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A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law

BRUCE A. MARKELL*

INTRODUCTION

Writing on the rule of law is daunting, especially for one trained in Anglo-American jurisprudence. The concept of the rule of law is so deeply ingrained in the training of American lawyers that it is often thought of as an indispensable part of any well-run and durable social and political system. This Article examines this assumption, at least to the extent that commercial law can be used as an index of efficacy and durability of a legal system. It also examines how current international law reform efforts in the commercial law area are affecting both the spread and the perception of the rule of law.

After setting out some basic components of the rule of law, this Article looks at how individual efforts and experiences in commercial law reform have affected and are affecting this concept. It seeks to accomplish this examination by taking an inductive approach. In short, it attempts to achieve a better understanding of what is happening to the rule of law on a global scale by piecing together discrete and isolated experiences and facts. These experiences and facts are a product of a few international efforts in which I have been fortunate enough to participate; but, even anecdotal as they are, they contain some lessons for thinking about the rule of law in this era of globalization. My approach is deliberately light on theory and reads at times more like a travelogue than a law review article. Law reform efforts are, however, very practical endeavors at the end of the day, making even anecdotal evidence relevant to understanding the larger scheme of things. By

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proceeding in this way, perhaps the reader will be able to glean a different understanding of the practical dynamics of rule of law efforts at the heart of the intersection between globalization and governance.

I. PRINCIPLES OF THE RULE OF LAW

The concept of the rule of law contains within it the central notion that governmental actions and decisions should proceed in accordance with known or knowable rules and norms. Put another way, legal texts or norms constrain those in power. This restraint can be positive or negative; a decision has legitimacy—and commands respect and obedience—only if justified by resort to some text or some norm. The text could be a statute, a decree, or something promulgated in a way that gives it legitimacy. Conversely, a decision is illegitimate—and thus need not be followed—if it cannot be tied to an authorizing text or norm.

This distinction is often captured in the catchphrase: a rule of law, not a rule of men. Of course, words admit varying degrees of specificity and constraint. Thus, any discussion of the rule of law can be broken down into at least three components: the textual rule of law; the rule of law as applied; and the culture of the rule of law. I examine these briefly before moving on to the intersection between global commerce and these rule of law concepts.

A. *Textual Rule of Law*

Perhaps the most common aspect of the rule of law is a “rule,” in the sense of a written text prescribing certain actions and proscribing others. The Code of Hammurabi, the Magna Carta, the Declaration of Independence, and other historical documents are in this tradition of limiting the discretion of those in power by reference to preset rules and guidelines. In national law, statutes, decrees, and regulations provide the most common textual sources of law. In international law, treaties are the texts that provide the written rules for State behavior.

Textual rules of law often codify, and/or are supplemented by, norms and customs—received and settled rules that may not be written down but that guide action and official discretion in ways that are just as binding as a written text. In many national jurisdictions, the common law embodies these unwritten rules of law that restrain the exercise of power. In international relations, customary international law contains the unwritten rules of interstate

behavior. Together, this body of text and unwritten norms are the “law,” in the sense that they prescribe what can and cannot be done by those in power.

B. Applied Rule of Law

Texts and norms, however, sometimes are honored more in the breach than in the observance. The bureaucratic tendency towards administrative convenience, or political pressures toward expediency, may create practices at odds with the spirit, if not the text, of the law. This divergence between law and practice is often captured in the acknowledgment of the existence of both the formal legal code and the “operational code.”

At a deeper level, the texts and norms behind the rule of law may have within them retained discretion for governmental officials. This retained discretion is not necessarily malign. Civil law traditions notwithstanding, lawmakers often understand that they cannot anticipate all contingencies and, therefore, allow those who administer the law some leeway. This discretion, however, all too often can swallow the rule; the opportunity to vary rules for exigent or emergency situations gives rise to latitude in the determination of what constitutes exigent or emergency. Additionally, often just the pretext of compliance may be enough to subvert the salutary effects of the rule of law. Delay can be a demon, and often works to the advantage of one side over another. In short, unless there is a separate norm that discretion should be used to further the public good, rather than private profit, even the best drafted rules will fail to achieve their aims.

