6

Historicising Rule of Law Performances

> We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape, till custom make it
> Their perch and not their terror.
>
> —*Measure for Measure*, II. i. 1–4

Thus far, I have argued in favour of performance analysis as a way of understanding the fragility of rule of law reform. But what of historical method as a means of turning rule of law reform into an object of analysis and critique? It is both plausible and powerful to suggest that, even if the radical edge of rule of law reformers' critical efforts may not be wholly socially constrained, it is historically structured and contingent.

In this chapter, I contextualise expert ignorance in rule of law reform as a historical phenomenon. I argue that efforts to historicise rule of law reform require the historian to make an ex ante determination of what the rule of law is such that it can be understood historically. Given the caveat, I frame this historical account as a self-contained intervention, seeking to articulate how rule of law performances have emerged as a way of doing rule of law reform as well as how actors have concurrently sought to discipline and organise those performances.

I focus on the historical emergence of rule of law reform as an aesthetic artefact instead of a sociological object, in particular in its contemporary manifestation of 'experimental' rule of law reform.[1] I suggest that a standalone profession of ignorant rule of law reformers emerged in the late 1990s or early 2000s. Earlier understandings of legal and institutional reform – in which institutions were ways of framing, limiting, and giving form to the sublime complexity of global economic and political life – had encountered their practical limits. Institutional arrangements themselves

[1] Deval Desai and Michael Woolcock, 'Experimental Justice Reform: Lessons from the World Bank and Beyond', *Annual Review of Law and Social Science*, 11:1 (2015), 155–74.

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came to be imagined as a complex sublime – an ever-more elastic container for policymakers' deepening anxieties about administering the world. At some moment, 'institutions', including legal ones, became wholly elastic, capable of being imagined as having enough form to be intervened on while being formless enough to adapt to an ever-more complex world.

6.1 Rule of Law Reform: A History of Many Histories

At first blush, historicising rule of law reform offers a powerful complement to a performance analysis of rule of law reformers. As Bourdieu argues, history is inscribed on and produces the professional body. Critiquing Jean-Paul Sartre's sketch of a café waiter's mauvaise foi in Being and Nothingness, Bourdieu writes:

> [T]he agents [in a field]—who do not thereby become actors performing roles—enter into the spirit of the social character which is expected of them and which they expect of themselves (such is a vocation) … The café waiter does not play at being a café waiter, as Sartre supposes. When he puts on his white jacket, which evokes a democratized, bureaucratized form of the dutiful dignity of the servant in a great household, and when he performs the ceremonial of eagerness and concern, which may be strategy to cover up a delay or an oversight, or to fob off a second-rate product, he does not make himself a thing … His body, which contains a history, espouses his function, i.e. a history, a tradition which he has only ever seen incarnated in bodies, or rather, in those habits 'inhabited' by a certain habitus which are called café waiters … He cannot even be said to take himself for a café waiter; he is too much taken up in the job which was naturally (i.e. sociologically) assigned to him (e.g. as the son of a small shopkeeper who needs to earn enough to set up his own business) even to have the idea of such role-distance.[2]

History reaches beneath the skin, offering an account of the conditions of possibility for inhabiting a role – that is, history reveals the evolution of an embodied structure as well as a chronicle of the structural scars of battle that result from agents struggling over the direction of the field.

Unlike the café waiter, however, a rule of law reformer can 'take himself for a [rule of law reformer]' – that is, to know that he is a professional without a clear substance to that profession. He is already seized of the contingency of his profession. What history can be told of such a person?

[2] Pierre Bourdieu, 'Men and Machines' in K. Knorr-Cetina and Aaron Victor Cicourel (eds.), *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* (Boston: Routledge & Kegan Paul, 1981), p. 309 (emphasis added).

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Consider some alternative histories to rule of law reform. Histories of ideas about the rule of law are of course numerous and prominent. They tend to encompass Western traditions of the rule of law – including Greco-Roman; common and civil law; Enlightenment and post-Enlightenment political philosophy across the UK, France, and Germany; and modern analytic and Continental philosophy. Some spread further, encompassing non-Western historical and contemporary traditions.[3] These histories range from tracts to synthetic summaries.

Jeremy Waldron argues that the concept, in its social and historical context, is 'essentially contested'.[4] This contest remains when rule of law reform is translated into a history of practices. Dezalay and Garth, drawing on Bourdieu, attempt to recount the history of the field and its contemporary manifestation in their story of the 'palace wars' between human rights lawyers and economic technicians in Latin America. They detail struggles between these actors over the political role of law in their home countries. Dezalay and Garth suggest that the rule of law concretised through the struggles for supremacy between different experts asserting different ideas of what the rule of law meant, drawn predominantly from ideologies prevalent in a few universities in the United States.[5]

Yet not long after their study, Maru provided a different account of rule of law reform's history, demonstrating that social accountability (rather than political contests over the state) was central to rule of law reform's domain. He did not simply argue that rule of law reformers should now engage with social accountability (whatever that might be). He instead takes the reader back to Aristotle and Locke to argue that the rule of law

[3] Arguments in favour of pluralism in our accounts of the rule of law are widespread, as many authors – postcolonial and otherwise – stress the importance of pluralising or provincialising the philosophical parochialism of that oeuvre. Tamanaha summarizes those arguments, after giving a detailed recounting of a history of Western debates on the rule of law: Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), pp. 1–73. However, actual efforts to provincialise the rule of law are perhaps less widespread. See, for example, Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books, 2011); John L. Comaroff and Jean Comaroff, *Civil Society and the Political Imagination in Africa: Critical Perspectives* (University of Chicago Press, 1999); Samuli Seppänen, *Ideological Conflict and the Rule of Law in Contemporary China* (Cambridge University Press, 2016).

