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COMMENT

THE LAW AND THE NON-LAW

*Katharina Pistor**

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The common theme of the articles assembled for this issue is a focus on Asian societies and their struggle with the conceptualization of "non-law" and its relation to law. This brief Comment reflects on the construction of the "non-law" as analytical categories in the four contributions. It suggests that the struggle with "non-law" reflects a deeper confusion about the role of law in ordering social relations broadly defined.[1] Focusing on the "non-law" assumes implicitly that "law" is a useful and well-delineated category for analyzing governance structures within and across states and thus can serve as a benchmark for analyzing "non-law." Closer inspection, however, reveals this assumption is flawed. Governance takes many forms in any society, and law or legislation is only one of them. Moreover, the function and form of formal law has changed in many settings from one of direct social ordering by way of prohibitions, punishments, and the like to one of creating space for cooperation among multiple actors and adaptations in governance structures over time. Further, the level of formal versus informal law in a society and in the governance of certain aspects of social life is fairly irrelevant absent a debate over the substantive goals that governance shall achieve. Put differently, the focus on law versus non-law evades the more challenging task of considering the normative agenda underlying choices among different governance mechanisms and their use in practice.

The two articles by Peerenboom and Tanase analyze the process of legal reform in China, with some parallels drawn to the Japanese experience in the case of Tanase. Eric Feldman focuses on the role of non-law in transmitting both social and legal change in Japan. Finally, Charles Whitehead extends the analysis of nonlegal norms to the international arena, analyzing Japan's compliance strategy with regard to the Basel I

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1. Social relations in this context include economic and political relations.

Accord, a set of now internationally-accepted standards for regulating banks. The authors use somewhat different terminology to capture "non-law". Whitehead, for example, uses terms, such as "signs" and "signaling," inspired by the game theoretical literature. For Feldman and Tanase the relevant term for "non-law" is "culture". Feldman explicitly concedes this is a broad and ambiguous category, but he points out that the extensive use of "institutions" in new institutional economics and related literatures is equally ambiguous. Finally, Peerenboom explains the Chinese legal reform project in reference to the state's culture, history, and political regime.

I. Law and Culture: Dichotomy, Amalgamation, or Deliberation

Tanase begins his analysis by introducing three models of the relation between law and non-law. The first model describes a clear cut dichotomy between law and culture. Law as such is autonomous or "culture-free." The process of transplanting law may, however, confront local cultural objections. As a result, formal law will contaminate this culture-free product with the local culture of the receiving state and change it in its course. In the second model, law is always subsumed by culture. Law reflects cultural values, which themselves may exert governance functions beyond specific legislation. Tanase suggests the law as culture model may lead to a conceptualization of "Asian common law," reflecting the region's unique amalgam of formal law, history, and cultural heritage. The third model focuses on the interaction between cultural law and what the author calls "modern law." Modern law is autonomous and universal, a notion Tanase ascribes to the Western conceptualization of law. His major claim is that modern law is not as free of ideology and interests as those proclaiming its universality and generality would have it. In fact, modern legal transplants often incorporate a particular position on core issues, such as social welfare, environmental protection, and economic efficiency, which in fact are contested and require political resolution. Tanase calls for a broader normative debate about the implications of modern law transfers and their alignment with political and cultural preferences in the law-receiving state. A short-hand for this third model could thus be the deliberative model of law and legal change.

The main contribution of Tanase's article to the law versus non-law debate is to emphasize the link between law and legislation on the one hand and basic social norms—which may vary across states—on the other. Contrary to advocates of "technical legal assistance," specific pieces of legislation typically embody norms and value systems that may

or may not be shared by constituencies in the law-receiving state. Imposing them without social consensus about the underlying norms may create frictions. Conversely, differences in social norms should motivate legislation that itself is informed by such norms. Tanase encourages Asian societies to be sufficiently self-confident to develop a normative and legislative agenda that reflects their social norms rather than mimic legislation derived from norms they do not share.