C. Rule of Law as a Cultural Norm

The constraint of power and political discretion is not only a textual matter. It has within it cultural underpinnings, assumptions, and implications. How far one may go in finding that discretion may override the general case is something that is often learned rather than prescribed. In many cases, the use of power for the general common good, as opposed to personal gain, must be taught or inculcated; experience has shown that such instincts do not often arise naturally or in abundance. In this respect, cultural norms or habits can create the difference between a system that resembles the Western notion of the rule of law and a system that uses the same tools, but in ways that vary from Western expectations. Thus, the role of law in a culture dramatically influences how the rule of law operates in a society.

II. TRANSPARENCY, CORRUPTION, AND CAPITAL MARKETS

One might well ask what this brief overview of the rule of law has to do with international commercial law. The answer is both simple and contradictory: nothing and everything. The rule of law can have nothing to do with international commercial law so long as there is a medium of exchange—typically currency—the value of which traders agree upon and for which there are clearing houses. For most, if not all, societies in today's world, these conditions are met. Every country has a national currency, and that currency is priced daily against every other currency. In this way, international commerce can and will operate regardless of whether one country, or many, favors the rule of law. A corollary of this notion is that money knows no heritage; gold is gold regardless of whether it is offered by a saint or a sinner. In short, traders will find ways to agree on the value of goods and currency regardless of whether the countries of which they are citizens are governed by the rule of law.

On the other hand, the rule of law has everything to do with commercial law. As technologies and sensibilities adjust to the notion that global transactions happen in the blink of an eye, more economic development for countries and more personal wealth for its citizens become available to those countries who can tap the resources of international capital markets. And to play that game, the price of entry is not just the traders' agreement on value; it is also adherence to a much more sophisticated system of currency exchange and investment rules. In short, the standardization necessary to move huge sums of capital around the globe makes it necessary that basic transactions be identified, abstracted and kept the same. Trinkets and beads may have been emblematic of trade several hundred years ago, but they have no place in the world today.

Since reliable ways to exchange and trade currency are a part of this global commercial system, governments and their fiscal policies are inevitably drawn into the mix. To receive the benefits of global capital markets, global traders must be able to convert local currency into the global coin of exchange, such as the U.S. dollar. Thus, international currency exchanges do enormous business. But these exchanges also leach sovereignty. If forces external to a country do not believe that the country's currency values basic goods and services in a manner consistent with other countries' currencies, the

result is a general decline or increase in the exchange rate.¹ One way global capital markets value basic goods is through their cost of production. Put another way, a country's currency will be valued more highly if the resources of that country are used more efficiently in the production of goods and services. Thus, currency rates also become a barometer of the ability of a country to marshal its resources efficiently. While global capital market scrutiny of a currency's value does not necessarily immediately impact the host country, it does change the price of imports and exports, which eventually will impact the domestic economy. Once the winds of external valuation blow sufficiently for this to affect the host country's currency and economy, that economy suffers the discipline imposed by global capital markets.

All of this, however, is more or less basic macroeconomics. What is it about the current state of the world that makes the dynamics of global capital markets relevant to my observations about the rule of law? I think there are at least two answers to this question. First, securitization has expanded the number and types of financial transactions and has made financial mavens aware of the enormous profit potential present in tapping everyday consumer or business transactions.² Second, perhaps a larger share of the world than ever before is now being asked (indeed, some might say forced) to adopt Western-style commercial law as a condition of receiving aid from such organizations as the International Monetary Fund (IMF) and the World Bank.³ These organizations believe in modern commercial law statutes, and they argue that the adoption of these statutes may help ameliorate existing economic and financial problems and help prevent future ones. Behind this emphasis on the adoption of Western-style commercial law statutes are assumptions about the importance of establishing the rule of law as a critical element of benefitting from (or surviving) the rigors of global economic and capital markets.

1. *The Economist's* "Big Mac" index is a light-hearted version of this principle. Periodically, *The Economist* prices the cost of a similar good—McDonald's "Big Mac"—across different countries with a constant exchange rate to show how the sandwich may be overvalued in one place and undervalued in another. See, e.g., *Big MacCurrencies*, *ECONOMIST*, Apr. 3-9, 1999, at 66.

2. See generally STEVEN L. SCHWARCZ, *STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION* (2d ed. 1993).

3. See, e.g., Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand: A Preliminary Assessment* 105-11 ¶¶ 156-70 (1999) (detailing efforts and conditions in Korea, Thailand and Indonesia), available from the International Monetary Fund website, <<http://www.imf.org/external/pubs/ft/op/opasia/>>.