[4] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?'. *Law and Philosophy*, 21:2 (2002), 137.

[5] Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press, 2002).

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and social accountability had always been engaged. However, as 'allies unknown', they just didn't know it yet.[6]

Maru's project entails producing a completely new history of rule of law reform to incorporate and focus on social accountability. It is not merely a reinterpretation of shared history but a new record of a wholly different set of ideas, practices and people that can just as easily be rule of law reform as those in Dezalay and Garth. And yet other recountings of the content and history of rule of law reform can be seen in the work of others writing about rule of law reform at the turn of the century in Latin America. Lutz and Sikkink, for example, focus almost exclusively on processes of transitional justice, political impunity, and truth-telling driven by transnational advocacy networks.[7] These incommensurable accounts of the identity and history of rule of law reform can coexist without having to be in conversation with each other.

Contemporary efforts to tell a history of rule of law reform often do two things. They rehash a sketch of rule of law reform's history, frequently beginning with Trubek and Galanter's 1974 piece Scholars in Self-Estrangement, a lament for the failings of the law and development movement of the 1960s and 1970s.[8] This article is a touchstone for many

[6] Vivek Maru, 'Allies Unknown: Social Accountability and Legal Empowerment', *Health and Human Rights*, 12:1 (2010), 83.

[7] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chicago Journal of International Law*, 2:1 (2001), 1–33.

[8] David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', W*isconsin Law Review* (1974), 1062–102. Although even this starting point can be bypassed by an alternative history of rule of law reform. Brown, for example, begins his history of rule of law reform itself in colonial times:

> Part of the problem, however, is that … rule-of-law scholars and practitioners alike hold a highly truncated view of their own discipline and its history. For the most part, rule-of-law programming is something imagined to have developed solely in the wake of World War II, and not truly in earnest until at least the late 1980s or early 1990s. The putative lessons to be learned are therefore very short-term ones … Quite absent from [rule of law reform] discussion[s] is the long history of the introduction of laws in colonial and imperial contexts … Many of those same systems remain in place today. There is thus a much longer history to rule-of-law reform than many contemporary scholars would allow.' (Mark Brown, '"An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism', *Law & Social Inquiry*, 43:4 (2018), 1391–1426, 1393, citations omitted)

Brown does not feel the need to make even a token reference to Trubek and Galanter. They are absent from his history of the field, which revolves instead around Thompson's *Whigs and Hunters*.

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histories, marking the 'death' of rule of law reform (from which its theory has never really recovered).[9] Authors then recount an emergence from Trubek and Galanter's ashes of whatever strand of work they are focused on (constitutional reform, property rights, police reform, civil service reform, and so on), often parsed through differently historicised 'waves' of rule of law reform.[10] This is an exercise in creating rule of law reform's history anew, producing fragments that will simultaneously be over- and under-inclusive – with too much focus on IFIs and not enough on the 'microsuccesses' of paralegals and social movements, or too much focus on court reform and not enough on family planning.[11]

Kleinfeld captures this dynamic of historical erasure and reconstruction. She writes about rule of law reform as 'twenty years of … fevered activity toward ambiguous ends' while noting that it is difficult to identify an 'easy start date' for rule of law reform activities, suggesting that we might go as far back as 'the era of Rome, or even ancient Greece' to see how developed countries affected reforms of weaker states, or that we start with the law and development movement of the 1960s or post-Soviet transitions in the 1980s.[12]

[9] In late 2015, the *Law and Development Review* had a special issue attempting to set out 'New Directions for Law and Development Studies', in which '[m]any of the legal scholars contributing to this volume take as their point of departure a reaction to the celebrated 1974 article of David Trubek and Marc Galanter in which they suggested the failure and death of the law and development enterprise in the United States': Colin Crawford, 'Redefining and Analyzing "Development" and the Role and Rule of Law', *Law and Development Review*, 8:2 (2015), 244.

[10] Amichai Magen, 'The Rule of Law and Its Promotion Abroad: Three Problems of Scope', *Stanford Journal of International Law*, 45:1 (2009), 51–115; John Henry Merryman, 'Law and Development Memoirs I: The Chile Law Program', *The American Journal of Comparative Law*, 48:3 (2000), 481–99; Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Carnegie Endowment for International Peace, 2012); Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2006), pp. 253–300; Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, 2006).

[11] Erik Jensen, 'Postscript: An Immodest Reflection' in David Marshall (ed.), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard University Press, 2014), p. 300; Aparna Polavarapu and Joel Samuels, 'Initial Reflections on an Interdisciplinary Approach to Rule of Law Studies', *Law and Development Review*, 8:2 (2015), 277–92.

[12] Rachel Kleinfeld, 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, 2006), pp. 64, 73. This ability to erase and refound rule of law reform perhaps helps explain why '[a] disproportionate volume of scholarship [exists that] critiques the rule of law industry'. Jensen, 'Postscript', p. 301.

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History is enrolled in the ongoing project of remaking and rearticulating the context of rule of law reform and institutional reform more generally. Moreover, so are historians. Woolcock, Szreter, and Rao, in an edited volume arguing for a deeper interaction between historians and development policymakers, suggest that historians are essential to development policymaking. This is because they provide thick accounts of the context and emergence of local institutions with which policymakers wish to engage, in contrast to the thinner accounts of new institutional economics.[13] Not only does an authoritative history of rule of law reform appear impossible; historians and the historical method offer no outside to rule of law reform either.

