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The World Bank & Rule of Law Reforms

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Chapter 1: Introduction

The World Bank's ("the Bank's") "discovery" of the Rule of Law (ROL) and ROL reforms in the early 1990s is often held to be the result of a convergence of external factors, not least the perceived limitations of the so-called "Washington Consensus", the emergence of an interest in "good governance", and the fall of Communism in Central and Eastern Europe.¹ But the role of the ROL in development – whether this is perceived instrumentally or ontologically² - has, in fact, a much older history than the Bank's relatively brief experience would suggest. Theoretical interest was shown by, notably, Max Weber, who saw legal rationality as an instrumental factor accounting for the emergence of capitalism in Western Europe; while practical interest was shown by the "Law and Development Movement" (LDM) of the 1960s and 1970s, which – like the Bank is today – was dedicated to the idea that the law could be used as a tool to promote social and economic development.

The LDM in particular has provided a wealth of ammunition for an academic community unconvinced of the utility of the Bank's work, and some (many of whom took part in the original movement) have, quite rightly, expressed concerns that the "mistakes" of the past – chief among them being that the LDM lacked a *theory* of law and development - will simply be repeated by the Bank. A parallel concern has been that the Bank's interest in "building" the ROL coincides with a period in which the ROL itself, as both philosophical doctrine and political theory, has been robbed of much of its analytical content. In an age when the search for "silver bullets" in development is arguably on the wane³, the ROL is put forward as the solution for an astonishingly wide range of problems: it poses as the link between fledgling and

¹ Rose (1993); Trubek (2004).

² Daniels and Trebilcock (2004).

³ See: Kenny and Williams (2000).

consolidated democracy; it promises to entrench human rights; it promises an end to violence and corruption; and it is a *sine qua non* for the foundations of a market economy.⁴ But with meanings as diverse as these, one could be forgiven for thinking that the ROL, in the end, means nothing at all.⁵

The Bank's interest in variously "building" or "promoting" the ROL comes up against a major practical difficulty, in that, in order to construct a reform agenda – something concrete – it has necessarily to translate the ROL as a philosophical idea into tangible legal institutions that can be reformed.⁶ This is in keeping with the body of theory – the New Institutional Economics (NIE) – which underpins to a considerable extent the Bank's work in "good governance." In practice, for the Bank: "legal and judicial reform is a means to promote the rule of law."⁷ Tamanaha⁸ has pointed out, however, that the ROL "has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements." Indeed, a distinction has been drawn in the literature between the ROL itself, and ROL *orthodoxy*: the "set of ideas, activities, and strategies geared toward bringing about the rule of law, often as a means toward ends such as economic growth, good governance, and poverty alleviation."⁹

With this in mind, this paper sets about examining the Bank's claims that it is "building" or "promoting" the ROL via legal and judicial reform. It seeks to put the Bank's work in historical and theoretical context, with the ultimate goal of identifying the theory or theories – so lacking in the LDM – informing the Bank's work. The primary argument of this paper is that the ROL is a social and political ideal more than anything else. At the social level, it requires – at a minimum – that the law is

⁴ Carothers (2003).

⁵ Shklar (1987).

⁶ Belton (2003); Carothers (2003).

⁷ World Bank (2004a:3) emphasis added.

⁸ 1995:476.

⁹ Golub (2003:7).

capable of guiding one's behaviour. The processes that allow this are extremely complex and scarcely understood. Moreover, the evidence suggests that these processes are either impervious to reform, or respond only extremely slowly (well outside the timeframe of a typical Bank project). At the political level, the defining feature of the ROL, from its origins in natural law thought through to present-day jurisprudential writings, has been the appeal to ordinary law as a control over naked political power, and the protection of ordinary individuals from the arbitrary acts of government.¹⁰ The Bank's difficulty at this level of analysis is that reform is ultimately dependent on the highly unsatisfactory idea of "political will."

In order to carry out this task, the paper starts by placing the Bank's current work within the context of the other notable attempt to build the ROL- the failed LDM – as well as its own work in governance. It then reviews the shift that has taken place in the Bank's definition of the ROL since the early 1990s, from a rigidly formal conception, to an ambiguously substantive conception. Chapter 3 then looks at the main vehicles the Bank uses for promoting the ROL: legal and judicial reform. It details the theoretical basis on which the Bank's work rests and highlights the inherent flaws in trying to build the ROL using these means, in line with the argument stated above. Chapter 4 concludes by reflecting on the implications of the preceding discussion for constructing a theory of the ROL.

¹⁰ Barnett (2002).

Chapter 2

2.1 Law and Development Part 1: The Law and Development Movement.

Ironically, whereas the fall of communism in the early 1990s, amongst other factors, signalled the beginning of the Bank's interest in the role of law in development, it was the end of World War II and a Cold War geopolitics which started the other notable movement in law and development (LD), the LDM.¹¹ The LDM was an overwhelmingly American movement, heavily influenced by modernisation theory, and believed that the law could speed up the social, political and economic convergence of "The Third World" with the West. Economically, this meant a role for the law in establishing contract and property rights, and providing market incentives via the law's predictability and stability functions¹²; politically, the LDM saw a strong, liberal-democratic government emerging once a certain threshold level of economic growth had been achieved.¹³ Over the course of its brief life, the LDM attracted the interest of the best law departments in the country¹⁴, drawing funds and professional support from the likes of the Ford Foundation, the Agency for International Development (AID), and the American Bar Association.

The LDM was primarily concerned with "the problem of 'the gap'"¹⁵: the mismatch between law "on the books" and law "in action." It believed that "the gap" could be narrowed by changing the rules- that new legislation could induce changes in social behaviour. Moreover, "where it becomes apparent that immediate rule changes will not affect social behaviour, attention shifts to the institutional changes that will be

¹¹ Gardner (1980).

¹² Burg (1977); Trubek (1972).

¹³ Trubek (2004).

¹⁴ Most notably Harvard, Stanford, Yale, and the University of Wisconsin.

