Law Reform in Developing and Transitional States

Edited by Tim Lindsey

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**In memory of Professor Daniel S. Lev,
pioneer scholar of law in developing countries
and doyen of Indonesian legal studies.**

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The law reform olympics

Measuring the effects of law reform in transition economies

Yvonne Taylor

The catalyst for this chapter was a brief conversation in Mongolia. My law school colleague, Professor Anita Ramasamy, had worked extensively on the official law indicators for transition economies in Eastern Europe (Ramasamy, 2002). She asked whether Japanese corporate law allows for cumulative voting (designed to give minority shareholders some prospect of electing a director of their choice). The answer is, 'Of course - American-influenced forms to Japanese corporate law introduced cumulative voting in 1953. They have seldom, if ever, been used.' This prompted me to wonder about Mongolia. During our visit in 2000, we observed a largely nomadic population; a country with no visible means of support; government in the hands of a few families; and - as far as we could tell - a very low incidence of incorporated enterprise. Much of the official development assistance (ODA) flow from countries such as the US, Japan and Germany was being used to fund infrastructure projects and to explore possible extraction of mineral wealth. In this context, to apply a set of corporate law indicators predicated on a different stage of capitalism and very different forms of social organization seemed problematic.

This chapter focuses on *why* indicators and evaluative questions about the current form of commercial law in transition economies are now so much in vogue. I trace the objectives and methods of four different evaluative projects sponsored by the World Bank and United States Agency for International Development (USAID) that are designed to assess and ultimately to rank the legal systems of transition economies. One obvious impetus for the evaluative work on formal legal assistances is that there are so many legal systems in transition and so much money is being spent on them (deLisle, 1999). Another is the global bureaucracies such as the World Bank, the International Monetary Fund (IMF), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and the post-industrial states that sponsor them, are predisposed to using evaluative techniques as forms of audit and control. The 'indicators' of commercial law now used in legal technical assistance projects are designed to allow the ranking of legal systems according to their compliance with 'best-practice' models of commercial law in countries considered to have a well-established 'rule of law'. Significantly, the rankings are presented in many cases to guide allocative decision-making. This is the process

Both the surge in technical legal assistance to transition economies and its formal evaluation are relatively recent phenomena. Following the demise of the Soviet Union, there was a rush to analyze (and shape) the economies and legal systems of its former empire.¹ In the latter half of the 1990s, we saw a quantum leap in both the monetary value and subject matter scope of law and development initiatives worldwide (De Lisle, 1999). Roland identifies two contending intellectual frameworks for shaping policies on transition in central and eastern Europe as the 'Washington consensus' (or economic 'shock therapy') and the latter – and ultimately more productive – 'evolutionary-institutionalist perspective' (2000: 328).² The two approaches differ in their prescriptions about law: the Washington consensus emphasizes the adoption of laws *per se* and de-emphasizes government, while the evolutionary-institutionalist stresses legal and financial change, law enforcement, reform of the organization of government and development of self-enforcing social norms, processes in which the role of government is important (Roland, 2000: 330–31).

In the first wave of law reform in transition economies, multilateral and bilateral donors presented Russia and former Soviet satellites with legal technical assistance as a tool for effecting economic (and political) transformation. Russia became the 'hard case': it received substantial amounts of formal law reform, but 'liberalization, stabilization and privatization' did not directly translate into a strong legal system and enhanced business trust.³ An alternative explanation is that law became compelling for economists at precisely the time that the initial round of economic prescriptions for Russia failed.⁴ As Russian institutions were failing, the 1997 financial crisis in Asia then opened up questions about the role of law and legal institutions in countries that had gone from 'being a miracle to needing one' (Garnaut, 1998).⁵

The Asian legal 'transition' story is complex (Pistor and Wellons, 1999), although it resonates in part with the central and eastern European experiences. One of the similarities has been that, after the 1997 financial crisis in Asia, law and legal institutions have assumed a much more prominent role in domestic policy and on agendas of international financial institutions and bilateral donors. The paradigm example is Indonesia, where loan conditionality made the IMF the author of wide-ranging, short-term legal reforms (Lindsey and Taylor, 2000). The Asian financial crises and Japan's continued recession since 1987 forced the formerly 'development states' of Japan (Drysdale and Amyx, 2003) and South Korea to adopt major economic and legal reforms, while, at the same time, Japan increased its aid commitment to provide legal technical assistance within Asia. Indonesia and Thailand instituted commercial law reforms in response to either loan conditionality or to demands by multilateral regulators. Malaysia and Singapore survived the financial crisis but, in both cases, the 'rule of law' is proving to be a fragile institutional arrangement (Jayasuriya, 1999a; Peerenboom, 2004). China remained *sui generis*, as the paradigm example of the success of evolutionary-institutionalist economics, but its entry into the World Trade Organization (WTO) became the catalyst for widespread law reform and escalated technical legal assistance. Similarly, Vietnam's bilateral trade agreement with the US and the pressure of WTO membership are driving the reform of its

of that legal system, while the foreign aid-financed rebuilding of the Mongolian legal system offers the prospect of a Western-influenced buffer between China and Russia. Following the terrorist attacks on the United States in 2001, we now see a further wave of legal technical assistance and military aid channelled toward states such as Afghanistan, Pakistan, Indonesia and those in Central Asia that have become strategically important.

Both in the transition economies of Eastern Europe and Asia, these 'waves' of externally funded law reform have been strongly influenced by 'new institutional economics' as the dominant theoretical framework (North, 1990). The construction of 'law' and 'legal institutions' in these projects is both formal and instrumental. Because the financial and human resource 'inputs' are both large and quantifiable, and because the enterprise is underpinned by the assumption (and an implicit promise to recipients and donors) that law will improve economic conditions in transition economies, there is a strong impulse to quantify the outcomes – to demonstrate and measure 'law reform' and its effects.

Benchmarking law reform

Implicit in the notion of evaluation and ranking is the idea that there is a competition in law reform. As a senior Indonesian policy official puts it: 'We must adopt laws like the other Association of Southeast Asian Nations [ASEAN] countries, or foreign investors will not come to Indonesia'.⁶ In the earlier postcolonial age, countries seeking independence or a regime change would win the approval of their former colonists, key trade partners and one or other of the global superpowers, if they produced a relatively stable political regime and some indications of economic growth (for example, Indonesia under Soeharto; Singapore under Lee Kuan Yew). With the end of the Cold War, the collapse of socialism, and the rapid realignment of world trade blocs, the rules of the game have changed. Now, both membership of multilateral trade politics such as the WTO, the European Union (EU) and North American Free Trade Agreement (NAFTA), as well as the approval of the United States as the surviving superpower, are conditioned on the adoption of a fully functioning legal system.