Rather than try to rescue or rehash such histories, I attempt something different, in line with my understanding of contemporary rule of law reform as an aesthetic phenomenon. I ask: when and under what conditions did rule of law reform emerge as an aesthetic artefact instead of a material, or sociological, or historically embedded one? That is, what were the historical circumstances that led to rule of law reform becoming a continued negotiation of law's autonomy rather than an effort to provide a schematic account of that autonomy?

In doing so, I reflect the efforts of the aesthetic theorists I drew on earlier in the manuscript to understand how and the extent to which art became autonomous in modernity rather than an object of reason or social control. As Bernstein argues, these efforts are yet another attempt to give form to a formless sublime, albeit clothed in historical method:

> [T]ranscendent perspectives approximate in one way or another to the very thing they are attempting to twist free from and overcome. In positing, through whatever means, a history as the specific determinant of our fate they … take up a position outside history and unify it, giving it the very unity and transcendence they are otherwise writing against.[14]

Nevertheless, they emerge from political or ethical commitments on the part of the authors.[15]

[13] C. A. Bayly et al., *History, Historians and Development Policy: A Necessary Dialogue* (Manchester University Press, 2011).

[14] J. M. Bernstein, *The Fate of Art: Aesthetic Alienation from Kant to Derrida and Adorno* (Polity Press, 1991), p. 10.

[15] For example, Bernstein understands Adorno's efforts to historicise art's autonomy as Adorno's ethical commitment: Bernstein, *The Fate of Art*, p. 10. O'Connor, by contrast, suggests that this historicisation (an account of the shift from archaic to modern art) is for Adorno a methodological necessity: Brian O'Connor, *Adorno*, 1st edition (Routledge, 2012), pp. 182–84.

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In that vein, I offer this historical excursus as a self-contained intervention. This is not an authoritative account of the historical contingency of the global institutional or political economy that gives rise to rule of law reform. I rather seek to recover a sense of the contingency of the sublime rule of law – in other words, to provide a basis for recognising that the radical contingency of rule of law reform may be a false contingency, in that it is itself not necessary.[16] This, I hope, destabilises the totalising potential of an overextension of my broader argument, which might simply reduce critiques of rule of law reform to tracing its reconfiguration through time by different performers. Instead, I try to trace the emergence of rule of law reform as an aesthetic artefact, whose styles can be engaged with as objects of social-scientific study.

6.2 From a Sociology of Rule of Law Reform to Self-Denying Rule of Law Reformers

I begin with an observation. Something changes in rule of law reform around the late 1990s or early 2000s. I bracket talk of rule of law reform's 'waves', 'fashions', 'movements', and 'moments' for a moment, voluble though it is, and focus on laments. As noted in Chapter 1, contemporary rule of law reform is beset by anxieties about its formal status – is it a profession, a field, a network, a sham? These anxieties manifest themselves in laments about rule of law reform: it is no field, has no coherent programme to speak of, has no professional norms, and so on. Laments then offer some suggestions for the formal organisation of reform: 'a set of ABCs',[17] an increased investment in knowledge and training, and so on.

Garth puts his lament in a temporal context:

> All this activity, however, comes with a strong current of disappointment [citation omitted]. We are trying hard, but the results are not what we had hoped. So far this disappointment is attributed mainly to the relative immaturity of the field, implying that we need more practice and more learning.[18]

[16] Susan Marks, 'False Contingency', *Current Legal Problems*, 62:1 (2009), 1–21.

[17] Amanda Perry-Kessaris, 'Introduction' in Amanda Perry-Kessaris (ed.), *Law in Pursuit of Development: Principles into Practice?* (Routledge, 2009), p. 4.

[18] Bryant Garth, 'Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results', *DePaul Law Review*, 52:2 (2002), 384.

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For Garth, if rule of law reform is a field, it is a field of stasis, not struggle; of history repeated, not accreted; of reproduction, not learning. Yet in another sense – Garth's suggestive use of 'immaturity' when describing the field – we are presented with the beginnings of a story of its transformation, a story not of the evolution (or otherwise) of rule of law reform as a series of disjointed practices or interventions but of the emergence of a profession.

Garth draws a sharp distinction between the 'old' law and development of the 1960s and 1970s and the 'new' one of the 1990s. In his view, the former was the product of a series of conversations between 'lawyers and developers' (in Trubek and Galanter's terms).[19] The latter, by contrast, achieved consensus among a range of transnational actors from different disciplines – economists, political scientists, lawyers, and development practitioners – around 'reform and the legal approaches identified with the United States, including the core idea of a strong and independent judiciary'.[20] Dezalay and Garth expand on this point, suggesting that (rule of) law reform became a field in which actors from different disciplines (particularly 'gentlemen lawyers' and economic 'technopols') brought the political, social, cultural, and intellectual capital that their backgrounds and disciplines afforded them in order to struggle for position.[21] In their story of the field, we would understand the turns to the rule of law as a facet of governance and development, of democracy promotion and human rights, and of state-building as different vernaculars in which participants in the rule of law field might seek to implement this 'consensus' in national contexts.[22] From the 1950s to the 1990s, we might understand contests over rule of law reform sociologically, that is, as struggles over the range and influence of disciplines orbiting around a core set of ideas: from lawyers and developers, to comparative lawyers and human rights practitioners, to (new institutional) economists and political scientists.

