

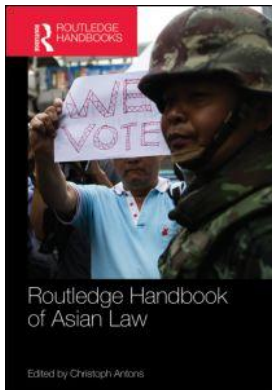
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On: 16 Jul 2019

Access details: *subscription number*

Publisher: *Routledge*

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London SW1P 1WG, UK



Routledge Handbook of Asian Law

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East Asia and the study of law and development

Publication details

<https://www.routledgehandbooks.com/doi/10.4324/9781315660547.ch3>

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Published online on: 07 Nov 2016

How to cite :- John Ohnesorge. 07 Nov 2016, *East Asia and the study of law and development from:* Routledge Handbook of Asian Law Routledge

Accessed on: 16 Jul 2019

<https://www.routledgehandbooks.com/doi/10.4324/9781315660547.ch3>

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Part II

The political economy of law in Asia: Law in the context of Asian development



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3 East Asia and the study of law and development

John Ohnesorge

Introduction

From a comparative perspective, one of the most noteworthy aspects of East Asia¹ over the past five or six decades has been the region's rapid development, which is true whether one defines 'development' in economic terms alone or takes a broader view. Growth rates in Japan, South Korea, Taiwan and, more recently, China have been outstanding over sustained periods, as has been these societies' performance on many broader measures of well-being (World Bank, 1993). For scholars interested in understanding how law and legal institutions interact with social processes of development, East Asia therefore provides a rich arena for research, not only to deepen understanding of fundamental theoretical issues, but also perhaps to provide practical guidance to today's developing countries as they seek to structure their own legal systems to facilitate development. As this chapter will demonstrate, the East Asian experience challenges many claims and assumptions found in the mainstream law and development field. This was true of the East Asian 'miracle' economies of Japan, South Korea and Taiwan, but the challenges posed by China's development path are even more fundamental.

This chapter will first discuss how specific areas of law functioned during high-growth episodes in East Asia, highlighting areas of general agreement, as well as areas in which views conflict. This will include comparisons of these findings with claims or assumptions within the broader law and development literature. The remainder of the chapter will explore to what extent the East Asian experience with law and development might be generalisable, aiming to provide the basis for an alternative model or at least to provide guidance in specific areas.

Law and development, as a field, has been organised around the basic question of how law and legal institutions can function to facilitate development,² and thus should be thought of as a socio-legal enterprise focused on a specific set of questions within the broader socio-legal tradition. Although this basic orientation of the field sounds straightforward, the reality is in fact complex. Even within a narrow definition of development, there exists substantial room for diversity of approaches and emphases. For example, even one who defines development purely in terms of economic growth will still confront long-standing debates in economics over whether the best way in which to maximise growth is through limiting the role of the state and expanding private enterprise and the market – a view now described as 'neoliberalism' or associated with the so-called Washington Consensus – or through state-orchestrated industrial policy. Either path will have implications for the role of law in that society, but those implications will be substantially different. Adding to the complexity is the fact that development itself can be

defined in different ways and adjusting the definition of development often requires shifts in the legal institutions or fields of law that must be studied. To take a current example, the popular tendency to incorporate environmental concerns into the definition of development (the ‘sustainable development’ movement) will require that environmental law be part of the law and development inquiry for anyone who adopts the broadened definition. Broadening the definition of development beyond economic growth to include concerns such as environmental sustainability, wealth distribution, or social development thus greatly increases the complexity of the task by fragmenting the ends to which law and legal institutions are expected to contribute, while a range of potential means also remains available.

In the face of such complexity, law and development research should maintain an empirical emphasis, and an inductive approach to theory building (Ohnesorge, 2007a) and the developmental history of history of East Asia in the era post World War II provides a rich laboratory for this kind of work. Not only have the societies of East Asia experienced long stretches of rapid economic growth, but they have also demonstrated many other characteristics of development more broadly defined, including transitions to democracy (South Korea and Taiwan), rising literacy rates, longer life expectancies and technological advancement, among other things. Moreover, despite their generally positive trajectories, each of the societies has faced significant policy challenges – some originating internally and some resulting from external shocks – which have pushed them to adjust their legal or regulatory arrangements in response. Such episodes of policy shift involving substantial legal system adjustment create valuable natural experiments in law and social change that can help to improve law and development, and socio-legal studies more broadly. Finally, despite important similarities, each of the societies of East Asia is truly unique from the others in important ways, and this pattern of discrete differences within broad similarities can help to facilitate the scholarly enterprise of seeking to identify which legal institutions or attributes are actually most important to development.