A. Commercial Law as Certain Law

Why do the IMF and World Bank so like these Western-style commercial statutes? For one, they allow governments to shift many revenue functions to the private sector by increasing the certainty of a known return for financing those services. With increased certainty, so the argument goes, comes increased competition. Increased competition brings more opportunities for trade and lower prices. Lower prices leave consumers with more disposable income, which can be used for more consumption or for savings, both of which positively affect the economy.

There is some precedent for this view. The history of commercial law is in part the history of pushing public courts to accept private norms; the law merchant (*lex mercatoria*), now partially incorporated into the Uniform Commercial Code (U.C.C.),⁴ was an effort to standardize commercial terms and practices across international borders. Lord Mansfield, when sitting in equity, would convene an advisory jury of merchants knowledgeable in the subject matter of the case before him.⁵ Standardization of commercial law across borders through the law merchant brings more certainty to transborder transactions, which helps increase cross-border economic activity that benefits the economies involved. Such standardization often requires many countries, particularly developing ones, to engage in commercial law reform. Often the IMF and World Bank encourage countries to engage in such legal reforms.⁶

Nowhere is the drive for certainty and standardization better seen than in the relatively recent phenomena of securitization. Securitization is basically a common law notion; it relies on the ability to transfer in bulk present and

4. See U.C.C. § 1-103 (1995).

5. See Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1284 (1991).

6. See SCHWARCZ, *supra* note 2. Indeed, the norms of international commerce tend to adopt English as the preferred language for international contracts because of its near universality and its adoption by major trading countries such as the United Kingdom and the United States. A good example of this is the October 1998 issue of the *International Business Lawyer*, which is devoted to a symposium entitled *Same Words, Different Meanings: English Legalese in Non-English Contracts*. 26 INT'L BUS. LAW. 1 (1998). Lawyers in civil law countries often plead with their common law cousins to be sensitive to the potential differences in law, and the different assumptions different laws make. See Vladimira Glatzová, *When Is a Warranty Not a Warranty? Common Law Versus Civil Law*, 26 INT'L BUS. LAW. 453 (1998).

future receivables for a present consideration.⁷ Without taking into account laws of developing countries, significant differences between civil and common law exist on how to handle securitization. While these differences are being addressed in an ambitious draft convention on the assignment of receivables being negotiated under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), they are real and exist.⁸

A short story illustrates these differences, even among so-called developed countries. I have represented the International Bar Association at the UNCITRAL receivables convention working group sessions. My status as an American law professor is known. During the discussions, the group was grappling with the thorny issue of proceeds. The draft convention, at least in English, specified the conditions under which a secured party would get proceeds of receivables; that is, when the secured party could claim the payments made in satisfaction of the receivables transferred. Under U.S. securitization law, proceeds play an important role. When a secured party's collateral is sold or parted with by its debtor, the proceeds concept automatically gives the secured party a property interest in the goods or property received in exchange, without the necessity of any writing or other action by the parties.⁹

When examining the relevant provision, in each of the seven official languages of the United Nations, the discussion seemed to be at cross-purposes. In an effort to simplify the matter, so I assume, the chair of the working group asked me (without notice) to explain the concept of proceeds to the whole group. Fighting back the fears that used to accompany being called on in law school, I gave what I thought was a short explanation along the above lines. When I was finished, there was a short silence, followed by the chair's instruction to the interpreters *not* to translate the word "proceeds" when uttered by a delegate, and simply to use the English word, presumably because what I had explained was not picked up by common translations of the word. I use this example not to illustrate that legal terms sometimes do not

7. For the basics of securitization, see Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994).

8. The English version of the current text of the draft convention can be found at UNCITRAL's website, *Working Group on International Contract Practices—Index* <http://www.un.or.at/uncitral/english/sessions/wg_icp/index.htm>. A good review of this convention is Spiro V. Bazina, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution*, 8 DUKE J. COMP. & INT'L L. 315 (1998).

9. See U.C.C. §§ 9-306(2); 9-203(3) (1995).

translate well. Rather, given the centrality of the proceeds concept to financial tools such as securitization, the example shows that even when the United Nations gets countries to talk about harmonization of commercial law, the process of commercial law reform is not easy, even among developed States.