Simply adding more domestic law is insufficient in this competition for transition through law: membership of the dominant economic blocs demands legal rules and institutions of the kind that support globalized capitalism and a demonstrated convergence (or willingness to converge) toward an international or US legal norm. The geopolitical shift of the Central European and the Baltic states to the West is illustrative. For many in the countries of these regions (and indeed, in Eurasia and the Caucasus), the most important fact about transition is the change from the status of a satellite country of the Soviet empire to that of a country belonging to the Western block or even to the European Union' (Roland, 2000: 338). In this way, the pressure to mimic the formal and informal legal rules of the EU, the US and multilateral bodies such as the WTO and Organization for Economic Co-operation and Development (OECD) is both externally imposed and internally driven.

As well as the quantity of law and the degree of convergence to dominant

their law and legal institutions. In the eighteenth and nineteenth centuries law reformers demonstrated the 'quality' and national prestige of their legal system by creating formal law and institutions in the style of other great states. Enormous energy was expended on securing the doctrinal integrity of a country's constitution and its civil code, commercial code, procedural codes and criminal laws, with carefully calibrated legislation being grafted on as necessary. This kind of classical process is echoed in the wave of new constitutionalism that swept Eastern Europe in the 1990s; the important new constitutional reforms in Thailand; and the Code drafting projects in Vietnam and Cambodia today.

In the post-industrial world, however, those doctrinal integrity concerns are increasingly being displaced by regulatory law (see for example, Teubner, 1987; Parker and Braithwaite, 2003). This partially explains why, running parallel to, and sometimes ahead of, these 'classical' changes in civilian transition economies we see the rapid introduction of new law on foreign investment, insolvency, intellectual property rights, competition, corporations, and new institutions, such as commercial courts. That collision can be seen clearly in Indonesia, for example, which has been forced by lenders and donors to implement a largely uncoordinated series of reforms in regulatory areas, such as intellectual property, insolvency and banking, while its nineteenth-century codes remain largely static. Not only has this resulted in a profusion (and confusion) of legislation, but systemic frictions erupt when the new law meets an institutional impasse, for example the slow speed of innovation in legal education or Indonesian lawyers and jurists who remain highly formalized and wedded to text in situations where reformers assume a common-law style of pragmatic commercial legal solutions.⁹

Implementation is the byword of the new regulatory legal rules; in line with 'evolutionary-institutionalist' economic thinking, institutional capacity to enforce law has a new prominence. So, for example, the state is no longer a passive provider of dispute resolution services of last resort, but rather is an active meta-regulator of a raft of regulatory devices that select and direct disputes for formal adjudication (for example, Teubner, 1987; Parker and Braithwaite, 2003). A strong emphasis on enforcement in post-industrial regulatory states translates as a new significance for the judiciary in transition economies as an instrument for making economic and social policy 'stick'. So the operations of the judiciary (and administrative agencies and other state regulators) are held up as important linchpins of government efficiency and transparency in the service of accelerating market liberalization.

Economists and legal formalists are seldom explicit about the shift in the significance and use of law that has taken place in many post-industrial states, particularly when analyzing the perceived shortcomings of legal systems in transition. Instead, what we see is a reappropriation of the term 'rule of law' as a proxy term for assessing the 'quality' of a legal system. 'Rule of law' in this context is often a 'thin' version of the concept: at minimum, a combination of transparency in government decision-making; submission of the executive and the legislature to judicial review; judicial independence; and public access to legal information (Lindsey, this volume). As Ohnesorge (2002) points out, the call for 'rule of law' in transition economies can also fundamentally be a coded reference

to the need for a western-style liberal democratic political regime. One way to defuse objections is to substitute terms like 'governance', so that institutions such as the World Bank are able to mesh legal and political reform issues, without appearing to interfere directly with the internal workings of a country's political system. In reality 'rule of law', 'governance' and 'governmentality' are simply place-markers for a host of complex debates about the changing nature of the nation-state (see for example, Scott, 2001). Without reproducing those debates here, we can simply note that there is considerable slippage between the ideal types of law and the state that underpin the assessment of law reform in transition economies and the models that actually operate in both post-industrial 'sponsor' states and in the transitional states themselves. The sequencing question for transition economies is how to create those three stages of contemporary legal development – 'best-practice' legislation, functioning legal institutions and transparent, legitimate implementation – simultaneously.

Inducements to compete

In assessing a country's market-readiness, or eligibility for membership of a privileged trading group, outside observers focus not only on its physical and human resource capacities, but also on its legal infrastructure and the navigability of its regulatory regime. In this way, law becomes an index of development, and 'performance' in law reform a competitive enterprise that is driven by multiple agents.

Remaking many of the world's legal systems is a highly expensive exercise. The first competitive driver is limited resources. The expense can be justified by the 'systemic transformation' of these new states (Sachs, 1996), if law and legal institutions become one of the levers a country has to promote sustained improvement in its well-being, given the competition from world markets (Sachs, Zinnnes and Elia, 2000b: 8). Not all emerging states, however, can attract external funding for the development of their legal capacity. Even where they seek it, it comes contingent upon political priorities, short-term policy horizons and beset with problems such as a mismatch between supply and the capacity to absorb; coordination failures; the danger of aid dependency; distortion of local priorities; moral hazard; and problems of sustainability. The appeal of a set of 'objective' measures is that they can be used to justify choices about allocating aid among recipients without accentuating the political and finite nature of technical legal assistance.

A second driver in the process is the fact that each donor or lender agency is itself a large bureaucracy subject to the accountability techniques of the regulatory state. As Ginsburg points out, 'formal institutions are easy to identify, analyze and engineer; hence they provide a naturally attractive field for large, bureaucratically organized development agencies that need to produce results' (2000: 850). Donors and lenders must continually persuade domestic and international constituencies that the shift from hard infrastructure (roads, dams, hospitals and schools) to soft infrastructure (judges, customs officials, legal aid and human

as the USAID and its Australian, Canadian, Swedish and Japanese counterparts,¹⁶ and multilateral agencies such as the ADB, the EBRD, the World Bank and the IMF, are under some pressure to reassure their constituencies that the 'invisible' law reforms will achieve 'results'.

