

THE POLITICAL ECONOMY OF RULE OF LAW IN MIDDLE-INCOME COUNTRIES: A COMPARISON OF EASTERN EUROPE AND CHINA

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ABSTRACT

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. This is preliminary attempt to understand some of issues facing MICs as they seek to establish rule of law. To keep the scope manageable given the wide diversity of MICs, I compare Eastern European MICs and China. Part II provides a brief introduction to MICs and general issues they face. Part III provides a broad empirical comparison of Eastern European countries, the Baltics and former soviet republics, and China. Parts IV to VI 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 VII turns to recent debates about the role of courts in China, and the controversial crackdown on social and political cause lawyering. Part VIII concludes.

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I. INTRODUCTION

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. A dearth of scholarship exists, however, on rule of law in MICs and the special issues MICs face in developing a functional legal system. What little is known is that rule of law is highly correlated with wealth; that many MICs never become high-income countries (HICs); and that MICs face many challenges, some of which are directly related to law and the legal system, others perhaps indirectly related, while others more or less largely unrelated to law and the legal system.

This article is a preliminary attempt to explore some of the 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 in a LIC may also be low given the nature of the economy. Conversely, MICs have some, albeit limited, resources, and most MICs have in place the standard institutions associated with modern states and found in HICs. Accordingly, this article emphasizes political economy issues: how persons and groups with common or competing interests use politics and law to affect change and realize their goals,¹ and in the process facilitate or impede the development of the legal system and the establishment of rule of law. In so doing, this article acknowledges that the rule of law is subject to many different interpretations consistent with a wide variety of institutional variations.

To keep the scope manageable given the wide diversity of MICs, this article compares Eastern European MICs and China. Part II provides a brief introduction to MICs and the general is-

1. 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.

sues they face. Part III provides a broad empirical comparison of Eastern European countries, the Baltics, former Soviet republics, and China. Parts IV to VI compares rule of law issues in Eastern Europe and China, focusing on lustration issues, implementation gaps, and the performance differences between constitutional and regular courts. Part VII turns to recent debates about the role of courts in China and the controversial crackdown on social and political cause lawyering. Part VIII concludes.

II. AN OVERVIEW OF MIDDLE-INCOME COUNTRIES

There is a general consensus regarding the goals of law and development programs. These goals include sustainable economic growth, establishment of rule of law and good governance, and consolidation of 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.² The World Bank's ongoing study of good governance concludes that there is no evidence of any significant improvement in governance worldwide.³

While the obstacles confronted by failed and transitional states receive considerable attention, much less is known about the particular issues facing MICs or what they should do to increase their chances for success. This oversight is unfortunate, as just under 50% of the world's population and one-third of the world's poor live in MICs.⁴ There are currently eighty-six MICs, ranging in per capita income from \$850 to \$10,000. The number of MICs has grown in recent years. Some LICs have grown into the category, a handful of MICs have grown out of the category, and several MICs have regressed into the low-income category. The World Bank estimated that in East Asia alone, 90% of people would live in MICs by 2010.⁵

MICs must overcome a range of technically, politically, and socially complex issues: achieving sustainable growth that pro-

2. Thomas Carothers, *The Problem of Knowledge in PROMOTING THE RULE OF LAW ABROAD* 15, 15 (Thomas Carothers, ed., Carnegie Endowment 2006).

3. Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *Governance Matters VI: Governance Indicators for 1996-2006* (World Bank Policy Research, Working Paper No. 4280, July 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979.

4. INDEPENDENT EVALUATION GROUP, WORLD BANK, *DEVELOPMENT RESULTS IN MIDDLE-INCOME COUNTRIES: AN EVALUATION OF WORLD BANK SUPPORT* xiii (2007), available at http://siteresources.worldbank.org/EXTMIDINCCOU/Resources/MIC_evaluation.pdf.

5. World Bank, *East Asia & Pacific Update* (Apr. 2007), available at <http://siteresources.worldbank.org/INTEAPHALFYEARLYUPDATE/Resources/550192-1175629375615/EAP-Update-April2007-fullreport.pdf>.

vides productive employment, protects the environment, and reduces 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 the state's inability to respond adequately to rising expectations and demands given its limited resources and weak institutional framework.⁶ MICs also face new challenges arising from globalization and an international trade regime which have increased 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.⁷

A World Bank study⁸ 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 MICs (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 (including China). MICs also confront critical health challenges (including China); furthermore, about 70% of MICs are failing to meet their Millennium Development Goal of reducing child mortality by two-thirds (not the case for China).

While some MICs have improved their 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

6. INDEPENDENT EVALUATION GROUP, *supra* note 4; WORLD BANK, DEVELOPMENT COMMITTEE, STRENGTHENING BANK GROUP ENGAGEMENT ON GOVERNANCE & ANTICORRUPTION (2006); WORLD BANK, REPORT OF THE TASK FORCE ON THE WORLD BANK GROUP AND THE MIDDLE INCOME COUNTRIES (2001), <http://siteresources.worldbank.org/COUNTRIES/Resources/mictf.pdf>.

7. See Ha-Joon Chang, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (Bloomsbury Press 2008) (2007); *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* (Neil Netanel, ed., Oxford University Press 2009).

8. INDEPENDENT EVALUATION GROUP, *supra* note 4, at 4.

rule of law.⁹ Programs to increase judicial independence have proven disappointing.¹⁰ Litigation is often expensive and time-consuming, and access to justice remains limited. How China and Eastern Europe fare along these dimensions is the subject of Parts III to VII.

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,¹¹ but the strategy is so new that it has yet to be evaluated.¹² That this is the World Bank's third strategy paper in six years reflects the difficulty the World Bank has had in grappling with the complex issues confronting MICs.¹³

The wide-ranging diversity among the MICs partly explains the World Bank's difficulty in understanding the obstacles faced by these countries. MICs vary socially, culturally, economically, and politically; this diversity acts as a serious impediment to designing effective programs for MICs. MICs range in population size from 1.3 billion in China to 20,000 in small islands such as Palau. In ten MICs, 40% of the population lives in poverty, compared to less than 5% in ten others. 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 individual MIC economies differ in terms of the relative importance of rural agriculture and urban industry, amount and mix of imports and exports, reliance on natural resources, openness to foreign investment and trade, financial and service sector lib-

9. Transparency International, *Global Corruption Report: Corruption and Judicial Systems* (2007), available at http://www.transparency.org/publications/gcr/gcr_2007 (last visited Nov. 7, 2010).

10. Javier Couso, *Judicial Independence in Latin America: The Lessons of History in the Search for an Always Elusive Ideal*, in INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES 203 (Tom Ginsburg & Robert A. Kagan, eds., Peter Lang Publishing, Inc., 2005); U.S. AGENCY FOR INT'L DEV., GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY (rev. ed., 2002), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf; Carlos Santiso, *The Elusive Quest for the Rule of Law: Promoting Judicial Reform in Latin America*, BRAZILIAN JOUR. POL. ECON., July-Sept. 2003, <http://www.rep.org.br/pdf/91-6.pdf>.

