

Chapter 2: Why developing countries prove so resistant to the rule of law (Barry R. Weingast)

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1. Introduction: Overview of the chapter

In spite of a large scale "rule of law" reform effort since 1960s, only few states successfully establish the sustainable RoL. In fact, except some western European, North American and East Asian countries, the elements of RoL are, if any, just superficial and overwhelmed by arbitrary state power. Or simply, back to previous situation - conflict. The author tries to explain why the majority of international community can not have sustainable RoL by presenting the concepts of "natural state" and "open access order". NWW says that 85 % of the world population live in limited access orders (=natural states). (NWW, p.13)

According to the author, indispensable elements of the rule of law are, firstly, "idea of certainty, equality before the law, and the absence of arbitrary abuse by authority", and, secondly, that "the rule of law must hold not only today, but also tomorrow". First one requires impersonal character of governance, and the later requires perpetuity of state.

The author insisted that the rule of law is possible only in open access orders by saying "[t]he emergence of the rule of law is intimately connected with the transition from natural state to open access order. Each of the three doorstep conditions, which represent the beginning of the transition, is necessary to achieve the rule of law. Natural states have great difficulties establishing and maintaining institutions capable of sustaining the rule of law. They cannot deliver benefits on an impersonal basis. The absence of perpetuity means that they cannot commit to long-term policies." (p.45)

In other part, the author simply said that "natural state cannot create the rule of law by adopting the institutions and governance structures possessed by open access orders" (p.29). But, at the end, author is very pessimistic about the possibility of the rule of law in developing states. (pp.50-51).

2. What is the "natural state" and "open access order"?

(1) Differences between "natural state" and "open access order".

According to NWW (2009, 11-12), natural state and open access order are two basic social patterns in the modern world. The open access pattern is characterized by:

- a. Political and economic development
- b. Economies that experience much less negative economic growth
- c. Rich and vibrant civil societies with lots of organizations
- d. Bigger, more decentralized governments
- e. Widespread impersonal social relationships, including rule of law, secure property rights, fairness, and equality - all aspects of treating everyone the same.

The limited access [*natural state*] pattern is characterized by:

- a. Slow-growing economies vulnerable to shocks,
- b. Polities without generalized consent of the governed,
- c. Relatively small numbers of organizations,
- d. Smaller and more centralized governments,
- e. A predominance of social relationships organized along personal lines, including privileges, social hierarchies, laws that are enforced unequally, insecure property rights, and pervasive sense that not all individuals were created or are equal.

Though authors do not clearly mentioned, this perspective is largely based on New Institutional Economy. *E.g.*, "Social orders are characterized by the way societies craft institutions that support the existence of specific forms of human organization, the way societies limit or open access to those organizations, and through the incentives created by the pattern of organization." (NNW, p.1)

According to Institutionalist school, institutions are the rule of games that limit human behavior. A society with good institutions achieves good economic performance. In analysis above mentioned, allocation of rent and credible commitment for perpetuity are the institutions that have great importance on economic performance.

[Question: Mancur Olson compared states with two kinds of bandit (roving bandit and stationary bandit), and discussed about economic effects. Please compare NWW and Olson in this context. See, Olson, Mancur "Dictatorship, Democracy and Development", *American Political Science Review*, vol.87 no.3, pp.567-576.]

. Transition from "natural state" to "open access order".

Doorstep conditions

Transition

(2) Implication to contemporary the "rule of law" reform.

rule of law:

- a. equality, absence of arbitrary -- impersonal treatment
- b. dynamic aspect -- perpetual (predictability and stability) - especially, making credible commitment by establishing constitutionalism

3. How do you think about the author's conclusion?

- Only the open access orders can have the rule of law. (If you refer to the "thick" and "thin" concept of the rule of law, what is your opinion?)
- Transition from natural state to open access order is difficult and rarely successful.

4. Perspectives about the legal transplant for the rule of law reform

(1) Watson's view on legal transplant

Prof. Alan Watson think that the legal transplant have been the most decisive factor of legal development all over the world. Watson insisted that "the moving of a rule or a system of law from one country to another, or from one people to another - have been common since the earliest recorded history," (1993, 21) and "transplanting is, in fact, the most fertile source of development [of law]." (1993, 95). His famous conclusion is that "there was no simple relationship between a society and its law." (1993, 107)

(See Alan Watson, Legal Transplant, 1993)

- a. Source of Law -- legislations, jurisprudences, doctrines, customs
- b. Pressure forces -- usually form as political group
- c. Opposition forces
 - Pressure and Opposition -- not the matter of number
- d. transplant bias
- e. law-shaping lawyers
- f. discretion factor --large discretion mitigate felt needs
- g. generality factor
- h. inertia -- stability, status quo, social indifference, reform cost...
- i. felt needs

(2) Opposition to Watson from legal culture school

Cotterell defined legal culture as "public knowledge of and attitudes and behavior patterns toward the legal system". Also, culture as "the ideas, customs, and social behavior of a particular people of society".

Legrant (2001) insisted that "Law is an indivisible part of culture , thus "how could law travel if it was not segregated from society?"

(see: Nelken & Feest eds., *Adapting Legal Cultures*, Hart Publishing, 2001.)

(3) "Asian way" school (Beijing, Mahatir, Lee Kwan Yew, Soeharto...)

a. Cultural discourses

- Particularism ("Western" versus "Asian")→particularity of Europe as well as Asia
- Relativism (Universalism versus Relativism)→great diversity among states
- Communitarianism (community interest versus individual interest)
- "Wise leader" discourse (privileges versus entitlements)

b. Economic discourses

Right to subsistent (human rights and development) --> authoritarian developmentalism

c. Security discourses

Fragile state, threat either of communism or counterrevolution, secessionist insurgency...

d. historical discourses

sin of the West:

- history of invasion -- slave trafficking, colonialism, neo-colonialism (dependency theory)
- history of their own human rights violation -- terror after French Revolution, child labor in the industrial revolution, oppression against labor union,...