¹⁵ Burg (1977:511).

needed to guarantee that this *will* occur.”¹⁶ In practice, this meant attention shifted to a poorly educated bar and judiciary, and the LDM became a programme, first and foremost, of legal education reform¹⁷, the expectation being that “once the obstacle of a passive legal profession is removed, instrumental solutions will play themselves out.”¹⁸ Training programmes were established throughout Latin America, Asia and Africa in the hope that lawyers and judges could be trained to appreciate the developmental role of the law and, in a sense, become “social engineers.”¹⁹

The theory had an appealing logic, but it lacked an explicit, social-scientific rigour.²⁰ Merryman²¹ saw this as a problem of the “intellectual style” of US legal scholarship, which he saw as more professional and practical, than theoretical. Consequently, the LDM lacked the social sciences’ concern with theory and theory-building. What it did have, however, was a “tacit set of assumptions”²² which guided LDM action. Trubek and Galanter²³ (TG) – whose hugely influential 1974 article marked the beginning of the end of the movement - labelled these assumptions “liberal legalism”, and set the paradigm out in the form of seven propositions:

1) “[t]he state is the primary locus of supranational control in society”; 2) ‘the state exercises its control over the individual through law – bodies of rules that are addressed universally to all individuals similarly situated’; 3) ‘rules are consciously designed to achieve social purposes or effectuate basic social principles’, and these rules are made through a ‘pluralist process’; 4) these rules are ‘enforced equally for all citizens, and in a fashion that achieves the purposes for which they were consciously designed’; 5) ‘the courts have the principal responsibility for defining the effect of legal rules’; 6) the outcome of adjudication by the courts is determined not by the policies underlying those rules or by extraneous considerations, but by an ‘autonomous body of learning’; and 7) ‘the behaviour of social actors tends to conform to the rules.’”²⁴

¹⁶ Trubek and Galanter (1974:1079) emphasis in original.

¹⁷ Faundez (1997); Gardner (1980); Tamanaha (1995); Trubek (2004); and Trubek and Galanter (1974).

¹⁸ Burg (1977:512).

¹⁹ Messick (1999:12).

²⁰ Friedman (1969a); Merryman (1977).

²¹ 1977:477.

²² Trubek and Galater (1974:1070).

²³ Ibid.

²⁴ Trubek and Galanter (1974:1071-1072), in Berg (1977:513).

For TG, a major failing of this liberal legalist model was its “ethnocentricity” and “naivety.”²⁵ When measured against the reality of developing countries, it did not correspond at all well: where the model assumed social and political pluralism, the reality in poor countries was often “social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems”²⁶; where the state was supposed to be “the primary locus of social control”²⁷, it was in fact frequently overpowered by the strength of “tribe, clan, and local community.”²⁸ Other problems stemmed from the fact that there was no internalisation of the laws by the citizens of the countries in which reform was taking place, and thus no real observance of it²⁹; and instead of a central role in social control for an independent judiciary free from tribal, religious, political, or class interests, the courts were more often than not “neither very independent nor very important.”³⁰ What TG called “the most serious challenge”³¹, however, was the recognition that the law could be used in an anti-developmental way, and that the best lawyers, newly trained by LDM programmes, could be used by elites to resist change and consolidate their privileged positions.³² Thus, while the LDM had foreseen the primary agent in change as a “strong, relatively centralized state”³³, it had been unable to anticipate that “when the state is captured by authoritarian groups, law seen in primarily instrumental terms cannot serve as a

²⁵ Trubek and Galanter 1080.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid at 1080-1081.

³⁰ Ibid.

³¹ Ibid at 1083.

³² Ibid.

³³ Trubek (1972); Trubek and Galanter (1974:1079).

restraint. Lacking its own internal values or goals, law will become an instrument of those who control and set the goals of the state.”³⁴

Faundez³⁵ has recently pointed out that while there are obvious similarities between the Bank’s conception of a fair legal system in its current ROL work, and liberal legalism, the current context is fundamentally different. Under the Bank’s approach the state is no longer “the primary locus of supranational control”, but limited to complementing the market in a very restricted way. The chance of the law’s capture by elites, he says – TG’s “most serious challenge” - is thus considerably reduced.³⁶ Despite the change in the role of the state, however, other issues raised by LDM scholars still appear to linger: the issue of foreign lawyers obtaining a sufficient knowledge of local culture, society, and the legal system to be able to construct the right kind of programs, and not simply resorting to transplanting laws and legal institutions from one country into another³⁷; the issue of traditional dispute settlement mechanisms³⁸ and attempting to formalise and professionalise what should perhaps be left alone or even de-formalised³⁹; the issue of hostility and resistance to foreign legal assistance⁴⁰; and the issue of the cost of program failure for the foreign legal expert, separated as he is by “geographic, political and cultural distance”, being far lower than those who actually live in the target nation.⁴¹

³⁴ Tamanaha (1995:474).

³⁵ 1997.

³⁶ Ibid.

³⁷ Merryman (1977).

³⁸ Beckstrom (1973); Trubek and Galanter (1974).

³⁹ Trubek and Galanter (1974:1078); More recently: Kennedy (2003); Upham (2002).

⁴⁰ Gardner (1980).

⁴¹ Merryman (1977:480).

2.2 Law and Development Part 2: The “New” Law and Development Movement.

Despite these issues which, sparked by TG’s article, led to “The Decade of Disillusion”⁴² with law and development (LD), the 1990s emerged as “The Decade of (re)-Discovery.”⁴³ Development practitioners from the EU, DFID, EBRD, UNDP, various Western governments, and the African, Asian, and Inter-American Development Banks identified in the 1990s two important roles for the ROL⁴⁴: on the one hand, the ROL could be used to ensure the proper functioning of a market economy, by providing protection for property rights; third party enforcement of contracts; and a stable, crime-free investment environment. On the other, the ROL could be used to help the emergence of democracy, good governance, and the protection of basic human rights.⁴⁵ Although the LDM had been no stranger to the “promotion of the rule of law”⁴⁶ (the implication was that all 7 elements of TG’s paradigm of liberal legalism needed to be present in order for there to be a ROL system)⁴⁷, the “new” law and development movement has increased the ROL rhetoric and explicitly embraced the ROL as a goal of development policy. According to Trubek⁴⁸, the Bank alone has spent \$2.9 billion dollars on some 330 projects in its pursuit of the ROL since 1990.

The clearest statement of the Bank’s role in this “new” LDM is to be found in its annual review of legal and judicial reform.⁴⁹ The 2004 edition lists both the factors contributing to its interest in the law, and what it hopes to achieve via the law⁵⁰:

⁴² McAuslan (2004:10).

⁴³ Ibid.

⁴⁴ Carothers (1998); Trubek (2004).

⁴⁵ Rose (1998); Trubek (2004).

⁴⁶ Gardner (1980:8).

⁴⁷ Tamanaha (1995).

⁴⁸ 2004.

⁴⁹ World Bank (2004a).

⁵⁰ Ibid at 1-2.