Wringing tangible results from law reform is difficult, as generations of criminologists and socio-legal scholars can attest. The most straightforward measure is quantitative – pointing to quantity and type of legislation passed; milestones in institutional development such as number of judges or officers in new agencies; and monetary totals such as fines levied for tax evasion, corruption or intellectual property infringement. Yet quantitative 'outcomes' do not necessarily mean much, or much desired, change. A more nuanced approach is qualitative – to enquire into how players in the regulatory arena perceive new interventions (for example, legislation, new agencies, new procedures) and the impact that they see on their own and other players' behaviour as a result. This assumes that law has an impact directly upon social behaviour, an assumption that is contested in legal discourse. Ideally, studies of law and legal institutions combine a range of methodologies and research strategies and extend over time. The studies that I discuss in this chapter do not; they are creatures of finite time and cost and are heavily weighted toward producing artificial economic indicators (Sachs, Zinnes and Eilat, 2000b: 11).¹⁷

The desire for 'outcomes' is reinforced by a third element: the need to fulfil the ideological claim that law is a necessary precondition for development. In its original Weberian form, the argument runs that a shift in consciousness was necessary to create capitalism and that economic growth requires rational institutions (for example, Ginsburg, 2000: 832). This is repackaged by institutional economics (North, 1990) as the proposition that private law rights, such as security of property ownership and the enforcement of contracts, are fundamental underpinnings for market transactions. By extension, private law becomes a necessary prerequisite for market-based economic development. This is a claim taken up with some energy by institutions such as the World Bank. Whether you find it persuasive or not (see Clarke, this volume), many observers have noted that clarification of property rights; the potential for secured financing through collateral; and the state-sponsored mechanisms for enforcing contract (for example, courts or court alternatives, registries and bailiffs) are frequently lacking, or are dysfunctional, in transition economies. What is important for our purposes, however, is that the Weberian claim (and its later versions) does not fully capture important aspects of the nature of law in post-industrial society. Private law in the post-industrial West has, to a large degree, been displaced by regulatory law (Teubner, 1987), with the consequence that the kind of 'legal transplantation' that we observe in transition economies is qualitatively different from the voluntary or induced adoption of modern 'Western' law by developing nation states at the end of the nineteenth century (for example, Watson, 1993).

A second important departure from the nineteenth century is that these 'sponsoring' legal systems are overlaid with a network of supra-national rule-making and norm-setting bodies (for example, Slaughter, 2002). To some extent,

the sources of law are no longer as finite or as clearly discernible as they were a hundred years ago. An example is the rise of standards promulgated by private organizations and the provision of dispute resolution and 'audit' functions by private organizations. These political and legal shifts in the developed world pose real challenges for emerging states that seek 'legal modernization' but which may not yet have the social and private sector infrastructure of the post-industrial states on which this depends.

Efforts to measure the effects of law reform in transition economies lie at the intersection of the regulatory state and the transition economy. Assessment itself is a technique of the 'audit society', where Power (1999) observes that, as the regulation is diffused and delegated, we take comfort in emphasizing accountability and audit in both the public and private spheres. The audit techniques are varied, and include the benchmarking or self-assessment of performance in comparison with superior products or processes in use elsewhere (particularly when used by competitors); hierarchical reporting requirements within a corporation and to external regulators or third-party assessors; and processes enabled by technology to collect and collate information about performance. In the law reform context it becomes 'indicators' and 'surveys' of how legal reforms are being implemented in the target country.

Taken together, these twenty-first-century legal imperatives go some way to explaining the drive to quantify law reform 'outcomes' in transition economies. In the following section I introduce a sampling of studies that attempt evaluation of 'rule of law' and law reform in transition economies and in the final section of this chapter, I comment on the utility of assessments and some of their inbuilt limitations.

Higher, stronger, faster¹⁸ – measuring law reform

Much of the work that attempts to show a causal relationship between economic development and law has been done by, or in conjunction with, World Bank economists. An interesting starting point is Kaufman, Kraay and Zoido-Lobaton (1999), in which authors construct a database of existing surveys of governance using different indicators and survey methods across 173 countries. That database, as we will see below, operates as a foundational resource for a number of other studies of this kind.

The World Bank: progressing through regression analysis

Kaufman, Kraay and Zoido-Lobaton (1999: 1) define governance broadly 'as the traditions and institutions by which authority in the country is exercised'. The subsets are a mix of the objectively identifiable (the process by which the government is elected, monitored and replaced) and perception ('the capacity of the government to effectively formulate and implement sound policies and the respect of citizens and the state for the institutions that govern economic and social interactions among them'). 'Rule of law' is one of six sub-clusters of indi-

Through regression analysis, the authors find 'new empirical evidence of a strong causal relationship from improved governance to better development outcomes' (Kaufman, Kraay and Zoido-Lobaton (1999: 3)). Specifically, they find a strong correlation between those countries that score well on the governance indicators (including rule of law) and an increase in per capita income, decrease in infant mortality and increase in literacy.

The 'new' empirical evidence offered in this study is the authors' modelling of the data input for the model comes from a range of existing sources compiled for commercial and non-commercial purposes. These source studies use a variety of methods – expert roundtable scoring; surveys of businesspeople and surveys of citizens.¹⁴ The authors admit that the mix of methodologies in the data sets used means that 'sorting countries into even broad categories is subject to significant margins of error for most countries' (Kaufman, Kraay and Zoido-Lobaton (1999: 11)) and users of the database are warned accordingly to focus on the range of possible governance for each country, rather than an absolute ranking.

The 'rule of law' indicators focus primarily on perceptions of the incidence of violent and non-violent crime; predictability of the judiciary; and the enforceability of contracts. Within the individual surveys, the concepts (or 'Representative Sources') measured are broken down into factors such as:¹⁵

- losses and costs of crime
- kidnapping of foreigners
- enforceability of private contracts
- enforceability of government contracts
- corruption in banking
- crime
- black market
- property rights
- law and order tradition
- theft and crime (now)
- confidence in authority to secure property (now)
- unpredictability of the judiciary (now)
- crime and theft as obstacles to business

The repetitions and redundancies in the list are intentional; these factors are recycled through a number of different surveys by different organizations. In essence, the factors track the key Weberian dimensions of law and development: security of property rights and enforceability of contracts. Clarke (this volume) seriously questions whether formal contract enforceability is, in fact, a prerequisite of economic development. Yet it remains the dominant proxy question for assessing the legal interaction between business and the state (represented by the judiciary) in all of the surveys that make up the composite study.

The Kaufman, Kraay and Zoido-Lobaton (1999) study, and the mélange of data sources it relies on, is now itself embedded within a broader range of indices and ratings of the business climate of different countries, presented by

listed there and compiled by both private and public entities are relied upon in both of the studies discussed below.