Using the East Asian law and development experience to generate and/or test ideas about law and development has an important corrective effect because, simply put, East Asian societies have experienced rapid development while conforming loosely, if at all, to mainstream law and development orthodoxies (Ohnesorge, 2003b). Just as Max Weber faced his famous ‘England problem’ – that is, the fact that the Industrial Revolution and nineteenth-century capitalism were led by a country that did not conform to some of his important claims – so today the dominant theories about law and development face an ‘East Asia problem’ (Ohnesorge, 2007a). This East Asia problem is troubling not simply because influential theories are developed in seeming isolation from knowledge of East Asia, which could result from methodological issues (deduction vs induction), or could stem from the fact that people who develop general ideas about law and development do not necessarily study East Asia. More troubling is the fact that there seems to be a real reluctance to test general theories or claims, however constructed, against the empirical reality of the region. This is not to claim that the history of law and development in the region could be reduced to a single agreed-upon empirical reality, a claim that would be belied by noted disagreements in some areas. But there are substantial areas of agreement about how law and legal institutions *functioned* in the region, even if there is debate over why they functioned in that way, and, provided that they are used with care, such areas of agreement do provide a legitimate basis against which general theories can be tested. A number of scholars have done this in different ways, and the following section will highlight some of their findings and conclusions.

Law and legal institutions in East Asia's high-growth episodes

In spite of the potential complexity arising from differing ends and contested means, the law and development literature tends to focus on a fairly standard set of concerns about legal systems and how they operate. Different themes have been emphasised by different writers and in various historical periods, but that standard set of concerns typically includes doctrines and institutions in both private and public law. Private law concerns include the clarity and effectiveness of private property and contract rights, the availability of the judiciary to fairly and efficiently adjudicate economic disputes between private actors, and the effectiveness of corporate law in facilitating business activities. The public law side focuses on both the effectiveness of regulatory tools to implement public policy initiatives and on the ability of public law, administrative or constitutional, to constrain state actors.³ Especially in the regulatory arena, there is an overlap between legal and policy concerns, although the institutions of private law also reflect policy choices. The following discussion follows this basic framework in presenting an overview of how law and legal institutions functioned in specific fields during East Asia's high-growth episodes, and how those realities challenge mainstream law and development thinking. The pattern that emerges from this exercise is that post-war Japan, South Korea and Taiwan diverged from mainstream thinking more in function than in form, while China's continuing episode of rapid development challenges mainstream claims in terms of both form and function.

Private law in East Asian development

With respect to the basic law of private economic activity – primarily property and contract – East Asia divides into two distinct groups. On the one hand are Japan, South Korea and Taiwan, in which, as a doctrinal matter, property and contract law were relatively clear, developed and comprehensive during rapid growth, being derived primarily from European civil and commercial law of the late nineteenth and early twentieth centuries. These societies also had courts, government agencies and legal professions organised along recognisably Western lines, each combining European and US influences in its own unique way. The fact that such legal infrastructure was in place during these societies' high-growth episodes tends to confirm mainstream thinking, which, echoing Max Weber, has long posited a positive relationship between economic development and legal systems that support market activity by enforcing private property and contract rights (Trubek, 1972). The fact that these legal systems were of civil law origin is noteworthy, however, as a corrective to currently popular claims for the economic superiority of the common law over the civil law espoused by the legal origins/LLSV school – so-called after authors Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny – which has gained institutional voice through the World Bank's 'Doing Business' project.⁴

More noteworthy than the black-letter law and the formal institutional arrangements were the ways in which East Asia's laws and institutions functioned in practice, which deviated significantly from standard assumptions. In comparison to the developed West, it was often said that business in the region was done on the basis of relatively short written contracts and that business litigation was relatively rare. The relative lack of formality and comprehensiveness in contracting behaviour has been discussed in cultural terms, but might also be explained by structural factors such as a

prevalence of long-term relationships in the region's economies. With respect to litigation rates, the relative rarity of litigation could have been based on structural features of the legal regimes, such as few licensed lawyers, a lack of civil discovery, rules against contingency fees, or 'loser pays' systems for legal fees (Ohnesorge, 2007c). Other explanations focused on traditional cultural norms against litigation and in favour of compromise or mediation, and a healthy debate over the motives of East Asia's 'reluctant litigant' has taken place in the academic literature (Ginsburg and Hoetker, 2004). Whatever the cause, however, the outstanding feature of the systems from a law and development perspective was the lack of resort to formal legality and dispute settlement rather than the doctrines of substantive law. The extent to which the East Asian experience confirms or contradicts mainstream law and development claims is thus complex. It does not contradict the general Weberian notion, popularised recently in the new institutional economics of Douglass North and others, that legal infrastructure is of fundamental importance to the operation of market economies, but it would contradict strong claims for the importance of particular black-letter rules, or functional claims for the importance of highly contractualised business relations, or of easy resort to litigation to solve disputes.