However, today this story seems to have been inverted: in place of disciplines orbiting a set of ideas, we now see a self-articulated rule of law profession confronting its core lack of ideas about the rule of law. Take David Trubek's forty-year retrospective on Scholars in Self-Estrangement. He argues that the article did not kill law and development efforts. Rather,

[19] Trubek and Galanter, 'Scholars in Self-Estrangement', p. 1066.
[20] Garth, 'Building Strong and Independent Judiciaries through the New Law and Development', p. 385.
[21] Dezalay and Garth, *The Internationalization of Palace Wars*, pp. 17–30.
[22] Dezalay and Garth, *The Internationalization of Palace Wars*, pp. 163–86.

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'disappointment with initial results, the loss of key supporters in [development] agencies, and the emergence of new 'hotter' alternative agendas … really led to the decline'.[23] Law and development's resurgence in the 1990s was driven by on the one hand a resurgence in money ('L & D bec[ame] big business'[24]) and on the other hand an intellectual pluralisation (Trubek pinpoints the entry of economists in particular into law and development efforts as a stimulus for their revivification[25]). As for 'twenty-first-century law and development',[26] Trubek argues that funding persists, while the 'field' is now marked by 'proliferation and fragmentation' of ideas and practices.[27] This fragmentation was generated by

> [a] strong critical tradition … sparked by scholars from the developing world. The discussion of the role of law in development was influenced by other trends in the social sciences. These provided support for a move away from one-size-fits-all recipes based largely on stylized accounts of US and UK experiences … At the same time, the concept of development expanded to embrace social and political dimensions and even the rule of law itself. This meant that law and development overlapped not only with law and economics but with other academic traditions including human rights, feminist legal theory, critical theory, and social welfare law. Indeed, by the dawn of the twenty-first century, law and development was becoming as much – if not more – a component of other academic movements and subfields as it was a free-standing enterprise of its own.[28]

It is hard to discern any sort of core to law and development here. Certainly, we have come a long way from a conversation between lawyers and developers. It is no longer clear what role there is for lawyers as distinct from a generic social scientist.

Trubek thus remarks on the twin dynamics of increased funding and fragmenting intellectual trends but does not go further and connect the two. If we do so, we might contextualise the figure of the professional rule of law reformer: someone who can mobilise and dispense funds while inhabiting many areas of development concern. Garth's strong sense of ideational consensus has been replaced by the idea that 'we know how to do a lot of things, but deep down we don't really know what we are doing',

[23] David M. Trubek, 'Law and Development: Forty Years after "Scholars in Self-Estrangement"', *University of Toronto Law Journal*, 66:3 (2016), 310.
[24] Trubek, 'Law and Development', p. 312.
[25] Trubek, 'Law and Development', pp. 311–12.
[26] Trubek, 'Law and Development', p. 316.
[27] Trubek, 'Law and Development', pp. 322–26.
[28] Trubek, 'Law and Development', p. 314.

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even as we can speak of 'rule-of-law aid practitioners' implementing the significant increase in aid allocated to the rule of law.[29] It is this change on which I focus: alongside or within a sociological understanding of the rule of law, the emergence of an aesthetic one, through a profession that specialises in 'other academic movements and subfields' as much as their own, that produces their own incommensurable histories based on those encounters, and, in doing so, that creates the foundations to keep accessing resources and operationalise those encounters.

6.3 A History of the Free-Floating Institutional Reformer

I argue that this type of professional rule of law reformer emerged in the late 1990s or early 2000s in response to one continuity and three changes in aspects of development thinking and practice:

(1) the history and role of law in development continuing to express a profound concern with administering a complex world – like its global economy, or collective memory, or violence, or whatever else development policymakers might care about. This might be understood as identifying a political sublime, and thus making the struggle to give it form and administer it the salient political terrain for global governance;
(2) the fragmentation of the available forms of the administration of human affairs, in the global shift from government to governance;
(3) a resultant conceptual change with regards to 'institutions', from an essential means of giving form to global political sublimes, to a sublime in itself; and
(4) given other means of giving form to institutional sublimes (such as scientific knowledge) are themselves institutional effects, a new effort to give form to institutional sublimes in institutional terms – simultaneously imagining institutions as elastic enough to express 'governance' or the 'rule of law' while concrete enough to be the object of intervention.

I am arguing, in essence, that the tension in point (4) eventually surpassed the ability of a field (or other forms of institutionalised social organisation) to contain it. Institutions can now be imagined as free-floating and potentially existing anywhere and anywhen (a formless object or administrative

[29] Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, 2006), p. 15.

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sublime in development policymaking). The tension between elasticity and concreteness was instead inscribed into the person of the individual reformer as a means of maximising the elasticity of governance or the rule of law (through expressions of ignorance) while retaining its concreteness (in the reformer's body).

I begin with the simple notion that ideas about law in development express various concerns with the ordering of society. It is a description of social and political order, refracted through the practice of governance (rather than, say, declarations of constitutional and legislative frameworks).[30] David Kennedy, in his historical survey of law and development ideas since the 1950s, thus argues:

> We might think of development policy asking two sorts of questions of law and legal theory: instrumentally, how can I translate my policy objectives into action, and what limits must I observe in doing so?[31]

We might add to this 'how can I translate my ideas into policy objectives and what limits must I observe?'. This is because law is central to articulating and prioritising development problems – whether a disparate group of scholars and activists interested in human rights and conflict choose to articulate their institutional programmes in the legal terms of transitional justice, or the international community uses humanitarian law to pinpoint a deficit in the administration of violence in a place, or local elites capture a constitution-drafting process to ensure specific economic and social objectives are reflected in the text, and so on.