The reaction of global capital markets to such continuing differences in commercial law regimes is not hard to predict. Uncertainty in application of commercial law confronts investors with increased costs, perhaps chilling investments the host nation desperately needs. Commercial law reform, in keeping with international harmonization, signals not only legal and economic certainty, but also commitment to the rule of law more generally. Such signals attract global capital and produce benefits for the domestic economy.

The flow of these benefits, and how different legal systems can choke it off, is illustrated by the following transaction. When visiting Indonesia to study the feasibility of a personal property security law I was a member of a team that interviewed many lenders and debtors. We sought, among other things, to learn how goods were actually being financed in the absence of a formal personal property security system. One of the lenders we visited had been in the business of lending funds to enable Indonesians to purchase motorcycles. In the year prior to the current Asian crisis, they had financed over 400,000 motorcycles through a simple title retention system. For each loan, they investigated the creditworthiness of the borrower by checking not only publicly available sources, but also by sending an agent to interview the proposed borrower's family, neighbors, and local vendors. When the loan was made, no payment book or other system of isolated payment was used. Rather, the company employed 4000 agents to make 11,000 individual collections per day. The interest rate on such loans? Thirty-six to thirty-eight percent. As this business grew, global capital markets took note. A securitization was proposed. Many legal obstacles were met, including the uncertainty that Indonesian law would recognize the bulk transfer of so many receivables and whether the various currencies involved could be traded at the level needed to hedge the risks involved. But the deal was done. And the effective rate for the investment secured by these high-yield receivables? We were told it was seven to eight percent.¹⁰

The vast difference in interest rates before and after securitization is a

10. For more background on asset securitization in Indonesia, see Arshad A. Ahmed, Comment, *Introducing Asset Securitization to Indonesia: A Method in Madness*, 19 U. PA. J. INT'L ECON. L. 823 (1998).

crude measure of the cost to a country such as Indonesia of having legal systems (and, quite frankly, political instability) at odds with those that built and which drive global capital markets. Even with certainty of text and norms, however, there remains other, equally daunting, impediments confronting the spread of the rule of law through harmonization of commercial law.

B. Corruption as the Enemy of Certainty

Reasonably clear and harmonized text and norms are only the beginning of the story. If they are not uniformly enforced, or enforced only with an eye toward enhancing private greed over public need, the cause of certainty is not furthered. Indeed, it may be completely subverted.

A case well-known in Indonesia illustrates this point. The island of Bali, located in Indonesia, is a wonderful spot; it embodies what many think is a perfect and lush environment. It is, therefore, a significant tourist destination. Tourists need hotels in which to stay, and hoteliers need capital to build hotels. Indonesia does have a working mortgage system for real property, and such was used to secure the loan to build one hotel. Business at that hotel, however, was not sufficient to pay the debt. The lender took every step necessary to foreclose its interest, only to be held up at the last stage by a one-page fax from the Indonesian Supreme Court halting the sale. The fax apparently stated no reason, and most legal experts could suggest none. The foreclosure was stalled, and the debtor remained ensconced. Clearly political influence was being wielded behind the scenes to upset the application of commercial law.

Instances of irregularities such as the Bali foreclosure need not be widespread to cause capital markets to increase the cost of credit. This problem is particularly insidious since it cannot be remedied simply by enacting new laws. It must be addressed in human terms, and is expensive. One factor that might account for the Bali incident is that, at current exchange rates, I am told that Indonesian trial court judges earn around \$150 per month, and that Indonesian Supreme Court justices earn around \$250 per month. Regardless of the exact exchange rate, however, most were agreed that the official pay only placed these legal officials, at best, in the lower part of the

middle class.¹¹ As in many developing countries, academics do not earn enough to merely teach; they must also have some form of practice on the side. Debtors' lawyers are picked, again I am told, as much for their legal prowess as for their knowledge of which officials are pliable when it comes to exercising discretion for a fee. All of this adds up to a recipe for corruption, or for the implementation of the written law in haphazard fashion according to the extra-legal methods employed by the parties, such as bribes and other inducements. This clearly runs contrary to the rule of law as a consistent set of *applied* norms and rules.