11. REPORT OF THE TASK FORCE ON THE WORLD BANK GROUP AND THE MIDDLE INCOME COUNTRIES, *supra* note 7; WORLD BANK, ENHANCING WORLD BANK SUPPORT TO MIDDLE INCOME COUNTRIES: MANAGEMENT ACTION PLAN (2004), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20976615~pagePK:41367~piPK:51533~theSitePK:40941~isCURL:Y,00.html>.

12. INDEPENDENT EVALUATION GROUP, *supra* note 4.

13. REPORT OF THE TASK FORCE ON THE WORLD BANK GROUP & THE MIDDLE-INCOME COUNTRIES, *supra* note 6; ENHANCING WORLD BANK SUPPORT TO MIDDLE INCOME COUNTRIES: MANAGEMENT ACTION PLAN, *supra* note 11; STRENGTHENING BANK GROUP ENGAGEMENT ON GOVERNANCE & ANTICORRUPTION, *supra* note 6.

eralization, and access to global capital markets. They also vary widely in their institutional capacity. A handful of countries 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 a reversion to authoritarianism.

Low success rates are another reason so little is known about how to address MIC problems. 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. Among the MICs, the 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. Others in the top quartile include North American and Western European countries; Australia; Israel; Chile from Latin America; Slovenia, Estonia, and Hungary from Eastern Europe; a handful of small island states; and the oil-rich Arab countries.¹⁴

The seemingly random countries in this group share at least one other commonality: wealth. All of them are high or upper-middle income countries.¹⁵ This observed correlation is consistent with the general empirical evidence that rule of law and economic development are closely related¹⁶ and tend to be mutually reinforcing.¹⁷

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

14. While rankings change from year to year, in recent years among these countries have been Antigua and Barbuda, Barbados, the Bahamas, Bermuda, the Cayman Islands, Malta, Martinique, Mauritius, Puerto Rico, and Samoa, in addition to Oman, Qatar, Bahrain, Kuwait and the United Arab Emirates. Several of the island states rely heavily on tourism and the provision of financial services to companies looking for tax havens for economic development. Most have populations between 50,000 and 500,000.

15. See generally RANDALL PEERENBOOM, *CHINA MODERNIZES* (Oxford University Press 2007).

16. *Id.* at 35.

17. See generally ROBERT J. BARRO, *DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY* (MIT Press 1997); Cesar A. Calderon and Alberto Chong, *Causality and Feedback Between Institutional Measures and Economic Growth*, 12 *ECON. & POL.* 69 (2000); Kaufmann et al., *supra* note 3; Philip Keefer & Stephen Knack, *Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 35 *ECON. INQUIRY* 590, 597 (1997); See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (Cambridge University Press 1990).

from their less fortunate regional counterparts? What are the political, legal, economic, cultural, and institutional obstacles to establishing a legal system and governance institutions that would compare favorably with those in the top quartile?

Second, 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, much less the particular institutional arrangements necessary for rule of law or good governance. Nor do the studies shed much light on the path or sequencing of reforms.¹⁸

Third, why have East Asian countries been so successful? Is there an East Asian Model (EAM) for development?¹⁹ I have argued that the EAM involves the sequencing of economic growth, legal reforms, democratization, and constitutionalism, with different rights being taken seriously at different points in the process.²⁰ As I discussed elsewhere,²¹ the following characteristics and sequences are typical of the EAM.

- (i) An emphasis on economic growth rather than civil and 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.²² In particular, governments adopt most of the basic macroeconomic principles of the Washington Consensus for the domestic economy. EAMs also adopt modi-

18. Sequencing, in particular prioritizing legal reforms aimed at strengthening rule of law before democratization, has recently come under attack. *See generally*, e.g., Thomas Carother, *How Democracies Emerge: The "Sequencing" Fallacy*, 18 J. DEMOCRACY 12 (2007). For a contrary view on that issue as well as a discussion of other sequencing issues, see Randall Peerenboom, *The East Asian Model and the Sequencing Debate: Lessons from China and Vietnam*, in LEGAL REFORMS IN CHINA & VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 29, 44 (John Gillespie & Albert Chen eds., 2010).

19. *See generally* WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (Oxford University Press 1993); ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (Oxford University Press 1989) (explaining the late industrialization process); Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 136 (Frederic C. Deyo, ed., Cornell University 1987); ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 34-51 (Princeton University Press 1990).

20. *See generally* PEERENBOOM, *supra* note 15.

21. *Id.* at 39-60; RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 450-98 (Cambridge University Press 2002).

22. PEERENBOOM, *supra* note 15, at 5-7.

fied versions of neoliberal aspects that reduce the role of the state through rapid privatization and deregulation. The state, however, remains active in reducing poverty and in ensuring the minimum material standards necessary to compete in a competitive global economy. The state modifies the prescribed Washington Consensus relationship between the domestic and global economy by gradually exposing the domestic economy to international competition while still offering some protection to key sectors and infant industries.

- (iii) As the economy grows and wealth is generated, the government invests in human capital and institutions. Investments include the establishment of a legal system that meets the basic requirements of a procedural rule of law. 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) The government postpones democratization, in the sense of freely contested multiple party elections for the highest level of office, until a relatively high level of wealth is attained.
- (v) Constitutionalism begins to emerge during the authoritarian period, including the 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 limited civil and political rights. Judicial independence remains limited, with the protection of the full range of human rights and in particular civil and political rights suffering accordingly
- (vi) After democratization, there is greater protection of civil and political rights, including those associated with sensitive political issues. Ongoing abuses of rights, however, still occur, and rights are frequently given communitarian or collectivist interpretations rather than liberal interpretations.

This very roughly describes the arc of several Asian states. With that said, many of the countries have differing levels of economic wealth, legal system development, and political regimes, which range from democracies to semi-democracies to socialist states.

South Korea, Taiwan and Japan have high levels of wealth, rule of law compliant legal systems, democratic governments, and constitutionalism. Hong Kong, Singapore and Malaysia are also wealthy, with legal systems that fare well in terms of rule of law, but are either not democratic (Hong Kong) or are non-liberal democracies dominated by a single party (Singapore and Malaysia). Thailand, less wealthy than the others, has democratized, but has a weaker legal system; under Prime Minister Thaksin Shinawatra, it had adopted policies that emphasized growth and social order rather than civil and political liberties. Compared to its East Asian neighbors, China and Vietnam are at an earlier stage. They are lower-middle and low-income countries, and have legal systems that outperform the average in their respective income class but are weaker than the rest.²³

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? If so, has the EAM been the cause of economic growth and development?²⁴ Assuming there is a definable EAM, is it applicable elsewhere? Have globalization, the WTO, and the strengthening of the international trade regime undermined countries' ability to pursue successful EAM policies? Does the global economic crisis signal the end of an era where growth was driven by U.S. consumption of exports and cheap financing derived 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 EAM of development. After the collapse of the Soviet Union, political reforms in Eastern Europe preceded economic reforms or occurred rapidly with democratization. In general, economic reforms reflected a neoliberal, "big bang" approach rather than the pragmatic, gradualist approach seen in China. After democratization, there was rapid dismantling or modification of socialist institutions and their replacement, or attempted

23. PEERENBOOM, *supra* note 15, at 31-32; see generally Randall Peerenboom & Weitseng Chen, *Development of Rule of Law: A Comparison of Taiwan and China* (November 13, 2008) available at <http://ssrn.com/abstract=1300862>.