Benchmarking legal competitiveness

Sachs, Zinnes and Eliat (2000a and 2000b) take a somewhat different approach to ranking the legal capacities of transition economies. In their multi-volume study, *System Transformation in Transition Economies*, law and legal institutions are both a pre-existing determinant of (successful) transition and an input in assessing the competitiveness of the economy in question. The project was funded by the USAID and carried out by the Harvard Institute for International Development with the express intention of demonstrating for USAID where and how its aid dollars could be spent effectively, based on ranking clusters of transition economies by competitiveness.

'Competitiveness' in this study is defined loosely as correlating (although not perfectly) with Gross Domestic Product (GDP) and represents 'no more than a method and the components from which it is constructed. Its strength arises from the fact that these components were chosen to reflect those elements that would be critical in guaranteeing the welfare of a nation under the current trends of world globalization ... [and] that, according to the beliefs of experts, all countries should promote' (Kaufman, Kraay and Zoido-Lobaton 2000b: 11). This strikes me as completely circular, no doubt because I lack sufficient sophistication in economics.¹⁶ The countries that are the focus of the study are clustered for analytic purposes throughout, so that the comparisons are inter- and intra-cluster comparisons. The overall competitiveness rankings place Hungary, the Czech Republic and Poland on top, followed by the Baltic States, the Eastern European states, Kazakhstan, Ukraine and Georgia, with Albania and Central Asia scoring lowest (2000b: 29).

Sachs, Zinnes and Eliat disavow a direct policy outcome from the project. In particular, they caution against inferring cause and effect, that is, if a country cluster is performing badly on an indicator, the direct strengthening of that indicator may or may not be the best policy. 'The goals of this paper are to highlight the stylized facts, not to provide an analytic treatment or even tests of causality' (Sachs, Zinnes and Eliat, 2000b: 36). Nevertheless, 'one of [the] major policy conclusions [of the paper is]: though hard to build and improve, institutions and rule of law matter most in the transition process' (Sachs, Zinnes and Eliat, 2000b: 38).

How did Sachs, Zinnes and Eliat arrive at the conclusion that 'institutions and rule of law matter most'? Certainly law and legal institutions could figure in each of the 'initial conditions of transition' that furnish the set of indicators on which the data modelling is based. These comprise 'fixed characteristics', such as geography, national resource endowment, culture,¹⁸ history and climate; 'hard' initial conditions including the quality of institutions (including legal institutions); and 'soft' conditions such as government policy, for example, tax law and international agreements. 'Hard' and 'soft' initial conditions are distinguished by the speed at

Although (legal) institutions and the rule of law are presented as key predictors of 'competitiveness' in the study, they are not treated as an organic or coherent set of elements. Regulatory laws are scattered throughout the 'hard' and 'soft' initial condition enquiries and 'regulatory environment' and 'rule of law' are separated, with the latter folded under the 'hard' institutions question (Sachs, Zinnes and Eliat, 2000b: 14). Rule of law translates in this study as essentially the due process, contract and property questions drawn from data sets used in the Kaufman, Kraay and Zoido-Lobaton (1999) study, which themselves are derived from indicators produced by entities such as Freedom House, the EBRD and the Heritage Foundation. This study follows those organizations by constructing its indicators to manipulate both 'hard' data, such as the numerical information published by multi-lateral statistical reporting agencies, and 'soft' data based on survey responses. The survey questions relating to law seem to cover regulatory law and institutions such as bankruptcy courts, competition law, a competition authority and insurance law (Sachs, Zinnes and Eliat, 2000b: 25). A core claim of the methodology is that:

[o]ur survey approach differs from the GCR¹⁹ ... in that we have tried to reduce some of the cultural biases that may affect their results. While the GCR asks business executives directly about their opinion on *subjective* issues, we survey think tanks on their expert opinion about *factual* data where such data are not fully available.

(emphasis in the original – Sachs, Zinnes and Eliat, 2000b: 11)

Moreover,

[w]e stress here that it is exactly the use of expert opinion that makes our approach so strong ... thus our exact definition of competitiveness comprises the list of input variables, the weights we have assigned to each, the hierarchy of aggregation, and the aggregation method itself. Just as in the case of GDP, this explicit definition provides a transparent means of discussion of an admittedly difficult subject. Fortunately ... sensitivity analysis confirms that our results are robust to even rather substantial changes to the components of our definitions.

(Sachs, Zinnes and Eliat, 2000b: 12)

Methodologically the inclusion of survey data is probably helpful, even though it is limited to input from 'experts'. What is striking about this study, however, is the very careful way in which it cleaves to the contours of existing data sets; creates economic indicators that are 'point in time' positive or negative responses; limits the rule of law/regulatory environment to a count of formal indices such as legislation and institutions; and surveys 'experts' about 'facts'. This tends to suggest that the intended audience is an economics and policy one, which does not seek noisy, messy data from law.

Although the authors warn against using the study's results for policy applica-

in counterpoint to the World Economic Forum's *Global Competitiveness Report* and to 'send a strong signal and incentive to the regions involved to improve their country's level of competitiveness if the higher incomes per capita associated with the higher ranking are desired' (2000b: 460). Ultimately, however, these are rankings based on 'stylized facts' of a highly abstracted kind. What the study and its fixed/hard/soft/typology cannot do is to project ahead to the effects of legal interventions, determine what form these should take, or predict how these might fare in individual country contexts.

Judicial efficiency? The Lex Mundi project

A more recent World Bank project, undertaken as part of the World Bank's *World Development Report 2002*, is 'Legal Structure and Judicial Efficiency: the Lex Mundi Project' (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001 and 2003). Rather than being an assessment of completed law reform, it is intended to be a diagnostic tool that indicates the need for reform in judicial systems that, in the authors' view, over-optimally regulate dispute resolution. The study is interesting in that it spans 105 countries and attempts to compare the 'judicial efficiency' of each based on fresh survey data from cooperating law firms.

The study presents two hypothetical problems – eviction of a tenant for non-payment of rent and collecting on a bounced cheque. The authors ask lawyers within the Lex Mundi and Lex Africa association of law firms to describe in detail the steps required in pursuing each of these problems within the court system. By looking at seven categories of regulation,²⁰ the authors then construct an index of regulation of dispute resolution.²¹ In this study, 'regulation' is defined narrowly, as 'formal legal rules', while 'dispute resolution' is used as a synonym for 'court-based adjudication'.

The hypothetical benchmark of efficiency used by the authors is Shapiro's triad in which a neighbour resolves a dispute between two other people (Shapiro, 1981). The authors compare the ideal with pursuit of a small claim in a court of first instance, as a way of gauging 'access to justice' within the legal system for the ordinary individual. The study finds that dispute resolution is 'more heavily regulated in civil than in common law countries' and that 'regulation of adjudication is heavier in less developed than in rich countries' (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001: 6). Since the majority of legal systems in the world today are, at base, civil law systems and are located in developing countries (something that the authors fail to note), this means that most countries in the world 'over-regulate' dispute resolution, as defined in this study.

