

The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes¹

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For the past 15 years an enormous enterprise of global norm making and related national lawmaking has been underway in many areas of global commerce. This article shows that leading global institutions, such as the World Bank, IMF, and United Nations, are building an international financial architecture with law—including corporate bankruptcy law—as its foundation. Building on research on international institutions and three national cases (China, Indonesia, Korea), the authors propose a new framework for legal change in a global context—the recursivity of law. They argue that the globalization of bankruptcy law has proceeded through three cycles: (1) at the national level through recursive cycles of *lawmaking*, (2) at the global level through iterative cycles of *norm making*, and (3) at the nexus of the two. Recursive cycles are driven by driven by four mechanisms—the indeterminacy of law, contradictions, diagnostic struggles, and actor mismatch. Thus the recursivity of law both revives and expands the sociological theory of legal change and offers a basis for an integrated theory of globalization and law.

Sociological studies of globalization largely neglect law. Whereas research has been extensive in such global arenas as finance, business, culture, religion, and population, it has been almost entirely absent for law. This

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neglect is apparent on both sides of the law and globalization equation: the sociology of law has remained overwhelmingly focused on the nation-state despite strong theoretical traditions that are attentive to transnational developments; furthermore, globalization studies, with important exceptions, shy away from law, ignoring even the legal dimensions of whatever globalization process is the object of inquiry (Halliday and Osinsky 2006).²

We offer a way forward not only for the sociology of law and globalization respectively but also for their rapprochement. We do so by confronting a particular problem in current global legal and economic change: How is it possible to explain global convergence in the enactment of corporate bankruptcy laws over the past decade while there remains significant variability in their implementation? To solve this problem we offer an integrated theory of legal change in a global context that seeks to answer three questions: What explains cycles of national lawmaking in a globalizing field of law? Where do the global norms originate and, more precisely, how does a single global standard emerge? And how does national lawmaking engage global norms and institutions and vice versa?

We show that leading global institutions, with strong support from the United States, are building an international financial architecture with law as a principal foundation. Economic globalization, according to the ideology of international institutions, demands and reflects a normative framework that delivers the effective operation of laws and rules (Carruthers and Halliday 2006). As a result, law has emerged in the last decade as a primary instrument and significant outcome of global change (Stiglitz 2002; Beck and Levine 2003).

Corporate bankruptcy law is a critical element in the global legal framework for markets (G22 1997). Domestic bankruptcy law enables economic Darwinism, a means of selecting out of the market those firms no longer able to compete within it. Whereas a socialist economy conventionally does not permit enterprises to go out of existence, it is a defining characteristic of a market economy that firms fail and that poorly managed

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² The most important exceptions to these generalizations can be found, on the law side, in a handful of studies (Braithwaite and Drahos 2000; Dezalay and Garth 2002; Canan and Reichman 2002), and on the globalization side, from world polity/world society studies on diffusion of a global culture (Boyle and Meyer 1998).

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assets be taken away from one set of managers and placed in the hands of those who can use them more efficiently. Bankruptcy law is thereby a means of enforcing creditors' rights because firms that cannot or will not repay their loans are subject to the threat or actuality of being driven out of the market. Corporate bankruptcy regimes provide for an orderly process by which scarce assets are redistributed in an efficient and fair way with the effect that bankruptcy law has distributional consequences: who gets what of the remaining assets. Indeed, potentially every type of economic actor in the market—creditors and debtors, managers and workers, firms and tax authorities, among others—can have economic interests at stake. Distributional consequences may also become social consequences: workers are made unemployed or company towns lose their principal source of livelihood or nation-states lose flagship industries to foreign control.

There are two principal variants of bankruptcy laws: liquidation, usually where the firm is simply dismembered and its assets sold to repay creditors; and reorganization, where a firm is given certain legal protections while it seeks to restructure in order to compete more effectively in the market. We shall show that the global movement driven by international institutions has been away from domestic bankruptcy laws that emphasize liquidation and toward laws that enable both liquidation and reorganization. It is now believed by international institutions that an effective bankruptcy system provides a safety valve to reduce the kinds of pressures within national financial systems that led to the Asian financial crisis (IMF 1999; World Bank 2002). For both transitional and developing economies, therefore, the world's most powerful agents of economic reform have also become advocates of complementary law reform.

The article draws on intensive research within the leading global actors (e.g., IMF, World Bank, regional development banks, OECD, United Nations, international professional associations) in the design of transnational and national bankruptcy regimes.³ It follows closely over 10 years the burgeoning efforts to reach a consensus at the global center on normative templates that will regulate transnational and national corporate failures. Since global normative templates and model laws are aimed primarily at transitional and developing economies, we draw evidence

³ The research design has included participant observation within meetings of the World Bank, United Nations Commission on International Trade Law (UNCITRAL), the Organization for Economic Cooperation and Security (OECD), and the International Bar Association (IBA) since 1999; periodic interviews with the principals of each institution, including the IMF Legal Department and regional development banks (Asian Development Bank, European Bank for Reconstruction and Development) from 1999 to the present; and documentary analysis of public and occasional internal reports.

from three case studies in East Asia—China, Korea, Indonesia—to explore the contestations and negotiations between global centers and peripheries. We anticipate, however, that the framework we offer applies, with appropriate adaptations, to other regions of the world.

We propose that the process of legal globalization can be understood theoretically as sets of cycles that integrate global norm making and national lawmaking. Extrapolating from the case of corporate bankruptcy law, we argue that globalization of law can be expressed through a complex set of three cycles: (1) at the national level through recursive cycles of *lawmaking* and law implementation, (2) at the global level through iterative cycles of *norm* making, and (3) at an intersection of the two where national experiences influence global norm making and global norms constrain national lawmaking, in an asymmetric but mutual fashion.

First, we draw upon scholarship on globalization and the sociology of law to inform an elaborated model of recursivity. Second, we observe how the dynamic of recursivity operates in lawmaking and law implementing in the three Asian nations since 1997. And, third, we examine the cycles of global norm setting and script production initiated by international institutions that set the context for national lawmaking.

We conclude by showing how global and national reforms can be integrated into a general model of the recursivity of law. Although this model of legal change is intended primarily to open up a more powerful theory for the sociology of law, the theory and evidence presented in this article also may have implications for scholarship on globalization in two principal respects: to show where and how the legal norms that govern markets originate and to show both the scope and the limits of the influence of international institutions on developing countries, especially during times of stress.

GLOBALIZATION AND LEGAL CHANGE

Law features little in most research on the impact of globalization. Studies abound on globalization's effect on advanced countries, ranging from business and government, the state and democracy, labor and the spatial structuring of work, to collective action in the provision of public goods and the legitimacy of the state (Cerny 1995). Research and theory have attended extensively to the consequences of globalization for developing countries, in such spheres as the power and survival of the state, public preferences for free trade, social spending (e.g., health, education, social security), political rights (Fisher 1997), and the impact of financial globalization (Weyland 1999). Neither does law intrude noticeably in social

science scholarship on the response of countries to globalization, on the impact of law on the international system or on firm strategy, structure, or investment decisions. Even across critical theoretical debates in the field, the centrality of law, whether as an explanation or an outcome of globalization, varies from mostly marginal to an occasional moment of significance.

The absence of law in most work on globalization is surprising. Law is a fundamental ordering principle of modern societies in theories as diverse as functionalism and Marxism. And globalization, itself, depends on a normative order—on ideologies, norms, and rules with their attendant institutions. This is true for the international system as a whole. As Falk (1999, p. 20) argues, “Every world system implies a complex normative architecture, partly explicit, partly implicit.” Dependency on law is increasingly recognized for economic globalization, whether by its champions or its critics (see also Braithwaite and Drahos 2000).

Three areas of scholarship do consider issues of globalization and law, and they point to aspects that engage the theory of recursivity we develop here (Halliday and Osinsky 2006). Within sociology, world society or world polity theory posits that a powerful set of norms, originating in Christianity and subsequently incorporated into Western culture, have been diffused universally, producing a surprising degree of normative convergence, principally through the intermediation of professionals, scientists, and international nongovernment organizations (Boli and Thomas 1999). Nation-states legitimate their standing in the world polity by adopting these universal scripts or models—of mass schooling, constitutionalism, human rights, citizenship, and suffrage, among many others (Boli and Thomas 1997, 1999; Ramirez, Soysal, and Shanahan 1997). Earlier versions of this theory were muted in their attention to the origination of norms, the complexities of agency, contestations in the global/local encounter, and asymmetries of power, and they had little to say about law. But more recent research has begun to show that universal scripts frequently are encoded in legal forms, that they are diffused by international actors that deploy varying mechanisms of power, and that contestation and resistance, cooperation and alliances, extend through all levels of the global/local encounter (Boyle and Meyer 2002; Boyle 2002; Boyle and Preves 2000). While this recent focus on law moves world polity theory toward a better understanding of global legal change, it mostly overlooks implementation (i.e., it attends almost entirely to law on the books, not law in action), it presumes strongly unidirectional effects from global institutions to nation-states, and it does not yet theorize the connection between local politics and how nation-states engage with global actors and institutions.

An effective counterpoint to the global-centered orientation of world

polity theory emerges from the interdisciplinary field of postcolonial sociolegal studies. Here, mostly anthropologists of law draw on the rich scholarship of law and colonialism to explicate continuities and discontinuities in a postcolonial globalizing world. By setting their inquiries within a colonial past, these studies embed particular renegotiations of cultural identities in local histories and place the local in a global field of power, where inequality is assumed to be integral to the global political economy (Darian-Smith 2004). By taking the point of view of the local subject, postcolonial studies immediately confront images of global law as autonomous, reified, impersonal, and universal with subversive refrains of law as contestable, ambiguous, and instrumental—even as a form of “globalized localism” (Sousa Santos 2002). And the encounter of the local with the global confounds any expectation of trouble-free legal transplantation because resistance and modification often coexist with appropriation and distortion, with the adoption of global norms for local purposes that may be quite at odds with either colonial or globalizing overlords (Merry 2000). Exogenous law may ironically offer local actors a measure of control over global players, and the local appropriation of global norms can empower previously disempowered local actors (Merry 2003, 2004). Moreover, local conflicts may spread outward to induce struggles among global actors or to exacerbate latent contradictions in global ideology and structure. Not least, this perspective attends closely to the construction of local and global discourses. Both colonial and postcolonial encounters require a construction of the “other” and of a narrative that, in the case of champions of “globalization,” may serve to disguise or mask power. Hence power is expressed no longer through control of territory but through control of consciousness (Silbey 1997). Law helps colonize the lifeworld, states Silbey (1997, pp. 220–21), but it does not do so without a struggle.

Scholarship on the second wave of law and economic development since the late 1980s has a protosociological referent because implicitly (and occasionally explicitly) it engages Weber’s (1954) theoretical link between law and the development of capitalism (Carruthers and Halliday, in press). Among scholars of East Asia, for instance, a lively debate surrounds the prevailing presumption of international financial institutions (IFIs) that economic development requires the certainty, predictability, and formality—the legal liberalism—that emanates from the commercial law of advanced countries, frequently mediated through global organizations such as the World Bank, the International Monetary Fund (IMF), and the United Nations (Pistor and Wellons 1999; Tamanaha 1995). Much empirical evidence casts doubt on this overly simple model of the relation between law and markets (Ginsburg 2000; Ohnesorge 2000). This debate has the merit, however, of addressing the relationship between law and

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economic globalization, not least because it has far-reaching pragmatic consequences insofar as it addresses an implicit theory that guides powerful global institutions.

If it is true that economic globalization is being underwritten by law and by norms, then it is imperative that attention be directed at the sources, processes, and outcomes of such lawmaking. Since economic globalization is being shaped not only by economic forces but by laws and norms, we must know where those laws and norms originate, how they are propagated, how they engage lawmakers in nation-states, and where their limits lie.

The sociological treatment of legal change within the nation-state has narrowed radically from 19th-century classical theory. Whether law was treated as an index of social change (Durkheim, Maine), a facilitator of economic and social change (Weber), or a barrier to revolution (Marx), earlier social theory heavily implicated law in centuries' long transformations of the economy, social organization, and political authority. Ironically, while 20th century practice has progressively championed law as instrumental to public policy, and thus lawmaking has become an integral function of the modern state for an enormous range of policy issues (Cotterrell 1992, p. 44), the sociology of law, with notable exceptions, has significantly narrowed its focus to one fraction of legal change—that of the move from formal law on the books to law in practice (Sutton 2001).⁴

While this “one-way move” from legal change to social change is not the sociology of law’s only paradigm, arguably it is its most entrenched and enduring framework over the past half-century (Cotterrell 1992, pp. 49, 65). Formal state law—whether regulations, statutes, or cases—becomes a mechanism to induce social change, either directly or indirectly, through the creation of institutions, such as markets, new legal duties, and new legal concepts (Dror 1959). This focus persists despite longstanding warnings about the limits of law’s capacity to effect social change (Pound 1913; Cotterrell 1992, p. 50). As sociologists, “our goal is . . . to understand *why* the outcomes of legal action differ from legal prescriptions” (Sutton 2001, p. 155).⁵

Studies of institutional incapacity, enforcement limitations, legal am-

⁴ While important exceptions can be found to this generalization, both in national lawmaking (Gunningham 1974) and in global norm-making (Boyle 2002; Merry 2003; Braithwaite and Drahos 2000), they remain to be drawn systematically into a holistic theory of legal change at the global and national levels.

⁵ Attention to this problem may be animated by theoretical or normative goals. For Sutton (2001, p. 158), e.g., two major theoretical traditions in American sociology of law, sociological jurisprudence and normative theory, aim “to make law a more effective instrument for solving public problems” and “to make policy-making and administrative processes more just.”

biguity, regulatory discretion, noncompliance, symbolic compliance, and evasion have produced a rich body of theory on the implementation of law. Yet this concentrated focus has come at some cost. By ceding lawmaking, and particularly the creation of statutory law, to political science, the sociology of law largely has taken for granted the very phenomenon—lawmaking—that animates its scholarly agenda. By taking as given the origins of state law, the prevailing model of legal change is unduly static. And insofar as the lawmaking process itself affects the gap between law and practice, this neglect undercuts explanations of law's uncertain implementation. Further, by retreating from lawmaking in accounts of legal change, law and society scholars permit political scientists to define the problems and formulate the theory of legislative lawmaking on their own terms, thereby losing the distinctive theoretical vantage point of the sociology of law.

We argue that legal change must be reconceived more dynamically and inclusively. The sociology of law must contextualize its singular strength within a broader framework that concomitantly will broaden the sociological mandate and complement political science approaches to lawmaking. We propose that legal change in the context of globalization can be conceived as a process of recursivity.

A sociological theory of recursivity distinguishes itself from conventional explanations of lawmaking in its particular emphasis on four issues at the heart of the law and society project. First, the recursivity approach attends closely to the influence of legal actors, such as lawyers, law professors, and judges, both on the implementation side of the cycle, where lawyers' creativity appropriates law for purposes that were not originally intended, and on the lawmaking side where lawyers, law professors, and judges mobilize their practical and intellectual capital to solve lingering problems and to resolve new problems with new legal solutions.

Second, our recursivity approach pays close attention to the constitutive power of legal concepts. In legal implementation, law's subjects come to view their problems through concepts institutionalized in statutes. In bankruptcy law, for instance, the 1978 U.S. Bankruptcy Act and the English Insolvency Act of 1986 introduced a flurry of new concepts (Carruthers and Halliday 1998; Halliday and Carruthers 1996) that were amplified, distorted, and creatively reinterpreted in practice. On the lawmaking side, law's agents regularly take a set of presenting problems and encapsulate, even capture, them within a legal idea or concept that may have been designed *de novo* by creative lawmakers or borrowed from another legal jurisdiction and adapted to a new context.

Third, the theory of recursivity pays special attention to the power of legal institutions—courts, regulatory agencies, enforcement authorities, professional associations—to impose their will or at least lay a special

claim to the shaping of law. For law's implementation, an extensive sociological literature demonstrates both the inertial momentum of institutional practices that are slow to respond to new rules as well as the adaptive capacity of institutions to modify law in practice, indeed to create their own "law."

And, finally, the recursivity of law is attentive to the influence of the form of law itself—regulations, cases, codes—on the way change is implemented or initiated. Law's form affects its implementation, its comprehension, its agents, and its function. Moreover, the formal properties of law have both intrinsic and extrinsic implications for legitimacy: intrinsic, since form signifies meaning, and extrinsic, because the issuance of statutes, regulations, opinions, decrees emanate from different sources of official power (see. presidential decrees or orders with Supreme Court opinions or new SEC regulations) that carry differing degrees of authority and thus variable fates in implementation. Research on the politics of lawyers shows that form becomes one of the technical resources that experts use for substantive ends (Halliday 1983, 1987).

Several bodies of work in Anglo-American scholarship point toward a theory of recursivity. A fairly straightforward recursive model is implicit in studies of the 19th-century English Factory Acts. Changes cycle from deplorable working conditions in England's factories to a series of factory acts (1802, 1819, 1825, 1833, 1842, 1844, 1853, 1860s, 1867) to protect women and children. Each subsequent act is substantially driven by the ineffectiveness of a previous enactment, by limited inspection facilities, or resistance by factory owners, or, later, by the power of the Chartist working-class movement (Sutton 2001, pp. 77–85; Bartrip and Fenn 1980).

A more complex recursive process can be observed in U.S. voting rights legislation. Here the pattern of legal change is influenced by the intersection of legislative cycles with a sequence of regulatory problems and court opinions. The 1957 Voting Rights Act to enfranchise blacks was unsuccessful because it included no regulatory apparatus and relied on individual blacks to bring grievances. The 1960 Voting Rights Act partially corrected this problem by allowing the attorney general to institute actions on behalf of entire counties and to sue the offending state, but it demanded cumbersome burdens of proof. The breakthrough came in the 1965 Voting Rights Act, where enforcement was placed in the hands of a dedicated federal agency and the burden of proof could be made substantially on demographic grounds. The Supreme Court supported the 1965 act in a series of decisions for a decade, after which it began to retreat. But when the Court in *Balden v. City of Mobile* restricted the scope of the act, Congress in 1982 overrode the court ruling (Lempert and Sanders 1986).

An even more complex recursive pattern can be discerned in U.S. equal

employment law, a pattern involving presidential executive orders, statutes, court decisions, and administration regulations. A series of executive orders signed by presidents Roosevelt (1941), Truman (1948), and Kennedy (1961) had little lasting impact until the 1964 Civil Rights Act made it illegal to discriminate in the workplace on the basis of race or sex. But it took a subsequent executive order in 1965, the establishment of a federal compliance agency (Office of Federal Contract Compliance), and further regulations and an amendment to Title VII (1972) to erect a legal framework, supported by the courts, that could induce change, although scholars disagree whether these cycles of ratcheting-up the legal instruments for change actually had far-reaching substantive effects (Lempert and Sanders 1986, p. 384; Freeman 1978).