In contrast to the experiences of Japan, Korea and Taiwan, China constitutes a much more radical challenge to mainstream notions in that it presents an example of rapid economic development taking place without even a solid foundation of private law on the books, let alone in functioning reality. China's rapid growth began in the 1980s, at about the same time as the country began its efforts to build a legal system appropriate to a market economy. Over the subsequent thirty years, economic development seems to have preceded developments in the private law system, not vice versa (Clarke, 2003b; Clarke, Murrell and Whiting, 2006). What was true of Chinese private law was also true of the institutions involved in the functioning of private law, such as the judiciary, government agencies and the legal profession. In China, these institutions all began their modern development in the 1980s, as the country abandoned Stalinist economic management, and have subsequently developed contemporaneously with the economy, not ahead of it. In this respect, China's experience of law and development offers a more extreme challenge to prevailing assumptions than do the experiences of China's East Asian neighbours. China's experience shows that a political commitment to support private enterprise that is sufficiently clear and stable may not need to manifest itself in the form of well-articulated law, strong courts and an independent legal profession, as much as some argue otherwise. Keeping private rights somewhat nebulous and out of the hands of independent courts clearly supports the Chinese government's effort to retain flexibility in dealing with the private sector, and, at least so far, this does not appear to have significantly hindered economic development.

Business organisation law

The law of business organisational forms is also clearly important for development in which the private sector is expected to play a major role, and the history of this area of law in East Asia largely parallels the history of property and contract law.⁵ During their rapid-growth eras, Japan, Korea and Taiwan all had on their books modern statutes creating a typical range of business structures, from simple agency relationships, through partnerships, to publicly traded corporations, as well as regulation of the sale of securities. As with property and contract law, these statutes reflected a mix of European and American

influences, and what was noteworthy was partly the legal doctrine itself, but perhaps more importantly how the legally constituted organisations operated in their local contexts. Business organisations operated differently in each of the three societies in important ways, but in each case successfully enough to support robust private sectors and rapid economic development.

With respect to corporations, where most of the attention has been focused, Korea and Taiwan were characterised by high levels of concentrated share ownership among founders and their families, while Japan was not (Claessens, Djankov and Lang, 1999). But whereas Korea's large business groups (*chaebol*), such as Samsung, LG or Hyundai, developed into enormous, hierarchically organised conglomerates operating in many areas of the economy (Kang, 1996), Taiwan's family-dominated business groups were more loosely organised and less hierarchical (Claessens et al., 1999; Chi-Nien Chung, 2003). Japan's major private corporate groups (*keiretsu*) have been more similar to Korea's *chaebol* than to Taiwan's business groups, although with financial institutions to some extent replacing the founder and their family members as long-term, stable shareholders.⁶ Importantly from a law and development perspective, in none of these economies did financial markets play a dominant role in financing corporate growth, with bank lending playing a comparatively larger role. The 'varieties of capitalism' literature would classify these as bank-centred, as opposed to market-centred, financial systems, despite other important differences noted above.⁷ The fact that these economies developed so successfully with bank-centred financial systems tends to undermine central claims of the legal origins/LLSV school, which builds its claim for the superiority of the common law on a claim that deep, liquid financial markets are important for development and that common law systems are better for such markets (Ohnesorge, 2009). East Asia's experience shows that bank-centred financial systems operating within civilian legal frameworks are perfectly capable of supporting rapid private sector development, so even if the common law tradition is more hospitable to advanced financial systems, this does not mean that the common law is in general superior for economic development.

Also noteworthy from a law and development perspective was the weakness in East Asia of litigation as a mechanism by which shareholders could influence management or protect themselves from the actions of dominant shareholders. That was as true in Taiwan and Korea, where corporations tended to be dominated by founder/controlling shareholders, as in Japan, where shares were more widely dispersed. This is how East Asia's generally observed propensity against litigation manifested itself in the specific setting of corporate governance and it tends to undermine the claims of the World Bank's influential Doing Business group, whose system for grading legal systems places great weight on legal protections for minority shareholders.⁸ Since the 1990s, legal rules and institutions have been adjusted in East Asia precisely to encourage shareholder litigation as a way in which to improve corporate governance (Ohnesorge, 2007c), but this came after those countries' rapid-growth episodes were long over. Although the mainstream view is now that weak minority shareholder protections are detrimental, the successes of East Asia's corporations suggest that protecting minority shareholders is less important than creating an incentive structure conducive to entrepreneurship, risk taking and long-term vision (Ohnesorge, 2009).

