and political resources can undermine judicial development and the rule of law. China’s experience highlights how gradual economic and political reform may impede the development of constitutional law and judicial independence. Collectively, they demonstrate one of the important lessons for MICs: there are many ways to go wrong, and it is never too late to fail. Fateful decisions with long term consequences may be made early in the reform process. In many cases, the available options may be severely constrained. The collapse of the Soviet Union precluded a gradualist approach to economic, political and legal reforms. Although the pace and form of privatization might have differed, whether it would have prevented the rise of political capitalism is doubtful. Privatization took different forms in Eastern Europe, but the result was largely the same: state assets ended up in the hands of former government officials and other politically connected elite who then used their economic power to subvert the rule of law. Legal reforms in China have also been subject to historical and political constraints. The dismantling of the legal system during the Cultural Revolution combined with the transition to a market economy ensured that much of the focus of legal reforms for the last three decades would be on institution building and increasing the professionalism of members of the legal complex (judges, lawyers, procurators, legislators, notaries, police, officials responsible for implementing law, etc.). As a result, the difficult political economy issues about the proper role of the judiciary were postponed. Now they must be addressed.

While there are many ways to fail, it would be premature to conclude that China and Eastern European countries will not someday make it into the elite ranks of HICs governed by the rule of law. Today’s successful HICs also confronted and overcame similar challenges. Indeed, today’s HICs continue to struggle to maintain high levels of economic growth and to

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32 While writing this, I received an invitation to be part of bid for a UNDP legal reform project in Vietnam, the goal of which was “the re-organisation of justice sector organs and institutions to ensure modern organisational structures and working conditions/facilities, in which the court system is placed at the centre and adjudication plays the key role.”
address the many shortcomings and imperfections in their own societies and legal systems, with rule of law an ideal to be aspired to but never fully realized.
Bibliography


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