These areas of research indicate that recursivity cycles range from the relatively simple to the highly complex. The simplest patterns stay within cycles of a particular kind of law: an iteration from statutes to practice to amended statutes, or from court decisions to practice to further decisions, or from regulations to compliance to further regulations. More complex cycles can take several forms. For instance, statutes lead to issues in practice that are taken to courts, which in turn clarify meanings of statutes in a process of “settling” (Grattet and Jenness 2001*a*, 2001*b*; Grattet 1993). In another, statutes lead to practices and subsequent court decisions that deviate from what legislators intended and thus stimulate legislatures to override the courts (Barnes 2004). In these cases, earlier states in a cycle, or even earlier cycles, produce momentum that constrains the direction and impact of subsequent lawmaking and implementation.

A particularly intriguing instance of recursivity in legal change can be found in Edelman’s (1992, 2002, 2005) theory of the endogeneity of law. Here new law arises less from lawmaking bodies like legislatures or courts and more from sites of practice, most notably corporations. Edelman shows that in response to broad and ambiguous employment law, corporations developed internal regimes ostensibly to protect employees and manifestly to demonstrate that corporations were in compliance with federal legislation. Over time, the procedures adopted by companies in response to statutory law came to be institutionalized in case law. “Law,” in other words, emerged as a response in the market to state prescriptions and was then accepted by the state as formal law.

The endogeneity of law represents a special instance of recursivity with several of its hallmarks. It incorporates full cycles of change from one kind of law (statutes) through creation of another kind of “law” in practice through to its institutionalization via judicial rulings (case law). It has something of the invisibility of legalistic reform for it unfolds far from the interest-group hurly-burly of legislatures and more through the technical advances negotiated among human resource experts, lawyers, and

judges. Cycles are driven by ambiguity, which we will see is a primary driver of reform, as well as by actors who were excluded from the creation of the governing statutory law within which change occurs.

Another line of research amplifies the dynamics of recursivity by attending to structural contradictions that produce lawmaking. This approach argues that lawmaking is driven by economic, political, and social contradictions, most fundamentally those stemming from the contradictions of capitalism itself (Chambliss 1979; Chambliss and Seidman 1982; Zatz and Chambliss 1993). Contradictions produce disturbances or triggering events (Gallagher 1979) that force leaders to find a solution, which they often attempt through law. Leaders face dilemmas in resolving these contradictions because they cannot all be solved simultaneously or definitively. Legal changes produce temporary resolutions so long as underlying contradictions persist (Chambliss 1979). Resolution through lawmaking is inherently unstable, and thus, it follows, cycles of attempted resolutions are inevitable.

Contradictions can occur between and within classes (Whitt 1979) and in markets, society, the economy, or culture. Lawmaking frequently occurs in a matrix of ideological contradictions: Calavita (1993) shows that the competing ideologies of nationalistic restriction and economic pragmatism are internalized in the 1986 Immigration Reform and Control Act and thus help explain its ambiguities and ambivalences. Moreover, the structural contradictions' approach moved toward a strong sense of agency and strategy. Not least, this theory points to forces—contradictions—outside any given society that may propel change within a country (Zatz and Chambliss 1993).

Overall, the relevant scholarship focuses mostly on instances from Western common-law countries with advanced economies and that stand closer to the center than to the periphery of the global world-system. Arguably, significant variations in patterns of legal change should be expected in advanced countries where judiciaries are less integral to lawmaking, in countries where executives drive lawmaking with limited popular participation, and in countries that differ in their exposure to strong global pressures. Nevertheless, we will show that the theory of recursivity does indeed apply in countries with a civil law heritage (e.g., Korea, Indonesia, China) that are outside North America and Europe, are constrained by global norms, and whose economies range from advanced (Korea) to developing (Indonesia). We believe that extensions of the theory will also apply to other advanced economies and other regions, always contingent on both national singularities of legal tradition and state structure and their locus in the world polity and world-system.

THE RECURSIVITY OF LAW

These lines of scholarship may be integrated into a coherent framework for the theory of legal change. From the perspective of the recursivity of law, the unit of analysis is *not* the shift from law on the books to law in action but the entire cycle that locks these two in a dynamic tension (fig. 1).

Poles

The recursive cycle has two poles. For our purposes, we define *law on the books* positivistically as binding in form or in effect, most often by a sovereign authority, and increasingly, by a transnational authority, such as the European Union or global regulatory bodies. It is codified in statutes, regulations, and cases. *Law in practice* refers to behavior and institutions that constitute and enact law as it actually is experienced by those it regulates. For the latter, law in practice effectively is law, but it cannot be understood without the frame of law on the books.

Contexts

In many areas of national lawmaking, cycles of reform and implementation derive from or respond to the global norms articulated by international organizations and sovereign states. While the mechanisms by which these global institutions influence national regulation are many (Braithwaite and Drahos 2000), in the field of insolvency law three predominate: the economic leverage of international credit institutions and sovereign states, the power of persuasion by international institutions, and the norms articulated by global organizations that serve as models for nation-states. We shall observe that the engagement of the global and local is complex, contested, and contingent on many factors, including the balance of power between the local and global and the proximity of the global to the local.

Cycles

Legal change that involves state law of any kind will proceed through cycles between formal law and law in practice. Law in practice concomitantly is an outcome to be explained (traditional sociology of law) as well as a further stimulus for lawmaking, just as law on the books must be explained as well as be followed into action.

Reform cycles have beginnings: while underlying problems in social practice or contradictions and tensions may build up pressure for change

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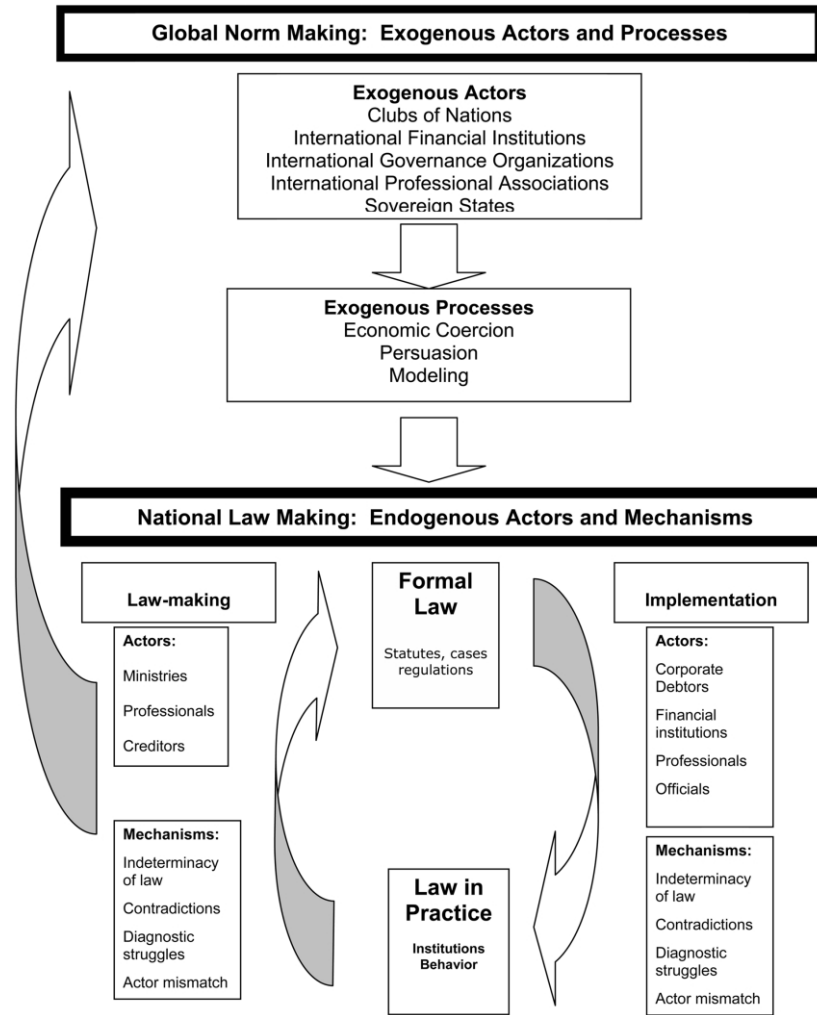


FIG. 1.—Recursive cycles of bankruptcy lawmaking in global context

of state law, the changes themselves frequently require some kind of triggering event—a tragedy or scandal or crisis—to precipitate lawmaking at a given moment. Cycles also have endings: when contradictions are resolved, consensus is reached, settling occurs, or an underlying cause fades away. Cycles also end when exogenous pressure is removed, an oppositional party runs out of resources, political attention shifts to other issues, or all parties are exhausted; cycles of rapid and regular adjustments

of formal law and practice will slow and reach some point of equilibrium.⁶ Practice continues, and a de facto law may consolidate, shift, and change, but formal law can remain static, often for decades.

Lawmaking cycles frequently cluster in *recursive episodes* with discernible beginnings and endings. A new episode may not recur for decades. In the history of U.S. bankruptcy law, such episodes can be observed in the late 1890s, the 1930s, and the late 1970s and through the 1980s.

In a global context, national lawmaking frequently influences global norm making, as national experiences are assimilated to the design of international norms through the cross-fertilizing activities of IFI lawyers and economists, the participation of national lawmakers on the committees and panels of international organizations, and the role of professionals who move regularly between local and global venues.

Actors

Each side of the recursive loop is populated by classes of actors. In the case of bankruptcy law, national or domestic actors on the *implementation* side involve all the parties to the practice of corporate bankruptcy—debtor corporations, secured creditors such as banks, unsecured creditors, trade creditors such as suppliers, workers, the state (for taxes and social security withholdings), the courts, government agencies (e.g., the English Insolvency Service), and insolvency-related professions (e.g., lawyers, accountants, insolvency practitioners). These groups have the capacity to widen or narrow the gap between the letter of the law and law in practice through the long-attested mechanisms of avoidance, creative compliance, resistance, and the like. The *lawmaking* side involves parties capable of legal and political mobilization. These may be private parties, such as banks, professionals, or various state actors—officials, politicians, judges. While bankruptcy law characteristically involves only market and state actors, other areas of law reform often involve groups within civil society, such as NGOs, or international civil society, such as reform groups, private monitoring bodies, and international networks that ally with local actors (Keck and Sikkink 1998).

In the global arena an external class of actors appears. These approximate, at the suprastate level, the state, market, and civil society actors within national politics. International institutions, such as IFIs, or international governance organizations, such as the United Nations, use a

⁶ In fact, the sociology of law has not done well in predicting or explaining when cycles of reform will slow or stabilize. One promising line of inquiry can be found in Phillips and Grattet's (2000) work on "settling," which focuses on stabilization of interpretations by courts.

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variety of mechanisms to press for lawmaking that conforms to international norms. Multinational corporations, international business groups and lobbies, and international associations of professions, among other market groups, align themselves with global and national state and civil society actors in the service of or opposition to national change. International civil society groups and networks mix into this complex web of influence and negotiation. And lying behind them all may be powerful sovereign states, such as the United States, which often seek to orchestrate the global formulation of norms and their impact on particular nation-states.

Mechanisms

Cycles of national lawmaking are driven by at least four primary mechanisms that hold each side of the recursive loop in dynamic tension. These are the indeterminacy of the law, contradictions, diagnostic struggles, and actor mismatch.

1. *The indeterminacy of law.*—All statutes, court opinions, and regulations contain ambiguities and gaps that create uncertainty and lead to unanticipated consequences. As an entire school of jurisprudence (critical legal studies) has argued, law inherently is ambiguous and subject to interpretive confusion or maneuver. This view has recently been reinforced by scholarship on law and finance that champions the precision of property rights as a prerequisite for economic development (Pistor and Xu 2002). The more diverse and less integrated its implementing agencies and courts, the greater variation will occur in its application. And the more sophisticated its professionals, the greater probability for creative misapplication or redirection of statutes and regulations in unexpected directions and to unimagined purposes. Moreover, indeterminacy may be compounded by institutional pathologies such as judicial corruption or incompetence. The occurrence of indeterminacy and unintended consequences regularly drives a turn of the reform cycle, as original crafters of law seek to remedy its deficiencies in order to achieve their original purposes, or subjects of the law react to unwanted outcomes, or courts seek to settle meanings. And more contentious lawmaking is likely to result in vague, ambiguous law that will produce inconsistency in application and provide ample opportunity for creative compliance.

2. *Contradictions.*—Cycles of lawmaking and implementation frequently are driven by contradictions that are internalized within the law. When lawmakers cannot definitively resolve underlying economic, political or ideological contradictions, they settle for partial or temporary solutions. Such unstable resolutions within the law make it vulnerable to

subsequent disturbances or triggering events that precipitate another round of attempted solutions.

Contradictions often express clashes of underlying ideologies. For instance, the Washington consensus stresses openness to global trade, lowering of national barriers, and exposure of local markets to international competition and investment.⁷ These practices are supposed to lead to more investment and greater economic growth. Yet many developing and transitional countries confront that ideology with one of national sovereignty; that is, they resist losing the flagships of industrial sectors to footloose foreign owners with much less interest in the country for its own sake. Bankruptcy lawmaking catches lawmakers between these countervailing ideologies and they will likely make their policy decisions partly to satisfy both—thus building contradictions into what may be an inherently unstable settlement. Contradictions may also be structural, when implementation is parceled out among rival executive agencies (e.g., national intelligence gathering), or when work is allocated to contesting or ill-prepared occupations and professions.

3. *Diagnostic struggles.*—Since legal (and other) professionals are so heavily invested in lawmaking, there is value in appropriating and adapting the conceptual apparatus of diagnosis and treatment that has been applied to professional work more generally (Abbott 1988). Diagnosis involves the identification of a problem, the application to that problem of various rules of relevance for a given reform (e.g., how broadly construed will be the depiction of the problem), and relating the problem so construed to a way of classifying problems for purposes of law reform (e.g., in relation to a profession's diagnostic classification system or the body of laws that govern a country and to which this reform must be fitted).⁸

Diagnosis in law reforms takes the form of a social construction of how a problem is to be understood and classified. It usually contains an implicit theory of relations between parts of a society, market and government. More important, diagnosis is a field of contestation among actors for whom the definition of the problem and its subsequent classification will influence prescriptions that yield differential benefits. Diagnosis therefore plays

⁷ The Washington consensus is an overarching economic ideology shared by the U.S. Treasury, the IMF, and the World Bank that emphasizes liberalization of the economy, privatization of government enterprises, minimal economic regulation, rolling back welfare, reducing expenditure on public goods, tightening fiscal discipline, loosening control over flows of capital, controlling labor, and allowing repatriation of profits (Falk 1999).

⁸ Abbott (1988, pp. 40–48) offers a more sophisticated analysis of diagnosis (and its constituent elements of colligation and classification) and treatment (e.g., measurability of results, acceptability to clients) than can be developed here.

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a role analogous to agenda setting in legislative politics.⁹ It sets constraints, filters information, and orients perceptions that point toward one set of putative treatments rather than another.¹⁰ The contest among actors in diagnosis will often carry over into conflicts over treatment. However, if the politics that surround diagnosis lead to clear victory of one diagnosis, the advocates of the rejected diagnosis may be excluded from the formulation of legal prescriptions and thus fight against their exclusion in later stages (e.g., law reform in the legislature, or more likely during implementation). Those actors who were successful in gaining acceptance for their diagnosis will usually also get to prescribe the legal solution.

Some of the contest over treatment turns on how measurable will be the results, since measurability allows closer monitoring, and so favors some actors (e.g., IFIs) over others (e.g., national governments not meeting their commitments). Asymmetries of power between national actors (e.g., professions) and the global institutions leads to considerable cross-national variation in the ability of external actors to impose their diagnoses and treatments. Lawmaking in a global context often occurs through the mediation of professionals so that struggles break out among the professionals (e.g., lawyers and economists) within the IFIs as well as among professions in the nation-state. Lawmaking in crisis circumstances may pit diagnosticians from international institutions against diagnosticians in the nation-state. In lawmaking, diagnosis and prescription is undertaken not only by professionals but by all other collective actors for whom lawmaking has relevance. Contests over diagnosis and prescription can have equally broad ramifications. Yet it is a common strategy of professionals to seek technical diagnoses and specialized treatments in order to encapsulate a sphere of regulation within their own professional jurisdiction.

As a result, contention occurs on either side of the recursive loop. The effect is to produce a strong recursive momentum between diagnosis and prescription. These are sometimes driven by changes in diagnosis. Often they are driven by experimentation with prescriptions precisely because actors confront problems that are highly complex and defy ready diagnosis. Sometimes this diagnostic challenge is “solved” by the application of a priori models to which supporting evidence is adduced.¹¹

⁹ In the 1978 U.S. bankruptcy reforms, compare the competing diagnoses and prescriptions for problems of bankruptcy administration offered by Brookings Institution and the Congressional Commission respectively (Carruthers and Halliday 1998).

¹⁰ Although Abbott (1988, pp. 44) appears to distinguish between prescription and treatment, we use the terms interchangeably.

¹¹ For a compelling analysis of diagnostic weaknesses in Russian law reforms, see Hendley (2004), who finds that one-shot empirical indicators usually are weak; intense time pressures for reforms can lead to superficial or mistaken diagnoses; outside observers place undue reliance on formal documents, i.e., written law; little attention is

4. *Actor mismatch*.—Almost always a mismatch occurs between parties in practice and actors in lawmaking. In bankruptcy politics, for instance, corporations or debtors are always actors in practice but scarcely ever actors in lawmaking. In bankruptcy lawmaking, international institutions or state officials may be primary actors in setting up a regime but play only episodic roles in its administration.

The mechanisms that produce or mitigate “mismatch” are critically important in the recursivity of law for they set in play numbers of subsidiary adjustments. Actors in lawmaking who rely on a diagnosis that excluded key practice groups may find their remedies faultily designed. Actors in practice who are excluded from lawmaking can use their control of implementation to undermine and subvert legal changes prescribed by reforms. Actors in practice who fail to participate in lawmaking through ignorance, who fail to recognize their own interests, or who display an inability to mobilize, often find that legal reforms crystallize their interests and help mobilize their members. Mismatch issues are particularly acute for professionals, since that group sits astride the implementation process, but is not always integral to statutory lawmaking. On the one hand, a failure to incorporate professionals into lawmaking provokes them to fight anew the lawmaking battle on the terrain of practice they dominate. On the other hand, by “professionalizing” lawmaking, where technical authority trumps the balancing of interests by all parties, the mismatch is likely to engender a backlash from excluded parties either in implementation or in a further round of reforms.