Turning to China, the story of corporate law there again provides a very interesting contrast with the rest of East Asia. As with areas of private law, such as property and contract, the law of business organisation in China was not in place prior to rapid development, but has instead been evolving along with economic development since

roughly 1980, when China abandoned Soviet economic organisation in favour of a largely market-oriented model – albeit one in which enterprise ownership by various arms of the state remains pervasive. As the government has made policy choices in favour of specific economic activities, it has developed the legal forms necessary to carry them out, often on a provisional or local basis. For example, when China decided in the late 1970s to open the country to foreign direct investment (FDI) in manufacturing, there existed no law of business organisation under which appropriate legal entities could be created. China could have put foreign investment on hold pending the creation of a generally applicable statutory structure of organisational forms for conducting private enterprise. That, however, might have been a fraught process in a country eschewing ‘shock therapy’ and instead transitioning gradually out of a Soviet economy, while also still ruled by a Chinese Communist Party claiming to adhere to socialism. In what became the pattern for Chinese law reform, the government deferred the larger legislative project, creating instead a regime of business and tax law designed specifically for the FDI sector (Gelatt, 1989). It was not until 1994, well into China’s high-growth episode, that the generally applicable Company Law became effective, after stock markets had been created in Shenzhen and Shanghai on which shares of Chinese corporations were being traded (Green, 2003: 12). Even now, the actual ownership and control structure of many Chinese business entities remains highly idiosyncratic, because ownership by governmental units, national and local, remains much more common, and much more opaque, than in a typical economy and because the Communist Party still appoints the leaders of many state-owned enterprises as part of its cadre system (Clarke, 2003a).

Public law and governance: Economic regulation and administrative law

With respect to regulation and administrative law, the experience of East Asia as compared with that of other parts of the world has been most noteworthy in two respects. First, in terms of substantive policies, governments in the region have engaged in industrial policies involving economic interventions well beyond the prescriptions of most modern economists.⁹ Secondly, in terms of public law, procedure and process, executive branch authorities in the region were able to implement these policies with relative freedom from the strictures of public law and judicial review that constrain government action in many other societies, and which tend to inform mainstream law and development thinking. In keeping with the pattern identified above, Chinese performance has been the most extreme on both metrics, thus presenting the greatest challenge to orthodox views. This section will first discuss the legal environment within which East Asia’s developmental policies were carried out, then focus on the substance of those policies.

Treating administrative law as a set of legally formulated constraints on executive action, East Asia during high growth was noteworthy for the fact that administrative legality operated primarily internally, within bureaucracies, rather than through external legal checks enforced by the courts. Legal scholars, perhaps especially those trained in the United States, too often think of legal control of administrative action as being external and judicial almost as a matter of definition, and this type of thinking is common where the mainstream law and development literature discusses the role of public law. However, as Japan scholar Richard Boyd (2003: 175) made clear many years ago in discussing Japanese industrial policy, a full understanding of the relationship between law and bureaucratic action in East Asia requires study of internal, as well as external legal, checks:

'The officials in question are overwhelmingly lawyers, . . . [who] have on their desks volumes of their industry laws, plastic bound in flexible covers so as to withstand constant use and reference.' At the same time, however, Boyd (2003: 176–177) highlighted the fact that the legal documents to which the law-trained officials constantly referred maximised administrative discretion both by their expansive scope and by the vagueness of their language and that judicial review was, in practical terms, unavailable. Thus although Japan's economic bureaucracy operated according to a type of internal administrative legality, it was nonetheless relatively unconstrained by externally operating administrative law in the way that is typically prescribed in the law and development literature. Japan was a democracy with a well-established legal culture at the time its economic bureaucracy enjoyed this high level of legal autonomy, and there are varying views concerning how and why this occurred (Ginsburg, 2001). In authoritarian Korea and Taiwan, the courts were naturally weaker and the economic bureaucracy, like the rest of the executive branch, was even less constrained by law. Whatever its origins, this oddly legalistic, yet legally unconstrained, bureaucracy nevertheless helped to shepherd East Asia's economies through decades of rapid growth and has earned the praise of generations of development scholars searching empirically for the institutional bases of the region's success.