II. Norm Relativism and Legalism in China's Legal Reform Process

Tanase and Peerenboom both use China's legal reform process as their point of departure. Yet their approaches differ substantially. While Tanase in his contribution struggles with the relation between law and an underlying normative agenda, Peerenboom seeks to separate the positive from the normative, characterizing legal reform as the expansion of the formal at the expense of the informal—in this case the arbitrary use of power in the context of crime control. His article seeks to develop a framework for understanding the path of reform and to make predictions about its success and failure. While Peerenboom acknowledges that even highly technical legal reforms are inherently political, he attributes this to the fact that any law reform produces winners and losers and will therefore be contested[2]—irrespective of the normative agenda that might be implicit in the reform effort. His criterion for success or failure of legal reforms is the degree of the infiltration of law into a system previously lacking legal governance and the level of compliance with these new mechanisms. To be sure, Peerenboom notes that this approach is somewhat problematic, as it evades the normative question. Compliance thus might mean compliance with "bad" law, such as the apartheid regime in South Africa. Nevertheless, Peerenboom prefers this approach to one based on a normative agenda:

> Evaluating the system in terms of broader standards such as justice or human rights is more controversial because justice means different things to different people and human rights are much contested, especially when moving beyond the broad wish list of abstract rights in international treaties to the interpretation and implementation of those broad provisions in practice.[3]

2. *See* Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 Mich. J. Int'l L. 825, 837 (2006).

3. *Id.* at 843.

The examples Peerenboom chooses to illustrate China's legal reform path and its success and failure along this path reflect this approach. The sources of reform and the degree of compliance with technical reform objectives form the core of his analysis. He raises normative issues and alludes to the fact that the goals of the reforms may be normatively contested. Yet he downplays any normative agenda of the reform project itself in favor of a more technical assessment of the expansion of formal law and compliance with it. One of the examples he chooses to exemplify the process of legal reforms is the evolution from a largely inquisitorial system of criminal adjudication to an adversarial one.[4] He documents the expansion of the adversarial principle in China, attributing it at least in part to the increasing familiarity of Chinese lawyers with U.S. practices. While the adoption of several laws suggests successful infiltration of formal legal principles, compliance has remained low. This Peerenboom attributes to a host of factors, including political ideology, culture, economic aspects, and a lack of general support from the public. Despite these countervailing factors, he concludes that the reforms have been positive overall, mostly on two grounds. First, he claims the fate of prisoners has improved at the margin—without, however, documenting that this is attributable to the legal changes he examines. Second, he argues that alternative reform strategies, such as strengthening the inquisitorial system, would not have been more successful, as the institutional prerequisites for such reforms were not present.[5] Interestingly, this argument implies that normative goals do ultimately play a role in assessing the success or failure of reforms.

Another of Peerenboom's examples deals with administrative detention. In his view, the fact that the purpose of detention has changed over time aggravates the task of assessing reform progress. While previously political opponents were the primary targets of detention, today the majority of detainees are poor migrant workers who resort to crime when confronting socioeconomic hardship. Moreover, past experience suggests other forms of criminalizing behavior can develop if detention is curtailed. Thus, Peerenboom concludes: "Determining whether administrative detention should be eliminated or, if retained, how the various types of detention should be reformed involves numerous judgments about contested empirical and normative issues and competing institutional interests. These are at once both technical and political issues."[6]

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4. *Id.* at 844.

5. "An inquisitorial system requires impartial and professional prosecutors and judges committed to discovering the truth. At the time, there was little differentiation between the criminal system and the political system, and the level of professionalism was relatively low." *Id.* at 848.

6. *Id.* at 858.

In fact, the primary issue seems to be political or normative in nature. At a deeper level, the failure to acknowledge a normative agenda behind the reform projects renders the reforms themselves meaningless. Why should anyone care whether any state adheres to adversarial or inquisitional processes, uses summary procedures, or practices detention unless these policies are related to deeper normative goals? What is the purpose of legal technical assistance if not to advance a normative agenda, no matter how hard to define? The separation of the positive from the normative invokes the dilemma faced by pure legal positivism in the last century:[7] If law is what a state sanctions as law, legislation becomes a machinery to implement any agenda.

