The path dependant problem of exporting the rule of law

Although there are multiple definitions of the rule of law in use no attempt to review them will be made here.[1] Instead three indicators of a functioning rule of law State will be insisted upon. First, that the executive operates through legally constituted channels: that administrative and political actions are constrained and channelled through legal authority. Second, that trial processes are robust: being genuine attempts to decide according to proof and law, rather than returning decisions that it is hoped will placate the powerful. Third, that no individual entities, be they corporations or individuals, be they economically or politically or militarily powerful, are able to act outside of the reach of legal remedy.

It will be observed that the rule of law can be undermined or destroyed by overbearing governors or officials, or by cowed judges and justice officials, or by over mighty subjects able to threaten or cajole vulnerable officials or governors. One reason the rule of law is slippery to define and difficult to establish is that it requires both strong State institutions in its judicial arm, and docile State institutions in its executive arm; it requires an active civil society and assertive right holders, and will be fatally undermined by individual actors able to overawe or corrupt its processes. Furthermore, the forms and procedures of the legal system need both the faith and belief of the powerless as well as the toleration of the powerful for the inconvenience and frustration of working within the law. These contradictions illustrate not incoherence but dynamics, the rule of law is not thing like but a continually changing process. The rule of law is not data or information that can be copied or transplanted, it is a difficult joint project, in the words of Lon Fuller:[2]

> "With all it subtleties, the problem of interpretation occupies a sensitive, central position in the internal morality of the law. It reveals, as no other problem can, the cooperative nature of the task of maintaining legality …. Reciprocal dependence permeates in less immediately obvious ways the whole legal order. No single concentration of intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules."

We do not need to adopt Fuller's particular approach to the rule of law to appreciate the importance of his identification of cooperation in any successful attempt to live under the rule of law. He identifies "reciprocal dependence" as the key feature of the successful legal enterprise, and that insight, although nowadays we tend to call it the need for "trust", identifies the nature of the problem, it is one of coordination. Fuller thought the coordination problems of legality could be addressed through a shared ethos, or morality of law. However, although this might be a feasible approach in places familiar with the rule of law, where such an ethos could be founded upon the shared practice of legality, it is far more problematic in places lacking this shared experience.

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[1] See: J. Raz, The Rule of Law and Its Virtue, in *The Authority of Law : Essays on Law and Morality* (Oxford, Oxford University Press; 2009); T. Bingham, *The Rule of Law* (London: Penguin Books, 2011); F.R. Jacobs, *The Sovereignty of Law: The European Way* (Cambridge: Cambridge University Press, 2007).

[2] L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) p. 91

Fuller famously clashed with Hart over law and morality, but more important for our concern with the rule of law is where they agreed.[3] Hart and Fuller, and indeed such leading "legal realists" as Llewellyn before them, agreed that law is importantly about facilitation rather than command and sanction.[4] The rule of law is important for development because of its facilitative role, it leads people to structure their affairs in reliance upon the efficacy of legal rules and process. When the rule of law is respected in a society then people can plan for the future using property law including that governing inheritance, and contract law: people can rely upon others to respect property rights, and to honour their contractual obligations; people can expect others not to dissemble, or snatch valuables from them. Legality operates to facilitate productive investment, in education, in valuable resources, in time and labour spent; and it does so by giving a credible assurance that the harvest of the investment, in career opportunities, in profit share, in wages or profits will be secure.

Recognition that the problem of the rule of law is a problem not of texts, nor of individual wickedness, nor of political will, but of the credibility of a legal order that rests upon general respect for law, and a willingness to be bound by it, despite its inevitable failings and foolishness explains why realisation of this minimum requirement for democratic governance is so elusive. Law invites everyone to believe in itself, and to act as if the world were explained and regulated by the law, and to make this subjunctive world real by acting as if it were true.[5] When most people accept this invitation and believe in the law then the law is effective, and we can deal with the few who disregard it. When most people do not use, trust in, or obey the law then it has no traction and reform is frankly irrelevant. In short, in important ways law is like fiduciary currency, and cannot rest on proclamation alone but requires acclamation by those subject to it.