Another important attribute of public authority during East Asia's rapid-development eras was that executive authorities in the region were comparatively unified, rather than fragmented by the creation of quasi-independent regulatory authorities. From a law and development perspective, this is important because it has been common since the 1990s for development assistance programmes to encourage developing countries to adopt the independent agency model for certain governance functions (Dubash and Morgan, 2012). Centralisation and coordination were especially prominent in pre-democratisation Korea and Taiwan, where it was very clear that bureaucracies reported to the single chief executive, but this was also true in Japan when compared to other established democracies, perhaps owing to the fact of Liberal Democratic Party dominance and a strong bureaucratic tradition (Ohnesorge, forthcoming).

Turning from the legal and institutional environment for regulation to the substantive policy choices that governments made, the overall thrust of the region's policies during rapid growth can perhaps be captured in the term 'pro-growth interventionism'. Governments were interventionist in that they used legal tools to intervene across broad swathes of their economies, so in no sense could these be described as free-market economies. As has been discussed by many development scholars, they implemented a host of industrial policy measures affecting the flow of goods, capital and technology across their borders in order to foster export-led development, and the serious debates have been over whether such industrial policies were effective or in keeping with international obligations, not whether or not they existed. This interventionism was exercised in a general pro-growth policy environment, however, which can be seen in the ways in which other areas of law and regulation operated. While, in the United States and Europe, interventionist industrial policy is often championed by the political Left and is thus associated with Left-leaning regulation in other areas, in East Asia, other regulatory interventions seemed to be minimised in order to maximise economic growth. Enforcement in areas such as environmental law, consumer protection law, competition law, intellectual property law, anti-discrimination law and labour law, among others, was not non-existent, but by the same token it was rarely aggressive by international standards and appeared to be subordinated to a more fundamental concern for economic growth led by a thriving private sector.

Applying this analysis to the role of public and regulatory law in China's current era of high-speed growth, one again can see the basic dynamics of the East Asian experience being played out in an even more extreme form. In terms of administrative law and legal controls on bureaucratic action, China's courts appear at least as impotent as those in pre-democratic Korea or Taiwan and face the additional burden that separation of powers is not necessarily even accepted at the theoretical level within the official Marxist legal ideology. With respect to law operating internally to constrain bureaucratic action, as described in Boyd's discussion of Japan's industrial policy bureaucracy, observers provide a description of China's bureaucrats wielding a similarly impressive set of regulatory documents, but being even less legally constrained in practice owing to the broad wording of the documents, continuing difficulties in establishing a clear and exclusive hierarchy of legal norms, and an open subservience of the courts to political will. The more complex nature of China's regulatory norm structure may be related to another difference, which is that regulatory authority in China appears much more fragmented than was the case in the rest of East Asia during rapid development (US Chamber of Commerce, 2014).¹⁰ This apparent fragmentation may have resulted from the fact that China built so many of its institutional structures during the 1990s and, for that reason, may have been more influenced than its neighbours by the global trend toward the independent regulatory commission model (Dubash and Morgan, 2012). While this might count as an exception to the general pattern of China displaying in more extreme form what was already visible in East Asia, the practical reality is that the Communist Party's continuing monopoly on power means that even where authority appears fragmented, such agencies, like the courts, cannot ultimately implement the law independently, while the Party itself remains above the ordinary legal system. In terms of substance, too, China displays the pattern of 'pro-growth interventionism' observed in the context of East Asian development, although arguably with even greater intervention, on the one hand, and an even greater pro-growth regulatory bias, on the other. Although China appears to be growing increasingly serious about environmental and consumer protection, perhaps diminishing to some extent its pro-growth policy bias, it appears increasingly open about pursuing an interventionist industrial policy (Dubash and Morgan, 2012), albeit perhaps one with a diminished bias towards growth.

Conclusion: East Asia, law and development, and today's developing countries

Although drawing on both legal and economic theory, law and development is an inherently action-oriented field. Descriptively and analytically, it explores what legal rules and institutions have been put in place historically that have seemed conducive to development, and why governments and development institutions have adopted the approaches they have. Another major strand of the field is less theoretical and more prescriptive, trying to determine what governments and aid institutions should do to reform national legal systems for development purposes. Knowledge of East Asia's experiences with law and development could contribute substantially to both endeavours, to inform retrospective analysis and theory building, but to also guide current and future law and development initiatives.