In the end, Peerenboom's conceptualization of the (technical) law and the political or cultural non-law resembles Tanase's first model—the dichotomy of formal law and culture. This may be called pragmatism, as suggested by Peerenboom, and may be the only realistic strategy to advance a legal agenda in China. As such, it may, however, face the same kind of critique that brought down the first law and development movement of the post-WWII era. In their famous 1974 article, *Scholars in Self-Estrangement*, Trubek and Galanter pointed out that the project of "liberal legalism" was naïve on several fronts. It presumed the expansion of law and a legal profession would reduce social inequality and enhance participation—while the opposite might be the case. Moreover, it ignored the possibility that this "instrumental orientation" might "weaken rather than strengthen legal guarantees for individual rights."[8] Trubek and Galanter argued that the agenda for liberal legalism assumed a particular state-society relation and a role for law within it that were both empirically and conceptually flawed.[9] Peerenboom might counter that his project is less about "liberal legalism" and more about "legalism." This, however, might be more a retreat than an advancement of a debate that started over 30 years ago.

III. CULTURE AS TRANSMITTER OF LEGAL CHANGE

Like Peerenboom, Feldman engages in a positive analysis of legal change. In contrast to Peerenboom, however, Feldman is interested in unpacking the process of legal change and identifying the mechanisms

7. The most important proponent of the pure theory of law was Hans Kelsen. *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

8. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISC. L. REV. 1062, 1076 (1974).

9. *Id.* at 1078.

and constituencies that contribute not only to legal but also to social change. His article tracks the process by which Japan reigned in smoking habits in the early twenty-first century—years after the United States and even Western Europe. He argues that the process of legal change can be understood only when the analysis incorporates culture as a critical transmitter of social and legal change. The critical cultural norm that facilitated the social and legal movement toward banning smoking in public places, according to Feldman, is the "norm of conformity with the West."[10] While this norm does not trigger "blind or random copying,"[11] it induces law-changing behavior, at least when other conditions are in place. Feldman acknowledges that many Western norms go unheeded. In the tobacco control case, however, three critical conditions were present: "the content of the norm, the existence of agents who will transmit and transfer the norm, and the receptivity of local conditions."[12] Whether these are truly distinct categories is not quite clear. Thus, whether a norm with a particular content will give rise to legal mimicking appears to depend on the receptivity of local conditions. Some norms, such as "honking of car horns and eating pungent fast food on public transportation do not serve particular useful social functions"[13]—according to preexisting social norms, one might add. By contrast, "norms that involve the treatment of vulnerable populations" or "norms that implicate the equality of opportunity seem to carry more weight."[14]

The basic social consensus that facilitates the transfer of some behavior may change over time. The receptivity of local conditions primarily depends on such changes, not with the compatibility of external change with unchanging domestic norms. With regard to tobacco and smoking control, the receptivity of local conditions changed not so much because of increased knowledge about the harmfulness of tobacco or the higher number of tobacco related litigation. Instead, the most important factor, according to Feldman, has been the broader social and political changes of the 1990s.[15] These developments eroded bureaucratic support for the tobacco industry and facilitated the speedy adoption of new legislation, which concluded rather than initiated a process of legal change. One may question whether this should be labeled "culture," but the important point is the interaction between sociopolitical and legal change. Feldman's analysis implies that the formation of cultural norms and their

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10. Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743, 749 (2006).

11. *Id.*

12. *Id.* at 763-64.

13. *Id.*

14. *Id.* at 764.

15. *Id.* at 787.

change is intimately tied to the political process. Law is neither politically nor culturally neutral. The major contribution of formal legal change is not to engineer change or to import norms, then, but to lend additional authority to social changes and send a clear signal about changes in preference.

Feldman suggests the major contribution of his article is to bring culture back into the analysis and understanding of Japanese law.[16] In fact, his contribution seems broader. Instead of treating legislation as an easily-described entity that once inserted into the legal system may or may not become effective, he unpacks the process of legal change and links it to broader sociopolitical change. The weakening of the elite who have long ruled Japan is as important as the transmission of Western norms by way of increased travel, student exchange, and commerce, which exposes the broader Japanese society to Western practices and values. This process culminates in legal change instead of using law to accomplish social engineering. Indeed, the social change described in the article may have been effective even without legal change—witness only Feldman's example of smoke-free Starbucks coffee stores spreading throughout Japan[17]—though it might be less enduring without the added authority of law. Viewed from this angle, legislative change is one of many tools various constituencies use in competing for influence and advancing their social, political, and economic goals. Law and legislation devoid of such contested goals is neither good nor bad, neutral or biased, but simply an empty concept. In the end, Feldman practices what Tanase preaches: the unpacking of legislation and the exposure of hidden values and social goals within a process of deliberation and competition.