- “The dramatic political and economic transformation in Eastern Europe and the former Soviet Union...naturally mandated institutional reforms and required creating legal and institutional infrastructure to support, implement, and enforce the new legal system.”
- “The Asian financial crisis...vividly illustrated that economic growth without the firm foundation of effective laws and legal institutions was vulnerable and unsustainable.”
- “Development experience...showed that the rule of law promotes effective and sustainable economic development and good governance. Lack of the rule of law significantly hinders economic growth...”
- “[D]omestic and foreign private investment...could not be reached without modifying or overhauling the legal and institutional framework and firmly establishing the rule of law to create the necessary climate of *stability* and *predictability*.”⁵¹
- “[E]nvironmentally sustainable development mandates rigorous regulatory regimes, clear property rights, and appropriate institutional frameworks.”
- “Discriminatory or arbitrarily enforced laws deprive individuals of their individual and property rights, raise barriers to justice and keep the poor poor.”

As the above list shows, the Bank speaks in terms of effective “laws”, “legal institutions”, and “the ROL”, and it pursues these objectives through the conditions it attaches to loans; in projects where legal and judicial reform is the sole objective; and in other projects like public sector reform, which often have a legal component.⁵² The Bank’s claims for the law have inspired voluminous literature, both supportive and contradictory, though a detailed review is outwith the scope of this study.

⁵¹ Ibid. emphasis in original.

⁵² <http://www1.worldbank.org/publicsector/legal/worldbank.htm>

2.3 The Bank and the NIE.

While many of the above claims made on behalf of the law and the ROL may appear more anecdotal than theoretical (e.g. reforms are “naturally mandated” as a result of “development experience”), that is not to say the Bank approaches its work entirely on working assumptions. Underpinning the Bank’s interest in the ROL is, in fact - to a considerable extent - the body of economic theory known as the New Institutional Economics (NIE), the great contribution of which has been to identify the institutional foundations of the neo-classical model of economics. “Institutions”, according to North⁵³, “are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights).” Property rights in particular play a central role in the NIE analysis, and the absence of well-defined and effectively enforced property rights has been identified as a major factor contributing to high transaction costs and poor economic performance through time.⁵⁴ The state plays a crucial role in both the NIE analysis and the Bank’s good governance agenda, in that (as Faundez⁵⁵ alluded to earlier) it both specifies and enforces the formal “rules of the game”⁵⁶, providing the legal infrastructure and other institutions necessary for the protection of property rights.

The fundamental problem with property rights, however – referred to in the political science literature as the “commitment problem” – is that any state or leader powerful enough to grant them, is also powerful enough to abrogate them for his own benefit.⁵⁷ In order to truly secure property rights and encourage investment, there

⁵³ 1991:97.

⁵⁴ North and Thomas (1973).

⁵⁵ 1997.

⁵⁶ North (1990:3).

⁵⁷ Haber et al. (2003).

have to be mechanisms in place to allow that rights in property will be respected regardless of the proclivities of individual leaders or ruling groups. Government, in other words, has to restrain itself – or be made to restrain itself - from acting in its own short-term interest. One possible – though ultimately unsatisfactory - solution to the commitment problem is what Mancur Olson has called “stationary banditry.”⁵⁸ For the NIE, however, “while economic growth can occur in the short run with autocratic regimes, long-run economic growth entails the development of the rule of law and the protection of civil and political freedoms.”⁵⁹ Thus, the NIE provides a valuable link for the Bank, in that it explicitly identifies the ROL as a factor contributing to economic growth, and highlights the importance of the positive law and legal institutions for protecting property rights, enforcing contracts, and otherwise making up several of the constituent parts of the ROL.

2.4 Two Competing Definitions.

Having identified (in a necessarily brief manner) the importance the of ROL to the Bank, the question then becomes: how does a country go about acquiring it? Clearly, before the ROL can be “built” or “promoted”, it has to be defined. Definitions of the ROL are important because they specify – or *should* specify - the end-goal of the Bank’s efforts in legal and judicial reform. The term, however - like other popular terms in the development discourse, such as “globalisation” and “the Washington Consensus” - is a slippery one, and tends to mean different things to different people. For USAID, for example, the ROL means “equal treatment of all people before the law”; “fairness”; “human rights”; “the protection of citizens against the arbitrary use

⁵⁸ 1993. See for discussion: Haber et al. (2003); and Przeworski (2004).

⁵⁹ North (1995:25).

of state authority”; and “judicial independence.”⁶⁰ The UNDP, on the other hand, stresses in its definition that “legal frameworks should be fair and enforced impartially”; that there should be “equal protection (of human as well as property and other economic rights)”; and that there should be “clear communication of the rules” and “punishment under the law.”⁶¹ The following discussion will identify how the Bank defines “the ROL”, and locate these definitions within existing jurisprudential and political debate.

The ROL under Shihata.

The World Bank’s working definition of the ROL has tended to reflect the particular views of its reigning General Counsel. Ibrahim Shihata, the Bank’s Counsel from 1983-98, for example, defined the ROL as “a system, based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules.”⁶² More specifically, the ROL required that:

a) there is a set of rules which are known in advance; b) such rules are actually in force; c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures; d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body; and e) there are known procedures for amending the rules when they no longer serve their purpose.⁶³

This was the definition of the ROL which coincided with the Bank’s “discovery” of the law in the early 1990s, and lasted for the duration of Shihata’s term as General Counsel.

⁶⁰ http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/

⁶¹ <http://magnet.undp.org/policy/chapter1.htm>
<http://magnet.undp.org/policy/glossary.htm>

⁶² Shihata (1991:85) emphasis in original.

⁶³ Ibid.

The ROL under Tung.

The Bank's position appears to have changed, however, in recent years, and the ROL was defined in a different way by Shihata's successor as General Counsel, Ko-Yung Tung, in a speech he gave in 2002.⁶⁴ The definition of the ROL put forward in that speech has been incorporated into the Bank's most recent publications on legal and judicial reform.⁶⁵ It asserts that the ROL prevails where:

(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy.⁶⁶

2.5 The Bank's Definitions and Politico-Legal Theory.

What are the implications of these two separate definitions? A crucial distinction made by legal theorists in discussing the ROL is between *formal* and *substantive* definitions. Formal definitions gauge the existence of the ROL according to whether or not certain objectively verifiable criteria are present in the legal system (e.g. whether or not laws are prospective; whether or not some means of judicial review exists), but demand nothing of the actual content of the law.⁶⁷ Substantive definitions, on the other hand – as well as insisting on the formal criteria - ask questions of the actual laws themselves.⁶⁸ Laws are held to conform to the ROL only insofar as they meet certain subjective criteria as regards the morality of the legal system, such as

⁶⁴ World Bank (2002a).

⁶⁵ World Bank (2002b);(2003);(2004a).

⁶⁶ World Bank (2004a:2-3).

⁶⁷ e.g. Craig (1997); Raz (1977, 1979).