As earlier sections of this chapter have shown, there has long been a disconnect between the realities of law and legal institutions during East Asia's rapid-development episodes and the assumptions and prescriptions found in the literature and practices of mainstream law and development. This incongruity has been demonstrated even more

dramatically during China's current rapid-growth phase, which has taken place despite the underdevelopment of its private and corporate law regimes, and the weakness of its courts and its legal constraints on bureaucratic action. This disconnect between mainstream law and development thinking and the East Asian experience is unfortunate, because it means that theory is being developed without careful consideration of obviously important evidence and that the theory so developed is also not being tested against what should be an important body of evidence. The tendency is not new, however, and has been noted by several scholars of Asian law who have ventured into the law and development literature. Over twenty years ago, Frank Upham (1994) pointed out inconsistencies between Japan's experience and claims of the World Bank and Peruvian economist Hernando de Soto (1990), suggesting that the legal informality that many observers say characterised Japanese law during that country's high-growth period undercuts claims by de Soto and World Bank General Counsel Ibrahim Shihata that legal formality is necessarily important for economic growth in developing economies. Not incidentally, Upham presented these views in commenting on a paper by Taiwan scholar Jane Kaufmann Winn (1994), which itself documented a high level of informality in commercial law in Taiwan during that economy's high-growth period. Over a decade ago, several essays in the volume *Law and Development in East and Southeast Asia* (Antons, 2003; for example Boyd, 2003) explored similar themes and scholars such as Don Clarke (2003a, 2003b) voiced similar objections based on China's experience. The East Asian experience has been useful in this way as a corrective to claims about law and development often described as 'neoliberal' – that is, calling for a limited role for the state and for the role of law to be limited primarily to creating market frameworks based on secure private property and contract rights. This is not to say that the East Asian experience proves that the World Bank's rule-of-law efforts, or the theorising of Douglass North or the legal origins/LLSV scholars, are without merit, but it is now abundantly clear that those approaches, so influential in the 1990s and 2000s, describe at best the role that law might play in *one* path to development. Attention to the East Asian experience with law and development is put to its best use not as a way in which to prove that neoliberal approaches cannot work, but as a way in which to show that effective governments have deviated from such prescriptions quite significantly – even radically, in the case of China – and yet still achieved outstanding development outcomes.

In the last decade, a new use for knowledge of East Asian law and development has arisen, which is to test ideas and assumptions not of neoliberalism, but of its critics, many of who are calling for a return to state-centric development models. In 2012, *The Economist* prominently proclaimed the return of state capitalism; scholars are seeking to define and justify interventionist industrial policies of a so-called new developmental state (Trubek et al., 2013; Ohnesorge, 2007b); the BRICS countries (Brazil, Russia, India, China and South Africa) have just taken another major step toward the creation of an alternative global development bank, promising that it will impose fewer market-oriented disciplines upon its clients (that is, it will be less neoliberal) than existing institutions such as the World Bank and the International Monetary Fund (IMF) (Leahy and Harding, 2014). Because of East Asia's perceived success with industrial policy and a more state-centric development path, the region's experience plays a central role in the intellectual underpinnings of this movement, making it even more important that scholars and policymakers consider what lessons they might learn from how law and legal institutions functioned in the region during rapid development (Ohnesorge, 2007b).

The following are some of the many lessons that might be drawn from this exercise. First, East Asia shows that activist industrial policy need not degenerate into debilitating rent seeking and corruption, as a strong version of neoliberalism might suggest (Ohnesorge, 1999). This is an important affirmation of the possibility of successful industrial policy interventions, which, at least on the rhetorical level, are often dismissed as impossible. On the other hand, East Asia's experience does not guarantee that corruption and rent seeking will not follow government interventions, because corruption has been, and remains, a serious issue in the region.¹¹ If the social, political or other characteristics of a particular developing country make successful implementation of industrial programmes especially improbably, then the East Asian experience ought to be heavily discounted. It is no coincidence that the earliest efforts to analyse East Asian industrial policy quickly focused on the characteristics of the state apparatus and the economic policy bureaucracy, identifying 'hardness', or relative autonomy from social and political forces, as key to their success. The extent to which a bureaucracy is insulated from outside forces and allowed to exercise its developmental expertise depends to a great extent upon how the legal system operates, especially in the fields of administrative and constitutional law. As noted previously, those areas of law played quite restrained roles during East Asia's high-growth periods, so any country seeking to replicate East Asian industrial policy must ask whether it can, or even wishes to, replicate those conditions. The East Asian experience might be most useful as a source of ideas for designing industrial policy institutions to keep rent seeking and corruption to manageable levels, keeping in mind that some aspects of the East Asian experience may not be replicable, or desirable, today.