In sum, each side of the recursive loop has a contingent relationship with the other. The politics of lawmaking influences compliance and implementation. If the lawmaking process is considered procedurally unjust or illegitimate, some parties in practice may react in practice by avoidance or resistance. Parties defeated in lawmaking may make the site of practice another battleground to fight again the battle they lost during enactment (see Pierson 2004, p. 135). What is notable in these scenarios is that implementation cannot be adequately understood without awareness of its lawmaking antecedents.

By the same token, the practices of law implementing can influence the politics of lawmaking. Noncompliance or creative compliance with the law implicitly, and often explicitly, points to the prospect of corrective formal adjustments that will narrow the gap between legislative or regulatory intent and its outworking in practice. Lawmaking involves the mobilization of actors, usually a biased subset of those who are engaged in practice.

given to outside organizations on either ways laws evolved in a society or the ways laws actually work; and little consideration is given to variations in legal culture.

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Finally, recursive cycles can be simple or complex, leading to iterations between mutually supporting or contradictory types of practice and different forms of state law. There are several implications of this analysis for a theory of recursivity. Any given act of lawmaking or any given cycle has a sequential and constrained logic, since it is partially dependent on the outcomes of prior cycles. Further, the variety of cycles that can occur between practice and lawmaking, even in the same issue area, suggests that contradictions may occur within the law itself as, for instance, when different courts or regulatory agencies define the law in conflicting ways.

LAWMAKING IN NATIONAL ARENAS: REFORM CYCLES IN THREE ASIAN NATIONS

We elaborate the process of recursivity with three cases of national insolvency lawmaking in a global context—China, Indonesia, and Korea. We selected these cases because they exemplify a variety of international interventions following the Asian financial crisis, which began in late 1997. They are not presented in order to “prove” or formally “test” our approach so much as to illustrate its usefulness through substantively important applications.

In each case there were rapid reform cycles, often driven by IFIs. We distinguish between “insolvency law” and “insolvency regimes.” The former refers to conventional substantive and statutory law. In the global arena, however, lawmaking in advanced, developing, and transitional countries is directed to the construction or reconstruction of insolvency regimes, a complex which includes six elements: (1) substantive law, (2) procedural law, (3) courts, (4) administrative agencies, (5) out-of-court mechanisms, in the shadow of the law, and (6) expert professions to administer the law.

The countries are arrayed along two dimensions. The first dimension concerns the economic and geopolitical status of the country itself. A country’s position in the international system will affect its relative strength to determine the direction and speed of its own lawmaking. A poor developing country will likely be most vulnerable to the pressures of IFIs, especially during a crisis; a rich developing country is likely to be less vulnerable; and a large transitional economy with geopolitical significance will be least vulnerable. The circumstances of its involvement with IFIs will also matter. Countries in financial crisis, and therefore highly dependent on infusions of capital from multilateral institutions, are likely to be much more susceptible to lawmaking influence by IFIs than countries in a stable and robust financial situation.

The second dimension relates to the type of influence that can be

brought to bear on national lawmakers by international institutions. There are three kinds. *Coercive* pressures occur when countries in financial crisis desperately require emergency funds and will agree to reforms as a condition of new loans. *Persuasion* takes the form of efforts to encourage countries to bring themselves into conformity with global principles. And *normative* influence occurs when models and alternative standards are available but there is limited leverage to have them implemented. Normative influence is positively experienced by nation-states as modeling, which has its own array of agents and complex dynamics (Braithwaite and Drahos 2000). In practice, all three mechanisms of influence are often present, but they differ in their relative weighting in particular national contexts, as table 1 indicates.

The countries can be arrayed along a continuum of pressure—or more properly, they vary by the types of influence to which they are exposed. Indonesia was most susceptible to semicoercive economic pressure by the IMF; Korea was not so susceptible to IMF/World Bank pressure but nevertheless was persuaded to be in general conformity with the expectations of these institutions; and China has been least susceptible, although it has been well aware of international standards. The fact that Indonesia and Korea were swept up by the Asian financial crisis, whereas China was not, also helps explain why their reform cycles differ significantly. The combination of pressures differs across countries: where all three pressures were present in Indonesia, economic coercion was less important in Korea and not at all operative in China. Moral suasion mattered most for Korea, and normative modeling for China. From our broader study of 60 nations, it is apparent that other national cases fall off the diagonal except for economic coercion, which is never applied to advanced economies. We anticipate that countries in other world regions will also be susceptible to varying types of influence. International institutions do not bring the same pressures to bear on Brazil as they do on Argentina, nor on Turkey as they do on Bulgaria.

Indonesia

In February 1998 Indonesia approached the IMF in some desperation over a mounting financial crisis that included some \$80 billion (U.S.) in debt that Indonesian corporations owed to foreign lenders and that threatened the imminent collapse of banks and companies within Indonesia.¹² Three sets of global actors rushed to Indonesia's aid. Approximately 200

¹² For analysis of the crisis from differing perspectives, see Hamilton (1999), Pincus and Ramli (1998), Montes and Abdusalamov (1998), Rodrik (2001), Wade and Veneroso (1998), Wade (2000), Chandrasekhar and Ghosh (1998), and Stiglitz (2002).

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TABLE 1
CASE STUDIES BY ECONOMIC PROFILE AND DOMINANT MODES OF
EXOGENOUS INFLUENCE

COUNTRY PROFILE	EXOGENOUS INFLUENCE		
	Economic Coercion	Moral Suasion	Normative Modeling
Poor, developing	Indonesia*	Indonesia	Indonesia
Rich, developing	Korea	Korea*	Korea
Major, transitional [†]		China	China*

* Indicates the primary, although not exclusive, form of influence.

[†] A major transitional economy is geopolitically significant.

foreign private banks met in Frankfurt to hammer out an interim private solution with Indonesia in cooperation with IFIs. The World Bank, IMF, and other multilateral banks hurried to put together a comprehensive rescue plan. And behind the IFIs stood the United States and Japan, which could act bilaterally and through the multilateral institutions.

The crisis galvanized the IFIs to develop a comprehensive financial restructuring plan for Indonesia, which included the establishment of an operational insolvency regime. In the narrow window of time—a matter of several weeks—that was available to the IFIs, they were compelled both to diagnose the problem and craft remedies that the government of Indonesia would commit to implement in its letter of intent—essentially a contract—with the IMF. However much ideological consensus they shared, the World Bank and IMF immediately fell into a dispute over who would take the lead in insolvency reforms (Halliday and Carruthers 2003a). The World Bank had been in Indonesia directly and through its investment arm, the IFC (International Financial Corporation), for many years and just three years earlier had funded a comprehensive study of law reform in Indonesia (Bappenas 1998; hereafter, Bappenas Report). At the same time, ELIPS, a program funded by United States Agency for International Development, had drafted a plan in cooperation with a coordinating minister of economics and finance to establish a new bankruptcy law. Because it believed the courts to be hopelessly incompetent and corrupt, USAID/ELIPS advanced the radical idea of avoiding the courts altogether and establishing an administrative agency to handle corporate reorganizations (interviews 2273, 2264). The IMF, backed by the U.S. Treasury and fresh from its experience in the crisis countries of Thailand and Korea, however, wanted to take the lead on bankruptcy reforms. According to one well-placed informant, this squabble among Washington-based IFIs and U.S. government departments on what should

happen in Jakarta was eventually resolved in the White House—and in favor of the IMF (interview 3002).

The IMF conducted a rapid appraisal of the situation. Its informants principally were foreign professionals, banks, government officials, local experts, distinguished local lawyers and academics (interviews 2276, 2268). There is no evidence they consulted at all with debtors—the corporations that the bankruptcy reforms would cause to be liquidated or reorganized. The evaluation identified five main problems: (1) an outmoded bankruptcy law on the books (the 1905 Dutch law had never been substantially reformed), (2) limited use of law in practice (courts were seldom used for companies in financial difficulty), (3) courts that were not independent from political interference or economic corruption, nor were they competent, (4) foreign investors could not expect to be dealt with fairly in Indonesia's courts, and (5) there was a severe shortage of the expert professionals needed to liquidate or reorganize companies.

In response, the IMF, later joined by the World Bank and assisted by the Asian Development Bank, kicked off a series of reform cycles that continue to the present.¹³ The IMF negotiated these reforms with the government of Indonesia and made sure their implementation was subject to the fund's semicoercive powers of conditionality: the government of Indonesia agreed to the reforms as a condition of receiving IMF moneys; it had to show evidence of putting the reforms into effect to obtain each new release of funds over subsequent years. Its compliance was publicly posted on the IMF website in the form of successive letters of intent, which included reports of projected dates for action and dates for actual implementation of commitments.

Substantive law reforms

The government of Indonesia agreed to 98 immediate statutory amendments, most of which facilitated reorganization as an alternative to the liquidation of companies. Most important, it agreed that the secured creditors (typically large banks) could not act unilaterally outside bankruptcy law to liquidate a company, no matter what the cost to other creditors. Just as in the United States the creditors would have to participate in proceedings, although they would obtain various protections for their assets. The reforms also imposed strict deadlines for expediting cases and steps to make procedures relatively transparent (interviews 2252, 2306).

Because the 1905 law suffered from numerous deficiencies, the emer-

¹³ See Letters of Intent, Government of Indonesia, <http://www.imf.org>; interviews 2256, 2305. Reforms passed from one donor agency to another, successively, the IMF with support from the Dutch government, AusAid, the World Bank, and, in 2006, USAID.

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agency amendments were stopgaps on the way to comprehensive reform in an integrated bankruptcy law, which would be consistent with other areas of commercial law written in modern Bahasa Indonesia, which would be consistent with other areas of commercial law. Submitted to Parliament in 2002, this bill languished for two years before being enacted in 2004, substantially in identical form to the 1998 law (interview 2306).

The Commercial Court

Much more important, at the vigorous urging of the IMF and in alliance with a handful of local, influential reformers, the government of Indonesia agreed to establish a new commercial court that would be well funded, staffed by “clean” competent judges, and able to handle efficiently and fairly major corporate liquidations and reorganizations. This commitment triggered a huge struggle that has led to one cycle after another of reform, followed by incomplete implementation or resistance, followed by a corrective reform, up to the present.

The government established the court in 1998. The IMF had a hand in the choice of judges and instituted a rapid initial training program. The Commercial Court’s first decision caused a minor sensation: a putatively strong case was carefully prepared by IFIs with international parties and even international observers. The judges were caught between countervailing local pressures on the one side by reformist officials who wanted a showcase ruling that was competent and clean, and on the other side by allies in the government and private sectors who looked for the courts to protect Indonesia’s corporations from foreign interests and to rule in favor of local corporations and creditors. The first decision took the latter course.

The IMF believed that this ruling (and others like it) could be a result either of incompetence or corruption. It tried to solve the *incompetence* problem by a series of measures such as the appointment of ad hoc judges, distinguished specialists who would sit with the judges on a particular case and give the court requisite expertise. But this step quickly faltered because, on a panel of three judges, an ad hoc judge could be outvoted by the other two, and because the Commercial Court did not allow for the publication of dissenting opinion it might appear that the ad hoc judge agreed with a decision that could compromise his or her reputation as a competent or “clean” jurist.¹⁴ So ad hoc judges refused to serve, which

¹⁴ The language of “clean” and “dirty” forms part of a professional moral discourse in Indonesia, where the professional community attributes to its prominent members a label of corruptibility or incorruptibility quite independently of competence, training, or other status markers. This labeling is reminiscent of Abbott’s (1981) analysis of

led to further regulatory reforms that would allow ad hoc judges to publish dissenting opinions—and to other administrative reforms that set up a panel to monitor publicly and to critique all decisions by the Commercial Court, which effectively included an implicit rating of judges by the “rightness” of their decisions (interviews 2254, 2268).

The IMF tried to solve the *corruption* problem through a succession of methods in what it called the “governance phase” of reforms, and these, too, had a point/counterpoint character. The government of Indonesia, with IMF encouragement, set up the Joint AntiCorruption Investigative Team to investigate and prosecute corruption in the court system, but the Supreme Court of Indonesia struck it down. Judges were made subject to review by the new Independent Commission for the Audit of the Wealth of High State Officials.¹⁵ The IMF then pressed the government of Indonesia to set up an anticorruption commission to investigate and prosecute cases and an anticorruption court with strong penalties, including criminal liabilities for judges and inducements for people to cooperate.¹⁶ Even further, the IMF pressed the government of Indonesia to set up a judicial commission and embark upon a wide-ranging reform of the entire judicial system, including the selection, training, and monitoring of judges (interviews 2306, 5100, 5102, 5103, 5104, 5105, 5109).

In short, the government of Indonesia, under heavy pressure from the IMF, has been compelled to go through cycles of ever-widening reform to install bankruptcy regimes acceptable to IFIs and international creditors. There is considerable skepticism over how well these have worked, so much so that even international agencies, such as the World Bank’s IFC, no longer consider the courts to be a viable institution for equitable or competent adjudication (interview 2263). The number of cases before the court have slowed to a trickle (interview 5102) and most observers concur with an IMF-funded study that “the bankruptcy law reform initiated in 1998 seems to be petering out” (Schröder–van Waes and Sidharta 2004). Yet the story of the Commercial Court reform neither begins nor ends with bankruptcy reforms. From the beginning the Court was also given responsibility for intellectual property cases, and in this substantive area, where economic stakes are much less substantial, it has reportedly done much better (interviews 5101, 5111, 5105). More fundamentally, almost without exception, the failures and successes of innovations in the Commercial Court have informed much broader sub-

professional status strain, but with an important twist, since in these cases the label of “dirty” applies not to low-status clients but to unethical and often illegal behavior on behalf of often very-high status clients.

¹⁵ Government of Indonesia, Letter of Intent, August 27, 2001, <http://www.imf.org>

¹⁶ Government of Indonesia, Letter of Intent, December 13, 2002, <http://www.imf.org>

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sequent initiatives in the Supreme Court and the court system at large (Lev 2004; interviews 5100, 5117, 5101, 5111).

Jakarta Initiative Task Force

After establishing the Commercial Court, the IMF next pressed the government of Indonesia to set up a restructuring administrative agency that would take the pressure off the courts by obtaining out-of-court agreements between corporations in financial distress and their main creditors (usually foreign banks). Launched in September 1998, the Jakarta Initiative Task Force (JITF) would offer companies with more than \$10 million in assets a sort of conciliation service in which experts would facilitate memorandums of understanding between debtors and creditors. By March 1999, the government of Indonesia reported the JITF was handling some 125 companies with \$17.5 billion in foreign currency debt and 7.8 trillion Rupiah in domestic currency debt,¹⁷ but it became quickly apparent that since debtors and corporations were not consulted in the creation of JITF, they used every expedient to resist its efforts.¹⁸ Again, the process followed one cycle after another of an unsuccessful reform followed by an attempt to correct the problem.

The frustration of the IMF is apparent in its statement of September 2001 that “the Fund recommends a more forceful implementation of the framework for corporate debt restructuring through the JITF. The work of . . . JITF will depend on taking forward, with greater vigor, legal reforms to tackle continuing debtor recalcitrance and improve the governance of the court system.”¹⁹

Against the advice of the IMF, the government of Indonesia set up the JITF as a voluntary scheme. This provided few incentives for corporations to negotiate. As a result, a series of measures, mostly in the form of executive orders, followed every few months to provide first positive then negative incentives for corporations to come to agreement with their creditors. Several carrots were offered. For instance, if parties dealt in good faith they might become eligible for tax incentives, banking incentives, and capital incentives. Debt-to-equity swaps were made tax neutral. And companies would be protected from being delisted on the Jakarta Stock Exchange. When those incentives proved relatively ineffective, the IMF pushed for sticks, ranging from threats to take away the licenses of companies that refused to cooperate and to warning that the attorney general

¹⁷ Letter of Intent, March 16, 1999, <http://www.imf.org>

¹⁸ Interview 2253; see Government of Indonesia, Letter of Intent, October 19, 1998; Letter of Intent, March 16, 1999.

¹⁹ Letter of Intent, September 2001, <http://www.imf.org>.

would force them into bankruptcy court, to shaming mechanisms such as publicizing the names of companies that dragged their feet. Some measures were implemented, but hardly used. Others were rejected altogether by the government (interviews 2277, 2251).

As late as January 2002 the IMF's fourth Indonesia review was still complaining of a continuing need to accelerate corporate debt restructuring under JITF, and it reiterated the problems it perceived with the quality of restructurings and their sustainability (IMF 2002). When the JITF was dissolved by the government in December 2003, its chairman stated it had managed to restructure 96 of 102 cases it handled worth some \$20.5 billion.²⁰ However, the quality of the deals was another matter. It appears that creditors were required to take extraordinary "haircuts" or loan reductions, frequently approaching 90%. And to save face, creditors frequently offered long-term bonds with generous terms, never expecting to see them mature (interviews 2260, 2277, 2251). Moreover, there were low expectations that memorandums of understanding would actually be executed in practice. Yet again, despite its limitations, the experiment with JITF informed a larger initiative whereby companies in commercial disputes must first go into mediation proceedings before courts will proceed (interviews 5115, 5111, 5117).

In sum, over the six years from the onset of the Asian crisis, for every two steps forward in formal lawmaking, implementation took at least one step back. The IMF effectively entered into a cat-and-mouse relationship with Indonesia in repeated cycles of enactment and frustrated implementation. An episode that began with reforms of every part of the insolvency regime still has not come to an end, as the comprehensive substantive law remains mired in the legislature and institutional corrections continue.

What does the Indonesia case tell us? The crisis that led to the lawmaking was induced internally and regionally, but lawmaking itself was triggered externally and through quasi-coercive measures.²¹ Since Indonesia was highly vulnerable to global institutions, and since those institutions had the enormous leverage of conditionality over release of loans, for the most part Indonesia has been compelled to enact law, issue regulations, and erect institutional frameworks in bewildering profusion.

In part, the struggle is ideological because the reforms pit a universalistic model of bankruptcy law, which would allow pure market forces to determine the fates of Indonesian corporations, against nationalist identity, which abhors the loss of Indonesian control over its flagship cor-

²⁰ *Jakarta Post*, December 19, 2003.

²¹ Some observers believe that most of what the government of Indonesia agreed to was already being discussed domestically before the crisis (interview 2306).

porations and critical economic sectors. Internalized within the bankruptcy reforms is a veiled ethnic and political struggle within Indonesia, between the Chinese, whose businesses dominate many sectors of the economy, and the ethnic Indonesians who dominate politics. Many ethnic Chinese view the corporate restructuring reforms as a political weapon to undermine Chinese business dominance (interviews 2032, 2067). On both counts, each reform internalizes conflicts that have not been resolved elsewhere and thus sow the seeds of future instabilities.

A smaller impulse to reforms can also be seen in the ambiguities or inefficacies of laws and regulations themselves. Much to the surprise of foreign observers, some early cases foundered in the courts on the seemingly straightforward definition of “debts.” No one anticipated that newly appointed ad hoc judges would refuse to serve. It was expected that corruption would undermine court reforms, though the IMF underestimated how difficult it would be to extirpate.