The second part of my argument draws on another simple notion: that if the history of law in development tracks the currents and eddies of broader concerns with administration in development, then that history will be entangled with shifting attitudes and fashions towards the state in development thinking. Too much has been written on the place of the state, and state law, in development to fruitfully recap it here. From the 1950s to 1970s, the state was either the naturalised unspoken context or explicit foreground assumption for the effectiveness of the work of development policymakers. Hirschman's Hiding Hand, for example, sketches

[30] See generally World Bank, *World Development Report 2017: Governance and the Law* (World Bank, 2017); Kim Lane Scheppele, 'Administrative State Socialism and Its Constitutional Aftermath' in Susan Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishing, 2010).

[31] David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense' in Alvaro Santos and David M. Trubek (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), p. 103.

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out an ideal of the evolving and adaptive planning process. The evolution of a plan rests on the adaptive capacities and risk-taking appetite of the policymaker as well as the stock of knowledge available to him. Hirschman makes absolutely no mention of laws and institutions: the development policymaker is already in place, authorised by, and held accountable to an institutionalised relationship between the state and development bank.[32]

Trubek and Galanter, by contrast, are much more explicit in using law as a vehicle for attitudes towards the state. They problematise their own past ethnocentric assumptions that state law is both good and functional law. They suggest that law in theory has an important functional role to play in promoting development, but the right combination of actors may never be found to realise it. Indeed, law may always be turned to undesirable ends by actors more immediately situated in the local legal context. At the same time, the authors give a short but potent paragraph on 'the possible irrelevance of law':

> Let us look first at the assumption of legal potency. The normative underpinnings of liberal legalism rested in part on the assumption that law reform could promote development, and that investments in the improvement of legal systems would yield high developmental payoffs. But experience has shown that law may have little effect on society.[33]

Trubek and Galanter then immediately dismiss this possibility: the subsequent paragraph discusses the potential 'badness' of the law (i.e., its instrumentalisation and capture by local actors). Law thus continues to mean something. Force is organised into some form of stateness, which is occupied and controlled by some local actors to administer their polity. That form is simply non-Eurocentric and not easily legible to interfering outsiders.

By contrast, come the 1980s, development policymakers were increasingly cognisant of the administrative limits of state laws and institutions. The causes of this are manifold. Rather than survey them, I simply want to emphasise here that policymakers' attitudes towards the state's limitations were not simply dismissive of state bureaucrats or hostile to its institutions. The 1981 *World Development Report* evinces a deep anxiety on the part of the World Bank about the complexity and effects of

[32] Albert O. Hirschman, 'The Principle of the Hiding Hand', *The Public Interest* (Winter 1967), 10.

[33] Trubek and Galanter, 'Scholars in Self-Estrangement', p. 1083.

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the globalisation of financial capital. The Report summarises the central development legacies of the 1970s thus:

> [T]he 1970s may be remembered for giving a new shape to the world economy. This is not the product of the search through negotiation for greater equality of economic opportunity among nations which the developing countries have pursued; little progress has been made along that route. Rather, what has evolved is a different pattern of economic power, with new centers of production, finance and trade, and new forms of interdependence.[34]

In the history of the then-present sketched by the Report, the cumulative effect of global dependence on oil as a motor for industrialisation – and the volatility in oil prices during the decade – was the development of complex new financial instruments to realise and recycle oil profits, as well as to manage exposure to price movements in this essential commodity. The 'different pattern of economic power' was thus financial in nature:

> Slow growth and fast inflation in the industrial countries, major increases in oil prices, the breakdown of the fixed-exchange-rate system, the changing pace and character of international trade (with its acute contrast between the rapid export growth of manufactures and the much slower growth of exports of primary commodities), the steep rise in the flow of commercial bank loans to developing countries.[35]

This global challenge required a solution beyond the state. 'Developing countries have to adjust to new circumstances; their effectiveness in doing so depends critically on their domestic management as well as on the industrial and oil-exporting countries' domestic and international policies'.[36] Indeed, industrialised countries offered no model.[37] We can see the contours of the idea of a global regulatory system here. And yet, the Report notes, developing countries were no equal participants, and their policymakers were in a tough spot:

> The developing countries' [space for policy] adjustment [to the vagaries of globalized finance] is more constrained: they depend heavily on the growth and openness of industrial-country markets for their exports and on the aid and credit institutions of the industrial countries for their external financial needs. The main force of world growth still flows from the developed to the developing world, even if today the new trade and

[34] World Bank, *World Development Report 1981* (World Bank Publications, 1981), p. 7.
[35] World Bank, *World Development Report 1981*, p. 1.
[36] World Bank, *World Development Report 1981*, p. 1.
[37] World Bank, *World Development Report 1981*, pp. 1–4.

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> financial links make the transmission of economic activity in the reverse direction ever more important.[38]

The Report is not trying to articulate a justification for the disciplining of a deviant or inefficient public sector. The Report is concerned – somewhat sympathetically – with making the case for transnational and international responses to the development challenges posed by globalised finance.

This is no momentary anxiety. The 1989 *World Development Report* repeats similar themes, albeit with a narrower focus on financial systems and development.