24. Paul Krugman, *The Myth of Asia's Miracle: A Cautionary Fable*, FOREIGN AFFAIRS, Nov.-Dec. 1994, at 62; see generally John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA (Christoph Antons ed., 2003) (questioning the effectiveness of the rule of law in economic development).

replacement, by liberal democratic ones. Finally, whereas China moved in the direction of the EAM, Eastern European countries largely followed the EU accession process which included the establishment of a rule of law modeled on the legal systems found in European HICs.

III. A STATISTICAL OVERVIEW OF EASTERN EUROPE, THE FORMER SOVIET REPUBLICS, AND CHINA

Eastern Europe's big bang approach has generally been considered less successful than China's pragmatic, gradualist 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 the population in the state-socialist countries of Europe lived in absolute poverty, a decade later more than 20% did; this rapid transition had caused an estimated three to ten million premature deaths.²⁵ 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 behind East Asia.²⁶

These broad regional patterns conceal considerable diversity. As is generally true for MICs, there is a wide disparity of

25. Jan Drahekoupil & Martin Myant, *The Political Economy of Welfare Reforms in Eastern Europe and Central Asia 2-3* (Apr. 29, 2009), available at <http://ssrn.com/abstract=1396736>.

26. See Stefania Fabrizio et al., *The Second Transition: Eastern Europe in Perspective* 4-6 (International Monetary Fund Working Paper 09/43, 2009), available at <http://ssrn.com/abstract=1366173>. The authors 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. Sonsoles Gallego Harrero et al., *The Impact of the Global Economic and Financial Crisis on Central Eastern and Southeastern Europe and Latin America* (Banco de Espana Occasional Paper No. 1002, 2010), available at <http://ssrn.com/abstract=1635773>, 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." *Id.* at 53-54. 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." *Id.* at 53.

wealth among MICs in Eastern Europe, China, and the former Soviet republics. At one end, Kyrgyzstan, Uzbekistan, and 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 eighteen Eastern Europe countries, there are ten upper-middle income countries (UM), seven lower-middle income countries (LM), and one upper income country (Slovenia). Among the twelve former Soviet countries, there are eight LMs, one UM (Russia), and three LICs. China falls into the LM category.

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 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. China ranks in the middle on most indicators, except voice and accountability, i.e., civil and political rights.

Table 1: 2008 Worldwide Governance Indicators
Percentile Rankings²⁷

Governance Indicator	Eastern Europe	China	Former Soviet Countries
Voice and Accountability	63.3	5.8	21.4
Political Stability	56.1	33.5	35.8
Government Effectiveness	61.3	63.5	31.5
Regulatory Quality	69.2	46.5	34.0
Rule of Law	58.5	45.0	23.5
Control of Corruption	59.1	41.1	21.5

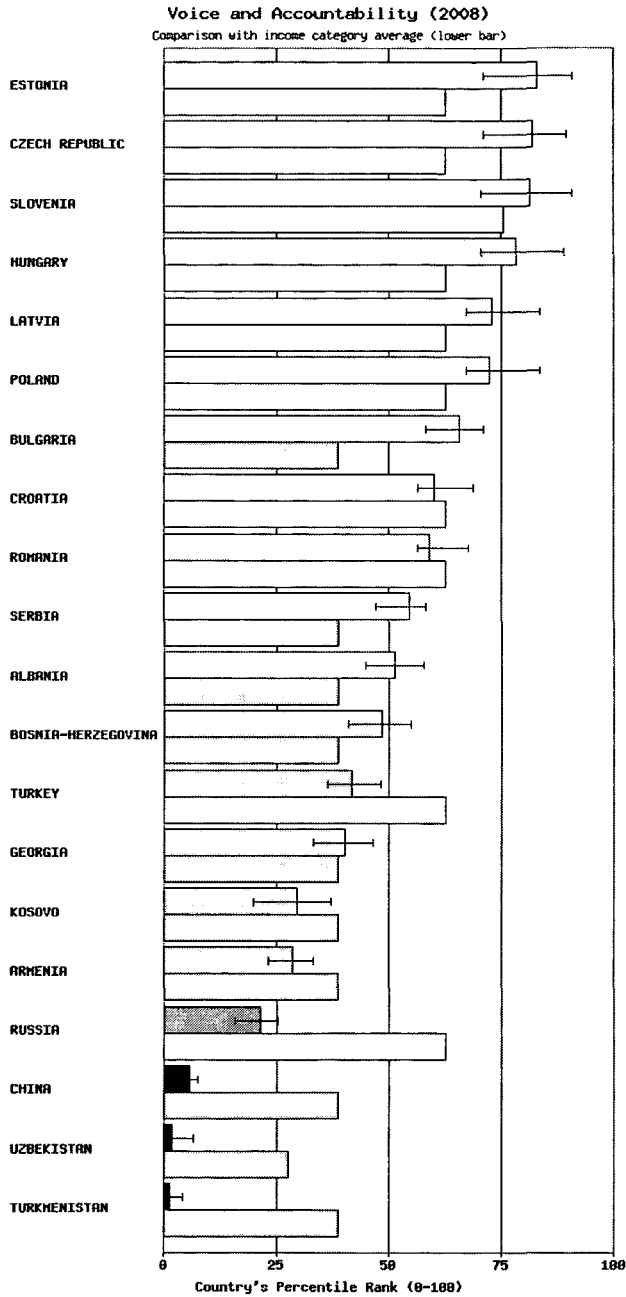
Source: [D. Kaufmann et al., *Governance Matters VIII: Governance Indicators for 1996-2008*, http://info.worldbank.org/governance/wgi/sc_country.asp]

Looking beyond regional averages, there is considerable diversity within regions, as reflected in the following tables on “Voice and Accountability,” “Rule of Law,” and “Government Effectiveness.”²⁸