That procedural rules differ the world over is a commonsense proposition for comparative lawyers, who would also observe that the division of the world into common law and civil law countries is factually inaccurate – almost every legal system today is a hybrid and this is particularly evident in civil and administrative procedure. Nevertheless, we can also see the overt supervision of proceedings by the judge in civilian settings as manifesting a legal *mentalité* and philosophical stance on the nature and role of the state, the legal system and civil litigation that is culturally and historically distinct from the non-adversarial procedures of the

common law worlds. Differences in legal institutional design and in procedural and substantive law derive from a particular context and set of policy objectives – none of which are canvassed in this study.

Specifically, in comparing legal systems, the authors find that, in eviction, ‘common law and Scandinavian legal origin countries [have] ... shortest duration and socialist and formerly socialist countries [are] at the bottom’ (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001: 34). In other respects, ‘using measures of the efficiency of the legal system from other sources, German and Scandinavian legal origin countries score the highest, with common law countries next, and French civil law countries the lowest’ (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001: 34). So, from this study we might deduce that developing countries unlucky enough to have inherited French or French-influenced Dutch law through colonization (for example, Indonesia) will post-socialist transition economies (for example, Eastern Europe, Eurasia) will tend to be handicapped with relatively more time-consuming, and more heavily regulated civil procedure. This, the authors argue, is likely to result in ‘extreme costs and delays, unwillingness to use the court system, and ultimately injustice. At least some of the burdens of such heavy regulation of adjudication may be therefore unnecessary and could be relieved through reform’ (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001: 40).

Many countries *could* alter their civil procedure rules to make evicting a tenant or recovering a debt quicker and subject to less intervention by judges. However, studies such as this one beg the question, ‘Why don’t they?’ The traditional comparative law scholarship cited (for example, Merryman, 1985) offers only a rather weak analysis of the historical origins of procedural forms, without considering their social and political significance today. For socio-legal scholars the differences are explicable because access to the formal venues of law are often restricted for political purposes, or indirectly restricted by bolstering the professional monopolies of lawyers and notaries. Judicial intervention may be a technique used to informally regulate the market by sending normative messages to prospective litigants, or to forestall social dislocation, or to promote settlement rather than fully litigated outcomes. Here the studies by Haley (1991) and Uphan (1998) on Japan are relevant and should be read against Kagan’s work on adversarial legalism (Kagan, 2001). This study has value to the extent that it makes transparent some of the policy choices being made deliberately or by default by nation states.²² However, some history would help.

‘Access to justice’ for the ‘ordinary person’ is an ambivalent concept and needs to be understood as such, even if, as in this study, the overriding normative priority is ‘efficiency’. It would be a more persuasive study if it went on to ask the reflexive question of whether, and on what basis, procedural efficiency should be the dominant value in a legal system; at what point this idea began to have traction in the common law world. Some of the ‘efficiencies’ being identified in this study are of recent vintage and represent, not some immutable difference between the civil and common law worlds, but justification used as a regulatory technique by the state. Teubner cites Habermas for the proposition that the legal systems of the US and Europe have been pressed into service to

‘constitutionalize’ the economic system – that is, the regulatory state deliberately channels social conflicts (such as evictions and debt collection) to the courts or to court alternatives, where litigants receive a guarantee of quick, judicial intervention that, at the same time, deprives them of other strategies and masks any political dimension of the dispute (Teubner, 1987: 395).

This study assumes that civil law courts would be better institutions if they were ‘de-regulated’, an analytic step that ignores regulatory theory suggesting that the outcome of ‘deregulation’ is usually more interventionist ‘re-regulation’ (for example, Scott, 2002) and that this is as true of legal and non-legal adjudication as it is elsewhere (for example, Teubner, 1987).²³ By treating courts as simply processing venues for problems with generic transactions, the study fails to provide a nuanced analysis of what the court as an institution represents in different legal systems and what litigation means in different kinds of cases. The authors try to hedge the latter question by disavowing interest in complex litigation prosecuted by business interests and in ‘difficult’ cases such as divorce. This does not, however, temper their ambitious claim that the study furnishes firm evidence on which to advance broad procedural reform of the civil law world.

The USAID C-LIR project

The USAID Commercial Law and Legal Institutions Reform Project in Eastern Europe and Eurasia (C-LIR) differs from the projects discussed above in both its aims and its methods. Its overriding aim is diagnostic: to enquire into the extent to which newly reformed law in target countries (whether USAID-funded or not) is being implemented. In this sense it attempts to capture change over time, as well as take ‘factual’ snapshots during fieldwork. The methodology, developed over a two-year period 1998–2000 and subsequently amended, attempts both qualitative and quantitative analysis. Reports on the countries and regions in which it has been used to date appear at: www.bizlawreform.com.

The C-LIR project defines its legal universe as seven areas of commercial law considered fundamental to economic growth and the development of a market economy (bankruptcy, collateral, company, competition, contract, foreign direct investment and trade), while acknowledging that other areas can – and in some countries perhaps should be – added. Qualitative aspects of this commercial law environment are assessed through a systematic listing of laws (both domestic and multilateral) and the institutions necessary for their implementation. The investigators quantify their findings by assigning numerical values to their qualitative judgments about the scope and effectiveness of those laws and institutions. This is intended to provide a more complete picture than qualitative assessments with no scoring. ‘Quantification permits both a standard for comparison with other countries and between areas of law, while providing a “reality check” on the integrity of the assessment’ (C-LIR Handbook, 1999: 2).

While ultimately delivering scores for individual countries, in the C-LIR project these are accompanied by lengthy narrative reports by teams of investigators who have conducted between twenty and forty field interviews each. The interviews are wide-ranging and seek to capture the views of both those on the

'supply' side of law reform and those potential consumers of law on the 'demand' side. The qualitative findings are designed to stand alone without the scores, but 'are strengthened by the numerical back-up, which can be used very effectively to sensitize planners to the need for change' (C-LIR Handbook, 1999: 2). Here we see an acknowledgment that the scoring and ranking is a technique of compliance and audit, aimed at both domestic and foreign legal policy makers.

Economic and other researchers who are strongly wedded to quantitative method would probably not find the scoring of indicators very rigorous, given that they are awarded by a changing population of investigators, can be impressionistic and may sometimes be mediated through group discussion. Nor is it easy to see how the 'scores' retain much statistical integrity after the indicators are altered or added to over time. An advantage of the C-LIR project design, however, is its reflexivity and capacity for change in response to internal or external critique.