⁶⁸ e.g. Dworkin (1986).

whether the laws are “good” laws or “just” laws.⁶⁹ Legal scholars tend to prefer formal definitions of the ROL because they allow for an element of consensus- the formal criteria are either there, or are not. Substantive conceptions, in contrast, are a battleground for competing notions of justice and differing moral visions. “If the rule of law is the rule of good law”, says Joseph Raz⁷⁰, “then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.” This distinction between formal and substantive definitions of the ROL is crucial to understanding the Bank’s work in legal and judicial reform, not least because substantive conceptions – incorporating various degrees of civil and political rights – are incredibly difficult for the Bank to work with, given the legal constraints of its charter. Thus, the Bank has a vested interest in promoting as formal and technocratic a version of the ROL as possible.⁷¹

Although the language has changed in recent years, at the heart of the Bank’s ROL remains a stark formalism. Shihata’s 1991 definition reflects this most clearly, in that it says nothing explicit about the substance of the rules, only the procedures through which rules are formulated and applied. The rationale, in keeping with the Bank’s charter, is purely economic: to create a stable, predictable legal environment in which economic actors can come together and transact, free from the arbitrary interference of government. Tung’s definition, on the other hand – given that it refers to issues of equality; human dignity; and “accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy” - seems to have included more of a substantive criteria. However, this is not necessarily so (although there is ample scope for debate). For example, when A.V. Dicey⁷² first wrote of

⁶⁹ Craig (1997).

⁷⁰ 1977:195-196.

⁷¹ Belton (2005:31); Tshuma (1999:83).

⁷² 1960:193.

equality before the law, he was not referring to a substantive equality whereby all members of a society would have equal legal rights and duties, but to a principle by which everybody – government officials as well as ordinary citizens – would be accountable for their actions in the ordinary courts.⁷³ Thus, Craig⁷⁴ has written (echoing Geoffrey Marshall⁷⁵), “Dicey’s formulation is concerned primarily with formal access to the courts, not with the nature of the rules which individuals will find when they get there.”⁷⁶ Similarly, “human dignity” is also open to a formal interpretation: both Friedrich Hayek⁷⁷ and Raz⁷⁸ explicitly tied adherence to a formal conception of the ROL into ideas of individual autonomy and human dignity.⁷⁹ A far more controversial part of Tung’s definition than his ideas of equality and human dignity, however, would appear to be his linking of the ROL with the goals of private sector growth and poverty reduction. This seems to move the ROL beyond the guarantee of certain negative freedoms, and into the realms of promoting positive rights. While it might seem that this is not particularly controversial territory for the Bank – generating economic growth and fighting poverty are, after all, its stated objectives – the legal community has in the past responded with scepticism to such expanded conceptions, both because of the perception that they represent a muddying of the theoretical waters – the ROL becomes all things “good” - and because they put a financial cost on the ROL: the cost of fighting poverty.⁸⁰ Barber⁸¹ has made a

⁷³ Hood Phillips and Jackson (2000); and Jennings (1959).

⁷⁴ 1997:472.

⁷⁵ 1971.

⁷⁶ Indeed, if that is the case, Tung’s fourth element – that “access is accessible to all” - becomes more or less redundant.

⁷⁷ 1986.

⁷⁸ 1977;1979.

⁷⁹ Respecting human dignity was not for Hayek and Raz a matter of specifically legislating in accordance with that goal, but rather a function of allowing individuals to plan their future with certainty- to know in advance the consequences to be expected of their actions. See: Raz (1977:204).

⁸⁰ See: International Commission of Jurists (1959:3) for the most well-known and controversial example of a substantive ROL, incorporating the “social, economic, educational, and cultural conditions under which man’s legitimate aspirations and dignity may be realized.”

strong case, however, that even the most formal of ROL conceptions presupposes a certain basic level of social and material well-being. Access to the courts, for example, requires an education (so that rights are known); money (so that the costs of litigating can be afforded); and the absence of gross imbalances of power (so that a person is not intimidated into avoiding recourse to the courts). There is a fine line, however, between endorsing those rights which flow naturally from a formal ROL, and those which drift into the realms of a substantive ROL.

Where does this leave the Bank in terms of defining the end-goal of legal and judicial reform? On the one hand, substantive definitions allow the Bank to move past morally neutral formal conceptions which allow that even “a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law.”⁸² On the other, however, substantive conceptions are extremely political and (especially when the substantive space is filled with a particular vision of a “developed” society – 1) a market economy; 2) if not democracy, then the *values* of democracy in the form of good governance; and 3) human rights) open the door once again to the charges of “ethnocentricity” and “naivety” that were levelled at the LDM.⁸³ Legal positivists seek to keep issues of law and issues of morality separate. Thus, while Tung’s definition may remain formal, it is ambiguously so, and the danger for the Bank, from a legal positivist perspective, is that it finds itself “getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice”⁸⁴,

⁸¹ 2004.

⁸² Raz (1977:196).

⁸³ See also Finnis (1980:272); and Peerenboom (1999:318).

⁸⁴ Peerenboom (2004:19).

rather than striving for the simple goals of stability and predictability in market exchange.

Chapter 3

3.1 Definitions of the ROL and Legal and Judicial Reform.

Whatever shift may have taken place since the early 1990s in the way the Bank defines the ROL, its actual work in ROL reform – what was referred to in the introduction as “ROL *orthodoxy*” – has actually changed very little. The Bank’s internal think-tank (*Legal Institutions of the Market Economy*) - under the heading “Building the Rule of Law”⁸⁵ - enumerates the various reforms deemed necessary for actuating the ROL. These are: “reforming laws” (i.e. drafting substantive laws, for simplicity often categorised under five main headings: property; contract; company; bankruptcy; and competition); and “reforming institutions” (“including courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centers, bar associations, and enforcement agencies.”)⁸⁶ These, say the Bank, are the means by which the ROL can be “built” or “promoted.” It will have been noted that this closely parallels Shihata’s original conception of the ROL as “a system, based on abstract *rules*...and on functioning *institutions*.”⁸⁷ The following section of the paper will examine this claim by the Bank- that concrete reforms can contribute to the goal of actuating the ROL.

3.2 The Bank and its Articles.

Before doing that, however, it is as well to point out explicitly what the Bank is – and is not – capable of achieving in terms of building the ROL. This is not so much a question of ambition, as a question of the limitations imposed by its charter. Article

⁸⁵ <http://www1.worldbank.org/publicsector/legal/building.htm>

⁸⁶ <http://www1.worldbank.org/publicsector/legal/reforminginstitutions.htm>

⁸⁷ See note 61 above.

IV, section 10 of the Bank's Articles of Agreement notes: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned."