In my most recent travels to Indonesia, my task was to try to recommend a personal property security law. Indonesia, like many countries in the civil law tradition, has no law permitting a debtor to grant security in its personal property without relinquishing possession. In this effort I, with the rest of the team, interviewed creditors, creditors' lawyers, debtors' lawyers and government officials. All were receptive to the idea of personal property security law—indeed, adoption of such a law is apparently an IMF aid condition—but all, to one degree or another, expressed concern and doubt over the implementation of such a law. The cause of their concern was the ability of well-connected persons to manipulate public record systems and to commit fraud on the system for private gain.

Moreover, doubt was expressed that the common feature of such a system—public notice of a secured creditor's security interest—would be acceptable and enforced even if enacted. Individuals pointed to the recent adoption of corporate laws making statements of share ownership and of the identity of corporate officers a matter of public record. Apparently, governmental officials would not allow members of the public to view filings made in accordance with this new law unless they could show that they were a shareholder of the company; this, of course, was in direct contravention with the spirit and letter of the statute, but the practice comported with political and/or cultural notions of what the law ought to be, not as to what it was. The prevalence of corruption in many countries adversely affects the objective of the rule of law by creating uncertainty in the application of legal texts and norms. Such uncertainty burdens these countries in connection with the dynamics of global capital markets.

11. On this point, see Caroline Van Rijkeghem & Beatrice Weder, *International Monetary Fund, Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?*, IMF WP/97/73 (June 1997).

C. Corruption and Education

Much of the disconnect between the law as written and the law as applied has to do with cultural notions of what law ought to do. Notwithstanding understandable resistance to change forced from without—such as when international aid is tied to law reform—many individuals in developing countries simply do not have the training necessary to change the ways that they look at the world, and thus do not share the cultural assumptions and practices implicit in Western notions of the rule of law.

An example of this occurred when I was working on the Secured Transactions project in Indonesia. Although the USAID project with which I was associated was co-sponsored by an Indonesian governmental agency, this agency did not know if any other agency had a draft in progress. When it became apparent that the Bank of Indonesia had such a draft in progress, and was fairly far along in its consideration, we arranged to meet with the Bank to discuss their draft. The Bank's document, although drafted in good faith, for the most part copied Indonesian land mortgage law. Although not wholly illogical, such an approach is not what global capital markets require; it is too cumbersome and, indeed, in some parts, unworkable. When these problems were pointed out, the response more often than not took the form of "well, the law says" There seemed to be an incomplete realization that they were rewriting the law and that, within reason, it could say whatever they wanted.

This rigidity of thought may be endemic. I was told that the primary word processor used in the Indonesian government was Wordstar, one of the first word processing programs for the desktop computer. This program, however, while once state of the art is now somewhat of a dinosaur in the global word processing market. The reasons for its adoption, however, were instructive: the education of those using the program concentrated on rote memorization without reference to the reasons and functions for various decisions. This background made the users inflexible when it came to software updates. In short, their training, like the training of many Indonesian lawyers, focused on acquiring information that was highly context specific. A personal property security law, for example, could not be different than real property security law because the real property was the only relevant context within the Indonesian legal mind. I am not saying that cultural practices and assumption make the process of commercial law reform hopeless. The Indonesians I met were bright, clever, and industrious. Their educational system, however, handicaps them from adopting fully and quickly a rule of law system

conducive to success in the rough world of economic globalization.

A final anecdote serves to illustrate this point. At one point during my first travels to Indonesia, I was having a meal with several prominent attorneys. The discussion drifted toward nepotism, which I would classify as a form of corruption. They did not see it that way, however. When I demurred that power should not be used to promote ones' friends and relatives, I was met with a puzzled silence. Finally, one attorney, in complete sincerity, said "Well, what else is power good for?"

In short, unless some cultural norm of principled fidelity to the consistent application of legal texts and norms exists, it is folly to think that legal habits and behaviors will change overnight. The IMF and World Bank have found cultural impediments to the development of the rule of law and good governance in developing countries deeply frustrating. While the lack of appropriate texts and norms, the failure to apply texts and norms consistently, and cultural dissonance in connection with the role of law cause difficulties for global capital markets, it is these markets that may do more to promote the rule of law than any other force.