A second lesson that East Asia teaches is that openness to FDI and a heavy focus on exports do not necessarily require a capital-importing country to adopt a free-market approach, with no government screening or guidance on industrial policy grounds. All of East Asia engaged in bureaucratic screening of FDI, but in substance China has so far been far more open than its East Asian neighbours, in which FDI played quite a small role during rapid development. On the other hand, East Asian countries have enjoyed particular traits or circumstances that likely helped to make this possible, so their experience may not be generalisable. Japan, South Korea and Taiwan were important allies of the United States and Europe during the Cold War, when they engaged in their most aggressive industrial policy measures, and many believe that this helped to moderate foreign pressures to open their economies. China does not enjoy the same geopolitical advantage, but the enormous size of its internal market and its enormous pool of low-cost labour likely help investors to overcome concerns that they might have about government intervention and a highly imperfect legal system. The fact that East Asian countries have been able to engage in certain kinds of screening practices while still attracting sufficient FDI therefore does not disprove the common perception of a global competition for FDI, in which openness and regulatory simplicity are one metric upon which countries compete. A developing country today that wishes to emulate the East Asian approach to managing foreign investment for industrial policy purposes will need to consider carefully where it stands in the competition and whether it will benefit most from openness or from policy-driven selectivity.

Although there are certainly other lessons to be learned from close study of the East Asian experience of law and development, perhaps the most important to those exploring the contours of a new developmental state, as well as to those espousing neoliberal approaches to development, is humility in the face of substantial uncertainty. Critics of law and development activities often say that developing countries *should* be given room

to develop their own policies free from top-down, one-size-fits-all solutions imposed from the outside, but the fact is that the ways in which law functions in developing economies inevitably *will* vary with each country's specific historical, political and economic circumstances. Paying careful attention to law's role in East Asian development might do no more than reduce the high level of uncertainty that will exist in any actual exercise in law and development, but even that would be a most worthy accomplishment.

Notes

- 1 'East Asia' here refers to Japan, the Republic of Korea ('South Korea'), the Republic of China ('Taiwan'), and the People's Republic of China ('China').
- 2 This chapter follows David Trubek and Alvaro Santos (2006: 3–5) in understanding the field of law and development as combining legal and economic theory with the practices of national and international institutions engaged in legal technical assistance.
- 3 Public, especially constitutional, law is thus used in part to further goals associated primarily with private law.
- 4 For a brief introduction to that approach in the specific context of China's legal and economic development, see Ohnesorge (2003a). See also Ohnesorge (2009). For further discussion of this approach in the context of business organisation law, see nn. 5–8 and accompanying text.
- 5 This section draws on Ohnesorge (2009).
- 6 For a detailed explication of Japanese enterprise types, see Imai (1994: 117–140).
- 7 For a helpful discussion of bank versus market-centred financial systems discussing Japan in comparative perspective, see Vitols (2001).
- 8 Information on the Doing Business project can be found online at <http://www.doingbusiness.org> [accessed 18 July 2016]. The main Doing Business metric relevant to corporate law, 'Protecting Investors' (<http://www.doingbusiness.org/data/exploretopics/protecting-investors/>), draws heavily on the LLSV/legal origins approach.
- 9 The literature on the industrial policies of the East Asian 'developmental state' is enormous.
- 10 For example, authority for implementing China's Anti-Monopoly Law is divided among at least three bodies – the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC) – none of which operates independently within China's party-state political system (US Chamber of Commerce, 2014).
- 11 Corruption arguably follows the general pattern identified in this chapter, with China displaying in extreme form a characteristic already seen in South Korea and Taiwan, and to a lesser extent in Japan.

References

- Antons, C. (2003) *Law and Development in East and Southeast Asia*, London/New York: Routledge Curzon.
- Boyd, R. (2003) 'The Rule of Law or Law as Instrument of Rule? Law and the Economic Development of Japan with Particular Regard to Industrial Policy', in C. Antons (ed.) *Law and Development in East and Southeast Asia*, London/New York: Routledge Curzon, 154–196.
- Chi-Nien Chung (2003) 'Managerial Structure of Business Groups in Taiwan: The Inner Circle System and its Social Organization', *The Developing Economies*, 41(1): 37–64.
- Claessens, S., Djankov, S., and Lang, L. (1999) 'Who Controls East Asian Corporations?', World Bank Policy Research Working Paper No. 2045, Washington, DC: World Bank.
- Clarke, D. C. (2003a) 'Corporate Governance in China: An Overview', *China Economic Review*, 14(4): 494–507.
- Clarke, D. C. (2003b) 'Economic Development and the Rights Hypothesis: The China Problem', *The American Journal of Comparative Law*, 51(1): 89–112.