IV. Norm Compliance in International Conduct

Whitehead takes the analysis of the law and the non-law to a different level by analyzing Japan's position vis-à-vis capital adequacy standards established by the Bank for International Settlement (BIS) in 1988 and endorsed by its members. Members of the BIS are the central banks of 55 states, including Japan.[18] Thus, the very structures of the BIS

16. See his summary of legal scholarship on Japanese law in the postwar era. *Id.* at 753-68.

17. *Id.* at 806.

18. These are: Algeria, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong SAR, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, the Republic of Macedonia, Malaysia, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Romania, Russia, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden,

suggest that not only states as unitary actors play a role in the international realm but that entities *within* states have formed transnational alliances. Whitehead argues that the efficacy of and compliance with the norms and regulations of international bodies, such as the BIS, cannot be understood without analyzing the network effect among these entities: "This Article proposes a new approach to understanding state compliance with international obligations, positing that increased interaction among the world's regulators has reinforced network norms, as evidenced in part by a greater reliance on legally nonbinding instruments."[19]

In fact, this approach is not entirely novel. Scholars of the European Union integration process have long pointed to nonlegal mechanisms, including cooperation among member states' regulators and among nonstate actors, as critical factors in the integration process ("Open Method of Coordination").[20] Scholars of international relations have pointed out similar trends at the international level.[21] The main contribution of Whitehead's article, then, is less to demonstrate network relations at the substate level than to extend the analysis to an institution, such as the BIS, that has largely escaped attention from scholars primarily concerned with public institutions, constitutionalism, and democracy.

Whitehead focuses primarily on the question of norm compliance with the Basel Accord. The Basel Accord is not a legally binding treaty, and thus its efficacy depends on compliance and enforcement by states whose central banks endorse the Accord. Whitehead argues that understanding network relations and informal sanctioning mechanisms within these networks is critical to explain norm compliance, even if it is only nominal. Building on existing literatures on social norms, in particular those in the law and economics tradition,[22] Whitehead argues that enforcement of social norms takes the form of threats of expulsion, mutual

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Switzerland, Thailand, Turkey, the United Kingdom, and the United States, as well as the European Central Bank. *See* Organisation and Governance, http://www.bis.org/about/orggov.htm (last visited Feb. 10, 2006).

19. Charles K. Whitehead, *What's Your Sign—International Norms. Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 697-98 (2006).

20. For an overview of these process, see Joanne Scott & David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

21. See especially ANNE-MARIE SLAUGHTER, THE NEW WORLD ORDER (2004), which displays a strong focus on networks among adjudicating bodies such as courts. For a recent account of the emerging global administrative law and its implications for democratic accountability, see Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. (forthcoming 2005), *available at* http://www2.law.columbia.edu/sabel/papers/GlobalAdlaw25.doc (last visited Mar. 18, 2006). See, particularly, the authors' extensive references to the literature on European governance. *See id.* (manuscript at 18 n.28).

22. *See, e.g.*, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

monitoring, and reputation sanctions.[23] The latter comprise "subtle means of reward and punishment involving group prominence, social approval, shame, and guilt."[24] Members of networks respond to these enforcement mechanisms because they fear for their own careers. "A bank regulator whose country fails to comply with the Accord, for example, is likely to suffer a loss of reputation and influence among network peers, which may in turn impair her future career opportunities and her effectiveness in representing her state's interests before other network members."[25] Whitehead emphasizes the importance of "group standing" in the banking community, which is characterized by a few influential and dominant players such as the Federal Reserve Board and the Bank of England.[26] This argument, of course, could be interpreted to suggest that power relations, which are typically more binding even than formal law, might trump social norms within networks. Even if we accept the notion that central bankers form a close club with extensive network relations and social norm governance, the critical element, of course, is how these network norms transcend the club and affect the behavior of states and state regulators in charge of enforcing the capital adequacy regime.