What this means in practice, is that the Bank has had to avoid "revisions of criminal codes, training of police or judges involved solely in criminal matters, or management of penitentiary institutions",⁸⁸ and generally any other area deemed too political by its General Counsel (such as constitutional law). Thus a central tension resides at the heart of the Bank's ROL work: the desire to "build" the ROL but only able to focus its reform efforts on the institutions which significantly affect the economic performance of a country. More will be said about the restriction of the Bank's charter in Chapter 4, when its implications for constructing a "theory" of law and development are considered.

3.3 Reforming Laws.

How does the Bank's work in drafting economic laws contribute to "building" the ROL? Joseph Raz⁸⁹ provides probably the clearest and most influential discussion of a formal ROL, and suggests that "the basic intuition from which the doctrine of the rule of law derives", is that "the law must be capable of guiding the behaviour of its subjects." From this basic idea, he elicits a list of principles which should be able to be applied to any law in order that it conform to the ROL: "all laws should be prospective, open and clear; laws should be relatively stable; and the making of particular laws (particular legal orders) should be guided by open, stable, clear and

⁸⁸ World Bank (1995:14).

⁸⁹ 1977:198.

general rules.”⁹⁰ These principles, says Raz, are the minimum requirement to allow people “to choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them.”⁹¹ The Bank’s drafting of substantive laws is therefore necessary for the ROL in a very obvious way: if there are no laws, by definition a person cannot allow himself to be guided by them.⁹² Similarly, existing means of structuring behaviour – perhaps based on trust, social networks or customs, and not codified - may not meet the ROL criteria.

In fact, the Bank is in a very general sense in good theoretical company in relation to its work in legal reform: the idea that a body of law can be uprooted from one country, transported to another, and perform substantially the same function, has – if not theoretical consensus – strong empirical support. Virtually every legal system can trace its origins back to either the English common law, the French Napoleonic Code, the German *Bürgerliches Gesetzbuch*, or the Scandinavian civil law (or a combination thereof). This is primarily the result of three major waves of “legal transplantation”: “the period of imperialism (1890–1914)”, during which laws were spread by colonisers to the four corners of the world; the period after World War II, when laws were borrowed from the former colonisers by the formerly colonised; and, lastly, the period following the collapse of communism in Central and Eastern Europe.⁹³ Given this history of legal borrowing – which Upham⁹⁴ prefers to call “transnational legal learning”, given it is how legal systems have avoided the long (some would say unnecessary) process of developing laws internally - the issue is not so much whether or not laws have been borrowed, as whether or not, when borrowed, they have been able to substantially guide individuals’ behaviour. In this respect, the

⁹⁰ Ibid at 198-201.

⁹¹ Ibid at 203.

⁹² World Bank (2002b).

⁹³ Berkowitz et al. (2003:165).

⁹⁴ 2002:33; See also David (1963) for the classic discussion.

field of comparative law has been perennially concerned with identifying the reasons why transplants seem to “take root” in some countries, but not in others.

The underlying logic guiding the Bank’s work in legal reform seemed in the early 1990s to proceed on the assumption that if the full panoply of economic laws was legislated for, demand would rise up to meet it.⁹⁵ This idea had much in common with Alan Watson’s⁹⁶ theory of legal transplants, which controversially suggested that the reception of Roman law by the countries of Western Europe had demonstrated that transplantation is a more-or-less technical exercise, and that “legal rules may be very successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system.” “How otherwise”, he asked, “could one explain the use made of Roman law by fifth-century Germanic tribes, the acceptance of so much Roman law dating from different periods and different political circumstance in the Middle Ages and later by so many diverse States in Western Europe, in monarchies, oligarchies and republics alike?”⁹⁷ Watson was controversial because he was going against a line of thought going back to Montesquieu⁹⁸, who saw laws as being unique to a country’s geography, politics, culture, religion and even climate, so as to render it “very unlikely for those of one nation to be proper for another.”⁹⁹ More recently, the Bank seems to have reached a middle-ground between these two positions, and its *Legal Institutions of the Market Economy* website advises that “Legal transplants have ‘taken’ much less often than one might expect. The reason may be an over-emphasis on the law’s content at the expense of sensitivity to local context in the adaptation and implementation

⁹⁵ Hendley (1999).

⁹⁶ 1974; 1976:80-81.

⁹⁷ Ibid at 81.

⁹⁸ 1977:105.

⁹⁹ More recently, Legrand (2001).

process.”¹⁰⁰ In other words, legal transplantation is neither a wholly technical process, nor wholly impossible, but achievable so long as due regard is paid to the process of implementation and the conditions of the “receiving” country.

The Bank picked up on the idea of “legal culture”¹⁰¹ in the mid-1990s as attempts to import masses of European and American corporate, bankruptcy, and property laws into central and eastern Europe (what Berkowitz et al¹⁰² have called a “legislative tornado”) produced only “mixed”¹⁰³ results. This was not a problem faced only by the Bank, but a problem faced by all donors. “Legal culture” thus emerged as a convenient term for explaining away the failure of legal transplants, while still allowing donors to claim the laws, in and of themselves, were “good” laws. The problem in Russia, for example, was not the American and European laws being imported: the problem was ordinary Russians and a rule-sceptical Russian legal culture, the product of years of Soviet-era neglect and political abuse of the legal system.¹⁰⁴ One Bank discussion paper from the late 1990s thus concluded, “We generally do not provide specific recommendations on the legal system, other than stressing the need to develop a legal culture in Russia that is consistent with the operation of a market economy.”¹⁰⁵

The term “legal culture” may convey the point as to why some laws “take” and others do not, but its ability to inform actual, concrete reform projects is extremely limited. At the same time as legal culture has been singled out by the Bank as a crucial variable for the success of legal transplants, debates have carried on over

¹⁰⁰ <http://www1.worldbank.org/publicsector/legal/reforminglaws.htm>

¹⁰¹ According to Friedman (1977:76), legal culture is the “attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts. So defined, it is the legal culture which determines when, why and where people use law, legal institutions or legal processes; and when they use other institutions, or do nothing.”

¹⁰² 2001:3.

¹⁰³ Ibid; McAuslan (2004:64); Sachs (1998); see also: Ajani (1995); and Waelde and Gunderson (1994).

¹⁰⁴ See: Hendley (1999); Sajo (1999).