Of course if this is true law depends upon reciprocal dependence in at least three relations. First, of those involved in its administration *inter se*. Second, between legal administrators and the intended users of the law – those groups whose activities it is intended to facilitate e.g. the business community, or heads of families. Finally, between legal administrators and the general public as users of the law. In consequence the idea of transplanting legality as rules or institutions is misguided.[6] Implementation of the rule of law is not a technical issue of legislative drafting, or a managerial concern with the obedience of administrative agents through campaigns against

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[3] H.L.A. Hart, Positivism and the Separation of Law and Morals (1957) 71 *Harv. L. Rev*. 593; L.L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart (1957) 71 *Harv. L. Rev.* 630; L.L. Fuller, *The Morality of Law*; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997).

[4] K.N. Llewellyn, *Bramble Bush: On our law and its study* (New Your, NY: Oceania Publications Inc, 1996); See: "the bad man" approach to law in O.W. Holmes, The Path of the Law (1897) 10 *Harv. L. Rev.* 457.

[5] A.B. Seligman and R.P. Weller and M.J. Puett and B. Simon, *Ritual and its Consequences: An essay on the limits of sincerity* (Oxford: Oxford University Press, 2008); R. Sennett, Ritual: *The Rituals, Pleasures and Politics of Co-operation* (London: Allen Lane, 2012); J. Frank, Appendix VII, *Law and the Modern Mind* (Gloucester, Mass: Peter Smith, 1970); J. Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (Abingdon: Routledge, 2002); R. Caillois, *Man Play and Games* tr. Meyer Barash (Urbana: University of Illinois Press 2001).

[6] The issue has received considerable juristic attention, see: A. Watson, 'Legal Transplants and Law Reform' (1976) 92 *LQR* 79 and 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 355; W. Ewald 'Comparative Jurisprudence II: The Logic of Legal Transplants' (1995) 3 *American Journal of Comparative Law* 489; O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR* 1; P. Legrand, 'What "Legal Transplants"?', D. Nelkin and J. Feest (eds) *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001); Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11.

corruption. The understanding of those subject to the law, whether as functionaries or as citizens, must be involved. That understanding, and with it the willingness to enter into the subjunctive world of the law, is going to be determined by the experience of those people and how they have understood that experience. We are in what lawyers call the arena of public policy because the issues are too complex to be justiciable.

In thinking about the problems posed by the desire to institute or strengthen the rule of law we need some frame of reference, and the identification of key problems, that is general enough to work across very different societies. We cannot generate a set of answers that can be applied to each society in turn; transplantation can only work if the law or institution transplanted is serviceable in the environment into which it is introduced. Therefore, we need to think at both a more particular or lower level of generality, this society with this history; and at a more general or higher one, all societies that achieve impersonal markets must struggle with these problems. Here the work of Douglass C North is of great value, as he has attempted to identify those general problems that need solution. He is potentially the source of the right questions to ask of each particular society.

North started his attempt at a developmental understanding of legal institutions in work reflecting upon the rise of the Western powers to economic pre-eminence.[7] He then tried to set out a framework sufficient to describe how such economic success was achievable at a structural level.[8] However, this structure proved inadequate when faced with the real problems of development and he elaborated it, attempting to incorporate work from other human sciences than his own (economics, and economic history).[9] Throughout this process of intellectual development North has been convinced that law, rules and processes, is a vital feature of the institutional structure of successful economies.

North makes a clear analytical distinction between “institutions” and “organisations”. Institutions are “the rules of the game in a society”, some are formal and some are informal, but both types are important to how an economy functions. Laws are formal institutions. How people understand laws, and whether they respect them, are features of society shaped by informal institutions. Organisations are the players of the social game. Organisations might be political, or commercial, or religious or educational. They pursue their ends in the context of the institutions of society. The impact of the institutions on the behaviour of organisations is the way that institutions structure the incentives for different behaviours. The terms “institution” and “organisation” are analytical terms, not expressive of any essential nature. So, a single feature of the world, such as a court, may be viewed as

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[7] Rise of west D.C. North and R.P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: Cambridge University Press, 1973).

[8] D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).

[9] D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005).