C-LIR differs from the preceding studies in its self-evaluation of the generational shift in technical legal assistance and funding for law reform.

The success of ... early efforts – referred to here as *1st generation* commercial legal and institutional reform (C-LIR) – were mixed. New laws were drafted (sometimes copied verbatim from advanced market economies) and enacted, but with little lasting change ... During [the] second phase, practitioners' attention turned to rationalizing and strengthening the institutional framework for implementation and enforcement of commercial and other laws. This led to important advances in institutional and operational analysis, regulatory design, and capacity building ... While significant gains were achieved in certain substantive areas (e.g., GATT/WTO accession, customs administration, collateral registries, and capital markets), there was little progress in others – notably in the enforcement of bankruptcy, antitrust, and intellectual property laws ... '3rd generation' C-LIR [focuses on] the 'implementation/enforcement gap' [and] achieving sustainability in implementation and enforcement of legal and institutional reforms.

(C-LIR Handbook, 1999: 3)

The vision of law encapsulated in these 'three generations' of USAID law reform is still predominantly the formalist view that underpins the other studies surveyed here, and the ultimate aim is instrumentalist – to deliver a technique for evaluating and ranking legal systems. As a project predominantly designed and implemented by lawyers, however, C-LIR attempts a range of analysis that is much more sympathetic to prevailing views within the legal world of how to define and assess law. As a participant in the study, I regard it as one of the most useful technical legal assistance initiatives to date, but I concede all of the theoretical and practical limitations that I identify in the following section.

Explicit goals and (un-)intended consequences

Can you evaluate legal systems? Of course you can. Donald C. Clarke might say, for example, 'Azerbaijan makes Indonesia look like Switzerland'. It is a mean-

ingful symbolic comparison. Not surprisingly, his first-hand observation and intuitive understanding is supported by economic data.²⁵

So, while the theme of the studies outlined above, following Hendley (1996) is that 'law matters', the questions that we should focus on are, what version of law is being assessed in transition economies, and how does this affect the value of the rankings that result? The studies I describe above apply a template of 'modern' law to transition economies. Law within each of the studies is both instrumentalist (law as an economic input; law as an instrument for effecting economic functions for example, dispute resolution, crystallization of rights, certainty for transaction rules) and formalist (law as legislation, judicial decisions and administrative rules). Restricting 'law' in this way has some clear advantages. It makes survey techniques possible and straightforward, it focuses qualitative input on a few questions, and it controls the type and spread of data collected. As we saw in the C-LIR analysis, too, this approach can serve a very useful diagnostic purpose, by helping to pinpoint gaps in the formal fabric of the legal system or by identifying procedural bottlenecks in effective functioning of legal institutions. Ultimately it makes comparisons of the quantitative kind possible and illuminating.

While the numbers are beguiling, the quantitative analysis can only ever be skeletal: it cannot furnish explanations for why even geographically-proximate economies have very different legal cultures and institutions. In Asian law it is axiomatic that comparisons of legal systems should be legitimate. To be intellectually persuasive, they should be information-rich, contextualized by political, economic, cultural and historical understandings of the target country; and draw on indigenous understandings of what constitutes 'law' and how it is understood to operate. We should overlay this with a reflexive awareness of the limitations of the framework of analysis that we are applying, or 'pragmatic postmodernism'.²⁶

Does it matter if these evaluative projects fall short of the methodological or normative ideals of Asian law or legal sociology? Some commentators suggest that we should just accept that coding countries by reference to economic indicators that are in part derived from formal elements of law and legal institutions and ranking them according to 'competitiveness' or 'efficiency' criteria is simply a 'fairytale' that should not concern serious socio-legal scholars.²⁷ I tend to disagree, for the theoretical and practical reasons outlined below.

The studies discussed in this chapter have in common a preoccupation with the state. In a transitional legal system where the state is nascent, or weak, or rather too reminiscent of the repressive regime it has just replaced, a focus on the state as the main recipient of technical legal assistance and as the major producer of 'law' is understandable. It is also understandable (perhaps desirable) that the 'assistance' has multiple motives beyond simply renewing or establishing legal infrastructure – for example, market opening or 'democratization'. However, Jayasuriya's analysis of the way in which states can capture rule of law rhetoric is instructive (Jayasuriya, 1999a).

Jayasuriya (1999b) argues that some modern states (for example, Singapore, Malaysia) have all of the formal attributes of rule of law and embrace its rhetoric of rule of law while simultaneously using formal legal channels to stifle freedom of speech, thwart political pluralism and constrain human rights. Rule

of law thus becomes a set of technologies that can be used to strengthen a state apparatus that bears little resemblance to the liberal democratic ideal. Peerenboom (2004) responds by suggesting that there is no *a priori* reason why an Asian state should resemble an American or European one: multiple or indigenous versions of rule-of-law might be possible. To the extent that donors and lenders engaged in technical legal assistance conceive of their funding as a tool for bringing about political pluralism and liberal democratic forms of law, both the Jayasuriya thesis and the Peerenboom response should sound a cautionary note.

Jayasuriya's analysis also reminds us that legal reform in transition economies is not necessarily always imposed or neo-imperialist. The reform dynamic may be complex: the changes necessary to comply with externally mandated conditions may be sought by some stakeholders and, predictably, resisted by others (for example, Nicholson, 2002). In any system in transition there is plenty of scope for insiders to arbitrage gaps in the system and to manipulate outcomes. The C-LIR methodology tries to capture this by identifying a 'market' for law reform that includes (and records) requests from 'stakeholders' such as business, trade organizations, non-government organizations (NGOs), government critics and universities. The measured outcomes, however, give an artificially static cast to the more fluid dynamic of the narrative reports.

Whichever way stakeholders align themselves, law reform is primarily done by and for elites. The numerical glosses in the studies above tend to mask the political nature of the reform struggles and the power discrepancies that can be entrenched during the process of large-scale reform. It is true that the multinational or individual foreign entrepreneur or investor is often privileged because the inflow of foreign investment is assumed to align with the (recipient) state's interests (Ginsburg, 2000: 833). Systemically, we see this in foreign investment legislation that offers tax and other benefits to foreign investors that are not available to local businesspeople or to returning members of a diaspora.