The uncertain fates of the Commercial Court and JITF reveal a connection between diagnostic failures and mismatch of players. The diagnosis of the problem was an amalgam of IFI ideology (that included the need for an independent judiciary) and local knowledge by Indonesian academics and practitioners, who brokered prescriptions for reform. The short time horizons forced by crisis events and inherent biases in the diagnostic phase of reforms completely excluded integral players in practice—the debtor corporations, many private banks, and the Chinese commercial leaders.²² The prescription itself was substantially driven by IFI models, although it got some support from an earlier Indonesian Report. Since the diagnosis of the problem reflected the biases of the professionals and those actors that were parties to reform, it is not surprising that the prescriptions that were translated into statutes and regulations were effectively resisted by excluded players who moved the grounds of struggle from lawmaking to implementation, where they used great ingenuity, inertia, professional expertise, and raw financial power to frustrate the

²² Here and elsewhere it might seem puzzling that without direct representation by debtors, reforms would press for reorganization (which favors debtors) over liquidation (which tends to favor bankers). In fact, the IFIs and governments had a coincidence of interest over reorganization provisions, the former because it reflects U.S. law and practice to enable companies to adapt to changing economic circumstances and the latter because it enables governments an alternative to politically risky hard budget constraints that drive businesses out of the market and make workers redundant (Carruthers, Babb, and Halliday 2001). “A reorganization can be a relatively cheap way to try to maintain employment, support industry, or encourage continued growth. It doesn’t require public ownership, subsidies, bailouts or other forms of direct intervention (except when the state has to bail out the banks whose loans are being renegotiated) and so politically it appears consistent with neoliberal imperatives” (Carruthers and Halliday 2003).

IMF-induced reforms at every point. The politics of implementation therefore became a site of outright resistance in two respects: when the government of Indonesia had no capacity to resist external pressures, it shifted the battleground to one where it had more advantage; and when domestic actors were excluded from lawmaking, they fought with whatever weapons they had available—legal and extralegal—in the courts and restructuring agencies (Halliday and Carruthers, in press).

Together, the ideological contradictions, mismatch of players in implementation and lawmaking, and an exclusion of certain facts and perspectives from the diagnosis intensified the indeterminacies of laws enacted and institutions constructed in crisis circumstances with the unsurprising result that successive iterations of reform have continued, as each cycle of lawmaking seeks to close the gap between practice and lawmakers' intent.

The peculiar circumstances of deep financial crisis and intense IFI intervention make the Indonesian and Korean cases particularly useful for analytic purposes because they both exemplify a rapid sequence of cycles that in less stressful circumstances might have taken decades to unfold. Powerful economic pressures create time pressures that in turn accelerated recursive cycles forward, in part because the time pressures themselves led to faulty diagnosis, failure to bring all parties into lawmaking, and insufficient time to permit orderly implementation.

Korea

The Korean crisis contrasts with Indonesia in some important ways. In 1997 Korea's economy was the eleventh largest in the world and Korea itself had recently become a member of the OECD. Korea possessed a highly developed banking sector, even if it was heavily controlled by the government (Woo 1991). While Korea's financial crisis was triggered by foreign currency shortage, at the real "epicenter" of the crisis were debt-ridden firms and especially the *chaebols*, the large, usually family-controlled conglomerates that had driven the Korean economic miracle (OECD 1999; Woo-Cumings 1997; Choe and Moosa 1999).

The World Bank and then IMF were called into Korea in November 1997. Acknowledging they had virtually no time to do "extensive diagnostic work," the teams from both institutions consulted quickly with major law firms in Seoul (including the IFC's local counsel), the banking sector, academics and economists, judges and government officials—although, again, not extensively with the corporate sector or debtors. Compared to Indonesia, the IFIs could take advantage of Korea's well-developed scholarly and research institutions, such as the Korea Development Institute, ample high-quality data, and government officials with

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advanced training in (mostly) top U.S. universities. Said a senior World Bank official who was on the original Korea crisis team:

Clearly, we recognized that it was not going to be possible to be prescriptive at that early stage about what it is that was needed to be done in an area as complex as insolvency. But what we wanted to do was to, first of all, gain an initial validation of the premise. And then to sketch out some actions that could be taken within a very short period of time to both start to ease the constraints on the insolvency system, and to sketch out further work that could be done over following months. Because we were anticipating, as in fact eventuated, a succession of operations, each of which could build on the preceding one It needed to unleash a reform process. And so really what we were doing was identifying quickly which direction the reform process should go. (Interview 2040, senior World Bank official)

The IFIs identified three sets of problems: bankruptcy law itself; the courts; and out-of-court solutions to corporate restructuring. It was immediately obvious that none of Korea's three bankruptcy laws were much used.²³ In consultations with the IMF and World Bank, the Korean government agreed upon a series of reforms. But in contrast to Indonesia, the reforms were made the subject of conditionalities only in general terms at the outset. Thereafter the IFIs depended on persuasion and modeling (Braithwaite and Drahos 2000).

The Korean reforms are particularly interesting because they reveal a fundamental conflict between economists' and lawyers' views of law's capacity to effect change (Halliday and Carruthers 2004a). The economists dominated the Ministry of Finance and Economy (MOFE), the government ministry that had spear-headed Korea's extraordinary economic development; the lawyers staffed the Ministry of Justice, the courts, and the legal profession, which, while not nearly so institutionally powerful as MOFE, nevertheless would be primary implementers of a reformed insolvency regime. Each profession had its own theory about how legal change can proceed. And each also represented contrasting visions of the relative dominance of politics, law, and the market in future Korean development.

Substantive Bankruptcy Law

The World Bank and MOFE quickly agreed that the law must compel courts to act decisively and swiftly, and perhaps most importantly, to

²³ These were the Bankruptcy Act, the Corporate Reorganization Act, and the Composition Act, all enacted in 1962. In 1996, e.g., in all of Korea, 18 individuals and companies were liquidated under the Bankruptcy Act, 9 individuals and companies entered proceedings under the Composition Act, and 81 companies made use of the Corporate Reorganization Act (Nam and Oh 2000, table IV-1, p. 37).

liquidate companies that deserved to go out of business (something Korean courts had been traditionally reluctant to do).²⁴ In 1998 it introduced statutory amendments that adopted a recommendation from a leading economist that every company brought to court under reorganization law would need to be appraised for its financial soundness according to an Economic Criterion Test. Judges, advised by accountants or consultants, would compare the liquidation value of a company (how much money it would bring investors if it were simply broken up and its assets sold) to the going-concern value of the company (what it would be worth if it continued to operate after some financial or operational reorganization). If the appraisal determined that the liquidation value was higher, judges would have no choice but to push a company into liquidation proceedings (Nam and Oh 2000; Oh 2002, 2003a; see interviews 2284, 2298, 2280, 2281).

In principle, this mechanical formula, which was intended to reduce judges' discretion, should work cleanly—but it performed in quite unexpected ways. In a notable case, that of Dong Ah Construction, one of Korea's leading construction firms was pushed into liquidation despite the fact that its creditors and the government felt the appraisal was flawed and that the company could be successfully reorganized and thousands of jobs saved. This dramatic case and others like it triggered another round of statutory reforms where the economists pulled back and yielded judges more discretion in application of the test.

In the pursuit of "efficiency" in law, the IFI lawyers and MOFE economists joined forces to persuade the Korean Government to commit in 1997 that it would unify its three bankruptcy laws into one seamless statute. It did not follow through in the next several years. After a World Bank review of Korea's insolvency laws in 2000 and an IMF Article IV review of the Korean economy in 2001, both institutions urged Korea to fulfill its earlier promise. With MOFE's support, the government agreed and passed into law a massive and comprehensive Unified Bankruptcy Act in 2005 (Oh 2002, 2003a; interview 5120).

Out-of-Court Reorganizations

Reorganizations formally handled inside courts never account for more than a fraction of restructurings. Yet out-of-court restructurings always potentially face a collective action problem. In 1999 MOFE devised a method, very loosely patterned after an English practice called the "London approach" to "prepackage" agreements (interview 2290). This amend-

²⁴ For overviews of the insolvency law reforms in Korea see Soogeun Oh (2002, 2003a, 2003b; Nam and Oh 2000; Nam, Kim, and Oh 1999).

ment to the Corporate Reorganization Act encouraged creditors to come to an agreement out of court, if possible, and then have a court grant its approval—but without altering the deal in any way (Nam and Oh 2000; Oh 2003*a*, 2003*b*). The reform seemed to offer the best of both worlds: a swift, inexpensive agreement among creditors in the private market, and the legal sanction of the court, without the costs, delays, and indeterminacies that critics associate with courts. It did not work, however, largely because lawyers effectively blackballed it by advising their clients not to use it (interview 2286).

MOFE tried again with a different tack in 2001—the Corporate Restructuring Promotion Act (CRPA), which targeted 934 Korean corporations with the largest debt burden. MOFE wanted to keep companies out of court. Banks would be motivated to detect at an early stage companies drifting into financial distress. In the restructuring format, a lead bank would bring together the largest creditors. They would undertake a financial analysis of the debtor’s situation and develop a plan. If most creditors voted in favor of the plan, it would be binding on all creditors. This offered a classic “market solution” to a collective action problem. And while many foreign creditors did not like it, it worked well from the Koreans’ point of view until its sunset provisions retired the act in 2005 (MOFE 2002; interviews 2290, 2284, 2292, 2301, 2280, 2292).

How does the Korean case amplify our understanding of recursivity? The recursive episode of Korean reforms sprang from pressure building in the 1990s within Korea upon banks to confront their own bad debts and for corporations to confront their heavy debt overhang. The 1997 Asian crisis and its impact on Korean foreign currency shortage precipitated cycles of bankruptcy reforms each year until the present when the imminent enactment of a comprehensive bankruptcy law may signal the closing rounds of the episode. The cycles have been driven both by endogenous processes and the exogenous influence of international institutions deploying a soft version of external constraint where economic coercion quickly gave way to normative modeling and persuasion.

The familiar repercussions of law’s unpredictability appeared as a result of both the unintended impact of the Economic Criterion Test after 1998 and the nonresponse in practice to the prepackage workout amendment of 2001, itself a statutory response to a private scheme initiated by MOFE between 1998 and 2000 but one that lacked legal authority to bind parties. In these cases, unanticipated or ineffective outcomes drove further rounds of reform in subsequent statutory amendments and enactments.

The Korean case bears out the analysis of both globalization and structural contradictions’ theory, namely, that its reforms stem from a fundamental contradiction within Korea’s development model. Despite decades of state direction of the economy, and state determination of the

life or death of individual corporations, Korea was compelled to open its financial sector as a condition of entering the OECD. But the exposure of sheltered markets to global financial pressures bought OECD membership at a high price, because Korea's the financial and legal systems were not prepared for global engagement. The Asian crisis triggered a run on Korea's currency; it experienced balance of payments difficulties; and the country was compelled to obtain multilateral and international financing to meet its obligations. The financial crisis precipitated a legal response.

While the cycles of reform were encouraged from without by the World Bank and the IMF, and their consistent pressure may have hastened the eventual unification of bankruptcy law, forces within MOFE, too, pushed strongly for the rationalization of market exit mechanisms. The cycles were also propelled by a series of conflicts, often of diagnosis, first, between MOFE and the Ministry of Justice, second, between the economists and lawyers, and third, between government officials long accustomed to intervening in the market and advocates of market solutions. The 1998 reform, for instance, can be attributed to MOFE's distrust of judges and the courts—it sought to restrict judges' discretion and to compel them to apply a simple formula. The national reforms engaged both the evaluative and prescriptive dimensions of global norm makers. On the diagnostic side, initial reforms came from the quick appraisal by IFIs in November 1997; later reforms were pushed by a World Bank appraisal; and the last reforms—many of which were quietly and not-so-quietly contested in Seoul—were encouraged by the IMF Article IV consultation. On the prescriptive side, the World Bank and IMF paraded their normative instruments before the Koreans, so much so that in public presentations in the presence of IFIs the chief architect of the comprehensive code would show how it conformed to the World Bank Principles. At the same time, the chief draftsman is also Korea's main delegate to the UNCITRAL Working Group and thus he is familiar with the new consensus emerging in the global arena. Finally, as in Indonesia, recursivity in Korea took a more complex form than legislative cycles alone. The legislative reforms of 1998, 1999, and 2000 were responses to court decisions and to professional practices, both of which were counted as unacceptable by MOFE. The 2001 workout amendment was a statutory response to a flawed administrative initiative by MOFE.

Like Indonesia, the crisis in Korea was partly induced internally and partly regionally. Unlike Indonesia, however, lawmaking was driven as much by internal imperatives as by the international institutions. Korea was less vulnerable than Indonesia, partly because its economic viability was manifestly more robust, and partly because Korea's internal capacities for professional diagnosis and prescription were much better devel-

oped. Essentially the international institutions set broad parameters for reform and let Korea fill in the details. In place of the heavy-handed use of conditionality, the international institutions preferred to use persuasion and modeling. Rather than threaten economic sanctions, the IMF used more subtle techniques of “shaming” to induce Korea to finally make good on its promise at the height of the crisis to unify its three bankruptcy laws into one seamless, comprehensive law. Whereas both Korea and Indonesia confronted problems of implementation, less of a gap opened up between statute and actual practice in Korea because local experts were more fully involved and local knowledge was more completely respected. A different pattern of lawmaking led to a different type of law in action. The out-of-court cycle of reforms adds another pattern of recursivity: an enabling statute that is rejected by the market for legal services and thus must be withdrawn or reworked in another round of amendments or lawmaking.

China

From a legal standpoint, China punctuated its long march away from a command economy with the enactment in 1986 of an interim bankruptcy law (Cao 1998*a* 1998*b*). This law worked poorly. It was intended only for state-owned enterprises (SOEs), and even then was often trumped by local politicians, who preferred administrative and discretionary means rather than legal solutions. Over the ensuing years, as the private market burgeoned and new ownership structures were permitted, a patchwork of other laws and regulations grew up to govern bankruptcy in different types of industries and different jurisdictions. Administratively, these supervisory structures and responsibilities have been dispersed among various segments of the Chinese state. China’s insolvency reforms have proceeded along two almost independent tracks (Halliday and Carruthers 2003*a*, 2003*b*).

For SOEs, the most important of these was a purely administrative process lodged in the powerful state agency previously in charge of these organizations. In response to State Council direction, beginning in 1994 the former State Economic and Trade Commission (SETC) undertook a series of ever more expansive administrative experiments where law-in-action served as the basis for subsequent regulatory adaptations. Through these trial-and-error methods, the SETC liquidated, merged, or reorganized tens of thousands of SOEs, all outside statutory bankruptcy law (World Bank 2000).

SETC began its administrative experiments because the Interim Bankruptcy Law suffered from the fundamental flaw that the assets of state-owned enterprises (SOEs) to be liquidated could not meet the economic

and social needs of workers who would be thrown out of work—and no social safety net existed. Under these circumstances, liquidation of the firm meant virtual paupery for the former employees. So the SETC began to devise alternatives.

The first, codified in State Council Document 59, attempted in 1994 to solve the problem by selling the only truly valuable assets of SOEs, their land-use rights, and using the proceeds to pay workers a cash lump sum as a severance payment. This would permit local governments to close down unproductive firms while avoiding worker unrest. Since these unproductive firms also owed banks a great deal, arrangements were made for banks to write off a certain proportion of their loans. SETC developed a formula, set in Beijing, that strictly controlled which cities and what volumes of debt could be written off at the discretion of local authorities, thus containing any problem of runaway financial restructurings (the capital structure optimization program, or CSOP) (World Bank 2000; also interviews 2309, 2310).

The Document 59 program ran into many problems. While the diagnosis of the SETC substantially accorded with that of IFI professionals (i.e., inefficient factories, unproductive workforces), its prescription was distorted since it reflected a mismatch between the actors most involved in everyday business practice and those with the most influence in the SETC where the document was drafted. In short, managers and workers were included and banks were excluded. Document 59 not only favored workers over banks, but it was a simple document based on limited research. Its indeterminacy and incompleteness allowed it to be readily abused by SOEs, which concocted schemes for false bankruptcies and devised techniques that would allow them to escape their indebtedness to banks. In 1997 the State Council issued Document 10, which sought to redress the earlier mismatch and was much more sympathetic to the banks. Companies would not get to write off their debts to banks unless a company was liquidated in fact and all workers dismissed and the assets sold piecemeal. Bank officials would be involved in the liquidation process itself to watch out for chicanery.

At about the time of Document 10, the SETC solicited a report from the Asian Development Bank, which was delivered in 2000. The report noted the inherent contradictions in the notion of a “socialist market economy,” notably that the “socialist” and “market” elements were potentially at odds. The PRC needed bankruptcy law as a part of a market economy and, yet, on the “socialist” side, it sought to promote and maintain public ownership in production (ADB confidential document, pp. 41, 72). An even more extensive report was delivered by the World Bank in 2000, which urged that the SETC withdraw from regulatory control of failing companies and that China enact a comprehensive bankruptcy law in its

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place. The World Bank report in particular took a much stronger position in favor of creditors, arguing that the Chinese must develop legal mechanisms to protect creditor interests and that creditor money should not be used to provide social security for workers, which was deemed to be a responsibility for local government. If China was to have a market system, said the Bank, it must defend the property rights of banks (World Bank 2000).

A second track of Chinese reforms was centered in the Finance and Economy Committee (FEC) of the National People's Congress (NPC) and involved preparation of a modern comprehensive bankruptcy law for China that would potentially encompass all corporate failures, both state-owned enterprises and private enterprises of various sorts. The drafting of a completely new bankruptcy law began in 1994 with the goal of putting in place an effective institutional component of a socialist market economy. For two years, a group based in the FEC labored on a new draft law. The committee comprised a small number of government officials, a judge, and an equal number of law professors from Beijing's universities. It did so without any direct foreign input and none at all from the IFIs or, it seems, from the private sector (interviews 2001:104; 2001:107; 3010).

In 1996 the committee produced a draft law that sought to confer a distinctive Chinese character upon the features of insolvency found in most capitalist countries. The Chinese draft combined political pragmatism with ideological distinctiveness. In 1996 the FEC submitted its draft to the powerful Legal Affairs Committee of the NPC, which called the reform process to an abrupt halt, apparently on grounds it was too politically sensitive and posed dangers associated with the potential closure of SOEs. In 2000, the FEC got permission to proceed. The draft went through successive revisions, variously expanding and contracting its scope (Wang 2001). Much of the wavering related to whether some or all SOEs should immediately be included under the law and how much discretion the government should maintain outside the legal process; some wavering related to the private sector and whether to include small proprietorships or partnerships, or all legal person enterprises but no natural person enterprises (usually smaller companies employing a handful of persons). A great deal of debate occurred over the relative priority of workers versus banks in the disbursement of assets in a bankrupt enterprise. Consistently, foreign experts, commentators, and aid agencies pointed to vagueness in drafting, an imprecision in terms, and a lack of clarity that would impair predictable implementation (interviews 2001: 104; 2001:107; 3010). Generally, each iteration of the draft law moved it toward a tighter, more precise formal statutory document.