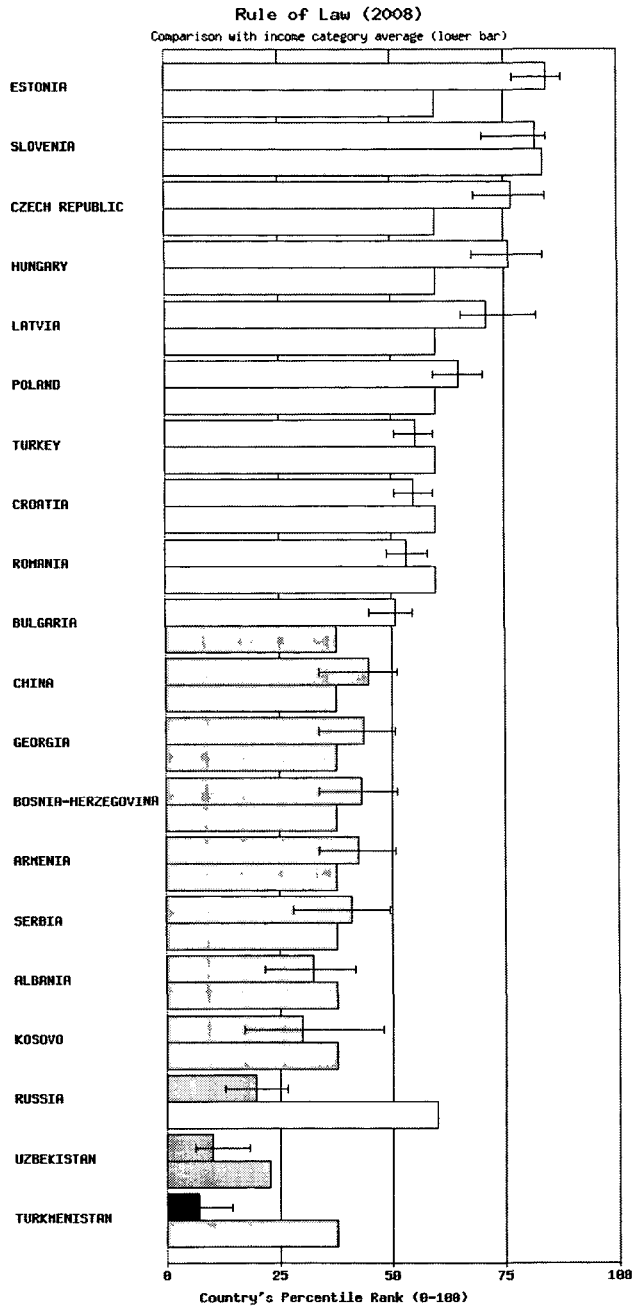
Former Soviet countries such as Armenia, Georgia, Russia, Turkmenistan, and Uzbekistan do fairly poorly on all three in-

27. Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VIII: Aggregate and Individual Governance Indicators 80-97* (World Bank Policy Research Working Paper 4978, June 2009), available at <http://ssrn.com/abstract=1424591>.

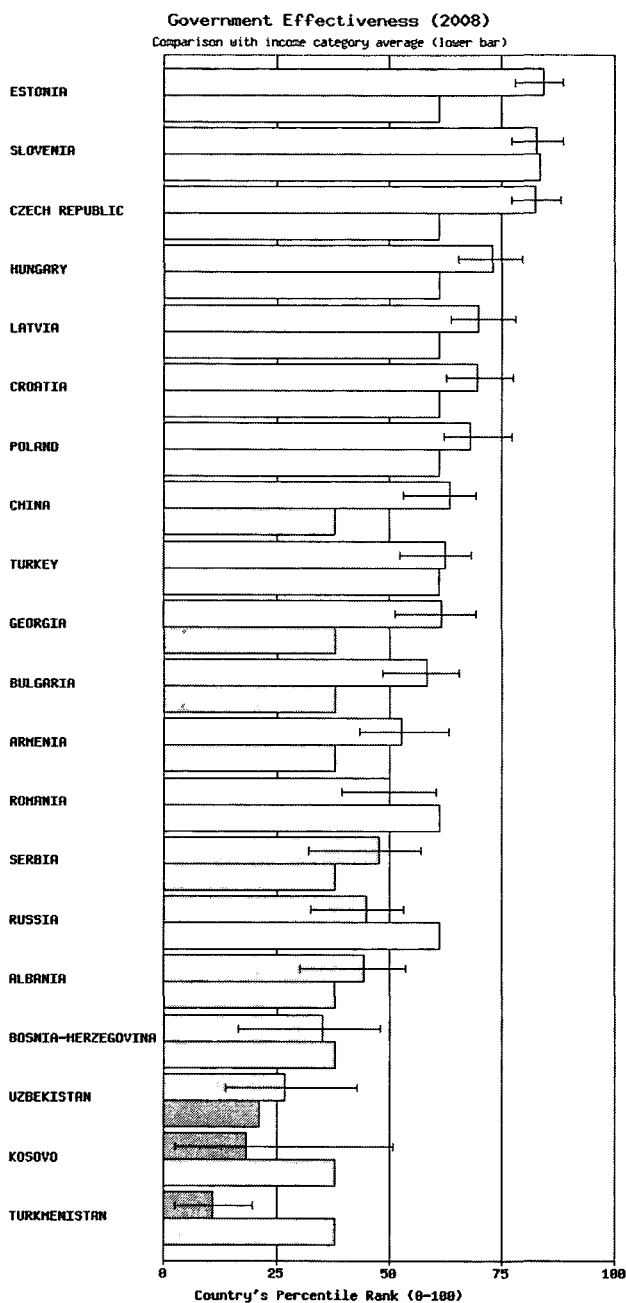
28. As the focus is on MICs, I include only one LIC – Uzbekistan – for comparative purposes. The rankings are generally similar for Uzbekistan, Kyrgyzstan and Tajikistan except for Kyrgyzstan’s surprisingly high 42nd percentile ranking on regulatory quality. Similarly, I include HIC Slovenia for comparative purposes.



Source: 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 survey institutes, think tanks, non-governmental organizations, and international organizations. The IGI do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent. The IGI are not used by the World Bank Group to allocate resources.



Source: 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 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.



Source: 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 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.

dicators, with the exception of Georgia's and Armenia's relatively high rankings 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, and UM countries generally outperform 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 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. Thus, China is similar to UM Eastern European countries in government effectiveness and similar to LM Eastern European countries on rule of law, but falls much lower than even the lowest scoring Eastern European country on voice and accountability.

The diversity of performance within Eastern Europe and the former Soviet countries calls into question theories that would attribute ongoing problems in some countries to the legacy of socialism alone.²⁹ The results also suggest that there is no single development path for former socialist states,³⁰ much less for all

29. See Leszek Balcerowicz, *Institutional Change After Socialism and the Rule of Law*, 1 HAGUE J. ON RULE L. 215, 238 (2009) (using different indicators but reaching a similar conclusion). See also Martin Kyrgier, *The Fall of European Communism: 20 Years After*, 1 HAGUE J. ON RULE L. 195, 197 (2009) (noting that "although communism imposed common and crucial systemic features on every country in the bloc, communism was not identical in every country.").

30. See Andreas Nölke & Arjan Vliegthart, *Enlarging the Varieties of Capitalism: The Emergence of Dependent Market Economies in East Central Europe*, 4 WORLD POL. 670-702 (Oct. 2009). The authors prefer Dependent Market Economies. Lawrence King favors "Liberal Dependent Post-Communist Capitalism" in CEE and "Patrimonial Post-Communist Capitalism" in the rest of the post-communist world. Lawrence P. King, *Central European Capitalism in Comparative Perspec-*

MICs, thus calling into question the one-size-fits-all approach to development based on rule of law toolkits that seek to transplant the values, institutions, and practices found in high-income Euro-America. A closer examination of several topics highlights certain common issues and its diverse responses within Eastern Europe.

IV. 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 lege* ("no penalty without a law") with the desire to rectify past injustices through retroactive findings of liability for acts that were not illegal under the previous regime. Other issues include the tension between individual and collective guilt, the extent to which 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."³¹ The difficulty of reconciling these competing demands suggests that conventional, thin conceptions of rule of law, which emphasize legal continuity and certainty, are at best only partially applicable to the special circumstances of a regime change from authoritarianism to democracy.