III. INFLUENCE OF GLOBAL CAPITAL MARKETS ON THE RULE OF LAW

The power of global capital flows is immense. People move capital to the places where it can earn the highest return. That is basic economics. The interesting question is what factors influence this movement. As indicated above, one basic factor currently seems to be perceptions of economic efficiency. World capital markets "grade" an economy based in part on the fiscal and financial system which support it. A large part of the Asian "flu" can be traced to this factor.¹² Another factor, I assert, is the stability and adaptability of a country's commercial law system. Securitization is but one example; it flourishes best, and thus returns its benefits most directly, in a legal atmosphere conducive to the easy and certain transfer of intangibles. This atmosphere, however, has thus far only been native to common law countries, and then only in those common law countries with a history of financial leadership.

How does the rule of law fit in with this picture? Although some might

12. See SCHWARCZ, *supra* note 2.

leap to connections between capitalism and democracy,¹³ there is no reason to make such strong assertions. Rather, the compatibility of preset rules, evenly applied in a spirit of making them work, is a strong component of the type of financial certainty modern financial markets seem to want as a component of investing funds on a long-term basis. With certainty, and evenhandedness, barriers to entry fall away, and competition tends to shave returns (the flip side of which is a lesser interest expense to the borrower). Projects previously uneconomic, although valuable (such as infrastructure projects like communications and power), now become possible since their cost is reduced through reduced borrowing costs. Ripple effects spur growth, change, and, one would hope, general prosperity.

While this flow of capital may be attracted to countries that embrace or move toward the rule of law, capital stays only so long as monitoring indicates that the commitment to a rule of law regime remains in place. This monitoring takes place on an almost instantaneous scale, aided immensely by new information technologies, such as the Internet. In addition, the Internet vastly increases access of people in the developing world to examples of legal texts and norms, the application of those texts and norms by administrative agencies and courts, and vast quantities of material that can help transform legal education and cultures. New information technologies not only sharpen the disciplines created by global markets, but also empower countries to make legal, political, and cultural changes necessary to establish the rule of law in the global era.

The ubiquity and power of the Internet as a communication tool was driven home powerfully for me during my first trip to Indonesia. On the night before a seminar on Indonesian bankruptcy in the Indonesian city of Semarang, I was taken to dinner by my local hosts. The food was Pranang style: individual dishes of delicacies such as fried cat lung and curried beef testicles (I ate a lot of rice). This was followed by karaoke of smaltzy tunes. In the midst of this cultural dislocation, one of my hosts leaned over and asked if I had anything to do with a bankruptcy article appearing in the *Indiana Law Journal*.¹⁴ Surprised, I said yes, since it had been written by my research assistant. After discussing it in depth for several minutes, my curiosity got the better of me. I asked him where he had read it. "The Internet, of course," was

13. The writings of Nobel laureate Freidrich Hayek often pursue this line of reasoning.

14. Julie A. Veach, Note, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211 (1997).

his reply. If academics in Semarang, Indonesia can read bankruptcy scholarship generated in Bloomington, Indiana over the Internet, then new information technologies offer great promise for furthering commercial law reform globally.

CONCLUSION

What is the moral of all these tales? One is that, through market influences and dictates of international financial organizations, Western-style commercial law is, or will soon be, sweeping the world. Given its power, and its speed, aided by modern technology, this economically-driven phenomenon may augur well for the rule of law. Commercial law reform might offer potential for dealing with the problems of pseudo-capitalism and low-intensity democracy discussed by Susan Marks. Commercial law reform is also compatible with the phenomenon of global network governance identified by Kaniska Jayasuriya. While “making the world safe for securitization” is not a ringing slogan, the seemingly obscure realm of commercial law might provide fertile ground for planting the seeds necessary for the creation of the rule of law.

These positive thoughts call forth, however, some cautionary words. First, despite the potential of the Internet and other new information technologies, the achievement of the various pieces of the rule of law—texts and norms, consistent application, and cultural commitment—will not happen overnight. To achieve the last piece of the rule of law—the adoption of its spirit—will perhaps take the longest because it will involve legal, political, and cultural changes that go far beyond the area of commercial law.

Second, my thoughts have primarily been descriptive regarding the connection between commercial law and the rule of law in the global era. My experiences in the field of commercial law reform in Indonesia suggest to me that commercial law reforms can contribute to the building of a rule of law. The next question, however, is normative. Should global capital markets, and the commercial law reform efforts they spawn, force Western-style rule of law notions on non-Western societies? At the heart of this question are concerns about globalization’s impact on sovereignty and culture, and about who benefits and who loses from this impact. These larger questions I leave for another day.