We can, of course, see this as a system of third party 'accreditation' of legal systems by the 'market' for mobile capital, but the claim would be more persuasive if it were based on empirical evidence that multinationals and foreign investors of scale *do* make their decisions in favour of 'best-practices' legal systems (and not tax regimes, lack of environmental regulation, absence of armed conflict or availability of a cheap labour force). It would also be a more credible claim if it were nuanced to take account of differentiated needs for formal law across industry, transaction type and historical period. At best we have a suggested correlation in Sachs, Zinnes and Eliat (2000b: 45) between 'competitiveness' (of which legal institutions are claimed to be the primary predictor) and levels of foreign investment.

A final, and more serious, objection to the search for the state is that 'the state' is not what it was. The kind of 'rule-of-law' images that we see implicit in these studies fixes the form of the (ideal) state as a kind of parliament, executive and judiciary employing separation of powers, sometimes bolstered by some independent regulatory agencies.²⁶ Transitional states tend toward a mix of the pre-modern state, the bureaucratic state, the regulatory state, the military state and backsliding autocracy. Yet at the same time, post-industrial states in Europe,

the US and Australasia have evolved into regulatory states that employ more law to govern, but that also draw on – and indeed depend on – the private sector for their vitality. It seems paradoxical (but perhaps inevitable) that what is being urged on these hybrid emerging states is an ideal type of law and state that the 'sponsors' have already discarded.

Practical implications

Tim Lindsey's insight about the potential for transitional states to learn from law reform in other transitional states is powerful (Lindsey, this volume). The appeal is not simply one of anti-American sentiment or political correctness. American practitioners in the field are themselves ready to concede that the legal templates of developed states – but particularly the United States – command a prestige and power that far outstrips their utility for transitional states (for example, Dezalay and Garth, 2002). In a perfect world, there should be nothing to prevent transition economies from studying what has worked (or has failed) in the imperfect settings of their transitional counterparts and being persuaded by this. In practice, the legal technical assistance industry erects structural barriers to allowing this to happen easily.

Lindsey's idea is important because one of the shortcomings of what Dezalay and Garth (2002) identify as 'global prescriptions' and a new legal orthodoxy is that it lacks reflexivity. A practical consequence of this is that few purveyors of the prescriptions admit that one of the features of the post-industrial regulatory state is its vulnerability to regulatory failure. Teubner's 'regulatory trilemma' of law that is irrelevant, socially disintegrative or that contains the seeds of its own disintegration (Teubner, 1987: 411–13) has to be designed for, and guarded against, if new forms of regulation in transition economies are not to collapse. This comes very close to the core issue of sustainability in law reform and legal technical assistance, which is referred to in the C-LIR project design but is conspicuously absent beyond this and in the other studies described above.

Sustainability as a normative preference should affect the way in which we regard the totemic features of the legal systems of transition economies. So, for example, under the existing formal model of law, a preoccupation with enforcement of judgments, grounded in concerns about the state's role in enforcing contracts and settling property disputes, leads us to the courts, judicial training and strengthening enforcement techniques. Responsive regulation, however, suggests that beyond a credible threat of sanction, effective regulation mobilizes self-regulation as the primary compliance mechanism (Ayres and Braithwaite, 1992). In essence, Braithwaite and his collaborators argue that you cannot legitimate rule of law within society simply by implementing punitive sanctions through formal institutions. Rather, engendering trust and creating space in which stakeholders can monitor each other and the excesses of government, and in which the state will be 'responsive', is the key to effective, efficient and sustainable regulation. This kind of enquiry clearly goes beyond the ambit of the evaluation designs that we are discussing in this chapter, but it does highlight the relative absence from the studies of informal and non-court institutions such as

professional organizations, legal service providers, independent regulators, accreditation authorities, NGOs, universities, churches and families.²⁹

Simply adding, or measuring, intermediate regulatory institutions would be unhelpful: the formalist nature of the new legal rules tend to conjure these institutions into existence without enquiring into the social, political and economic conditions that enable their western counterparts to function. So, for example, indicators ask about 'lawyers' and the 'legal profession' in transition economies without asking, 'What constitutes a "profession"?' and whether this exists in a way that makes sense for comparative purposes (for example Taylor, 2002). The same is true for 'independent' regulatory agencies and NGOs, which are often celebrated as counterweights to the state and, as Lindsey (this volume) argues, are sometimes the only functioning institutions in some societies that promote legal norms associated with rule of law. The useful regulatory role of NGOs and regulatory agencies does not obviate the need for a close analysis of the governance issues which afflict them as institutions, including capture, fatigue and potential corruption. E-commerce and e-governance, too, are touted as new institutions in transition economies with potential for promoting transparency in rule making and 'access' to legal information. Certainly we see some dramatic take-up rates in this area and the creation of truly valuable information resources by non-state actors.³⁰ However, information technology also has the potential to supplant and transform existing social and legal norms in a negative sense as well and this dual potential needs to be noted.³¹

Few, if any, law and development studies provide guidelines for creating and sustaining viable and legitimate legal institutions. Braithwaite's restorative justice and responsive regulation theories (Braithwaite, 2002) are valuable as critiques and refinements of legal and social institutions in industrialized countries, but they are open to the criticism that he imagines a monolithic state; and that his examples do not speak to the question of how to establish these in transition economies or settings in which social trust has almost completely eroded. He would probably respond by saying that it is precisely that inquiry that is important if you are to create institutions that are both legitimate within that society and will be flexible, responsive and inclusive.

Confining the definition of legal institutions to the court pyramid and associated compliance and dispute resolution entities, then, considerably under-describes governance in most societies. Legal norms are not found solely in newly minted legislation. They derive from the political and symbolic nature of law (Fitzpatrick, 1992), and from cultural values and historical myths that may not be liberal or progressive. They occupy a spectrum of legal pluralism that embraces the differing perceptions of law by elites and the disadvantaged; by business; and by intermediate social organizations such as churches, extended families, clans and community groups; and by professionalized legal actors.

Enquiring into these messier characteristics of a legal system is a more taxing endeavour than any of the studies described in this chapter. That they avoid the more complex picture in favour of a simplified legal 'anatomy' does not invalidate the studies per se, but it should make us extremely cautious in both interpreting the results and applying the results as policy or in allocative decision-making.