> In the past, governments have allocated credit extensively. In a world of rapidly changing relative prices, complex economic structures, and increasingly sophisticated financial markets, the risk of mismanaging such controls has increased. Many countries could allocate resources better by reducing the number of directed credit programs, the proportion of total credit affected, and the degree of interest rate subsidization.[39]

The Report argues that this complex systemic challenge requires interconnected but heterogeneous policy solutions, cognisant of the capacities and limitations of developing countries:

> Most developing countries have a long established informal financial sector that provides services to the non-corporate sector households, small farmers, and small businesses. Although family and friends are usually the most important source of credit, pawnbrokers provide a substantial amount of credit to those with marketable collateral, and moneylenders to those without … The scale of lending is small, the range of services is limited, markets are fragmented, and interest rates are sometimes usurious. Nevertheless, these institutions help clients that formal institutions often find too costly or risky to serve. Some countries have recognized this and have established programs to link informal markets more closely with formal markets.[40]

Both *World Development Reports* suggest that development policymakers' encounters with the limits of the state in the 1980s were not the product of anxieties about public administration but about administration writ large (formal markets and informal markets, central banks and pawnbrokers) – that is, social ordering in the face of the power and complexity of global capital.[41]

[38] World Bank, *World Development Report 1981*, pp. 2–3.
[39] World Bank, *World Development Report 1989* (Oxford University Press, 1989), p. 3.
[40] World Bank, *World Development Report 1989*, p. 4.
[41] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017), pp. 251–57, 262–74.

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This anxiety reflects a specific current of thought and policy from the 1970s to the 1990s, which was concerned with theorising and implementing a global welfare project that relied on institutional change – that is, a global governance project. Its core contention was to understand the global economy as a sublime, and its core concern was how to administer it or give that sublime a form:

> [B]y the end of the 1930s [… early neoliberal thinkers] concluded that the world economy was sublime, beyond representation and quantification. This conclusion turned them away from the documentation and analysis of the economy as such and toward the design of institutions necessary to sustain and protect the sacrosanct space of the world economy.[42]

This concern was predicated on a strong sociological and epistemological critique of scientific knowledge and planning. For example, drawing on the perspective of complex systems, Hayek analogised his aspirations for economic governance to the conditions for emergent phenomena in natural complex systems – say, creating the laboratory conditions through which atoms might arrange themselves into a crystalline form.[43] Institutions were to be the instruments guaranteeing the insulation of the market from political interference, such that information could effectively and efficiently be transmitted through the medium of price signals, and in response people might spontaneously arrange their economic activity to crystallise maximum welfare.

The institutional project was fundamentally and overtly political. As reflected in the *World Development Reports* of the 1980s, the state form was no longer considered adequate to administer the sublimely complex economy. To give institutional form to that sublime, one would have to reach within and beyond the state to create adequate institutional arrangements. This

> would have to be a project of redesigning the state and, increasingly after 1945, of redesigning the law. The essence of this project was multitiered governance or neoliberal federalism. In the wake of the mystification of the world economy, the […] most important field of influence was not in economics per se but in international law and international governance.[44]

[42] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), p. 18.
[43] F. A. Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (University of Chicago Press, 1973), pp. 39–40.
[44] Slobodian, *Globalists*, p. 18.

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If there must be technicians in the world, let them be institutional ones.

Thus, if the fantasy of the sublime of the state had been a 'deus ex *machina* [… consisting of] a prescient bureaucracy independently moving the levers of government',[45] the 1980s evinced the need for a new fantasy. As has been well-established, the fantasy of the state was 'hollowed out' as government gave way to governance.[46] The state and state law were no longer a precondition for, but became a challenging object of, administration, to be built from the ground up when the situation, and the exigencies of markets, demanded.[47]

Thus, following the collapse of the Soviet Union and '[c]rises in Bosnia, Rwanda, Kosovo, East Timor, and Sierra Leone',[48] an 'explosion of rule-of-law assistance'[49] – potentially 'a neocolonialist or neoimperialist enterprise'[50] – was 'designed to rebuild (or at times build up from scratch) legal institutions, restore functioning governments, provide accountability for abuses and war crimes, and permit gradual economic recovery'.[51]

Stromseth, Wippman, and Brooks – former American defence and foreign affairs policymakers writing as chastened liberal interventionists post-Iraq and post-Afghanistan – reflect on this shift:

> Until the mid-1990s, rule of law assistance generally involved aid packages designed to encourage governmental law reform initiatives undertaken by indigenous authorities and to support law-related NGOs. In recent years, however […] there have been more and more situations in which the United States, UN, and other key actors […] have ended up wholly or partially administering a society in crisis.[52]

[45] Charles F. Sabel, 'Learning by Monitoring: The Institutions of Economic Development' (Center for Law and Economic Studies, Columbia University School of Law, 1993) Working Paper 102, 27, https://charlessabel.com/papers/Learning%20by%20Monitoring.pdf, accessed 24 August 2022.

[46] R. A. W. Rhodes, 'Understanding Governance: Ten Years On', *Organization Studies*, 28:8 (2007), 1243–64; R. A. W. Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain', *The Political Quarterly*, 65:2 (1994), 138–51.

[47] The subject of the 1997 *World Development Report* was on how to reimagine the forms and functions of the state to keep pace with a 'changing world' of global flows: World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997).

[48] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, p. 62.

[49] Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment, 2011), p. 165.

[50] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, p. 64.

[51] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, p. 62.

[52] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, p. 63 (citations omitted).