¹⁰⁵ World Bank (1998:111).

the term itself: how to define it, how to measure it, and how to establish its causal effects.¹⁰⁶ Roger Cotterrell¹⁰⁷, for example, has remarked that the term serves “more of an artistic than a scientific function”, and that “it may, indeed, be impossible to develop a concept of legal culture with sufficient analytical precision to give it substantial utility as a component in legal theory and, especially, to allow it to indicate a significant explanatory variable in empirical research in sociology of law.”¹⁰⁸

Deciphering how the Bank views legal culture as part of a process of concrete reforms – besides broad statements to the effect that “it’s important” – is actually quite difficult. On the one hand, it claims that “knowledge of the legal culture is key to adopting culturally adequate reforms.”¹⁰⁹ Yet it also claims that “changing the legal culture is one of the key elements of the reform process.”¹¹⁰ Thus two separate issues are highlighted, each of which has different implications for the Bank’s work. The first talks of acquiring knowledge of legal culture. In theory, this is the kind of information that is – or should be – collected as part of one of the Bank’s Legal and Judicial Sector Assessments. The second raises the idea of *changing* legal culture. Whereas the former suggests adapting rules to fit local cultures, the latter suggests adapting the culture to fit the rules. The problem with the first stance, is that despite the Bank’s documents being littered with references to the need to “be more sensitive to local context”¹¹¹, attempts to understand “local context” before introducing new laws – however common sense a notion this would seem – are in practice quite rare. One practitioner¹¹² points out that these reconnaissance missions are virtually never carried out, “either because of time constraints, shortage of resources or simply

¹⁰⁶ <http://www1.worldbank.org/publicsector/legal/LegalCultureBrief.doc>

¹⁰⁷ 1997:20.

¹⁰⁸ Ibid at 14.

¹⁰⁹ World Bank (1999:22).

¹¹⁰ Ibid.

¹¹¹ World Bank (1995:11).

¹¹² Faundez (2000:7).

because there is no agreement on how it should be done.” The problem with the second stance, is that theories of changing legal culture tend to lead back to the mistakes of the LDM and the idea of the lawyer as “social engineer.”

The use of the term “legal culture” has at least encouraged the idea that laws need a kind of “glue” to work, and that a legal system is essentially static without the people (and most notably the *views* of the people) who inhabit it. But the Bank has no real theory to account for how this feature of the legal system operates. Interestingly, the Bank’s 1993 study of what it calls the “High-Performing East Asian Economies” (HPAEs)¹¹³ made virtually no mention of the role of law and law adherence in helping those countries achieve dramatic growth, despite all of them coming into the possession of significant amounts of European commercial law in the 19th and early 20th centuries. The only reference, in fact, pointed out that, “[c]ompared with other developing economies, the HPAEs have been more successful in creating a legal and regulatory environment conducive to private sector development.”¹¹⁴ Nearly 10 years later, however, the Bank had changed its mind, claiming that “the Asian financial crisis...vividly illustrated that economic growth without the firm foundation of effective laws and legal institutions was vulnerable and unsustainable.”¹¹⁵ Other research, though, has indicated a less cut-and-dried picture, suggesting that when the years of spectacular growth began, a sizeable gap opened up between the law “on the books” and the law “in action.”¹¹⁶ This gap only narrowed later as a result of internal and external pressures for the law and legal protection.¹¹⁷ In fact, a strong case can be made that the so-called “developmental state” model is more akin to rule *by* law than

¹¹³ “The East Asian Miracle”, World Bank (1993).

¹¹⁴ Ibid at 180-181.

¹¹⁵ World Bank (2004a:2).

¹¹⁶ Pistor and Wellons’ (1999). This study of six Asian economies covering the period 1960-1995 remains the only comprehensive work on the subject.

¹¹⁷ Ibid.

ROL, in that governments never truly subordinate themselves to the law. To this end, Pistor and Wellons¹¹⁸ have called for legal reform projects to be assessed, “not in isolation, but within a broader context of economic policies.”

3.4 Reforming Institutions.

The other arm of the Bank’s ROL-building strategy - reforming judicial institutions - aims to promote, broadly, four reform goals: “Judicial independence” (i.e. the impartiality of the judiciary); “Efficiency” (the speed with which cases are heard in the courts); “Access to justice” (the ability of litigants to have their claims heard); and “Accountability” (improving the professionalism of the bar and bench). The range of reforms the Bank uses to achieve the second, third and fourth of these objectives are extensive and include such things as: introducing computers and case processing equipment to reduce delays; providing training to judges and lawyers; and simplifying complex procedures (“Efficiency”); changing the rules of procedure from written to oral format; reducing the costs of litigating; and setting up alternative dispute resolution mechanisms such as arbitration committees (“Access”); and providing accurate statistics on judicial performance and encouraging civil society organisations and the media to monitor judicial performance (“Accountability”). Although these are all important aspects of the ROL by any definition¹¹⁹, they mean very little if the first element – judicial independence – is not also present: increasing the exposure of people to the courts is of very little social benefit if judges are not interested in deciding cases impartially.

¹¹⁸ Ibid at 19.

¹¹⁹ Compare, for example, Raz (1977) with Ch. 6 of the Bank’s 2002 *World Development Report*. The influence on the Bank’s work is striking.

This view is in keeping with the essence of the ROL – the core idea which stretches back to its roots in natural law thought – which has always been that the law applies to everyone, irrespective of status or rank.¹²⁰ The formal ROL exists to protect individuals from tyrannical or capricious governments, in order that they can plan their lives with reasonable foresight. The goal of an independent judiciary is closely allied with this core idea, because the judiciary – as the primary venue in which disputes are settled – is an obvious target for a government that wants to assert its will. As Raz¹²¹ points out in relation to his “basic intuition” (above), “[s]ince the court’s judgement establishes conclusively what is the law in the case before it, the litigants can be guided by law only if the judges apply the law correctly.”¹²² A court which bases its decisions, not on the law, but on political considerations, is thus not in conformity with the ROL.

The Bank, however, ran up against a problem operationalising a reform programme aimed at promoting judicial independence in the early stages of its ROL work because a politicised judiciary - besides being arguably the most crucial ROL reform - is also, by definition, a political one. As one publication put it, “the tension arises when the achievement of the reform goal of a judiciary able to make fair, consistent and transparent decisions runs up against the necessity for constitutional changes in the manner in which judges are selected, governed and removed.”¹²³ This changed in the mid-1990s, however, when the Bank revised its position and embraced a welter of reforms aimed at improving the independence of borrower countries’ judiciaries.¹²⁴ A report by the Lawyers Committee for Human Rights

¹²⁰ Barnett (2002).

¹²¹ I’ve used Joseph Raz’s conception here again, more than anything because of its clarity and simplicity.

¹²² Raz (1977:201).

¹²³ Lawyers Committee (1996:26).

