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Beyond Common Knowledge: Empirical Approaches to the Rule of Law (review)

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Erik G. Jensen and Thomas C. Heller, eds.
Beyond Common Knowledge: Empirical Approaches to the Rule of Law
Stanford: Stanford University Press, 2003, viii, 435 pages

"Make yourself a stranger!" I recall those words clearly almost 40 years after they were uttered by my professor of comparative law. The message was two-fold - you can never know the other if you remain anchored in your own habits of thought and blind to your assumptions; just as importantly, you can never know yourself if you cannot know the other. *Beyond Common Knowledge* is primarily located within the first of these aspirations, but its message equally speaks to the second.

The various authors of this collection are interested in one aspect of what Harry Arthurs calls the "globalization of the mind". They observe that there is an intensive global search for the "rule of law", the holy grail of good governance. This quest has led to wholesale exportation of western concepts of legality and judicial practice. But the authors enter a cautionary note about two large gaps that afflict thinking in this field. The first of these is the gap between theory and practice: between the ambitious programmes traced by the IMF, World Bank, NGOs and assorted do-gooders who think that they will lead to good governance (and its attendant economic prosperity), and the facts on the ground. The second, and more insidious because less visible, is the gap between the stated goals of individual programmes (what might be called "the practice in theory") sponsored by these organizations, and the actual activities (what might be called "the theory in practice") that are being funded.

In brief, the authors conclude that we don't know what "rule of law" programmes are actually working, and we don't know why individual programmes succeed or fail. More troubling, we don't even really know what it means for a programme to succeed or fail. Most serious of all, we don't know how to design empirical studies of these issues, to frame questions and hypotheses that can be tested, and to carry out the research entailed by these hypotheses.

Of course, answering all the issues raised in the preceding paragraph would require time, resources and coordination beyond the capacity of all but the most lavishly funded agencies and research teams. Hence the editors have set themselves a narrower task. They wish to focus on "rule of law" proposals that have as a target judicial reform. The collection comprises an Introduction and 11 chapters, four of which raise theoretical concerns, and six of which consider the empirical evidence from India, China, Chile and Mexico. The remaining essay considers general themes, but restricts its coverage to Latin America. At page three of the Introduction, the editors state:

> (…) at the very least, the chapters here encourage critical thinking about rule-of-law programs. A cautionary story that threads its way

> through this volume is that we need to adjust our expectations, to calibrate our goals and objectives, to reflect two realities: the impact of legal and judicial reforms generally is limited, and so are the resources.

This volume is a remarkable effort at clearing away the underbrush, of asking hard questions, and of exposing the unreflective faith of the true believer. The various essays shed much light on "the unpleasant realities of the record in the field of legal and judicial reform and reveal the cracks in what seemed to be infallible doctrine" (p. 18).

One could write pages about the wealth of insight and information presented in each of the chapters of this collection devoted to case studies in Asia and Latin America. The message that results would not, however, be substantially different from country to country. The lessons are three. First, because the legal cultures that inform the expectations of legal actors have evolved under conditions normally at odds with those implicit in rule-of-law reform, displacing those norms might be easier in new institutions, rather than in reforming courts. Second, it is far from clear that legal services should be organized through a public monopoly, and that in many countries competition for dispute resolution should be allowed. Third, law services are a scarce resource, and should be used only when other public and private substitutes would be less effective, and this would reduce the unrealistic pressure that the rule of law places on courts for formal, but ineffective and delegitimating change.

I will restrict my more detailed comments to three essays of a more general character. Chapter 2, "Judicial Systems in Western Europe" by Erhard Blankenburg is a sobering read. His target is not developing legal systems, where the pressure for the rule-of-law comes as a stalking horse from the west. Rather he examines the landscape of the rule of law in Western Europe – holding it to account against its own standards, and its own claims. He tabulates empirical data about legal aid, judicial review, attitudes of the public about their faith in courts, and their views of law. Is it a surprise that in England the public has a very high awareness of the highest court, and much trust in it, combined with a very low tolerance of scoff-law behaviour, a belief that the law is on its side, and that order is primary value? And who doubts that in Italy knowledge of the highest court is low, there is only fair trust in the court, more than a third of the population believes compliance with the law is not necessary, almost half think the law is against them, and only two-third think that order is a primary value? The point of these rhetorical questions is not to disparage the data collected. It is rather to reinforce Blankenburg's novel, and I believe convincingly demonstrated, claim: that national cultures are shaped as much by their institutions, as the institutions are shaped by national cultures (pages 91-92).

In Chapter 10, "The Rule of Law and Judicial Reform", one of the editors, Erik Jensen, explores the political economy of diverse institutional patterns and reformers' responses. Not surprisingly, he concludes that the objectives of rule-of-law entrepreneurs from the west should be more

modest. Some of their shibboleths need revisiting. The notion that support for the judiciary translates into fewer human rights abuses, faster economic growth and more robust democratic participation merits more careful investigation and less polemical affirmation. In addition, we need to locate our understanding of courts within a better understanding of how local networks and institutions of dispute resolution operate. The claim to universalism in accounts of the rule of law must be given up in favour of more differentiated analyses and prescriptions in particular times and for particular places. The "standard package of rule of law reforms" is tributary to the "standard analysis of law" – a conception of the enterprise that is at best problematic and probably, given the insights of modern legal pluralist analysis, deeply flawed (page 366).

Finally, in Chapter 11, the other editor, Thomas Heller pens what he calls "An immodest Postscript". Having worked with UNCITRAL on the preparation of a Legislative Guide for Secured Transactions law I can only applaud this chapter for its realistic assessment of what can be accomplished through transnational law and development programmes. The author advances three hypotheses for reorienting rule of law projects: scarce court resources should be deployed where they can have the greatest human rights impact; concomitantly, rule of law energies might be most profitably deployed in building other governance institutions such as the police and public service and in strengthening the monitoring role of NGOs; and creating competition for the delivery of justice and incentives for destabilizing existing practices of hierarchy and deference are preferable to pragmatic and incremental reform of existing lower level tribunals (pages 411-13).

This collection serves as a refreshing antidote to the boosterism of "rule of law", "world peace through law", and "international human rights law" entrepreneurs. It should be mandatory reading for any law professor embarked on an international consultation project, or establishing a development internship programme, or called upon to advice governments and development agencies. As the author's careful studies illustrate, until we come to understand the "rule of law" as more that a slogan to seduce funding agencies, we are unlikely to achieve any of the institutional practices that the idea is actually meant to promote.

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