After advancing through two readings by the Standing Committee of the NPC in late 2004, the draft statute stalled between two countervailing

influences concerning SOEs. On the one side, the World Bank and the German government have provided considerable expert assistance to ensure the draft law is consistent with global norms.²⁵ Some reformers on the drafting committee and inside China supported this move toward a socialist *market* economy. On the other side, conservatives and pragmatists in the Chinese government feared that a new law could produce political and social instability because it would remove administrative discretion from control of SOE failures and thus potentially lead to widespread unemployment and social disruption. Since SOEs historically have had explicit welfare functions, their failure also raises fears of a loss of welfare benefits attached to the enterprise. Thus these political leaders championed a *socialist* market economy, where national or local government might retain powers to intervene, especially in SOEs. Caught between these ideological differences, it is not surprising that the reforms had an on-again/off-again character, with international institutions pressing their norms but with little leverage other than modeling and light persuasion.

A revised version of the draft law subsequently stalled in the Standing Committee. Here the lines were sharply drawn between top leaders who backed the primacy of workers in treatment under bankruptcy law (i.e., *socialist* market economy) and those that advocated the ascendancy of secured creditors, mostly banks (i.e., a *socialist market* economy). Each faction found a top leader to press its cause. Finally, on August 27, 2006, a new law on Enterprise Bankruptcy was promulgated by President Hu Jintao to come into force on June 1, 2007.²⁶

The breakthrough came via a series of compromises. The law covers all private enterprises that are “legal persons” and all SOEs, except for some 2,000 SOEs explicitly excluded from it. Yet it will permit considerable administrative interventions by state agencies over the accessibility of SOEs and financial companies to bankruptcy processes. The deadlock between workers and bankers was resolved in favor of the bankers (interviews 5101, 5102, 5103, 5104). Otherwise the new law encourages the rescue of companies.

While both sets of China’s reform cycles were informed by and aware of the global context and occur within the purview of the IFIs and German aid program, it is clear that China’s internal agenda and domestic political imperatives drove the speed of reform and, most important, the enactment

²⁵ The German aid program, GTZ, offered various kinds of assistance in the drafting of this law as with others by the FEC. For instance, in 2001 it brought together experts from many countries in a symposium to review thoroughly the draft law under discussion here.

²⁶ The law was adopted at the twenty-third meeting of the Standing Committee of the tenth National People’s Congress, August 27, 2006.

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of law that would meld both tracks into one. The recursive process, which is not yet over,²⁷ owes much to relations among competing government agencies over SOEs—the former SETC, the banks, the NPC, and most to political factionalism that is invisible to observers. No professional conflicts influence the process although legal academics are integral to both tracks. As a result the formal properties of the cycles also differed. Whereas the regulatory cycles were rapid, the legislative cycles of successive drafts sped up and slowed down as political currents changed.

The pervasive combination of actor mismatch and incomplete diagnosis can be seen in the judgment of a senior Chinese official formerly responsible for the experiments in State Council documents 59 and 10:

There is a massive gap between what happens on the ground and the drafting of the law—in fact, there is almost no relationship between the two. The law-drafters don't really know what's going on on the ground. And the people on the ground, actually dealing with SOEs, which are in terrible shape, don't know and don't care about the bankruptcy law. They have 50 years of terrible management to recover from. A huge gap exists between the two, and law lags well behind and it will take a huge amount of time before law and practice are in sync. (Interview 2001, p. 101)

From the viewpoint of recursivity, China's administrative reforms represent an instance of purely regulatory cycles which owe little to statutes or courts. Regulatory experiments were tested in practice and subsequently modified to respond to the unanticipated aberrations that occurred. China continued to prefer this type of recursivity for it allowed much greater government control and arbitrary intervention in the affairs of SOEs than would be permitted by a new bankruptcy law, which, paradoxically, would likely increase uncertainty in the short term (Halliday and Carruthers 2004b).

Trajectories of Recursivity

The three case studies demonstrate that lawmaking/law-implementing episodes even in a single substantive area exhibit quite distinctive trajectories (table 2). In the Korean case, a series of modest amendments kept comprehensive reforms at bay until external pressure built up sufficiently to induce a unification of its three bankruptcy laws. In the Indonesian case, by contrast, a fairly comprehensive packet of reforms initiated at the beginning of the reform process has led to corrective statutory,

²⁷ The Supreme People's Court is drafting an interpretation to clarify much of the ambiguity and gaps in the law. Other state agencies will also draft regulations that relate to SOEs, professionals, and financial institutions that can also be covered by the law, among others.

TABLE 2
SUMMARY: RECURSIVE EPISODES OF INSOLVENCY LAWMAKING IN EAST ASIA

Attributes of Recursive Episodes	China	Indonesia	Korea
Onset	Progressive transition from command to market economy	Financial crisis: transition from national to global capital markets	Financial crisis: transition from national to global capital markets
Period	1994–2006	1998–2006	1998–2006
Frequency	Periodic	Rapid/annual	Rapid/annual
Pressure	Domestic	Foreign	Foreign/domestic
Indeterminacy	Drafting vagueness, ambiguous discretionary powers, creative noncompliance	Vagueness of concepts, faulty grafting onto outmoded substantive law, institutional failure	Inflexibility of brightline rule, non-use of prepackage innovation
Contradictions	<i>Socialist</i> market economy vs. socialist market economy; firms as rational economic actors vs. firms as social safety nets	Global creditor vs. national debtor interests; market neutrality vs. ethnic expropriation	State directed vs. law/market driven economy; global opening vs. local protectionism; economic vs. legal models of change
Diagnosis	State agencies (judges, academics); IFI research (World Bank, ADB)	Local legal elites, major law firms, bankers, officials; indigenous research	Local legal elites, major law firms, bankers, officials, government ministries (MOFE); indigenous research
Actor mismatch	Insolvency and legal practitioners, private firms	Debtors (corporations), labor, trade creditors/suppliers	Debtors (corporations), labor, trade creditors/suppliers
Cycles:			
Problem based	SOEs (SETC agency track)	Substantive law	Substantive law
Institution based	All corporations (NPC legislative track)	Courts:—competence—corruption; out of court	Courts; out of court
Episode trajectory	Progressive steps culminating in comprehensive reforms	Significant reforms followed by corrective steps	Successive limited reforms leading to comprehensive reform

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regulatory and administrative actions, all aimed at institutionalizing the initial concept of an insolvency system purportedly agreed to by the IMF and government of Indonesia. China displays a more complicated pattern for its state agencies have undertaken many stopgap measures to compensate for the failings of the 1986 Interim Bankruptcy Law.²⁸ But the actual law reform itself—a comprehensive bankruptcy law—was not enacted until 2006. China thereby demonstrates its capacity to resist external pressure and set a legislative agenda determined principally by its internal political and economic imperatives. Effectively it has de-coupled the drafting process, which engages international experts and agencies, from the enactment process, which remains substantially immune from external constraints.

GLOBAL NORM MAKING AND DESIGN OF NATIONAL SCRIPTS

In many areas of commercial law, national law reforms can no longer be purely national. To one degree or another, the momentum for reform, the content of reform, and the trajectory of reform proceed from or respond to transnational and global contexts. Recursively changing commercial law within the nation-state therefore must be held in dynamic tension with the enterprise of norm making by global actors. National actors feature—norm making arises out of lawmaking in which many global actors are involved—but nevertheless national actors remain mostly invisible.

The great majority certainly, and probably all, of the national bankruptcy reforms of the past 15 years are influenced by transnational or international developments. All three sets of recursive reforms in China, Indonesia, and Korea took place within global frames where norms have progressively developed from ad hoc and implicit to systematic and codified

Five groups of global players have participated in the design of global bankruptcy standards: clubs of nations (e.g., G7, G22, OECD), IFIs (e.g., IMF, World Bank, and regional development banks such as the European Bank for Reconstruction and Development [EBRD] and the Asian Development Bank [ADB]), international governance organizations (e.g., United Nations), peak associations of professionals (e.g., the International Bar Association, International Federation of Insolvency Practitioners), and certain metropolitan nations (e.g., United States, Germany, France).

They have engaged in the development of a global normative frame-

²⁸ The Supreme Peoples Court also issued an “opinion” in 2002 that sought to clarify ambiguities and fill gaps in the 1986 Interim Bankruptcy Law.

work in two ways. One line of attack has proceeded through lawmaking itself, where IFIs have provided direct advice, technical assistance, and conditional lending on a country-by-country basis. Examples range across the world from the OECD in Russia, the World Bank in Slovakia, the IMF in Argentina, the ADB in Laos, and the EBRD in Central and Eastern Europe. Another line of influence proceeds through norm making. Although there were elements of norm making for insolvency regimes before the Asian crisis, it was the crisis itself that precipitated a flurry of activity by international institutions keen to erect national and international architectures that would forestall any repetition of the regional meltdown and global near-meltdown in 1997 and early 1998.

The actors in global norm making play on a common stage. Every actor has relative strengths and weaknesses and much of the jockeying for position among them occurs precisely because each seeks to compensate for its own limitations with the advantages of others. On the one hand, this creates opportunities for cooperation. On the other hand, global actors often are in incipient conflict, whether contests for influence occur among sovereign nations (e.g., United States and other nations at the center of the world financial system), among global and regional IFIs, among global IFIs, and between professions. The grand prize is to be the institutional sponsor of a global standard for bankruptcy law.

The politics of cooperation and conflict among global actors have followed an iterative process both within institutions and across institutions.²⁹ They began independently and quickly became interdependent. The iterations follow a trajectory toward a single harmonized standard, although that path itself has not been entirely harmonious.

These actors can be arrayed along a rough continuum of leverage in imposing normative templates. IFIs anchor the continuum at the pole of greatest leverage since they can exert enormous pressure on countries, particularly during financial crises, to adopt norms as a condition of access to multilateral loans and sovereign and private lending. Of less direct but of considerable diffuse influence lie clubs of advanced economies, most notably the G7 and G22, whose policy directives and even prescriptions influence the IFIs in particular. The OECD has played a more regional and less obtrusive role as a disseminator of reforms. In the middle of the

²⁹ For conceptual precision, we designate as “iterative” those cycles of norm-making whose norms are *not binding* on the subjects of those norms, such as model laws, principles of corporate governance, and the like, and designate as “recursive” those episodes of lawmaking which produce *binding* laws, regulations, or court rulings. In the case of insolvency law, all the global norms are non-binding. In other areas of law, however, global norms are binding through the accession of nations to conventions, through rulings of international bodies such as the WTO, and regulations adopted by international governance bodies (e.g., IATA or the Basle banking regulations).

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continuum lie organizations such as the United Nations, and especially its Commission on International Trade Law (UNCITRAL), whose products carry an intrinsic suasion of their own, since they are legitimated by a global legislative process (Block-Lieb and Halliday 2006; Halliday and Carruthers 2002). At the pole of least leverage lie the international professional associations that can provide technical expertise but have no powers to compel compliance. The most prominent metropolitan power, the United States, has not formulated normative standards itself but exerts its influence indirectly and broadly through clubs of nations, IFIs, the UN, and professional associations.

Clubs of Nations

The cycle of global norm making was precipitated by clubs of rich nations in the wake of the Asian financial crisis. The latter demonstrated to the leaders of the global economy how vulnerable it was to regional and possibly global collapse. Around the time of the Asian crisis, the G7 already had charged the World Bank to begin looking into the importance of bankruptcy regimes to the developing economies. In 1998 the G22, a club of “systemically important” nations, gave international institutions a mandate to develop global frameworks, principles, or foundations for substantive law and legal institutions that would prevent financial crises.³⁰ The G22 Working Group on International Financial Crises issued a policy statement about insolvency and debtor-creditor regimes (G22 1998, chap. 2.5) which might reduce the scope of crises and facilitate swift workouts of indebtedness. The Working Group repeatedly stressed the importance of predictable legal frameworks and robust insolvency and debtor-creditor regimes for solving the financial difficulties of firms. In addition to strong “laws,” strong “insolvency regimes,” and “necessary frameworks,” the G22 called for effective enforcement apparatuses, such as courts and tribunals, which are staffed by competent professionals. In addition, there should be incentives and appropriate frameworks or forums for working out or restructuring corporate indebtedness outside courts or government agencies.

If the G22 and G7 launched global norm making, at the other end of the process—that of implementation—lies the Organization of Economic

³⁰ Finance ministers and central bankers participated from England, Hong Kong, Argentina, Australia, Brazil, Canada, France, Germany, Japan, Malaysia, Thailand, and the United States (G22 1998).

Cooperation and Development (OECD),³¹ a Paris-based international organization of mostly rich countries that has committed itself principally to dissemination and diffusion.³² The OECD neither developed its own standards nor diagnostic instruments. But in the wake of the Asian Financial Crisis, and in partnership with IFIs and governments, the OECD invited Asian nations to a series of Forums on Asian Insolvency Reforms (FAIRs) to disseminate norms and cross-fertilize accomplishments in law-making and implementation. Successively held in Sydney, Bali, Bangkok, Seoul, and New Delhi, each forum has a theme that highlights a particular component of an insolvency system (e.g., nonperforming loans or risk management) and discreetly places the country in which the forum is held under the spotlight for its progress in the implementation of global norms. Without standards or instruments of its own, and without financial leverage, the OECD forums function distinctively to offer a relatively neutral arena in which major international organizations and nation-states can exchange ideas and experiences as putative equals. Its intent, however, is clear—to drive forward the cycles of reform across the region in adherence to the global norms that are advocated during the forums.

IFIs

Major regional and global international financial institutions responded to the G22 call by creating normative templates for national lawmaking, but they did so in quite different ways. A significant difference among them relates to a key feature of iterative norm development. Cycles of legal change always presuppose two intervening processes—diagnosis and prescription. The global norm making of IFIs varies by the relative weight given to the diagnostic or prescriptive sides of the lawmaking cycles and by their capacity to balance the two (table 3). For the European Bank for Reconstruction and Development (EBRD), the emphasis has been entirely on diagnosis. For the IMF the emphasis has been principally on prescription, while the Asian Development Bank (ADB) and World Bank hold both in roughly equal balance. The key issue of whose diagnoses or prescriptions will dominate remain only partially resolved as elements of rivalry for regional or global ascendancy continue among these leading international institutions.

³¹ The predecessor organization to the OECD was founded to administer the Marshall Plan; it was later converted into an economic analog to NATO and more recently has become a global organization that includes the world's most advanced economies. It has an annual budget of approximately €300 million.

³² In the mid-1990s the OECD had undertaken a study of insolvency in transitional economies and had been involved in the Russian insolvency reforms, so its Asian efforts were not without its own institutional precedent (interviews 2071, 2072).

EBRD

The youngest of the IFIs pioneered assessment instruments for insolvency regimes. Founded in 1991, the EBRD was created to enable economic and political development in the 26 countries of the former Soviet Union and Central and Eastern Europe. In 1995 its Legal Transition Team launched a Legal Indicators Survey to cover all 26 EBRD countries of operation (Bernstein 2002, pp. 3–4; Averch et al. 2002; EBRD 2002, 1999). For each area of substantive law, such as insolvency, the EBRD sought to evaluate (1) the *extensiveness* of law, or how well a country covered the breadth of areas which should be characteristic of bankruptcy law in a developed country and (2) the *effectiveness* of law, a judgment that “legal rules are clear and accessible and adequately implemented administratively and judicially.” In other words, it judged the quality of law on the books and law in action. The EBRD rated entire countries *numerically* on indicators of substantive law and implementation. These comparisons of all countries were published in annual scorecards.

Curiously, the EBRD undertook the survey without publicizing a detailed set of standards or the precise evaluation criteria. Its publications include two very general sets of norms of no more than two to three pages. In effect, the EBRD began with the diagnostic side of the reform cycle and elaborated it into the most extensive and public of all IFIs. But it did not provide its own normative template. It preferred rather to acknowledge a division of labor in which initiatives by the IMF and World Bank would come to fill that void after 1999.

ADB

First into the arena with a systematic normative template was the ADB. It shifted from case-by-case technical assistance projects to a project initiated in 1997 to evaluate systematically the state of bankruptcy regimes across Asia (ADB 2000). To ensure systematic comparisons, the ADB created an extensive checklist of questions and enlisted country specialists to respond. While the 1999 report began to lay out the broad brush strokes of “essential elements of rescue” and the basic elements of informal work-out processes (ADB 1999, pp. 29–30, n. 10) the final report (ADB 2000) takes the bold step of establishing 33 “good practice standards” that cover core topics of bankruptcy law.³³ On each standard, a table rates all coun-

³³ What entities are covered by the law, whether the liquidation/reorganization processes are separate or dual, access to the process, commencement of proceedings, administration of proceedings, processing of liquidation, rescue processes, the role of creditors, the formulation of a plan, the supervision of the process, implementation of the plan, creditor priorities, avoidance of transactions, civil sanctions, cross-border issues (ADB 2000, pp. 27–53).

TABLE 3
 GLOBAL NORM-MAKING INITIATIVES AND TECHNOLOGIES BY TRANSNATIONAL ACTORS FOR DEVELOPING
 AND TRANSITIONAL COUNTRIES

Initiative/Product	Legitimation Warrants	Diagnostic Instrument/ Approach	Formal Instrument/ Technology	Leverage
Clubs of nations:				
G22	Economically significant states	World financial system	Principles	Persuasion
OECD	Quasi-representation; neutrality; expertise (broad)	None	None	Persuasion; peer pressure
IFIs:				
EBRD	Experience; expertise (narrow)	National surveys	Surveys	Technical assistance; ratings for lenders; implicit shaming; investment
ADB RETA	Experience; expertise (narrow); technical assistance	National reports (national experts, consultants, ADB staff)	Standards	Technical assistance; public shaming
IMF Blue Book	Experience; expertise (narrow)	Internal reports; consultants	Normative model: objectives, approved alternatives	Conditionalities for loans; technical assistance
World Bank Principles and Assessment Template	Experience; expertise (broad)	Assessment templates; reviews of standards and codes (ROSCs)	Principles	Conditionalities for loans; technical assistance

IPAs:				
INSOL Workout Principles	Technical expertise	None	Principles for Multi-Creditor Workouts	None (trades on its technical authority)
IBA Model Bankruptcy Code	Technical expertise	None	Model Law on Liquidations—harmonization of substantive law	None (trades on its technical authority)
IBA expedited procedures	Technical expertise	None	. . .	None (trades on its technical authority)
IGOs:				
UNCITRAL	Representation; expertise	None	Legislative guide	None (relies upon representative authority)
Sovereign states:				
United States	Expertise	None	U.S. Bankruptcy Code	Economic power; symbolic ascendancy

tries on a three-point scale by whether that principle is “applied,” “applied in part,” or “not applied.” Countries are therefore explicitly compared to each other, comparisons that are made even more explicit in commentary that praises and criticizes individual countries for their performance.