- Clarke, D. C., Murrell, P., and Whiting, S. (2006) 'The Role of Law in China's Economic Development', The George Washington University Law School Public Law and Legal Theory Working Paper No. 187, Washington, DC: George Washington University Law School.
- de Soto, H. (1990) *The Other Path: The Invisible Revolution in the Third World*, New York: Harper & Row.
- Dubash, N., and Morgan, B. (2012) 'Understanding the Rise of the Regulatory State of the South', *Regulation & Governance*, 6(3): 261–281.
- The Economist* (2012) 'The Rise of State Capitalism', 21 January.
- Gelatt, T. A. (1989) 'China's New Cooperative Joint Venture Law', *Syracuse Journal of International Law and Commerce*, 15(2): 187–201.
- Ginsburg, T. (2001) 'Dismantling the Developmental State? Administrative Procedure Reform in Japan and Korea', *American Journal of Comparative Law*, 49(4): 585–625.
- Ginsburg, T., and Hoetker, G. (2004) 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation', *Journal of Legal Studies*, 35(1): 31–59.
- Green, S. P. (2003) *China's Stockmarket: A Guide to its Progress, Players and Prospects*, London: Bloomberg.
- Imai, K. (1994) 'Enterprise Groups', in K. Imai and R. Komiyama (eds) *Business Enterprise in Japan: Views of Leading Japanese Economists*, Cambridge, MA: MIT Press, 117–140.
- Kang, M. (1996) *Korean Business Conglomerate: Chaebol Then and Now*, Korea Research Monograph 21, Berkeley, CA: Institute of East Asian Studies.
- Leahy, J., and Harding, R. (2014) 'Shanghai Leads Race for BRICS Bank HQ', *Financial Times*, 2 July, available online at <https://next.ft.com/content/aea32354-00eb-11e4-b94d-00144feab7de> [accessed 18 July 2016].
- Ohnesorge, J. K. M. (1999) '“Ratch”eting up the Anti-Corruption Drive: Could a Look at Recent History Cure a Case of Theory-Determinism?' *Connecticut Journal of International Law*, 14: 467–473.
- Ohnesorge, J. K. M. (2003a) 'China's Economic Transition and the New Legal Origins Literature', *China Economic Review*, 14(4): 485–493.
- Ohnesorge, J. K. M. (2003b) 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia', in C. Antons (ed.) *Law and Development in East and Southeast Asia*, London/New York: Routledge Curzon, 91–127.
- Ohnesorge, J. K. M. (2007a) 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience', *University of Pennsylvania Journal of International Economic Law*, 28(2): 219–308.
- Ohnesorge, J. K. M. (2007b) 'Northeast Asia's Developmental States and the Problem of Rights: Challenges for a New Developmental State?', in T. Groppi, V. Piergigli and A. Rinella (eds) *Asian Constitutionalism in Transition: A Comparative Perspective*, Rome: Giuffrè Editore, 305–319.
- Ohnesorge, J. K. M. (2007c) 'Politics, Ideology, and Legal System Reform in Northeast Asia', in C. Antons and V. Gessner (eds) *Globalisation and Resistance: Law Reform in Asia since the Crisis*, Oxford/Portland, OR: Hart, 105–130.
- Ohnesorge, J. K. M. (2009) 'Legal Origins and the Tasks of Corporate Law in Economic Development: A Preliminary Exploration', *Brigham Young University Law Review*, 6: 1619–1634.
- Ohnesorge, J. K. M. (forthcoming) 'The Regulatory State in East Asia', in F. Bignami and D. Zaring (eds) *Comparative Law and Regulation: Understanding the Global Regulatory Process*, Cheltenham: Edward Elgar.
- Trubek, D. M. (1972) 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 3: 720–753.
- Trubek, D. M., and Santos, A. (2006) *The New Law And Economic Development: A Critical Appraisal*, Cambridge/New York: Cambridge University Press.
- Trubek, D. M., Garcia, H., Coutinho, D., and Santos, A. (2013) 'Law and the New Developmental State': *The Brazilian Experience in Latin American Context*, Cambridge: Cambridge University Press.
- Upham, F. K. (1994) 'Speculations on Legal Informality: On Winn's Relational Practices and the Marginalisation of Law', *Law & Society Review*, 28(2): 233–242.

- US Chamber of Commerce (2014) *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, Washington, DC: USCC.
- Vitols, S. (2001) 'The Origins of Bank-based and Market-based Financial Systems: Germany, Japan, and the United States', Social Science Research Center Berlin, Discussion paper FS I 01–302, Berlin: SSRC.
- Winn, J. K. (1994) 'Relational Practices and the Marginalisation of Law: Informal Financial Practices of Small Business in Taiwan', *Law & Society Review*, 28(2): 193–232.
- World Bank (1993) *The East Asian Miracle: Economic Growth and Public Policy*, New York: Oxford University Press.