Due to an emphasis on *lustration* and *decommunization*, transitional justice in post-communist countries differed from transitional justice in other countries. 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; decommunization refers to all political and legal strategies the aim of which is eradication of the legacies of communism, includ-

tives in BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTIONS, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY 307, 307 (Bob Hancke et al. eds., 2007). Martin Myant & Jan Drahoukoupil 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 Martin Myant & Jan Drahoukoupil, *Varieties of Capitalism in Transition Economies* (2010), available at <http://ssrn.com/abstract=1561944>. See generally VARIETIES OF CAPITALISM IN POST-COMMUNIST COUNTRIES (David Lane & Martin Myant eds., 2007).

31. Adam Czarnota, *Lustration, Decommunisation and the Rule of Law*, 1 HAGUE J. ON RULE L. 307-336 (2009).

ing eradication or modification of party organizations, dismantlement of the secret police, creation of new institutions, amendment of existing laws, and passage of new laws.

Initially, there was not much emphasis on transitional justice issues because of the peaceful transfer of power pursuant to negotiated agreements among the political elite via the "round table talks" (the exception being the violent demise of the ruling regime in Romania).³² However, almost all countries ultimately passed 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 injustice over the principle of *nulla poena sine lege*. 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 on 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 presumed, collective guilt and have led to politically motivated witch hunts. For example, candidates for office are occasionally "outed" on the eve of elections, at times accused of having been informers. Alternatively, advocates argue that the new regime must distinguish itself from the previous regime. They insist that 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. They find that the debates over lustration laws and their applications contribute to a more informed citizenry and successful 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.

32. See generally THE ROUNDTABLE TALKS & THE BREAKDOWN OF COMMUNISM (Jon Elster ed., 1996).

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.³³

A. 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 and the restoration of property or compensation in some cases. It also led to the highly publicized, through rule-of-law-challenged, trial of the Gang of Four.³⁴ 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 may still prove controversial. Most notably, the government refuses to reconsider the Tiananmen incident of 1989, failing to address the demands of the "Tiananmen mothers" and others seeking information about and justice for those who lost their lives.³⁵ The government also denies the release of those still imprisoned for their participation in the Tiananmen Square protests, ignoring human rights organizations' calls for pardon. In addition, as China's low score on voice and accountability suggests, the government has arrested and sentenced many to administrative detention or prison, for what many citizens would consider the legitimate exercise of their rights under international and even domestic law. Examples include the arrests and detention of Falun Gong disciples; Internet users; whistleblowers who expose government corruption and malfeasance; petitioners and demonstrators protesting

33. *Id.*

34. See Ian Dobinson, *The Criminal Law of the People Republic of China (1997): Real Change or Rhetoric?*, 11 PAC. RIM L. & POL'Y J. 1, 11 (2002).

35. See Randall Peerenboom, *Assessing Human Rights In China: Why The Double Standard?*, 38 CORNELL INT'L L.J. 71, 93-94 (2005).

alleged violations of their rights in land taking cases, labor disputes, or disputes between homeowners and developers or their affiliated management companies; and 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 instances of torture, coercion, and physical abuse. In addition, although not quite rising to the level of 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 are now dead or will be soon. And, while a number of groups are very vocal in their demands for a reappraisal, many citizens, including the youth, seem to have moved on, focusing on other concerns. Furthermore, 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) [R]elatively 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.³⁶

The prosecution of two former presidents in South Korea is a notable exception. However, even the implications of such cases are ambiguous with respect to a broader movement toward social justice in the region. Although Presidents Chun Doo

36. See Tonya Cook, *Introduction: Transitional Justice in East Asia and its Impact on Human Rights*, HUM. RTS. DIALOGUE, Mar. 5, 1997, available at http://www.carnegiecouncil.org/resources/publications/dialogue/1_08/articles/550.html (citing Park Won Soon, *Transitional Justice in East Asia*, presented at the Carnegie Council Human Rights Initiative Workshop: New Issues in East Asian Human Rights (Oct. 2-4, 1996)).

Hwan and Roh Tae Woo were convicted, many citizens and commentators viewed the trials as politically motivated show trials. 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."³⁷

Whether transitional justice concerns become an issue in China depends on several factors, including the nature and timing of any regime change and the political realities of 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, along with the 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.

V. 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 systems, 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 nec-

37. Park W. Soon, *Bringing Justice to an Unjustified Past in Korea, Transitional Justice in East Asia and its Impact on Human Rights*, HUM. RTS. DIALOGUE, Mar. 5, 1997, available at http://www.carnegiecouncil.org/resources/publications/dialogue/1_08/articles/551.html.

essary protections against social exclusion and civic passivity.³⁸ Notwithstanding the differences, the new order was modeled on the values, institutions, and rules of wealthy liberal democracies.

The initial design phase was followed by a period where Eastern European countries competed in a “regatta” to see which would be the first to join the European Union. During this phase, the emphasis shifted from broad systemic design issues to strict compliance with more than 80,000 pages of highly specific technical requirements.³⁹ The accession process has been widely criticized as elite driven, instrumentalist, technocratic, undemocratic, and formalistic in the extreme.⁴⁰ 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 of 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 on legal transplants and creating Potemkin villages.⁴¹ 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.⁴²

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 are the most prevalent in the implementation phase.

The problems, however, should not be overstated. Over time, the implementation gap has narrowed, and it is likely to narrow further still as institutions grow stronger and citizens and government officials adapt to the new rules of the game. As previously noted, notwithstanding high levels of public dissatisfac-

38. See Grażyna Skąpska, *The Rule of Law, Economic Transformation and Corruption After the Fall of the Berlin Wall*, 1 HAGUE J. ON RULE L. 284, 288 (2009).

39. Jiří Pøibán, *From ‘Which Rule of Law?’ to ‘The Rule of Which Law?’: Post-Communist Experiences of European Legal Integration*, 1 HAGUE J. ON RULE L. 337, 350 (2009).

40. MARTIN KRYGIER, *Introduction*, in *SPREADING DEMOCRACY AND THE RULE OF LAW?* 3-24 (Wojciech Sadurski, Adam Czarnota & Martin Krygier eds., 2006).

41. Pøibán, *supra* note 39, at 350.

42. Balcerowicz, *supra* note 29, at 236.

tion 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.”⁴³ This “democracy dividend” offsets, to some extent, the aforementioned democracy deficits.

Notwithstanding ongoing problems, citizens of Eastern Europe enjoy greater personal and political security:

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 fundamentals 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.⁴⁴

A. A COMPARISON TO CHINA

China has also looked extensively to foreign models. However, as with its 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 Congress.⁴⁵ In contrast to the

43. Pøibán, *supra* note 39, at 350. See also Wojciech Sadurski, *Accession’s Democracy Dividend: The Impact of the EU Enlargement Upon Democracy in the New Member States of Central and Eastern Europe*, 10 EUR. L. J. 371–401 (2004).