¹²⁴ See: World Bank (2003);(2004a).

noted the shift in policy, when the Bank (in a letter to that organisation) explicitly endorsed such reforms as “a transparent and merit-based appointment system, tenure which is either for life or subject to a transparent renewal system, the adoption of a code of judicial ethics to foster peer pressure for the maintenance of high standards of judicial conduct, judicial budget autonomy, and adequate and stable compensation packages for judges. The Bank’s judicial reform projects aim to address these types of issues.”¹²⁵

It is very difficult to gauge how much of the Bank’s stated commitment to eradicating executive interference from the judiciary and actualising the ROL via judicial reform in general has actually filtered through to concrete Bank projects and been carried off successfully.¹²⁶ A number of issues appear, however, to lurk unresolved. Besides the issue that the Bank has no explicit criteria - despite the millions of dollars being spent every year on judicial reform projects – for establishing the success or failure of its judicial reform projects¹²⁷; and the inherent difficulties of defining and working with something as subjective as an “independent judiciary”¹²⁸; and despite the unarticulated manner in which individual programmes aimed at different sectors of the judiciary (training, computerisation, independent judiciary, etc.) contribute towards building the unified concept of the ROL; there exists the fundamental matter that the ROL is a political issue which – short of

¹²⁵ Quoted in Lawyers Committee (1996:27-28).

¹²⁶ Stand-alone projects in Guatemala (\$33m approved in 1998); Armenia (\$11.4m in 2000); and Georgia (\$13.4m in 1999), for example – all of which have the independence of the judiciary as a stated objectives - are still listed as “active” and no information is yet available, other than general governance indicators which show a decline in the overall ROL for all in the period during which the Bank’s projects have been operating (Kaufmann et al., 2005).

¹²⁷ Messick (1999); Prillaman (2000).

¹²⁸ The legal literature talks of reaching a *balance* between independence and accountability. The term “independent judiciary” for lawyers conjures up images of judges free from precedent, and able to command bribes as and when they want. The term “accountable judiciary” also has problems, given that the line between an executive applying political controls in order to ensure the accountability of the judiciary, and an executive encroaching upon the judiciary’s decisional independence, is in practice a very fine one. See: Wallace (1998); and Burbank (2003).

regime change – may actually stand next to no chance of emerging in the countries where these programmes are carried out. Or, as Carothers¹²⁹ has pointed out, “rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.”

In order to capture this sentiment – that the ROL is about politics and the restraint of raw political power – the Bank has acknowledged from the very start of its ROL work¹³⁰ (and reiterated again recently) that “judicial reform, is a long-term process, highly dependent on political will.”¹³¹ “Political will”, however, like “legal culture” is not a satisfactory term, and may serve no other purpose than to absolve the Bank of responsibility for the failure of the ROL to emerge from its various ROL-building activities. Moreover, the term reduces its work in judicial reform in relation to the ROL almost to insignificance: if government is committed to the idea of judicial independence and the ROL, reforms aimed at actuating it are superfluous. An example of the Bank’s position in operation – that is, technical reforms which are comparatively easy to implement, on the one hand, and the reliance on “political will”, on the other – can be seen in Venezuela, where the Bank carried out two judicial reform projects in the late 1990s (the \$30m “Judicial Infrastructure Project”, and the \$4.7m “Supreme Court Modernization Project”). The first of these projects was to be the Bank’s “flagship” project in judicial reform: its first attempt at a “stand-alone” project. Of the \$84.34m ultimately expended, \$52m were spent on physical infrastructure; \$18.34m on courtroom administration, and the remainder split between judicial training and judicial administration. The Judicial Infrastructure Project, in other words, was primarily about renovating the courts and equipping them with both state-of-the-art case processing equipment, and the personnel capable of using them.

¹²⁹ 1998:96.

¹³⁰ World Bank (1994:24);(1995:26).

¹³¹ (2004b:12).

At the same time as these reforms were being carried out, however, there were developments in the Venezuelan political arena which severely undermined the Bank's efforts to build the ROL. The project, for a start, was delayed for two years because of political strife; then in 2004 a "court-packing" law was passed¹³² that expanded the supreme court from twenty to thirty-two members, and allowed justices to be elected and removed by simple majority. As the head of the judiciary, a politicised supreme court effectively means that every judge in Venezuela risks losing his job should he not apply the law in the manner the government wants it applied.¹³³ More generally, a press release by Amnesty International in 2002 claimed that "the rule of law has been weakened by the climate of impunity, extreme political polarization, the imminent risk of social upheaval, the militarization and politicization of the armed forces and police forces, and the apparent inability of the state to guarantee human rights to its citizens in an impartial and effective way."¹³⁴

Trying to "build the ROL" in a heavily politicised atmosphere like Venezuela would seem hopeless in the extreme, and the kind of technical reforms implemented by the Bank can hardly be blamed for failing to build a ROL state. That issue aside, however, the Bank has earmarked a further \$28 million for what it calls the "Judicial Conflict Resolution" project. What makes this proposal interesting is that it comes in the aftermath of a \$22.5m Judicial Reform Project in Peru, in which the Bank's decision to approve the project was heavily criticized by human rights campaigners.¹³⁵ This project was eventually cancelled by the Peruvian government (NGOs claimed this was a face-saving move, to pre-empt the Bank's own imminent termination of the project when it came to realise that the requisite level of "government commitment"

¹³² Ley Orgánica del Tribunal Supremo de Justicia.

¹³³ Economist (2004).

¹³⁴ <http://web.amnesty.org/library/print/ENGAMR530162002>

¹³⁵ Lawyers Committee (2000).

was sorely lacking). The question was asked, however: Why was the Bank lending, in the first place, to a government intent (as Alberto Fujimori was intent) on trampling over the ROL at every opportunity? A similar question can be asked about the Venezuelan project: How can the Bank's reforms trump politics? The main difference between the Bank's approach in the Peruvian project - where "its reaction to events after approval was appropriate and forthright"¹³⁶ in that it very publicly postponed the project – and its current work in Venezuela, seems to lie in the fact that the Bank sees the disbursement of funds for judicial reform in Venezuela, not as part of the problem as campaigners in the Peru project claimed, but as part of a possible solution. Indeed, the project proceeds on the basis that "strengthening the Rule of Law and increasing access to justice for all can help reduce social discontent and inequality."¹³⁷ Another report – this time by Human Rights Watch - has cautioned the Bank, however, against this line of thinking, and urged it to make all future loans contingent on Venezuela tackling the issue of judicial independence.¹³⁸ "Without that, other improvements may only help a fundamentally flawed system function more efficiently."¹³⁹

¹³⁶ Ibid at 11.

¹³⁷ World Bank (2004c:1).

¹³⁸ Human Rights Watch (2004).

¹³⁹ Ibid at 3.

Chapter 4: Conclusions

Where does this discussion leave the Bank in terms of a *theory* of LD or the ROL?