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Concerns with administration were thus disentangled from the state to the extent that policymakers might decide to build – or ignore – a state. State-backed law was no longer a container or repository for broader anxieties about administration; it became a further source of those anxieties. The rule of law provided no fantasy template of a fantasy state, never to be reached but constantly to be desired. It became instead a means of articulating the complexity of governance. Stromseth, Wippman, and Brooks again: 'If most rule of law projects so far have been disappointing, we think it is in part because of the sheer (yet often underappreciated) complexity of the task'.[53]

The third part of my argument thus suggests that the idea of institutions emerged in practice as an alternative object to the state to contain policymakers' anxieties about administration. The various intellectual, practical, ideological, and material currents leading to the primacy of institutions have been well-canvassed. I seek neither to rehash them nor to take a position on the particular conception of institutions that may or may not have emerged as hegemonic. I simply remark on the work the term was and is called on to do with respect to administration. As the World Bank argued in 2002, reflecting on its reform experience in the 1980s and early 1990s,

> [Our] experience suggested that reform efforts could not stop with policies designed to shrink the state and liberalize and privatize the economies [… Rules] had to be established first and institutions capable of regulations also needed to be established. It turned out that a lack of attention to institutions generally, especially legal ones, placed substantial limits on the reforms as a means to promote economic development and poverty reduction.[54]

Writing of the evolution of governance reform, the OECD notes of the early 2000s that

> [T]his was the period in which a 'typical' governance practitioner was no longer a specialist in public finance, elections, rule of law or capacity development – but more likely a political scientist, hopefully with a good knowledge of all of the above. Certainly by the close of the decade the debate had also brought an epiphany that Weberian concepts of governance could be a hindrance. Indeed perhaps non-Weberian systems work better than

[53] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, p. 69.

[54] World Bank Legal Department, 'Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency', The World Bank (31 July 2002), 17–18, https://documents1.worldbank.org/curated/en/639721468028843406/pdf/multi0page.pdf, accessed 24 August 2022.

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> anybody had realised – enabling a management of power that served the purposes of the leaders involved (if not necessarily those of their people). Ideas of neopatrimonial development now made sense.[55]

Institutions might be needed not just because the state could not manage or would be antithetical to the governance of a sublime economy but because it might (also) fail to regulate or establish a monopoly over violence, or to govern complex and contradictory political preferences through elections, and so on.

From both the World Bank and OECD's experiences, it may be that this proliferation of the possible forms and functions of institutions could be understood as an effect of the results of the Washington Consensus-era efforts to reform institutions – a realisation through practice that institutions themselves are radically complex and sublime. I am cautious in this claim as there is limited historical scholarship on the particular ways in which such governance reforms were applied globally.[56] But whatever the specific cause, we might say that institutions came to stand in for administration, not necessarily tethered to government – in other words, institutions themselves came to be understood as complex or sublime.

And in such a view, law becomes a way of talking about institutions, although policymakers have remained ambivalent about the particular and distinctive characteristics of law ever since. Returning to Stromseth, Wippman, and Brooks:

> '[P]romoting the rule of law' is an issue of norm creation and cultural change as much as an issue of creating new institutions and legal codes[…]
>
> [The rule of law] is adaptive and dynamic in that it aims to build upon existing cultural and institutional resources for the rule of law and move them in a constructive direction, but it recognizes, at the same time, that the rule of law is always a work in progress, requiring continual maintenance and reevaluation.[57]

Here, the rule of law is everything: culture and norms and institutions; it comes to express as well as restrain 'existing cultural and institutional resources'.

We might understand the absence of boundaries to this notion of institutions as follows: where previously institutions were a means of giving simple form to other complex sublimes, here, institutions are self-reflexive,

[55] Alan Whaites, 'Memo to Lucy' in Alan Whaites et al. (eds.), *A Governance Practitioner's Notebook: Alternative Ideas and Approaches* (OECD, 2015), p. 22.

[56] Liat Spiro, 'Global Histories of Neoliberalism: An Interview with Quinn Slobodian – Toynbee Prize Foundation', https://toynbeeprize.org/posts/quinn-slobodian/, accessed 24 August 2022.

[57] Stromseth, Wippman, and Brooks, *Can Might Make Rights?*, pp. 75, 80.

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giving form to the sublimity of institutions themselves. In other words, Stromseth, Wippman, and Brooks might be trying to articulate institutional sublimes in institutional terms – and concomitantly, cannot reach outside institutions to find an authoritative way of talking about them.

Thus, fourth, I argue that a recognition of institutions as complex has led to two forms of elasticity through which policymakers express anxieties about administration. The first is elasticity in the term 'institutions', and the second is elasticity in the relationship between 'institutions' and the rule of law (and thus governance reform and rule of law reform). That 'institutions' have no clear meaning in development practice is well-established. Jütting, in a review of the term for the OECD, argues that

> [T]he literature has not settled on an overall accepted definition of institutions. Quite divergent definitions and concepts of 'institutions' are given, ranging from the narrow definition proposed by Douglas North—i.e. rules and norms that constrain human behaviour—to definitions that include organisational entities […] The impact of social norms, values and traditions on the current governance structure and vice versa is one of the important questions [for development research].[58]

As a consequence, Portes and Smith point out that there is

> [A] state of confusion about the definition of the concept itself. [North offers] a vague definition that encompasses everything, from norms introjected during the socialization process to physical coercion. From this statement, all that can be said is that institutions exist when something exerts external influence over social actors, exactly the same notion that Durkheim termed 'norms' more than a century ago. In the current institutions and development literature, we encounter quite different theoretical and operational definitions – ranging from laws to safeguard property rights to meritocratic bureaucracy to actual organizations like central banks.[59]

For Chang, such definitional incoherence leads to significant endogeneity problems when trying to conceive of institutions in development. At some level, development is now institutions is now development.[60] This offers some context for a contemporary pluralisation and fragmentation of

[58] Johannes P. Jütting, 'Institutions and Development: A Critical Review' (OECD Publishing, 2003), 210, 9–10 https://ideas.repec.org/p/oec/devaaa/210-en.html, accessed 24 August 2022 (citations omitted).