44. Venelin I Ganev, *The Rule of Law as an Institutionalized Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe*, 1 HAGUE J. ON RULE L., 263, 270 (2009).

45. The Political-Legal Committee is a Party organization that oversees the courts, procuracy and public security. Adjudicative committees are a panel of senior

Eastern European experience, where legislators copied EU member laws “by the meter,”⁴⁶ 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.

China has been slow to implement reforms in some areas of law, most notably with respect to civil and political rights and the implementation of criminal procedure laws, and in some less developed regions with weak institutions.⁴⁷ Implementation problems arise from a variety of causes, including insufficient resources and relatively weak institutions as generally found in comparable LM countries. Nevertheless, China’s rankings on rule of law and government effectiveness and its rapid economic growth suggest that its gradualist, more pragmatic strategy, has worked reasonably well, albeit at the 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.⁴⁸ In contrast, as with lustration and transitional justice issues, China has postponed fundamental political reforms. This strategy is not necessarily a bad one. South Korea and Taiwan also restricted civil and political rights during their rapid growth phase; yet, they democratized at a higher level of development as a result of peaceful, negotiated transitions. Although the transition still resulted in dramatic changes in laws and institutional orientation, many of the institutions were already quite 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

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 by the courts through a procedure known as *kangsu*. Until recently, people’s congresses were also able to supervise individual cases. See generally PEERENBOOM, *supra* note 21, at 302-03.

46. Katharina Pistor, *Enhancing Corporate Governance in the New Member States: Does EU Law Help?*, in *LAW & GOVERNANCE IN AN ENLARGED EUROPEAN UNION* 339, 364 (G. Bemran & K. Pistor eds. 2004).

47. See generally Randall Peerenboom, *Assessing Implementation of Law in China: What is Standard* (LA TROBE UNIV. AUSTL., Legal Studies Working Paper No. 12, 2008), available at <http://ssrn.com/abstract=1283181>; *MAKING LAW WORK: CHINESE LAWS IN CONTEXT* (Marina Svensson & Mattias Burel eds. forthcoming Jan. 2011).

48. Similar arguments are made regarding India. See Randall Peerenboom, *Law and Development in China and India: The Advantages and Disadvantages of Front-loading the Costs of Political Reform*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER* 491, 503 (M. Sornarajah & Wang Jiangyu eds., 2010).

transition than seems to have occurred in Eastern Europe, and certainly than has occurred in the former Soviet countries.

Moreover, many skeptics challenge the rosier picture presented above where Eastern European institutions and practices converge over time toward those 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.

VI. 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 held in higher regard than regular courts.⁴⁹ As summarized by Ganey:

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 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.⁵⁰

49. Bjoan Bugarcic, *Populism, liberal democracy, and the rule of law in Central and Eastern Europe*, 41 *COMMUNIST AND POST-COMMUNIST STUDIES* 191-203 (2008) (pointing out that constitutional courts, under fire in several countries, have lost some of their luster and authority).

50. Ganey, *supra* note 44, at 268-69.

In contrast, the regular courts are seen as chronically dysfunctional and strikingly inefficient:

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.⁵¹

The dominant view attributes the performance differences between constitutional and 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 *entrepreneurchiks* 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.”⁵²

The more pessimistic view suggests that early decisions regarding privatization effectively undermined hopes for rule of law, at least in the short to mid-term:

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

51. Ganev, *supra* note 44, at 271.

52. *Id.* at 276.

from reality. . . [I]n . . . 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.⁵³

A more optimistic view is that the Organization for Economic Co-Operation and Development accession process, combined with the ongoing domestic pressure for further judicial reforms, have had some positive impact, with the possibility of 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 equipped to handle at least run of the mill commercial cases effectively. Hendley, 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.⁵⁴ Thus the courts are able to handle cases between relatively equal parties with a reasonable amount of impartiality and effectiveness.

On the other hand, political influence remains a factor when there is a significant differential in power between the parties. Russia's extremely low score on rule of law indicators reflects the government's politicized, instrumental use of the legal system to curtail the powers of the oligarchs, thereby thwarting 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 the government in this action again demonstrates 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 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.⁵⁵ 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 concurs that "political reform in all these post-communist societies

53. Skapska, *supra* note 38, at 285.

54. Kathryn Hendley, 'Telephone Law' and the 'Rule of Law': *The Russian Case*, 1 HAGUE J. ON RULE L. 241-62.

55. Bugaric, *supra* note 49 at 192.

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.”⁵⁶

A. A COMPARISON TO CHINA

China has yet to establish a constitutional court, and constitutional law remains a relatively undeveloped area. Constitutional law and litigation serve 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 has been to provide an initial distribution of power among state organs. This distribution 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. As of 2007, citizens have submitted at least 37 requests for review.⁵⁷ The NPCSC, however, has yet to respond formally to a citizen’s 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.

While the NPCSC review creates a constitutional mechanism for dealing with one type of principal-agent problem, other

56. Vladimir Tismaneanu, *Leninist Legacies, Pluralist Dilemmas*, 18 J. DEMOCRACY 34, 37 (2007).

57. Keith Hand, *Can Citizens Vitalize China’s Constitution?*, FAR E. ECON. REV., May 1, 2007 at 15-19.

principal-agent issues, including the problem of inconsistent regulations, are for the most part dealt with through other administrative and political mechanisms.

Constitutional litigation to protect individual rights is still in its infancy, and 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 with jurisdiction over individual rights claims were to be established, 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 adequately address certain discrimination claims, they are likely to be less effective in handling socio-economic, civil, and political rights cases which are threatening to the ruling party for reasons discussed below.

In contrast, higher levels of educational and professional standards for judges, rising rates of commercial litigation, and public polls are indicative of improvements in the judiciary and its capacity to handle commercial disputes. The general trend in the commercial area has been for an increase in litigation, with an expansion of the range of justiciable disputes, as mediation has decreased and arbitration has remained relatively stable and limited.⁵⁸ 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 concluded a “high degree of popular trust in legal institutions” and the widespread belief that courts are effective and fair.⁵⁹ 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.⁶⁰ 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

58. ZHONGGUO FALÜ FAZHAN PAOGAO (1979-2004) [CHINA LEGAL DEVELOPMENT REPORT (1979-2004)] 21, 26 (Zhu Jing-Wen ed., 2007).

59. Pierre F. Landry, et al., *Introduction: Markets, Courts and Leninism*, 9 CHINA REV. 1, 1, 12.

60. Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China's Economic Development* 43 (Geo. Wash. U. L. Sch. Public L. & Legal Theory Working Paper No. 187, 2006), available at <http://ssrn.com/abstract=878672>.

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.⁶¹ 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.⁶² 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.

Empirical studies suggest that local protectionism is increasingly less significant in urban courts located in economically advanced areas.⁶³ In one large empirical study of corporate law cases in Shanghai, Howson 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.⁶⁴ Similarly, although foreign investors often worry that courts in the People’s Republic of China (PRC) will be biased toward parties and will fail to take intellectual property (IP) rights seriously, one study found that Western companies prevail in 90% of IP cases.⁶⁵

61. MINXIN PEI ET AL., *A Survey of Commercial Litigation in Shanghai Courts, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 221-233 (Randall Peerenboom ed., 2010).