His recent collaborative work D.C. North and J. J. Wallis and B. R. Weingast *Violence and Social Orders* (Cambridge: Cambridge University Press, 2009) is not considered here, and it is not necessary to endorse this work, which raises fundamental issues on the interpretation of modern history, in order to make use of the earlier work

either institutional: when seen as a part of the context in which an organisation is situated; or, organisational when viewed as a group of people that act in concert to protect or extend their power and influence. The question asked, and the identity of the agent whose point of view is under consideration, determines the characterisation. The institutional structure and the organisations that develop within the institutional structure will determine how a society operates, with higher or lower transaction costs, through cooperation or predation, encouraging effective investment and productivity growth or focussed on rent seeking behaviour.[10]

In North's terms laws and legal processes are examples of institutions. The presence or absence of the rule of law is an important institutional feature of society, but it is a concept that cuts across Northian terms: as it describes the operation of the organisations that administer law, and it indicates that the *formal* rules reflect the *actual* institutional structure of a society. North argues that the development of institutions and their effects on behaviour are "path dependant", and that path dependence is: "the constraints on the choice set in the present that are derived from historical experiences of the past".[11] In other words that the social context delimits the available possibilities for change, there is no *tabula rasa*. The social context controls the possible, the "choice set", or that which might be done, is pre-determined in unique ways.

To understand the role and importance of path-dependence for the rule of law, and institutions generally, it is necessary to understand the crucial problem that a society has to overcome if it is to prosper. North sees the problem as uncertainty for agents when facing the future. If the consequences of one's actions are obscure then effort is irrational. Too much uncertainty is likely to stymie investment, as it is better to consume now than risk losing what has been saved but cannot be kept. People who feel that the future is unpredictable will not have the incentives necessary to encourage investment in economic activity. In other words exactly the problems that the facilitative legal project, as described by Hart, Fuller, and Llewellyn seeks to address. North's thesis is therefore consonant with important strands of jurisprudential work. However, North has taken far more interest in the formal qualities of the problem the legal project attempts to address in practice.

The key problem for agents is one of uncertainty over time. Importantly it is not risk over time as that would be far more tractable.[12] The social world is not consistent over time or space. North characterises the uneven nature of the world as being its 'non-ergodic' character. The substance of the social world is constantly shifting and adjusting to the actions of the social actors it is made up of. Thus, one crucial aspect of the problem of

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[10] The key concepts and the sporting metaphor are all introduced in the first chapter of *Institutions, Institutional Change and Economic Performance*.
[11] *ibid*. 52.
[12] This distinction between risk and uncertainty is expressly derived from: F. H. Knight, *Risk, Uncertainty, and Profit* (New York, NY: Houghton Mifflin &Co, 1921), see: D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005) 13-14.

uncertainty is that the social world itself generates novel uncertainties. So, even if human beliefs were perfectly aligned with reality, and sufficiently worked out to allow agents to act with confidence, the world would change and undermine this perfect correspondence between model and reality.

Thus, North is primarily concerned with uncertainty caused by novel problems as repetitive problems can be reduced to risk. Moreover the most important contemporary source of uncertainly is not the physical world, but the uncertainty generated by the human institutions and organisations developed to deal with the uncertainties of life. Progress in the "conquest" of the physical world has unleashed a new, and more intractable type of uncertainty, that of the social world. This uncertainty is more intractable than physical uncertainty because unlike the physical universe people respond cognitively to events, because society is reflexive. This entails a constantly changing social world of uncertainty. The act of finding out what the situation is changes the situation, rendering the quest for any final certainty illusory. In the social world certainty is a will of the wisp, and its pursuit must ultimately prove futile.

The past determines both the present state of society, and the range of possible responses to the future that are available, it determines the available choice set. This past is contingent in nature.[13] Furthermore, relatively small differences in starting conditions can have unpredictable and large effects on eventual outcomes, because of the reflexive nature of society working through feedback loops, and other mechanisms. Feedback loops can be positive or negative in effect.[14] North calls this contingent and varied social response to events and possibilities over time "path dependence". Path dependency provides a general theoretical explanation for the relative unpredictability of legal transplantation including attempts to strengthen the rule of law.[15] One reason that mere copying of legal rules and systems does not produce the same consequences in their new environment as were produced in their original environment is that the new environment will respond to the transplanted law in novel ways. This response will be peculiar to the new social environment, as it will be a function of the path dependant situation at reception and response to the novelty of the recipient society. As the path dependency hypothesis is such a powerful determiner of what is possible we need to consider further whether in reality it is a feature of social systems, and if so, then how and why path dependency is a feature of society.