The ADB initiatives bear some resemblance to the EBRD’s emphasis on evaluation and diagnosis of law on the books. However, while the ADB does not go as far as the EBRD’s annual surveys, it goes much further in its development of a normative standard for the design of insolvency regimes, at least the substantive side of insolvency law. Unlike the EBRD, it does not try to measure implementation of formal law. Thus the ADB balances diagnosis with prescription but at the cost of the frequency and depth of the diagnosis itself.

IMF

Although the IMF had been providing country by country advice on insolvency reforms for transitional nations through the 1990s, it was the Asian crisis and the urging of the G22 to protect the international financial system that compelled the IMF legal department toward creation of a broader policy product that would simultaneously be diagnostic and prescriptive. In this shift of emphasis from a reactive to a preventive orientation, the IMF moved from its iterations of country initiatives (which were diagnostic and prescriptive on an ad hoc basis) to a higher level of rationalization (in which experiences were codified in a normative code) with the expectation that the code could be applied both inside the IMF and among member countries.

In 1999 the IMF published a small book entitled *Orderly and Effective Insolvency Procedures* (“Blue Book”). The Blue Book (IMF 1999) begins with general objectives and a list of common issues that all insolvency regimes, of whatever legal and historical provenance, must confront. It maintains that every insolvency system must provide two frameworks: a *legal* framework and an *institutional* framework, thus laying tacit claim to a broad scope of intervention comparable to the economists’ mandate to manipulate economic levers, such as interest rates, while also building economic institutions, such as restructuring and banking systems. The Blue Book organizes its normative model very simply with chapters on (1) liquidation of companies, (2) reorganization of companies, (3) institutions, and (4) cross-border procedures. At the end of each section is a “principal conclusion” in bold, which summarizes the preference of the IMF’s legal department.

The IMF takes a distinctive position in the international division of labor. It is the international institution with the most powerful economic sanctions especially as it usually acts hand in hand with the U.S. Treasury.

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As we saw with the case of Indonesia, it pushes cycles of reform relentlessly in countries where its financial exposure is high and legal regimes are underdeveloped. Yet in the growth of the global insolvency field, it strikes just the opposite balance than the EBRD: instead of extensive evaluation with a limited normative template, it offers an extensive normative template without public assessments.

World Bank

Last into the field of insolvency norm making came the World Bank. In 1998, the World Bank's legal department appointed an American insolvency lawyer to lead the World Bank's institution-building initiative for insolvency regimes. It distinguished itself by aspiring to create norms or principles for substantive insolvency law and all the institutions upon which it rests. This defined an ambitious agenda that would come to include both prescriptive frameworks and assessment tools.

Procedurally, the insolvency initiative set out to combat the World Bank's reputation for heavy-handedness and imperative diktats by spreading the consultative net exceptionally widely, embracing not only IFIs, but also scholarly and practitioner communities across the world.³⁴ The Bank initiative has followed an iterative process where successive drafts are circulated and discussed in forums throughout the world (the first draft was rolled out in Sydney in late 1999).³⁵ While this was intended to give the appearance of inclusiveness, and thus solve a besetting legitimation problem of the World Bank, in fact neither the mode of deliberation nor drafting have been systematically representative of the world's nations or of interested parties in contrast to the United Nations Commission on International Trade Law (see below).

Earlier drafts of the World Bank's principles emphasized the *systemic* nature of its enterprise. While it includes the substantive topics common to other enterprises, it goes far beyond the IMF's and ADB's black letter law focus to include all the institutions necessary for the functioning of a fully-defined insolvency regime. Whereas the ADB offered "standards" and the IMF presented "principal conclusions," the World Bank presents

³⁴ For instance, in its October 2000 "Consultation Draft on the Principles," the World Bank includes as "partner organizations" the African Development Bank, ADB, EBRD, Inter-American Development Bank, INSOL, the IBA, International Finance Corporation, the IMF, the OECD, and the United Nations Commission on International Trade Law (UNCITRAL). See also World Bank (2001).

³⁵ Forums have been held in South and Southeast Asia, Central and Eastern Europe and the Baltics, Latin America and the Caribbean, Africa and the Middle East. Often these are co-sponsored by regional multilateral institutions, such as the EBRD in Central Europe, or the OECD in Sydney, with support from national governments.

35 “principles and guidelines.” The World Bank styles these principles as “a distillation of international best practice” (World Bank 2001, para. 6).

Alongside its principles, the World Bank has designed an assessment template that offers an extensive set of standards for any country. Keyed into the 35 principles, the template proceeds successively to raise 20–40 questions on each principle that will indicate a country’s conformity to the Bank’s purportedly global standards. The template therefore offers a normative model in another guise.

The World Bank complements internal self-evaluations by nations, with external bank-staffed evaluations of a country’s insolvency system. In a four-year program set up by the bank, the insolvency staff, often in cooperation with officials from other multilaterals and consultants, intends to undertake some 70–80 reviews of developing countries. All carry more or less explicitly the implication that favorable outcomes or favorable adjustments will affect future lending decisions by the bank. Of all the international institutions, therefore, the bank goes farthest to develop both diagnostic instruments of law on the books and law in action *and* to balance these with an extensive list of principles that cover both substantive law and legal institutions.

At the global center, therefore, we observe two closely connected types of iterative cycles. *Within* institutions themselves, normative templates and diagnostic instruments have gone through several rounds of refinement, most notably in the case of the World Bank, whose respective drafts of the “principles” have been under revision since 1999 and still remain to be released in their final approved version. The reforms *among* the institutions also display a cyclical quality, for each subsequent template or assessment instrument is made not only with the awareness of those that preceded it by other IFIs, but with the intent of building upon prior efforts, either by tailoring them to particular organizational mandates or by expanding their scope. In this sense, more than a division of labor has emerged. The cycles of reform across institutions have the effect of ratcheting up the sophistication of global instruments and of pressing them toward a global consensus in which all IFIs subscribe to broadly similar norms. This race to the top is fuelled by a complex pattern of cooperation and competition: cooperation, because the institutions are aware of each other’s efforts and may even collaborate; competition, for the prize of being the institution able to claim authorship of the preeminent global standard.

Professions

In earlier work (Carruthers and Halliday 1998) we argued that *within* national lawmaking, professions often engage each other in a struggle for

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jurisdictional rights to gain state-sanctioned control of certain areas of work. The metabargaining that occurs during lawmaking offers a prime opportunity to fix jurisdictional rights in place. Similarly, we might expect that conflict among professions for jurisdictional rights will occur when divisions of labor among professions are being built into global normative codes.

Professionals and professions, acting collectively, pervade global lawmaking of insolvency reforms. Two main associations of professionals dominate global law reform efforts—the International Federation of Insolvency Practitioners (INSOL), which is a peak association of national organizations, and the International Bar Association (IBA), which is a membership organization of lawyers. To overstate the case slightly, each thrives in rather different types of bankruptcy regime: lawyers in rule- and court-governed regimes; and insolvency practitioners in private market-based schemes.

INSOL brings the expertise of insolvency practitioners, most of whom are accountants,³⁶ workout specialists from banks, bankruptcy judges, and some lawyers who specialize in bankruptcy, into an energetic INGO that has partnered closely with international institutions to turn its expertise into global standards. It does so by allying with international institutions and by providing technical assistance to global initiatives. For instance, INSOL was perhaps the most important single NGO in the development of a model law by UNCITRAL (United Nations Commission on International Trade Law) to regulate major corporate bankruptcies across national frontiers. INSOL drafted the principles in the G22 (1998) call for laws to prevent international financial crises.

INSOL's most notable contribution to the global insolvency field is its effort to convert the "London approach" to out-of-court corporate restructurings into a universal model. INSOL has generalized from the English experience to launch in 1997 its "Statement of Principles for a Global Approach to Multi-Creditor Workouts."³⁷ While INSOL leaders have fanned out across the world to present the merits of this approach, its most effective efforts have been to integrate the principles into global templates of organizations with sanctioning power (e.g., the World Bank's principles) and to attempt a similar feat with the Legislative Guide currently developed by UNCITRAL. Each of the major initiatives undertaken by the leading IFIs has actively involved INSOL.

In part these consultative relationships are a way of appropriating the

³⁶ The most prominent of these are either from the corporate reorganization departments of major accounting firms, such as the Big Five, or from dedicated insolvency firms which have not yet been absorbed into multinational accounting firms.

³⁷ Presentation to New York judges by INSOL Lenders Group, 1998.

concentration of expertise within INSOL, effectively harnessing its human resources. In part, however, the IFI's also recognize that their reform programs require implementation "on the ground" and this may be more readily effected when the support and cooperation of practitioners' associations are already assured, since their representatives participated in the formulation of the original standards or principles. Thus INSOL offers both an expert and legitimating value to the international organizations for they provide a veneer of professional neutrality, best practice, and efficiency.

While INSOL brings together several professions with a common specialty in insolvency, the International Bar Association's (IBA) Committee J on Creditor Rights brings together an international network of lawyers who specialize in insolvency law. Committee J has had high aspirations. In the late 1980s and early 1990s the IBA produced a model law and a cross-border insolvency concordat. Its current impact, however, has been felt principally through its participation in other multilateral organizations, most notably UNCITRAL, where its delegates have worked more closely than any other international expert organization with the secretariat in drafting the new legislative guide on insolvency. The IBA has the not insignificant benefit that it consults closely with the U.S. State Department, which has shown considerable interest in a global insolvency guide that would advance U.S. interests. While the IBA is not a creature of the U.S. government, its association with the strongest single state engaged in UNCITRAL gives the lawyers' association an influence that might otherwise be overshadowed by INSOL. The international section of business law of the American Bar Association works in close partnership with the IBA representatives, most of whom are American practitioners.

Reciprocal interests join financial and professional institutions. While IFIs benefit from professional expertise—indeed could scarcely proceed without it—the professional associations strive to have their particular norms, frameworks or templates institutionalized in IFI products. INSOL has been singularly successful in doing so with its Principles for out-of-court workouts. The lawyers have also been successful in keeping courts—and therefore lawyers—central to any regimes advocated by IFIs or UNCITRAL (Halliday and Carruthers 2002)

Significantly, both global peak organizations recognized fairly early in the global negotiations that neither of them could prevail entirely against the other. Their backup strategy has been to keep options either for both types of professionals in any context and to worry about jurisdictional rights at the point where it really matters—national lawmaking.

Governance Organizations

In contrast to a reliance for lawmaking authority on economic power (such as the international financial institutions), or on technical expertise (such as the professional associations), UNCITRAL offers itself as a deliberative forum much like a national legislature. The commission functions through working groups and every working group includes 36 (recently expanded to 60) nations that are elected by the UN General Assembly “to be representative of the world’s various geographic regions and its principal economic and legal systems.” The working groups develop treaty conventions, model laws, or legislative guides and submit them to the UNCITRAL commission for adoption (Block-Lieb and Halliday 2006).

In 1998, Australia proposed that in light of the “recent regional and global financial crises,” there was a need to strengthen the international financial system, and “strong insolvency and debtor-creditor regimes were an important means for preventing or limiting financial crises and for facilitating rapid and orderly workouts from excessive indebtedness.”³⁸ By accepting this charge, with the strong concurrence of the IMF and the grudging agreement of the World Bank, UNCITRAL officials understood the symbolic and legitimatory significance of their move. In part it proceeded from the manifest deficit in the legitimacy of other efforts. According to a senior UNCITRAL official, “the World Bank has a problem, as does the International Monetary Fund—their efforts are seen to be the work of a few experts. And there is always the feeling that Washington might be cramming things down the throats of others. This doesn’t go down well with policy makers in countries when they sit down to reform their laws.” As for the professional associations, “INSOL and the IBA are similarly prejudiced. INSOL is mostly insolvency practitioners. The IBA is mostly lawyers. These are people who charge fees and are seen to have particular interests. They don’t carry cachet in key ministries. And they have no effective way of getting things implemented.” Furthermore, the ADB and the EBRD “have a regional focus, so that limits their global impact.” Quite about from UNCITRAL’s successful record of creating model laws, its principal distinction lay in its “truly universal representation”—the representation of delegates from all countries makes a difference in the “acceptability” of the product (interview 2065A, 4008).

In the most complete example of iterative norm making, UNCITRAL labored from 2000 to 2004 in order to produce its Legislative Guide on

³⁸ UNCITRAL A/CN.9/WG.V/WP.50.

Insolvency Law.³⁹ Through one- to two-week-long meetings twice a year in Vienna and New York, with small expert meetings in between, and through widely circulated drafts of its guide, UNCITRAL's methodology was highly participatory. The formal meetings themselves brought together national delegates from some 40 to 60 nations as well as the leading professional organizations and representatives from IFIs, such as the IMF, World Bank, and ADB (Halliday and Carruthers 2003*b*).

The legislative guide combines two kinds of normative material. Most precise are specific statutory recommendations, many of which are drafted in statutory language. Supporting these is a commentary that explains the importance of a topic, discusses various approaches to it across jurisdictions, and explains why UNCITRAL has taken the decision it recommends. Most surprising to veterans of global norm making in this field has been the remarkable degree of consensus that has been forged among delegates and expert organizations from different legal families, levels of economic development, and differences in economic interests. With very few exceptions the guide recommends a single option or no more than two alternatives for every topic it addresses.⁴⁰

The UNCITRAL Legislative Guide on Insolvency Law may therefore be seen as a capstone of all the individual efforts in the previous five years. All the IFIs and professional associations have been drawn inside the UNCITRAL process so it may, concomitantly, build on their prior normative products and reach for a higher level of consensus and precision through a universal deliberative process.⁴¹

Metropolitan Nation-States

While many nations have been influential in the development and propagation of global norms,⁴² none equal the pervasive impact of the United

³⁹ UNCITRAL Draft Legislative Guide on Insolvency Law. A/CN.9/WG.V/WP.70 (Part I); A/CN.9/WG.V/WP.70 (Part II).

⁴⁰ For a detailed analysis of the repertoire of rules developed in the legislative guide, see Block-Lieb and Halliday (2006).

⁴¹ This portrait of global concordance has been marred by an unresolved struggle between the UNCITRAL Secretariat and the World Bank Legal Department over the extent to which the World Bank Principles will continue to serve as any kind of standard or diagnostic touchstone after the completion of the UNCITRAL Guide. This struggle over the stakes of a single vs. competing global standard has drawn into the fray the IMF, U.S. Department of Treasury, U.S. Department of State, and expert organizations. It seems probable it will be resolved in a compromise that recognizes each organization's contributions.

⁴² For example, Australia through its aid program in Asia and leadership in the UNCITRAL initiatives, Germany in its aid program with China, and France through its strong participation in the UNCITRAL Working Group on Insolvency.

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States. The United States leads the world in its experience with reorganization of corporations through bankruptcy law (Carruthers and Halliday 1998; Delaney 1992) and its philosophy of corporate rehabilitation has been incorporated in all the global standards by IFIs. To this degree, the global template for reforms that has emerged from international organizations bears more than a little resemblance to a “globalized localism,” namely, an elevation of certain principles in U.S. law to the world at large. This has occurred partly because U.S. lawyers headed the IMF, the World Bank, and the EBRD initiatives, and the U.S. Treasury was privy to each phase of global reforms, particularly those led by the IMF, World Bank, and UNCITRAL. The U.S. State Department led by far the most high-powered delegation to UNCITRAL’s Working Group on Insolvency, often coordinating many U.S. experts before each meeting to reach a negotiating consensus, and U.S.-led lawyers’ organizations have been among the most influential in crafting UNCITRAL’s legislative guide.

Yet this influence must be carefully parsed because counterbalancing influences, adjustments, and alternative orientations came from other international organizations, such as the ABD, from other delegations to UNCITRAL, and from other professional groups, such as INSOL. Nonetheless it remains safe to conclude that while the U.S. could not and did not impose its preferences on standards, it remains singular in the pervasiveness and depth of its influence over the broad principles that govern the global template.

THE INTERSECTION OF GLOBAL ITERATIONS AND NATIONAL CYCLES OF LAWMAKING

We have argued that the globalization of bankruptcy law is expressed in a set of three cycles: (1) at the national level through recursive cycles of *lawmaking*, (2) at the global level through iterative cycles of *norm* making, and (3) at the intersection of the two where a variable and uneven balance exists in which national experiences influence global norm making and global norms constrain national lawmaking.

We style patterns of norm making at the global level not as recursivity, but as instances of iterative negotiations that are exogenous to national recursive lawmaking. Like national lawmaking, global norm making is often driven by crises. IFIs proceed inductively, drawing selectively on their engagement with national lawmaking in response to market problems. In effect, the IFIs link multiple recursive loops across countries by selectively aggregating lawmaking experiences in one country or another. Their filtering process has strong regional and national biases for countries are not equal in their import. Whereas Latin American experiences in-

fluenced initial solutions in Asia, African countries are almost never used as exemplars. Big transitional countries offer commensurately big lessons, but most smaller countries offer little. Geopolitically important countries weigh more heavily as models for IFIs than small or marginal nations. Altogether, the accumulation of lawmaking experiences from systemically important countries drives a global learning curve that informs the institutionalization of global standards.

Alongside lessons inductively learned by repeated interventions of global organizations, nation-states are drawn into global norm making directly. On the one hand, global governance organizations such as the OECD bring together countries from across a region to describe their experiences not only to each other but to global norm makers. On the other hand, and more systematically, agencies of the United Nations provide a parliamentary forum in which a representative cross-section of the world's nations can directly participate in the crafting of global scripts.

At the same time, global norms inform recursivity in national practice. Global institutions may draw on their normative models invisibly, partly to protect themselves from accusations of imposing "one-size-fits-all" solutions on hapless nation-states. Increasingly, however, the global norms championed by particular institutions have been made visible through publications, conferences, and diagnostic appraisals. In the cases of Indonesia and Korea, the implicit global norms in 1997 and 1998 had become explicit by 1999 and thereafter. More recently, as a global consensus emerges from a more representative deliberative process, the global norms have been articulated as a unified standard to guide national lawmaking. Already national lawmakers feel compelled to show how their prospective reforms conform, principle by principle, to the global standards of the World Bank or UNCITRAL. Since UNCITRAL in mid-2004 reached agreement on a legislative guide to insolvency, the single global standard is likely to be propagated by all of the five clusters of players in the global field using the full range of tools of influence at their disposal.