62. 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).

63. He Xin, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 AM. J. COMP. L. 419, 453 (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); Mei Ying Gechlik, *2006 Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 113 (2005) (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).

64. Nicholas Howson, *Judicial Independence and the Company Law in the Shanghai Courts, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 134-153 (Randall Peerenboom ed., 2009).

65. Tony Chen & Mark Cohen, *Real and Present Danger: Patent Litigation in China*, LAW 360, June 10, 2009, available at http://ip.law360.com/print_article/105112. Foreign parties are increasingly seeking relief in Chinese courts. The number of IP cases involving foreign parties increased 48% annually from 2002 to 2006. See KRISTINA SEPETYS AND ALAN COX, INTELLECTUAL PROPERTY RIGHTS PROTECTION IN

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-reliant economy in Russia. The fate of a single company is relatively less important to the local government in a major urban area, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for 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, however, still suffer from corruption in 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% 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% of China's billionaires, though they have been less successful in politics.⁶⁶ The CCP co-opted the growing class of private entrepreneurs, inviting them into the Party and, in so doing, prevented 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 share the Party's interest in maintaining economic growth and socio-political stability, even at the cost of restrictions on civil and political rights and the postponement of democracy.⁶⁷ By co-opting members of the entrepreneurial class, the CCP ensured that courts would act as an apparatus that cemented state control.

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.

CHINA: TRENDS IN LITIGATION AND ECONOMIC DAMAGES 5 n.16 (2009), available at http://www.ipeg.eu/blog/wp-content/uploads/NERA-IP-Protection_China_2009.pdf.

66. Peh Shing Huei, *China's corporate world ruled by princes*, STRAITS TIMES, July 25, 2009.

67. See BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY'S EMBRACE OF CHINA'S PRIVATE SECTOR* 238-42 (2008).

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.

VII. 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 not mimic the courts of Western liberal democracies. These announcements have been coupled with ongoing efforts to shore up loyalty in the courts 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. 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 people, and of the constitution and laws.

This is a crucial time for judicial reforms in the PRC. For much of the last thirty years, while China was a low-income country, the judiciary was weak and being rebuilt. The CCP's basic task was institution building to increase the overall professional capacity and efficiency of the courts. However, as the country develops financially, political economy issues become more important, giving rise to a new series of questions to be answered. What will the role of the judiciary be in policy making? What types of cases will courts exercise jurisdiction over? 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 deci-

sions? 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 continuing tensions and challenges.⁶⁸ Activist lawyers have been classified as moderate, critical, or radical, depending on the type of cases they handle, their objectives, and their approach.⁶⁹ 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 also include advocating the overthrow of the CCP.

The recent detentions, however, include moderate and critical lawyers. Moderate lawyers are not overtly political, selecting cases only minimally politically sensitive such as those involving

68. 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, Aug. 3-9, 2009, available at <http://chrinet.org/wp-content/uploads/2009/08/china-human-rights-briefing-august-3-91.pdf>; Tini Tran, *Chinese legal activist held for tax evasion*, ASSOCIATED PRESS, Aug. 4, 2009; Rowan Callick, *China's Lonely Heretic*, AUSTRALIAN, July 3, 2009.

69. Fu Hualing & Richard Cullen, *Weiwan [Rights Protection] Lawyering in an Authoritarian State: Toward Critical Lawyering* 6 (Jan. 15, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083925. 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.

consumer protection, labor rights, and discrimination. Moderate lawyers operate within the limits of law and rely on legal arguments, seeking to promote rule of law. Critical lawyers are often more critical of the political system. They are pragmatic in their acceptance of the lack of viable alternatives; yet, they work to ensure that the system lives up to expressed ideals and often push for systemic reforms. They are willing to take on somewhat more politically sensitive cases involving free speech, religious freedom, and freedom of association, yet are unwilling to take on cases that are politically prohibited such as those involving Falun Gong or the representation of dissidents calling for the overthrow of the CCP. They rely on a mixture of both legal and political methods, including greater mobilization of the domestic and international media, support from foreign NGOs, and petitions equally designed to challenge the Chinese leadership and obtain popular support from the general public.

These tensions suggest that judicialization of two types of disputes have been unsuccessful: (i) political disputes that challenge, or are perceived to challenge, the ruling regime; and (ii) certain socio-economic disputes, particularly those involving a large number of plaintiffs.

The substantive results of political cases are often dissatisfying for both the parties involved and the public. 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 the standard rule of law criteria codified in domestic and international law. These cases reflect the limits of political rights lawyering in China and other single-party authoritarian states,⁷⁰ the current state of socio-political stability, the dominant conception of law, China's model of development, and the political contract between central and local governments.⁷¹

Socio-economic cases reflect harsh judicial realities in LM counties such as China. In many cases the courts are unable to

70. 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 generally STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING (2004); Terrence Halliday et al., *The Legal Complex and Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1-40 (Terrence Halliday et al. eds., 2007).

71. For an elaboration of these points, see Fu Yulin & Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 95-133 (Randall Peerenboom ed., 2010).

provide parties with legitimate complaints an effective remedy due to 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 take to the streets to demonstrate, thereby 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 the melamine poison milk cases and the claims arising from the Sichuan earthquake. Courts have also been reluctant to hear cases that threaten social stability such as land taking cases or mass plaintiff labor cases.⁷²

Whether this strategy will enhance social stability, or further undermine it, remains to be seen. As the complaints against the legal system are often legitimate, future stability will largely depend on the ability of non-judicial mechanisms to resolve disputes effectively. There have already been numerous attempts to address disputes through non-judicial means: mediation; arbitration; administrative reconsideration; increased political participation in the form of hearings, notice-and-comment opportunities, and public opinion polls assessing the performance of government officials; and pay-offs, i.e., throwing money at problems and protesters to make them disappear.⁷³

There is no reason to expect that the courts in LM China will play the same role as in HICs, or even other MICs. There is considerable diversity in the allocation of decision making powers among the legislative, executive, and judicial branches both globally and within Asia, notwithstanding a general trend toward juridification and the judicialization of disputes.⁷⁴ Promoters of rule of law and many human rights organizations tend to emphasize the U.S. model of highly decentralized dispute resolution. In

72. *Id.* at 96.

73. 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 generally id.*

74. 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 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. Albert Chen, *Conclusion: reflections on administrative law and judicialized governance in East and Southeast Asia*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 359-380 (Tom Ginsburg & Albert Chen eds., 2009).

the U.S. model a wide array of private and public actors have access to a range of courts with broad jurisdictional rules and power. This environment fosters the existence of an active legal profession, highly mobilized to increase its importance and economic benefits by promoting class actions, punitive damages, and contingency fees. Yet this model is an outlier globally.⁷⁵ European and East Asian countries have generally adopted a more centralized, coordinative 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.⁷⁶

75. 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. DEPARTMENT OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at http://www.justice.gov/final_report.pdf. Moreover, jurisdiction rules limiting or expanding access to the courts are always being fine-tuned. See e.g., Andrew M. Siegel, *Notes Toward an Alternate Vision of the Judicial Role*, 32 SEATTLE U. L. REV. 511, 511-23 (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 Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?* (NYU Center for Law, Economics and Organization, Working Paper No. 08-46, 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 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). Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO, 1-19, available at http://www.cardozolawreview.com/content/denovo/WEINSTEIN_2009_1.pdf, 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."