The absence of a guiding theory in the Bank's work has been its main failing since it discovered the law in the early 1990s, just as it was with the LDM before it. Besides the issues of "legal culture" and "political will", to a considerable extent this is a function of the Bank's Articles: the need to focus on purely economic legal institutions necessarily imposes on the Bank a very restricted view of the legal system and the ROL, and severely limits its ability to "build" the ROL. For example, if the law is to guide individual behaviour in order for the ROL to exist- as Raz's formal conception insists - a whole host of other institutions need to be brought into the equation besides commercial laws and the commercial courts. For one thing, there have to be effective law enforcement institutions like the police and prison services, and a network of criminal courts, all capable of ensuring compliance with the law. The problem, in other words, is that whereas the ROL is a *system-wide* concept, reliant on the functioning of many different aspects and institutions of the legal system,¹⁴⁰ the Bank's approach to building the ROL is necessarily a *sectoral* one.

There is evidence, however, that – whatever the limitations of its charter, and however much of a stumbling block ideas like "legal culture" and "political will" might be to its ROL-building activities - the Bank sees its ROL work in the economic sphere as part of a broader, ROL-building initiative, and that the limitations of its charter actually forms the basis of its "theory" of the ROL. The working assumption appears to be along the lines of "all good things go together": that reforming those laws and legal institutions which affect the economy can somehow gather momentum and parlay into a broader, social and political acceptance of the principles of the ROL.

¹⁴⁰ Belton (2003).

As well as the most recent Venezuela project, the 2002 *World Development Report*¹⁴¹ suggested that:

Not all the elements that affect judicial performance are equally difficult politically. This is important: institutions work as systems. An improvement in one part can affect the efficiency of the whole system; that is, policymakers may complement various small reforms to improve efficiency while building momentum for larger reforms

This kind of thinking – a “faith in spillovers”¹⁴², if you like – was identified by David Trubek¹⁴³ in a retrospective of the LDM as one of the four pillars on which the movement rested: the belief – in line with its modernisation theory roots - that reforming the laws of the economy would lead to economic growth and, from there, democracy, access to justice, human rights, and everything else that was good and desirable. More recently, both Matthew Stephenson¹⁴⁴ and Carol Rose¹⁴⁵ have examined a similar phenomenon: governments (China in Stephenson’s case, Vietnam in Rose’s) wishing to limit ROL reforms solely to the economic sphere, but with reformers (the US in China, and a plethora of organisations in Vietnam) hoping that once these economic reforms “take”, they will somehow manage to snowball into a broader, substantive ROL incorporating all manner of civil and political rights. Stephenson¹⁴⁶ calls this the “Trojan Horse” strategy to building the ROL, adding that “I know of no theoretical work that gives a solid foundation to this hypothesis.” It is interesting in this respect, that whereas economics has long since moved on from the difficult-to-model ideas of “high development theory”¹⁴⁷ - theories like “The Big Push”¹⁴⁸, “unbalanced growth”¹⁴⁹, and “circular causation”¹⁵⁰ - both LDMs have

¹⁴¹ World Bank (2002c:131-132).

¹⁴² Trubek (2004:5).

¹⁴³ Ibid.

¹⁴⁴ 2000.

¹⁴⁵ 1998.

¹⁴⁶ 2000:18.

¹⁴⁷ Krugman (1995).

¹⁴⁸ Rosenstein-Rodan (1943).

found vague references to “spillovers” and “demonstration effects” incredibly hard to put down. With the LDM the focus was primarily on legal education and getting the legal profession to appreciate the developmental role of the law; with the Bank, the focus is on a broader range of institutions: education, courts, legislative bodies, etc. But the underlying logic is essentially the same.

It is certainly not the claim of this paper, however, that the Bank’s work in legal and judicial reform is completely without substance. But as Belton¹⁵¹ has pointed out, “not all work to reform legal institutions is rule-of-law reform.” Thus a distinction can be drawn between what the Bank can hope to achieve by reforming specific institutions; and what the Bank can hope to achieve in terms of building the ROL. Whereas it may be perfectly feasible for the Bank to give the judiciary a makeover – things like speeding up the processing of cases with its computerised management systems; and constructing new courthouses - the *real* ROL – the ROL which exists as philosophical doctrine and political theory - is of a much more elusive nature. The Bank has yet to come up with satisfactory answers to the questions raised by the LDM, and has yet to move past facile statements like “the mistakes of the past must not be repeated.” What, for example, are the “social, political, psychological, and other factors external to the normative system of the legal order itself”, which “limit the ability of the law to induce behaviour”?¹⁵² How can these factors be isolated, measured, and manipulated?

This paper has taken the position that claims to be “building” the ROL should mean just that, otherwise the term becomes merely a rhetorical device. A promising line of attack for the Bank, in this respect, is the formal conception it endorses, in

¹⁴⁹ Hirschman (1958).

¹⁵⁰ Myrdal (1957).

¹⁵¹ 2005:22.

¹⁵² University of Wisconsin (1971) in TG:1073.

that it provides a much clearer end-goal for ROL reforms than substantive conceptions. Importantly, however, while the Bank is limited by its charter as to what it can do, it needs to find ways of, if not reforming directly, then at least pulling within the orbit of its consideration, those other, non-economic sectors of the legal system. For example, while the Bank's project documents relating to the Venezuelan "Judicial Conflict Resolution" project mentioned in the previous chapter highlight the need to focus reform efforts on the highest court (the Supreme Tribunal of Justice) "in order to effectively direct reform, to provide an example for other courts in the system, and to encourage a broad based civic constituency for promoting sustainable change"¹⁵³, they say nothing about co-ordinating the Bank's efforts with the other ROL operator in the country, the Inter-American Development Bank (IDB), which approved a \$75 million loan to Venezuela in 2001 to improve the criminal justice system (by reforming the criminal courts, prisons, police service, and Attorney General's office). Working in tandem with the IDB to ensure the complementarity of their reform efforts would be a far more profitable exercise for the Bank than working in isolation with a speculative theory. Moreover, given the centrality of the IDBs work on law and order to the Bank's own mission of creating a favourable investment environment, it is hard to see how the ROL could thrive otherwise.

The Bank will do well to temper its enthusiasm for the ROL, however, given that some of the most important factors affecting it seem – at this point in time – to be either unreformable, or at least very difficult to reform. The Bank, to its credit, acknowledges this, noting that "reform is complex and of a long term nature."¹⁵⁴ But in the absence of answers to questions like the ones posed in this paper, statements

¹⁵³ World Bank (2004c:2).

¹⁵⁴ World Bank (2002b:27).

like these serve only to legitimise reforms in the absence of theory, on the grounds that they will come good, hopefully, in the end.

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