Relations between the global and national are both cooperative and contested (Carruthers and Halliday 2006). An asymmetry of knowledge and power exists in which global actors can more strongly influence enactment, while national actors more effectively control implementation. Thus one prime motor of legal change in insolvency reforms results from the inherent tension between exogenous supra-national institutions and endogenous national institutions.

Within national lawmaking, changes in bankruptcy law have followed a recursive pattern as four mechanisms of change push forward cycles of reform within global constraints. First, *indeterminacy* of law exists in rulemaking of any kind but can be compounded when the interpretation and application of that law proceeds on a terrain of struggle between

winners and losers in the law reforms, or between those actors integrated into the lawmaking process and those excluded from it. Indeterminacy may be amplified by a poor fit between imported law and indigeneous legal traditions, leading to the so-called transplant effect (Berkowitz, Pistor, and Richard, in press; Pistor and Xu 2002).

Second, it matters who gets to define situations of practice and to craft the *diagnoses* of the problem to be solved by lawmaking. Diagnosis in lawmaking is often contested. In technical commercial lawmaking, professions characteristically mediate the contests, acting as agents for their respective principals. But professions also act in their own right, for lawmaking always provides potential opportunity for the establishment of jurisdictional rights over work (Carruthers and Halliday 1998). Other actors also contest diagnoses, but frequently they, too, must rely on expert services to legitimate their definitions of situations. The diagnostic phase usually involves exclusion of some actors, whether because they did not recognize their interests, they suffered from various incapacities, or they were deliberately excluded. To exclude actors means that facts and interpretations are also excluded, which in turn distorts and constrains the colligation and classification processes that constitute diagnosis (Abbott 1988, pp. 41–42).

Third, *actor mismatch* occurs when parties to practice are missing from the design of treatments in response to diagnosis. Sometimes those parties are missing from both the diagnostic and treatment design phases; at other times they may have provided a diagnosis but did not participate when prescriptions are developed. A double effect occurs that affects implementation: the quality of the prescription is likely to be lower since it rests on an a weaker foundation, and disenfranchisement from participation in the design of treatment will lower its legitimacy for certain parties, reduce compliance, and engender resistance at the point of implementation.

Fourth, ideological and structural *contradictions* get internalized within the law. These emanate both from tensions between the global and the local and from the compounding effect of these on efforts to reconcile domestic conflicting ideologies and policies in pieces of law or the institutions that administer law. Thus, developing countries have sought to negotiate their way among conflicting ideologies, structural contradictions, and contesting actors to erect insolvency regimes that trade off national and sectional interests against global constraints.

At many points in the recursive cycles of reform in each country it would be possible to undertake a conventional law and society analysis. Such an analysis would show the indeterminacy of formal law and disjunctions with practice that variously permit discretion by regulators and enforcement agents as well as avoidance by its subjects. A conventional

analysis might further explicate a local normative order that operates in the shadow of the law, yet effectively becomes law for those it regulates. These offer significant value for understanding the behavior of law, but they are incomplete. What is lost by remaining within a restrictive law and society framework and what is gained by assimilating it to a model of recursivity can be observed from the three national case studies. Furthermore, the importance of global linkages becomes clear even when external institutions (e.g., IMF, World Bank, etc.) do not have maximum leverage over a country.

Following the installation of the Commercial Court in Indonesia or the establishment of the Jakarta Initiative, after the enactment of the Economic Criterion Test in Korea or the passage of the Corporate Promotion Restructuring Act, or subsequent to the experiment with State Council Document 59 or State Council Document 10 by the SETC in China—in all cases a competent analysis of the deviation of law in practice from the intent of its lawmakers and the letter of the law would offer a telling instance of sociolegal stock-in-trade. In all cases, however, those accounts would be incomplete for two reasons. Much of the problem to be explained depends on the political sociology of this particular lawmaking episode. That is, before there is informality, there is formality. Moreover, the shape of the explanation itself depends partially on patterns established in longer-term trajectories of multiple lawmaking cycles.

In Indonesia, the politics of lawmaking—most notably the conflicts between IFIs over courts versus administrative agencies—amplify the explanation of why the Commercial Courts have been fraught with difficulties. They suggest that the IFIs may have had serious disagreements over how, and how far, to push for implementation. The ELIPS alternative offers evidence for the intractability of the problem in reforming not only a commercial court, but the Supreme Court as well. And the lack of judges' involvement in the diagnosis of the situation intimates both limited knowledge of reformers about how courts work and the scarcity of personnel to erect a reformed regime. Moreover, the short time horizon and the absence of public hearings offered few opportunities to enlist broad-based support for implementation. Similarly, the problems confronted by the Jakarta Initiative take on a quite different cast when set in a lawmaking context that takes seriously the ethnic foundations of market structure in Indonesia and in their absence from either the diagnostic or prescriptive phases of reform. Later on, the flurry of "corrective" regulations, administrative initiatives, and statutory amendments make sense only when they are understood to be repercussions of a widening range of lawmaking efforts to correct for implementation failures of earlier, narrower initiatives. Or they may represent experimental efforts to try out various treatments in lieu of an adequate diagnosis of the problem.

Even the shape of the trajectory itself—a major initial commitment followed by complementary and expanding corrective steps—has a distinctive structure that frames all particular moments in recursive cycles.

Explanations of Korean bankruptcy practice after the crisis similarly are amplified and given dynamic framing when understood in terms of the political tensions between the Ministry of Finance and Economy and the Ministry of Justice, through the epistemological conflicts of economics and lawyers. One side principally drove lawmaking, with a highly instrumental, rather unsophisticated economic notion of how law regulates markets. The other side presided over implementation and thus mounted resistance on a new battlefield where they dominated the terrain, namely, practice. Every statutory initiative, therefore, not only is framed by a prior gap in implementation, but is significantly determined by the entire series of lawmaking cycles, which reflect differences in ideology, structural contradictions, and institutional reconfigurations of Korean society, politics, and markets (Halliday and Carruthers 2004a). The shape of the trajectory itself also points to a wider lawmaking context—a series of amendments and legal enactments that failed to satisfy the IMF and thus opened the Government of Korea to implement a unified comprehensive statute that conforms to a now fairly stable set of global norms. Yet we can predict that efforts to implement the comprehensive, unified bankruptcy law will encounter reluctance to comply since it is the uncertain resolution of two tensions—between indigenous and exogenous political forces and between economic and lawyerly images of how law constitutes markets.

In China, too, the successes and failures of repeated experiments inside the former SETC are amenable to traditional sociolegal inquiry. The issues with implementation of the last State Council measure, however, relate not only to prior problems with implementation, but to prior episodes of regulatory lawmaking. More important, they are framed by the 1986 Interim Bankruptcy Law and the continuing politics of drafting the new, comprehensive bankruptcy law for all of China that might make redundant broad regulatory responsibilities over state-owned corporations in distress. The practices of implementation thereby are constituted by the politics of lawmaking and they in turn constitute further cycles of statutory, regulatory and judicial lawmaking. Taking a part of the whole—one reform track or another, one episode rather than the complex recursive trajectory—limits, even distorts, a conventional sociolegal explanation.

A recursivity model that nests national reforms in global contexts offers a systematic framework to analyze the globalization of law. The cycles of reform inside nation-states reflect relationships of power between global centers and nation-states, including fractions within nation-states. They also reflect both the moves toward a global consensus on legal norms, yet

also the differences in emphasis, in powers to make norms binding, and in concertation. For instance, the implementation of insolvency law in Indonesia must be explained not only by institutional factors within Indonesia but also by tensions among the IMF, World Bank, and USAID on how best to proceed. Similarly, the discretion the Chinese have had to set their own pace for reform cycles and to craft a substantive law that has distinctively Chinese characteristics results both from a balance of power that favors their nation-state over global institutions and the government's ability to pick and choose among multiple normative models variously offered by different development banks, international financial institutions, and foreign aid programs. A model of national recursivity nested within global contexts broadens and deepens the explanatory frame for legal change.

Thus the model of recursivity offers an approach to legal change that is dynamic, evolutionary and nested. It offers a dynamic rather than static theory of law in action by building law in action into a dynamic tension with law on the books, and identifying mechanisms that drive cycles of reform and implementation. The lens of recursivity opens up the explanatory frame of the sociology of law to do better what it has conventionally done and additionally to embrace the lawmaking it has conventionally ignored. A recursive model places any given moment of legal implementation in an evolutionary context. Just as path dependency explains a given institutional configuration in terms of a set of prior events, so the dynamics of any cycle take on a different form depending on their positioning earlier and later in an episode. Episodes can manifest a variety of reform trajectories: earlier cycles sometimes build to a climactic reform; or later cycles often settle relatively minor but otherwise indeterminate outcomes from earlier lawmaking cycles. And within a theory of globalization, recursivity is located at the nexus of endogenous and exogenous exchanges between nation-states and international organizations. That is, recursive episodes of lawmaking are a significant site for the mediation of exchanges between the global and the national. In part those exchanges drive recursive cycles and in part recursive cycles refract the encounters between global norms and national law.

A recursive model of legal change is also attentive to explanatory factors that are often missed by scholarship on legislative politics but which are central to sociolegal scholarship. First, lawyers, law professors, and judges have been primary agents and mediators of global norm making and lawmaking. The international professional associations in the insolvency field, dominated by lawyers, have generated their own normative scripts and have harnessed their technical authority to the economic and persuasive leverage of international institutions whose lawmaking initiatives are in turn driven by their Legal Departments. Overwhelmingly, the global

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insolvency norm making enterprise is a professional project driven by lawyers and judges whose expectation is that national insolvency regimes will be dominated by lawyers and judges. In this enterprise, lawyers created new concepts to transcend national differences and drafted every legal instrument. Within China, Indonesia, and Korea, lawyers, judges, and legal academics mediated all other interest groups since they controlled the drafting of new substantive law and design of regulatory institutions. At the same time, further reform cycles gained their impetus from conflicts among different fragments of the profession: between lawyers who exploited gaps and ambiguities in the law and lawyers who sought to remove them; between judges who were corrupt or incompetent and reformist judges who tried to constrain them; between reformers who imagined law as a new market restructuring mechanism and entrenched legal interests who recognized that reforms would disturb long-standing extralegal perquisites.

Second, global normmaking iterations instantiate the constitutive power of legal concepts to recast economic and ideological conflicts in legal terms. Sometimes this transcends conflict, as in UNCITRAL's creative coining of new legal terms in order to cope with widely divergent practices across legal jurisdictions or to disguise the origins of a concept that might be discredited by association with a dominant power, such as the U.S. Sometimes this sidesteps contentious policy issues by excluding them from ostensibly technical products. Yet the constitutive power of law occurs more invisibly in diagnostic instruments that purport to be about law but in fact have wider ramifications about the distribution of political and economic power in a society. And the struggle between debtors and creditors within countries may be fought on the terrain of legal concepts, as did Indonesia's most infamous bankruptcy lawyer over the meaning of "debt" in the new statute. Indeed, a terrain of conceptual struggle often becomes a battleground between professions and scholarly disciplines, as lawyers and economists demonstrated in the faulty Korean experiment to use strict economic criteria (the Economic Criterion Test) as a check on judicial discretion. Arguably, however, the constitutive power of global lawmaking reveals itself most comprehensively in the formulation of global scripts that instantiate norms for adoption by nation-states (Caruthers and Halliday 2006).

Third, the evidence on global norm making and national lawmaking underlines the integral involvement of legal institutions in global market making. Scholarship on economic globalization too often proceeds as if goods, capital, and labor flow independently of legal regulation.⁴³ It is a

⁴³ This is not merely a problem for economics. World-systems theory proceeds in much

central insight of economic sociology that markets are institutional constructions, embedded in social relations (Fligstein 2001). And it is a core contention of the sociology of law that the institutional construction of markets, such as the creation of an international financial architecture, relies on norms of varying degrees of formality, including binding law. The most influential international financial institutions now valorize legal norms as necessary conditions of expanding global trade and national economic development.

For the World Bank, in particular, statutory insolvency reforms are inseparable from institution building. As an institutional threshold for effective insolvency regimes, global norms valorize a competent and independent judiciary and skilled professions of lawyers, accountants, and insolvency practitioners. Although the global scripts lean towards substantive law and procedure, since this is where lawyers' principal competency lies, the active engagement of global actors in national reforms has consistently been accompanied by reconstruction of courts, professions, and government agencies. But as sociolegal scholarship predicts, it is precisely at the point of implementation where institutions facilitate or impede statutory reforms. We have shown that the recursive cycles in Indonesia and Korea, and the iterations of new draft laws in China, have been driven by institutional "failure." Yet the apparent neutrality of this term should not disguise the fact that institutions themselves shift the site of conflict from legislative lawmaking, where exogenous influences are greater, to everyday practice, where local opposition can fight very effective rearguard actions. Thus a dual struggle occurs at the lawmaking and law-implementing moments, each driving forward the recursive cycle one more turn.

Fourth, the formal properties of law matter. At the very least it matters how law is legitimated. This is so in global institutions as it is in national lawmaking forums. A sharp tension exists between the urgent press of IFIs to obtain immediate reforms in a crisis and the slower, deliberative, interest-balancing politics of legislative debate. Whereas the former is most quickly accomplished by administrative regulations or presidential decree, the latter risks delay and dilution as the price of a political settlement that may endure. Whereas decrees and bureaucratic regulations can deliver rules most similar to those promoted by IFIs, policy issues are more likely to be aired for public debate if reform proceeds through statutes.

Recursive episodes themselves can vary significantly. We have observed a variety of types of cycles—from statutes to cases to amending statutes;

the same way—as if law was irrelevant to flows of capital between center and periphery and patterns of dependency.

from statutes to resistance in practice to compensating statutes; from statutes to regulatory agencies to corrective statutes; from one regulatory experiment to another, as each is adjusted to experience—the variants on the recursive theme are considerable and they deserve classification in future work. We have further identified distinctive trajectories in law-making. These vary from major pieces of initial legislation with subsequent cycles of correction and clarification, on the one hand, to multiple smaller amendments that may cumulatively lead to a comprehensive legislative or regulatory solution. In between there are stop-gap trajectories that unfold at a lower level of activity—and sometimes deliberately to forestall more far-reaching legal change. It requires further investigation with a greater variety of cases to discern if there is a contingent relationship between the global and national that produces predictable variants of recursive episodes. Further research must similarly amplify our understanding of what precipitates a recursive episode (a series of recursive cycles) and what brings it to a close.

This leads to two sets of questions about the scope of the theory: does it apply in non-global law-related contexts? And does it apply to areas of law and society research other than bankruptcy? The first question can be answered decisively because a limited version of the theory has been applied to reforms within nation-states when global influences were weak or non-existent (Carruthers and Halliday 1998, chap. 2). In most fields of law before the late 1980s, recursive processes of reform can be found that are mostly endogenous.⁴⁴ However, we expect that the more proximate are nation-states to global institutions and norms and the more susceptible they are to external influences, the more likely that legal change will require a recursive theory that embraces both exogenous and endogenous influences.

The second question calls for speculation about fields other than the empirical case studied here. Evidence from diverse areas of law and society research indicates that recursivity is either implied in, or required to amplify, several theories:

Legal consciousness.—How is it possible to explain “turns” from private responses to harms, such as worker injuries or sexual harassment, to formalized legal responses? What drives successive ef-

⁴⁴ Nevertheless, even here there is value in attentiveness to exogenous influences. For instance, in cycles of reforms previously thought to be entirely domestic, such as U.S. civil rights law, legal historians (Dudziak 2004a, 2004b) are now arguing that they were precipitated in part by the contradiction between the U.S. government’s Cold War advocacy of democracy and its embarrassing global image as a racially segregated society.

forts to effect change, such as antipornography ordinances? (see Nielsen 2004)

Regulation.—What mechanisms drive successively more elaborate approximations by agents of state or suprastate regulation to cope with partial- or creative or noncompliance by the subjects of regulation? Why do the subjects of regulation not comply? (see Braithwaite and Drahos 2000)

Criminalization.—How are nonlegal forms of social control converted into legalized criminal sanctions and what does it take for subsequent cycles of state regulation to “settle” in such areas as prohibition, drug control and crimes against humanity? (see Hagan 2003)

Procedural justice.—Do people obey the law in part because of the legitimacy of lawmaking, its consistency with public beliefs, and its clarity of formulation? (See Tyler 1992.)

Indeed we propose that any sociolegal issue that involves implementation or attention to the gap between formal law and law in practice can be advanced by placing it within a recursivity frame.

This study of law in the globalization of a neoliberal market ideology also points to promising directions for research on globalization. To the world polity school of globalization theory, the case of corporate bankruptcy reveals a set of processes by which global norms are generated, how a division of labor and diversity of products and legitimation warrants can be melded into a single universal standard, and how these global norms are diffused through specific actors employing discernible mechanisms. To the world systems theory of globalization, this study confirms that international institutions can exert a powerful influence on developing countries, especially during times of financial stress. However, that influence can be over-stated: law on the books and law in action are two quite different things. Implementation shifts the battleground in favor of nation-states and even weak states have many ways of foiling global hegemons (Halliday and Carruthers, in press). The sociology of law distinction between law-on-the-books and law-in-action, especially in a dynamic framework of recursivity, exposes a means by which “weapons of the weak” can forestall the seemingly overwhelming power of IFIs and the United States.

This article reinforces the findings of postcolonial studies on law that the point of view of the “subject” reveals how much contestation and cooperation, negotiation and resistance, constitute the points of engagement between the global and local. The field of law can be both highly instrumental, as for instance in the aspirations of global elites, and highly

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conservative, as in the inertial local resistance to exogenous forces, although it must be said that instrumentalism can arise locally and inertia can reside in global institutions. Globalization of many kinds relies upon law whether in the establishment of global legal norms or the institutionalization of national practices

In sum, lawmaking belongs firmly on the agenda for the sociology of law. By dropping lawmaking from its agenda, law and society scholarship impoverishes the explanation of the phenomenon—the gap between law on the books and law in action—at the core of its enterprise. The nature of any current gap almost certainly bears a connection to prior cycles of lawmaking. Lawmaking can be integrated back into the sociolegal nexus by drawing the theory of practice into a model of the recursivity of law. Several strands of work in the field have implicitly pointed to such a model, without specifying it conceptually. Research on global insolvency reforms indicates that much of the conventional sociolegal problem to be explained depends on the sociology of a particular lawmaking episode. How much can only be understood by attending to the structures and processes that contributed to the formalization of law. And some of the problem to be explained and the shape of the explanation itself depends on patterns established in longer-term trajectories of multiple lawmaking cycles. In many respects, the best of law and society scholarship has done this. However, the recursive perspective builds systematic approaches to sociolegal explanation directly into the frame itself and opens up a set of questions largely implicit in conventional analysis. In the highly instrumental field of global norm making and national lawmaking, the recursivity of law provides an integrative framework to build on the classical foundations of the sociology of law while elaborating theoretical structures that are more robust and better suited to law and society in a global context.