Notes

- 1 In fact, lawyers drafting Japanese articles of incorporation for *kabushiki kaisha* (joint stock corporations) typically exclude cumulative voting as an option (personal communication from a number of practising attorneys in Japan).
- 2 Perhaps a more recent manifestation of the 'transition tournament' among the Czech, Hungarian and Polish governments, each hoping to be the first to enter the European Union (Roland 2000: 338).
- 3 The United States policy community seems to understand 'transition economies' to mean those that were formerly part of the Soviet Union, or were Soviet satellite states. Sachs, Zinnes and Eilat (2000b: 13) cluster these new states as:
 - *EU-border states* (Croatia, Czech Republic, Hungary, Poland, Slovakia, Slovenia);
 - *The Balkans* (Bulgaria, Macedonia, Romania);
 - *Baltic States* (Estonia, Latvia, Lithuania);
 - *Albania*;
 - *Western Former Soviet Union* (Belarus, Moldova, Russia, Ukraine);
 - *Caucases* (Armenia, Azerbaijan, Georgia);
 - *Central Asia* (Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, Uzbekistan).
- 4 Here I confine discussion to Asia, Central Asia and Eastern Europe; and leave aside studies of Latin and South America (for example, Dezalay and Garth, 2002) and the difficult question of why Africa is relatively invisible.
- 5 Roland characterizes the 'Washington consensus as intellectually rooted in a combination of (1) standard neoclassical price theory; (2) standard macroeconomics and experience of stabilization policy and (3) a broad body of knowledge in comparative economic systems emphasizing both the complementarity of the constitutive institutions of economic systems and the disappointing experiences with partial reform in Central and Eastern Europe' (Roland, 2000: 328). The 'evolutionary-institutionalist perspective is rooted in (1) the institutional modern microeconomic theory and its methodology shaped by cooperative game theory (2) themes of the evolution approach to [economics] and (3) a philosophical scepticism ... an emphasis on uncertainty ...' (2000: 329).
- 6 But see the careful empirical work of Kathryn Hendley, challenging the contention that Russian businesses were unable or unwilling to use formal legal institutions for dispute resolution (Hendley, 2001).
- 7 An insight from David Linnan, University of South Carolina.
- 8 See also the important studies on rule of law in Asia by Jayasuriya (1999b) and Peerenboom (2004).
- 9 Private communication; notes on file with the author.
- 10 Thanks to David Linnan for this example. On the nature of law in Indonesia and the viability of the current legal system, see generally, Lindsey (2000).
- 11 AusAID, CIDA, SIDA and JICA, respectively.
- 12 An under-researched 'outcome' of technical legal assistance programs is the extent to which donor and loan funds are reticulated to 'consultants' and institutions in the industrialized West. It is widely accepted that only a fraction of the money allocated bilaterally and multilaterally for legal technical assistance in transition economies actually makes its way to nationals of the target country. This has little to do with corruption in the target country (although this certainly occurs) but is, rather, the result of cultural bias; contract tendering processes that favour (indeed require) organizations of a certain scale; and nationality clauses that require consultants from the donor country.
- 13 *Citius, altius, fortius*, motto of the modern Olympic Games.
- 14 The others are Voice and Accountability; Political Instability and Violence; Government Effectiveness; Regulatory Burden and Graft (the latter being coupled with Rule of Law).

- 15 The governance database comprises survey results from (1) Business Environment Risk Intelligence, (2) Wall Street Journal Central European Economic Review, (3) Standard and Poor's DRI/McGraw-Hill, (4) European Bank for Reconstruction and Development, (5) Economic Intelligence Unit, (6) Freedom House (7) Gallup International, (8) World Economic Forum, (9) Heritage Foundation/Wall Street Journal, (10) Policy Risk Services/International Country Risk guide, (11) Political Economic Risk consultancy, (12) Institute Management Development, (13) World Bank/University of Basel.
- 16 Non-representative sources are broken into factors such as (partial listing only):
 - enforceability of contracts;
 - rule of law;
 - extent of tax evasion;
 - costs of organized crime for business;
 - intellectual Property protection;
 - compliance with court ruling and/or arbitration awards;
 - legal system effectiveness at enforcing commercial transactions;
 - independence of the judiciary from interference by the government or parties to the dispute;
 - proven business capacity to file lawsuits and an independent and impartial court and government;
 - citizens' willingness to accept legal means to adjudicate disputes rather than depending on physical effort or illegal means.
- 17 www.bis.net/investment_climate.html.
- 18 Note the strong critique from Krugman (1994) suggesting that 'competitiveness' is a meaningless term in this context.
- 19 Legal culture and legal institutional culture could clearly fit here, although the working definition of 'culture' is not clear.
- 20 The World Economic Forum's annual *Global Competitiveness Report*.
- 21 (1) Use of professional judges and lawyers rather than lay judges and self-representation; (2) need for written rather than oral arguments; (3) necessity of legal justification of various actions by either disputants or judges; (4) regulation of evidence; (5) nature of superior review of first-instance judgment; (6) presence of statutory interventions during dispute resolution (for example service of process by a judicial officer); and (7) number of independent procedural actions required by law.
- 22 Some other determinants of judicial efficiency are also considered, namely (1) defendant protection in different countries; (2) incentives for attorneys; (3) mandatory time limit on judges and litigants; (4) indexation of debt contracts; (5) 'loser pays' rules; and (6) availability of alternative administrative procedures to solve the dispute. However the authors do not find any systematic evidence that these factors matter. As the authors put it, 'Moreover they do not wipe out the influence of the index on judicial efficiency' (Djankov, La Porta, Lopez-de-Silanes and Shleifer, 2001: 8).
- 23 If the data becomes public at some point it would be interesting to have it analyzed by an interdisciplinary group of scholars who work in the field of dispute resolution. An interesting side issue in this study is the agency of the lawyers who provided the data, since they are presumably the primary beneficiaries of systemic inefficiency. The design of the project and the way that it bypasses the legal academy completely is also interesting.
- 24 Nor is there any attempt to track the self-represented litigant, perhaps a result of relying on attorneys as informants. The self-represented litigant in countries such as Japan accounts for up to 60 per cent of cases heard in courts of first instance (personal communication from High Court Judge, Japan).
- 25 General Agreement on Tariffs and Trade.

- 26 So it must be true: 'Interestingly, in spite of the extremely impressive foreign direct investment performance of Azerbaijan ... it has the worst banking sector performance in the Caucasus' (Sachs, Zunes and Eilat, 2000a: 31).
- 27 Pip Nicholson uses this term to characterize the kind of Asian law scholarship that is theoretically informed and self-aware without becoming paralyzed by post-modern consciousness to the point of abandoning the study of other legal systems and cultures. This rather ignores the political reality of a state that in 2000 was struggling to absorb the enactment of some 300-plus laws that year and where political power is in any case dominated by familial and interpersonal networks.
- 30 This is less true of the C-LIR analysis, which leans in the direction of canvassing the views of non-state actors and encourages (to the extent possible under time constraints) interviews with 'ordinary people, as well as what one team leader calls 'the usual suspects'.
- 31 In Indonesia, the paradigm example is www.hukumonline.com.

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