[59] Alejandro Portes and Lori D. Smith, 'Institutions and National Development in Latin America: A Comparative Study', *Socio-Economic Review*, 8 (2010), 586 (citations omitted).

[60] Ha-Joon Chang, 'Institutions and Economic Development: Theory, Policy and History', *Journal of Institutional Economics*, 7:4 (2011), 473–98.

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methodological orientations in development practice: the ability to turn to new institutional economics, behavioural economics, sociology and political science, history, film, and literature – as the circumstances demand – is a means of containing, filleting, and reframing this endogeneity.[61]

This is in turn reflected in rule of law reform. Just as institutions are conceptually elastic in practice, so is the distinctiveness and autonomy of the rule of law from mere institutionhood. As Tamanaha points out,

> Legal institutions and cultural attitudes toward law exist inseparably within a broader milieu that includes the history, tradition, and culture of a society; its political and economic system; the distribution of wealth and power; the degree of industrialization; the ethnic, language, and religious make-up of the society (the presence of group tension); the level of education of the populace; the extent of urbanization; and the geo-political surroundings (hostile or unstable neighbors) – everything about a particular society matters.[62]

This provides some context for the intellectual fragmentation in rule of law reform on which Trubek remarked.[63]

Other vocabularies arose in the 1990s to provide elastic ways of speaking about administration, most notably 'networks' (of new governance) and 'indicators' (of the new public management). They achieved no small degree of success, and their legacy persists. Yet the indicator has come under attack for being an overdetermined epistemological technology of governance and the network for being an overdetermined social technology of the same.[64] I do not dismiss their importance here; I simply suggest that 'institutions' and the 'rule of law' have emerged as an extremely robust, and circular or self-reflexive, contemporary means of expressing anxieties about, or framing as complex and sublime, administration in global governance.

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[61] World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank, 2011); World Bank, *World Development Report 2015: Mind, Society and Behavior* (World Bank, 2015); Bayly et al., *History, Historians and Development Policy*; David Lewis, Dennis Rodgers, and Michael Woolcock, 'The Fiction of Development: Literary Representation as a Source of Authoritative Knowledge', *The Journal of Development Studies*, 44:2 (2008), 198–216; David Lewis, Dennis Rodgers, and Michael Woolcock, 'The Projection of Development: Cinematic Representation as A(nother) Source of Authoritative Knowledge?', *The Journal of Development Studies*, 49:3 (2013), 383–97.

[62] Brian Tamanaha, 'The Primacy of Society and the Failures of Law and Development', *Cornell International Law Journal*, 44:2 (2011), 214.

[63] Trubek, 'Law and Development', pp. 322–26.

[64] Davis et al., *Governance by Indicators: Global Power through Classification and Rankings*; Amy Cohen, 'Negotiation, Meet New Governance: Interests, Skills, and Selves', *Law and Social Inquiry*, 33:2 (2008), 501–62.

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It is against this backdrop that I remark on the emergence of a group of self-denying rule of law reformers. My own career has spanned some of its evolution. I argue here that the contemporary moment – at least since the early 2000s – has been marked by a proliferation of the aesthetic rule of law reformer, as well as efforts to discipline and organise her.

Some rule of law reformers, of course, simply adopt their particular method, idea, or niche as a means of orienting themselves within their increasingly elastic professional domain. They draw on pre-constituted articulations of the rule of law. Or they understand institutions as belonging to some functional silos or semi-autonomous domains and choose to work on those. Or they understand rule of law reform as a function of local elite agendas, or global flows of aid money, or efforts by rule of law reformers to make themselves marginal to mainstream development practice. And so on.

But others contain this elasticity in themselves, embodying it and enacting it through radical recursive self-questioning. When exactly they came to be is impossible to tell, for their existence erases the possibility of their history. As noted earlier in the chapter, they always already have multiple and incommensurable histories, in a field that does not progress beyond first-order questions. It is, however, plausible that their history begins and ends at the End of History, whether Fukuyama's, or the emerging market sovereign debt crises of the 1990s, or some other singularity.

6.4 Conclusion

This chapter has grappled with the possibility that a historical account of rule of law reform might provide both context and insight into reformers' own attempts to radically critique rule of law reform. I have made two arguments. The first is methodological: reformers' ignorance about the rule of law makes it impossible to conduct an authoritative historical sociology, genealogy, or historicised immanent critique of reformers. The second is historical: I have offered an historical account of rule of law reform but framed it as a specific and standalone political intervention. I argue that a standalone profession of ignorant rule of law reformers emerged in the late 1990s or early 2000s, when development ideas about the form and function of institutions shifted from a neoliberal understanding of institutions as a means of giving form to the sublime complexity of the world, to being a complex sublime themselves. The following chapter sociologises these insights. It begins not with rule of law reform or its reformers as an object of sociological study but with the production and disciplining of its aesthetic, or orientation towards the sublime complexity of institutions, along with its social form.

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