REFERENCES

- Abbott, Andrew. 1981. "Status and Status Strain in the Professions." *American Journal of Sociology*. 86:819–35.
- . 1988. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: University of Chicago Press.
- ADB (Asian Development Bank). 1999. RETA (TA No. 5795-REG).
- . 2000. "Report on Insolvency Law Reforms in the Asian and Pacific Region." *Law and Policy Reform Bulletin* 1:10–86.
- . 2002. "Key Indicators of Developing Asian and Pacific Countries, 2002." Asian Development Bank, Manila.
- Averch, Craig, Hsiamin Chen, Frederique Dahan, Paul Moffatt, and Alexei Zverev. 2002. "The EBRD's Legal Reform Work: Contributing to Transition." *Law in Transition* (autumn): 37–47.
- Bappenas (Ali Budiardjo, Nugroho, Reksodiputro). 1998. *Law Reform in Indonesia: Diagnostic Assessment of Legal Development in Indonesia*. Jakarta: Cyberconsult.

American Journal of Sociology

- Barnes, John. 2004. *Overruled? Pluralism, Court-Congress Relations and Legislative Overrides in an Age of Statues*. Palo Alto, Calif.: Stanford University Press.
- Bartrip, P. W. J., and Paul Fenn. 1980. "The Administration of Safety: The Enforcement Policy of the Early Factory Inspectorate, 1844–1864." *Public Administration* 58: 87–102.
- Beck, Thorsten, and Ross Levine. 2003. "Legal Institutions And Financial Development." National Bureau of Economic Research. Working Paper no. 10126.
- Berkowitz, Daniel, Katharina Pistor, and Jean-François Richard. 2003. "Economic Development, Legality, and the Transplant Effect." *European Economic Review* 47: 165–95.
- Bernstein, David S. 2002. "Process Drives Success: Key Lessons from a Decade of Legal Reform." *Law in Transition* (autumn): 2–13.
- Block-Lieb, Susan, and Terence C. Halliday. 2006. "How Global Law-Making is Possible: Legitimation Strategies and Rule Production in the UNCITRAL Legislative Guide on Insolvency Law." Working paper. American Bar Foundation.
- Boli, John, and George M. Thomas. 1997. "World Culture in the World Polity: A Century of International Non-Governmental Organization." *American Sociological Review* 62 (2): 171–90.
- . 1999. "Introduction." In *Constructing World Culture: International Nongovernmental Organizations since 1875*, edited by John Boli and George M. Thomas, 1–12. Stanford, Calif.: Stanford University Press.
- Boyle, Elizabeth Heger. 2002. *Female Genital Cutting: Cultural Conflict in the Global Community*. Baltimore: Johns Hopkins University Press.
- Boyle, Elizabeth Heger, and John W. Meyer. 1998. "Modern Law as a Secularized and Global Model." *Soziale Welt* 49:213–32.
- . 2002. "Modern Law as a Secularized and Global Model: Implications for the Sociology of Law." Pp. 65–95 in *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, edited by Yves Dezalay and Bryant G. Garth. Ann Arbor: University of Michigan Press.
- Boyle, Elizabeth Heger, and Sharon Preves. 2000. "National Lawmaking as an International Process: The Case of Anti-Female-Genital-Cutting Laws." *Law and Society Review* 34:401–32.
- Braithwaite, John, and Peter Drahos. 2000. *Global Business Regulation*. Cambridge: Cambridge University Press.
- Calavita, Kitty. 1993. "The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986." *Law and Policy* 11:17–47.
- Canan, Penelope, and Nancy Reichman. 2002. *Ozone Connections: Expert Networks in Global Environmental Governance*. Sheffield: Greenleaf Publishing.
- Cao, Siyuan. 1998a. "The Storm over Bankruptcy (I)." *Chinese Law and Government* January–February, pp. 2–93.
- . 1998b. "The Storm over Bankruptcy (II)." *Chinese Law and Government* March–April, pp. 28–79.
- Carruthers, Bruce G., Sarah L. Babb, and Terence C. Halliday. 2001. "Institutionalizing Markets, or the Market for Institutions? Central Banks, Bankruptcy Law and the Globalization of Financial Markets," in *The Rise of Neoliberalism and Institutional Analysis*, edited by John Campbell and Ove Pedersen, Princeton, N.J.: Princeton University Press.
- Carruthers, Bruce G., and Terence C. Halliday. 1998. *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*. Oxford: Oxford University Press.
- . 2003. "Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis." Paper presented at UNICD Conference, Bangkok.

Globalization of Corporate Insolvency Regimes

- . 2006. “Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes.” *Law and Social Inquiry* 31:521-84.
- . In press. “Law, Economy, and Globalization: How Modern International Financial Institutions Embraced Adam Smith and Accidentally Discovered Max Weber.” In *The Spirit of Global Capitalism*, edited by Richard Swedberg and Victor Nee. Stanford, Calif.: Stanford University Press.
- Cerny, Philip G. 1995. “Globalization and the Changing Logic of Collective Action.” *International Organization* 49, no. 4 (autumn): 595–625.
- Chambliss, William J., 1979. “On Law Making.” *British Journal of Law and Society* 6:149–71.
- Chambliss, William J., and Robert Seidman. 1982. *Law, Order, and Power*. Reading, Mass.: Addison-Wesley.
- Chandrasekhar, C. P., and Jayati Ghosh. 1998. “Hubris, Hysteria, Hope: The Political Economy of Crisis and Response in Southeast Asia.” In *Tigers in Trouble: Financial Governance, Liberalisation and Crises in East Asia*, edited by K. S. Jomo. New York: St. Martin’s Press
- Choe, Chongwoo, and Imad A. Moosa. 1999. “Financial System and Economic Growth: The Korean Experience.” *World Development* 27 (6): 1069–82.
- Cotterrell, Roger. 1992. *The Sociology of Law: An Introduction*. London: Butterworths.
- Darian-Smith, Eve. 2004. “Ethnographies of Law.” Pp. 545–68 in *The Blackwell Companion to Law and Society*. Oxford: Blackwell Publishing.
- Delaney, Kevin J. 1992. *Strategic Bankruptcy: How Corporations and Creditors use Chapter 11 to their Advantage*. Berkeley: University of California Press.
- Dezalay, Yves, and Bryant G. Garth. 2002. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: University of Chicago Press.
- Dror, Y. 1959. “Law and Social Change.” *Tulane Law Review* 33:787–802.
- Dudziak, Mary L. 2004a. “Brown as a Cold War Case.” *Journal of American History* 91:32–42.
- . 2004b. “Brown and the Idea of Progress in American Legal History: A Comment on William Nelson.” *Saint Louis University Law Journal* 48:851–57.
- EBRD. 1999. EBRD Information: Legal Transition Programme.
- . 2002. EBRD Annual Report 2002: Annual Review. London: EBRD.
- Edelman, Lauren B. 1992. “Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law.” *American Journal of Sociology* 97:1531–76.
- . 2002. “Legality and the Endogeneity of Law.” In *Legal and Community: On the Intellectual Legacy of Philip Selznick*, edited by R. Kagan, M. Krygier and K. Winston. Lanham, Md.: Roman & Littlefield.
- . 2005. “Law at Work: An Institutional Approach to Civil Rights.” In *Handbook of Employment Discrimination Law: Rights and Realities*, edited by Laura Beth Nielsen and Robert L. Nelson. New York: Kluwer.
- Falk, Richard. 1999. *Predatory Capitalism: A Critique*. Cambridge, Mass.: Polity.
- Fisher, William. 1997. “Doing Good? The Politics and Antipolitics of NGO Practices.” *Annual Review of Anthropology* 26:439–64.
- Fligstein, Neil. 2001. *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies*. Princeton, N.J.: Princeton University Press.
- Freeman, Alan D. 1978. “Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine.” *Minnesota Law Review* 62:1049.
- G22. 1998. “Key Principles and Features of Effective Insolvency Regimes.” G22 Working Group on International Financial Crises. Washington, D.C.
- Gallihier, John. 1979. “Utah’s Liberal Drug Laws: Structural Foundations and Triggering Events.” *Social Problems* 26:284–97.

American Journal of Sociology

- Ginsburg, Tom. 2000. "Does Law Matter for Economic Development? Evidence from East Asia." *Law and Society Review* 34: 701–34.
- Grattet, Ryken. 1993. "Structural Contradictions and the Production of New Legal Institutions: The Transformation of Industrial Accident Law Revisited." Pp. 404–20 in *Making Law: The State, the Law, and Structural Contradictions*, edited by William J. Chambliss and Marjorie Zatz. Bloomington: Indiana University Press.
- Grattet, Ryken, and Valerie Jenness. 2001a. "The Birth and Maturation of Hate Crime Policy in the United States." *American Behavioral Scientist* 45:668–96.
- . 2001b. "Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference." *Journal of Criminal Law and Criminology* 91 (3): 11–50.
- Gunningham, Neil. 1974. *Pollution, Social Interest and the Law*. London: Martin Robertson.
- Hagan, John. 2003. *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*. Chicago: University of Chicago Press.
- Halliday, Terence C. 1983. "Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions." *British Journal of Sociology* 36 (September): 421–47.
- . 1987. *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment*. Chicago: University of Chicago Press.
- Halliday, Terence C., and Bruce G. Carruthers. 1996. "The Moral Regulation of Markets: Professions, Privatization and the English Insolvency Act 1986." *Accounting, Organizations and Society* 21 (4): 371–413.
- . 2002. "Procedural Legitimacy in the Globalization of Legal Regimes: UNCITRAL and the Institutionalization of Corporate Bankruptcy Law in Transitional Economies." Paper presented at the American Sociological Association meetings. Chicago, August.
- . 2003a. "Conformity, Contestation and Culture." In "The Globalization of Insolvency Regimes: International Institutions and Lawmaking in Indonesia and China." American Bar Foundation Working Paper no. 2214.
- . 2003b. "Globalizing Law: Political Influence in the Legal Construction of Markets by the United Nations." Paper read at the American Sociological Association Annual Meeting. Atlanta, August.
- . 2004a. "Epistemological Conflicts and Institutional Impediments: The Rocky Road to Corporate Bankruptcy Reforms in Korea." *Korean Law Reform*, edited by Thomas Ginsburg. New York: Routledge Press.
- . 2004b. "Legal Certainty, Market Uncertainty, and Social Instability: The Confounding Case of Stalled Bankruptcy Law in China." Paper presented at the Annual Meeting of the Law and Society Association. Chicago, May.
- . In press. "Foiling the Financial Hegemons: Limits to the Globalization of Corporate Insolvency Regimes in Indonesia, Korea and China." In *Globalisation and Resistance: Law Reform in Asia after the Financial Crisis*, edited by Christoph Antons and Volkmar Gessner. Oxford: Hart Publishing.
- Halliday, Terence C., and Pavel Osinsky. 2006. "Globalization and Law." *Annual Review of Sociology* 32:447–70.
- Hendley, Kathryn. 2004. "Business Litigation in the Transition: A Portrait of Debt Collection in Russia." *Law and Society Review* 31:305–47.
- Hamilton, Gary. 1999. "Asian Business Networks in Transition: or, What Alan Greenspan Does Not Know about the Asian Business Crisis." In *The Politics of the Asian Economic Crisis*, edited by T. J. Pempel. Ithaca, N.Y.: Cornell University Press.
- IMF (International Monetary Fund). 1999. IMF, Orderly and Effective Insolvency Procedures. Legal Department, Washington, D.C.
- . 2002. "Indonesia: Selected Issues." In *IMF Staff Country Report* no. 02/145. Washington, D.C.: IMF.

Globalization of Corporate Insolvency Regimes

- Keck, Margaret E., and Kathryn Sikkink. 1998. *Activists beyond Borders: Advocacy Networks in International Politics*. Ithaca, N.Y.: Cornell University Press.
- Lempert, Richard, and Joseph Sanders. 1986. *An Invitation to Law and Social Science: Desert, Disputes, and Distribution*. New York: Longman.
- Lev, Daniel S. 2004. "Comments on the Judicial Reform Program in Indonesia." Report prepared for IMF. Washington, D.C.
- Merry, Sally Engle. 2000. "Globalizations Past: From Lahaina to London in the 1820s." Pp. 81–101 in *Globalizing Institutions: Case Studies in Regulation and Innovation*, edited by Jane Jenson and Boaventura de Sousa Santos. Aldershot: Ashgate.
- . 2003. "From Law and Colonialism to Law and Globalization." *Law and Social Inquiry* 28:569–90.
- . 2004. "Colonial and Post-Colonial Law." Pp. 569–88 in *The Blackwell Companion to Law and Society*, edited by Austin Sarat. Malden, Mass.: Blackwell.
- MOFE (Ministry of Finance and Economy, Korea). 2002. "Corporate Promotion Restructuring Act." Slide presentation. Seoul.
- Montes, Manuel F., and Muhammad Ali Abdusalamov. 1998. "Indonesia: Reaping the Market." In *Tigers in Trouble: Financial Governance, Liberalisation and Crises in East Asia*, edited by K.S. Jomo. New York: St. Martin's Press.
- Nam, Il Chong, and Soogeun Oh. 2000. *Bankruptcy of Large Firms and Exit Mechanisms in Korea*. Seoul: Korean Development Institute.
- Nam, Il Chong, Joon-Kyung Kim, and Soogeun Oh. 1999. "Insolvency Mechanisms: Korea." Paper presented at a conference on the Insolvency Systems in Asia: An Efficiency Perspective Conference. OECD, World Bank, APEC and the Australian Treasury. Sydney, Australia. November 29–30.
- Nielsen, Laura Beth. 2004. *License to Harass: Law, Hierarchy, and Offensive Public Speech*. Princeton, N.J.: Princeton University Press.
- OECD (Organization for Economic Cooperation and Development). 1999. *OECD Country Report: Korea, 1999*. Paris: OECD.
- Oh, Soogeun. 2002. "Drafting of New Insolvency Law of Korea." Paper read at FAIR Conference, OECD. Bangkok, December.
- . 2003a. "Drafting of New Insolvency Law of Korea." Paper presented at World Bank Forum on Insolvency Risk Management. Washington, D.C. January 28–29.
- . 2003b. "Insolvency Law Reform of Korea: A Continuing Learning Process." Paper presented at World Bank Forum on Insolvency Risk Management. Washington, D.C. January 28,
- Ohnesorge, John K. M. 2000. "Asia's Legal Systems in the Wake of the Financial Crisis: Can the Rule of Law Carry any of the Weight?" Presented at the UNRISD Conference on Neoliberalism and Institutional Reform in East Asia. Bangkok, Thailand. May.
- Phillips, Scott, and Ryken Grattet. 2000. "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." *Law and Society Review* 34:567–606.
- Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton, N.J.: Princeton University Press.
- Pincus, Jonathan, and Rizal Ramli. 1998. "Indonesia: From Showcase to Basket Case." *Cambridge Journal of Economics* 22.
- Pistor, Katharina, and Philip A. Wellons. 1999. *The Role of Law and Legal Institutions in Asian Economic Development: 1960–1995*. Hong Kong: Oxford University Press.
- Pistor, Katharina, and Chenggang Xu. 2002. "Incomplete Law—a Conceptual and Analytical Framework and Its Application to the Evolution of Financial Market Regulation." Working paper, Columbia University.
- Pound, Roscoe. 1913. "Legislation as a Social Function." *American Journal of Sociology* 18:755–68.
- Ramirez, Francisco O., Yasemin Soysal, and Suzanne Shanahan. 1997. "The Changing

American Journal of Sociology

- Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990." *American Sociological Review* 62:735–45.
- Rodrik, Dani. 2001. "Trading in Illusions." *Foreign Policy*, March/April.
- Santos, Boaventura de Sousa. 2002. *Toward a New Legal Common Sense*. London: Butterworths.
- Silbey, Susan. 1997. "'Let Them Eat Cake': Globalization, Postmodern, Colonialism, and the Possibilities of Justice." *Law and Society Review* 31:207–35.
- Stiglitz, Joseph. 2002. *Globalization and Its Discontents*. New York: Norton.
- Sutton, John R. 2001. *Law/Society: Origins, Interactions, and Change*. Thousand Oaks, Calif.: Pine Forge Press.
- Tamanaha, Brian Z. 1995. "The Lessons of Law-and-Development Studies" *American Journal of International Law* 89:470–86.
- Tyler, Tom. 1992. *Why People Obey the Law*. New Haven, Conn.: Yale University Press.
- Wade, Robert. 2000. "Wheels within Wheels: Rethinking the Asian Crisis and the Asian Model." *Annual Review of Political Science* 3:85–113.
- Wade, Robert, and Frank Veneroso. 1998. "The Asian Crisis: The High Debt Model versus the Wall Street–Treasury–IMF Complex." *New Left Review* 228 (March/April).
- Wang, Weiguo. 2001. "Several Targets in the Current Drafting of Bankruptcy Law." Paper delivered to Symposium on Reforming the Bankruptcy Law, sponsored by GTZ (German Ministry of Economic Co-operation and Development). Beijing.
- Weber, Max. (1925) 1954. *Max Weber on Law in Economy and Society*, edited and with an introduction and annotations by Max Rheinstein. Translation from Max Weber, *Wirtschaft und Gesellschaft*, 2d ed., by Edward Shils and Max Rheinstein. Cambridge, Mass.: Harvard University Press.
- Weyland, Kurt. 1999. "Economic Policy in Chile's New Democracy." *Journal of Interamerican Studies and World Affairs* 41 (3): 67–96.
- Whitt, J. Allen. 1979. "Toward a Class-Dialectical Model of Power: An Empirical Assessment of Three Competing Models of Political Power." *American Sociological Review* 44:81–100.
- Woo, Jung-En. 1991. *Race to the Swift: State and Finance in Korean Industrialization*. New York: Columbia University Press.
- Woo-Cumings, Meredith. 1997. "Slouching toward the Market: The Politics of Financial Liberalization in South Korea." In *Capital Ungoverned: Liberalizing Finance in Interventionist States*, edited by Michael Loriaux, Meredith Woo-Cumings, Kent E. Calder, Sylvia Maxfield, and Sofia A. Perez. Ithaca, N.Y.: Cornell University Press.
- World Bank. 2000. *Bankruptcy of State Enterprises in China—a Case and Agenda for Reforming the Insolvency System*. Washington, D.C.: World Bank.
- . 2001. "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems." April. Washington, D.C.: World Bank.
- . 2002. "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems." Unpublished manuscript. Washington, D.C.: World Bank.
- Zatz, Marjorie S., and William J. Chambliss. 1993. "Future Directions." Pp. 423–30 in *Making Law: The State, the Law, and Structural Contradictions*, edited by William J. Chambliss and Marjorie S. Zatz. Bloomington: Indiana University Press.