76. Tom Ginsburg, *Judicial Independence in East Asia: Lessons for China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 247-259 (Randall Peerenboom ed., 2009); CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 143-44 (U. Chi. Press 2008). Milhaupt and Pistor, 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

The more centralized and coordinative 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 overshoot the mark. It will not be possible to simply close off the courts or to prevent all social or political rights lawyering. There will always be new people to replace the Xu Zhiyongs or Gao Zhishengs, and a strategy that relies 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 outlining what law firms, legal aid centers, social organizations—and individual lawyers and other activists—can and cannot do “to promote a harmonious society;” this includes a need for guidance on acceptable substantive issues for political lawyering as well as further clarification of what methods are acceptable.

A. 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.⁷⁷ Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as “more murder in the middle” – as greater political space opens, the ruling regime is subject to greater threats to its power and so it resorts to violence more frequently.⁷⁸ More recent studies have also concluded that the level of democracy matters. Below a certain threshold, demo-

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 U.S. approach, even allowing some competition for influence between the U.S. and other countries to promote their own systems.

77. James A. McCann & Mark Gibney, *An Overview of Political Terror in the Developing World*, in POLICY STUDIES AND DEVELOPING NATIONS 15, 19 (David L. Cingranelli ed., 1996); see also David A. Reilly, *Diffusing Human Rights: The Nexus of Domestic and International Influences* (2003), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/2/7/4/pages62741/p62741-1.php.

78. Helen Fein, *More Murder in the Middle: Life-Integrity Violations and Democracy in the World*, 1987, 17 HUM. RTS. Q. 170, 170-91 (1996).

cratic regimes oppress as much as non-democratic regimes.⁷⁹ Moreover, the recent war on terror in the U.S., England, 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 rights 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 also 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.

VIII. CONCLUSION

A threshold question is why focus on MICs? LICs are worse off. Arguably, intellectual and financial resources should be concentrated on solving LIC problems first. Collier, 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.”⁸⁰ Yet the problems of LICs have preoccupied both academics and international donor agencies for decades. Despite the years devoted and the billions of dollars spent, the results have been poor. Thanks to Collier and others, support is gaining for more nuanced approaches; simply increasing aid is not sufficient, though it can be effective in the right circumstances and certainly should be part of the answer.⁸¹

The pressing needs of LICs certainly merit further attention; however, 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

79. Bruce Bueno De Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 INT'L STUD. Q. 439, 439-57 (2005); Christian Davenport & David A. Armstrong II, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 AM. J. POL. SCI. 538, 538-54 (2004).

80. PAUL COLLIER, *THE BOTTOM BILLION* 190 (2007).

81. See, generally, WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006); JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005).

pressing. Many more people live in MICs than in LICs. And, 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. The prescriptions for addressing these challenges have so far 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 1990. 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 limited, resources, and relatively stronger institutions. They face different challenges than LICs whose main concerns may be peacekeeping, basic state-building, 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, or human well-being 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 scarcity of resources and the competing interests vying for those limited resources suggest that whether MICs graduate into the rarified ranks of HICs will depend in large part on political economy factors. These factors include 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. International donor agencies now regularly acknowledge that there is no magic formula for development. They have learned that reform must be country owned and country led. There needs to be more emphasis on local politics and the mechanisms for deciding issues and resolving conflicts of interest. One of the key causes of project failure is the implementation of recommendations untailed to the particular circumstances of the target country; this indiscriminating treatment proves all the more

problematic for MICs, given their wide diversity.⁸² 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,⁸³ all too often the prescriptions have not been adequately tailored to local contexts.⁸⁴ In part this is because MICs have had little input on the policymaking process of the World Bank and other international donor agencies.⁸⁵ There is therefore a pressing need for more detailed studies of the specific 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 USAID report, with the assistance of IFES, 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 state organs 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.”⁸⁶

Judicial independence takes time to establish and requires competent and honest judges.⁸⁷ Courts must also be able to provide effective remedies, which requires not only wealth but a set

82. See generally WORLD BANK, EAST ASIA PACIFIC UPDATE: 10 YEARS AFTER THE CRISIS (2007).

83. Carothers, *supra*, note 2, at 15.

84. INDEPENDENT EVALUATION GROUP, *supra* note 4, at xvi.

85. *Id.*

86. U.S. AGENCY FOR INT'L DEV., *supra* note 10, at 6.

87. 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

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 point out that the emphasis on judicial independence obscures the dynamic interaction of the judiciary and other political actors.

[T]his 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.⁸⁸

They 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 justicially reviewable. Although the Swedish Constitution has for long allowed judicial

in the scores for Eastern European countries from 1996 to 2008. See FRASER INSTITUTE, *ECONOMIC FREEDOM OF THE WORLD: 2008 ANNUAL REPORT* (2008).

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 Lars P. Feld & Stefan Voigt, *Economic growth and judicial independence: cross-country evidence using a new set of indicators*, 19 EUR. J. POL. ECON. 497, 497-527 (2003).

88. Stephanie Balme & Michael W. Dowdle, *Introduction: Exploring for Constitutionalism in 21st Century China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 1, 4 (2009).

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 engage in judicial review, but the governments have claimed authority to ignore their findings.⁸⁹

Eastern European constitutional courts, despite their differences in institutional configurations and powers,⁹⁰ 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 roles were also being redefined. In MICs where political reform is less rapid, constitutional courts will have to contend with existing institutions that already have established networks of power and patronage, their own institutional culture and way of doing things, and an institutional interest in protecting their turf.

It is remarkable, given the enabling circumstances, that Eastern European constitutional courts acted strategically and sought to minimize conflict with other state organs in consolidating their power, status, and role in the new polity. As Ganey 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.⁹¹

89. *Id.* at 2-3.

90. 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 Wojciech Sadurski, *Twenty Years After the Transition: Constitutional Review in Central and Eastern Europe* (Sydney Law School, Legal Studies Research Paper No. 09/69, 2009).

91. Ganey, *supra* note 44, at 268-69.

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, or a large segment of the public. As 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 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 institutions and actors are often weak, self-interested, corrupt and incompetent, or they simply lack the 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. They work with government agencies to resolve disputes and 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, promoters of rule of law may need to adopt a more pragmatic approach that places greater emphasis on coordination between the judiciary and other political branches.⁹² At minimum, there needs to be more attention paid to judicial accountability, and a better allocation of decision making 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 and for some types of disputes, a more centralized and coordinative approach may be desirable. In other countries and for other types of cases, however, 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.

92. 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."

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. And, 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, which includes judges, lawyers, and officials responsible for implementing the law. As a result, the difficult political issues about the proper role of the judiciary were postponed. But they must be addressed now.

While there are many ways to fail, it would be premature to conclude that China and the Eastern European countries will never 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 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.