Whitehead is well aware of this problem: "Actual state compliance with a network norm, however, may depend on politicians, bureaucrats, and others 'outside' the network who do not view compliance in the same light."[27] In fact, compliance may be less costly in some states than in others, which may influence their willingness to comply not only in form but also in function. This leads Whitehead to suggest the importance of networks lies not only in the creation of norms and the enforcement of norm compliance but in the facilitation of cooperation in the process of norm enforcement. On occasion, and in the case of Japan, this may go as far as toleration for member state deviation from a norm, at least as long as the member state does not question the norm itself and couches its policies as attempts to achieve norm compliance. As recounted by Whitehead, Japan found it exceedingly difficult to live up to the Basel standards in practice after the stock market tumbled in December 1989, as a result of which Japan's banks "lost up to 40 percent of their public market capitalization."[28] In response, Japan deferred the implementation of the Accord while signaling to fellow networkers that it continued to cooperate and take serious efforts to remedy its shortcomings. Under a

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23. Whitehead, *supra* note 19, at 705.
24. *Id.* at 708.
25. *Id.* at 710.
26. *Id.*
27. *Id.* at 711.
28. *Id.* at 726.

strict law enforcement regime, one might expect punishment—in the worst-case scenario, even expulsion from the club—for failure to comply. In fact, the Basel response was much softer and geared at mitigating any impression that Japan was defecting from the Accord.

The more basic questions this analysis raises concern whether the signaling story is plausible, under what conditions it might be plausible, and what alternative explanations might be available to explain Japan's response to the Basel Accord.

Arguably, the signaling story is a powerful explanation if the Basel Accord is less than it purports to be—i.e., if capital adequacy as such is less relevant than coordination among central bankers, then signaling compliance while practicing deviation is plausible. If capital adequacy is as critical as it purports to be, then we should have seen a strong market response to Japan's failure to live up to the Accord, which may have influenced the willingness of other members of the network to tolerate formal rather than substantive compliance. In other words, to be fully convincing, the signaling story requires a return to the substantive goals of the Basel Accord and their relevance in practice. Once more, assessing governance mechanisms without including goal assessment remains unsatisfactory. The story becomes more plausible if the real benefit from the Basel Accord is cooperation among key central banks to maintain financial stability. Viewed in this light, compliance with specific criteria is not critical. Signaling cooperation, however, is. Member states will apply sanctions to noncooperative behavior—not to deviations from the Accord.

As Whitehead suggests, one of the hallmarks of the Accord and similar instruments is their openness, flexibility, and, ultimately, softness. This creates a puzzle for those thinking about law primarily as "crime and punishment" in the Beckerian account.[29] (Interestingly, the part of the social norm literature that scholars in this tradition have influenced analyzes social norms from a very similar perspective by focusing on sanctions for deviations from these norms.) For those who study changes in governance mechanisms in new governance environments (such as the EU) or governance in the face of uncertainty (i.e., in highly competitive industry sectors or responses to natural or manmade disasters), this is less puzzling. The relevant question from this perspective does not concern the kind of sanctions governments or regulators who are bound together in networks face (i.e., the prospect of being fired or

29. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45 (2000); George J. Stigler, *The Optimal Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

not being invited to dine with the chairman of the Central Bank of England) but whether new governance structures establish frameworks that foster cooperation in the face of uncertainty.

V. Conclusion

This brief Comment seeks to make two points concerning the analysis of law and legal change. First, the distinction between law and nonlaw is irrelevant without understanding and determining the goals various governance mechanisms—be they legal or nonlegal—shall accomplish. Such goals might be the protection of human rights or the mitigation of the risks of globalized financial markets. The critical outcome variables are the effectiveness of legal or nonlegal mechanisms in accomplishing these goals and the extent to which one can attribute variations in outcomes across states to a particular choice of governance structure. Second, formal law and legislation is not a firm concept immune to change but one that morphs and adapts to changes in the environment and new challenges as they arise. Law may be hard or soft, mandatory or enabling, creating incentives for or prohibiting actions, encouraging or discouraging cooperation among actors. And so may social norms. Put differently, scholars should not evaluate means and ends separately, neither in the context of a positive examination nor, certainly, in an inherently normative analysis.