The world, and any new events or interventions, will be apprehended by agents through systems of belief and in the contexts created by social and economic institutions. How a problem is perceived, and what strategies are readily available to deal with it, are

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[13] For a powerful account of the importance of contingency in the story of life on Earth see: S. J. Gould, *Wonderful World: The Burgess Shale and the Nature of History* (London: Vintage, 2000).

[14] M.A. Pollack, When Cooperation Fails: The International Law and Politics of Genetically Modified Foods (Oxford: Oxford University Press, (2009) gives an example of feedback lops generating a negative effect.

[15] R.J. Daniels, M. Trebilcock and L. Carsen, The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies (2011) 59 *Am. J. Comp. L*. 111.

determined by the previous experience of a society and its constituent groups and individual agents (organisations), as embodied in its institutional structure and the resulting structure of its organisations.

Classic economic theory tended to ignore the beliefs of agents, taking little interest in their origins or effects. The assumption being that if beliefs are wrong then negative feedback from the world will lead to the beliefs being corrected, or to the holders' of the beliefs swiftly becoming marginalised and unimportant for analysis. As has already been indicated this approach will not do for law. Law invites belief in itself, and the effect of the legal project generates a new subjunctive world in which people act as if the law did explain and govern social relations. The group of believers, or their subjunctive world, is a new social fact: the beliefs do not just describe they generate a new reality. If the rule of law is *believed* in by people, then the rule of law *does* operate, and the law effectively facilitates people's plans. The new reality formed by the group of believers also changes facts independent of the existence of the group. The social world is different, transaction costs drop, corruption becomes a manageable abuse, legal wrong is met by legal remedy, and these changes vindicate the original belief. The relationship is not one of subjective belief somehow automatically policed by objective reality, it is one of reflexive interaction between reality and belief. The beliefs affect the situation, and they generate feedback loops that in turn affect the beliefs. Thus, in a negative feedback loop, lack of belief in the rule of law generates opportunistic illegality, which undermines belief in the rule of law further which generates more opportunistic illegality etc. It is the potential power of such feedback loops, the investment of organisations in the current institutional structure, and the power of subjunctive worlds to make some choices unimaginable, that can make initially small differences in starting conditions potentially determinative over time.

So, when considering a reform proposal the merit of the proposal is contingent upon the nature of the recipient society. Transplanting will only work in a straightforward manner if the recipient society shares very similar belief and institutional structures with the donor society. [16] Even in the most propitious circumstances the match of beliefs and institutions will not be identical, as we are dealing with complex systems that are path dependant. Therefore, we need some model of how belief and institutional systems operate if we are to have any chance of effecting consciously directed change to a society.

This analysis means that local conditions are always as important as the contents of any reform attempt. The problem is not one of amassing sufficient technical expertise from external sources to apply to the situation in a society. The ultimate problem is the genesis of effective adaptive institutions within a society. This must be so because of the nature of the uncertainty that we are faced with. North tries to go beyond merely flagging up uncertainty in general as the problem. He attempts to identify which problems of uncertainty are likely

[16] For an attempt to test this empirically see: D. Berkowitz, K. Pistor, J.-F. Richard 'Economic Development, Legality, and the Transplant Effect' (2003) 47 *European Economic Review* 165.

to yield to outside technical resources and which are likely to be most intractable. He distinguishes between five different types of uncertainty.[17]

The first type is uncertainty that can be reduced simply by the accretion of more information that can then be deployed within existing theories of explanation. The task is to observe, record, calculate. This type of uncertainty can be reduced to risk, through the collection of enough data. The second type is uncertainty that cannot be resolved without the development of some new explanatory theory. This might comprise the coining of new and more powerful explanations with reference to pre-existing subjects of inquiry. Alternatively, it might demand the development of new subjects of inquiry.

It seems that these first two types of uncertainty correspond approximately to working within a paradigm and the formulation of a new paradigm in Kuhn's description of the scientific method. These two categories are in harmony with traditional accounts of the progressive development of rational and scientific thought through time.[18]

The third category of uncertainty is of a different nature. It is uncertainty that requires an alteration of the institutional structure of society to resolve. This is the sort of uncertainty about the actions of other social actors that political and legal systems can mitigate, or aggravate. The rule of law has a key role to play here. The reduction of uncertainty in this sphere is effected through changes to the incentive structure that faces agents. Uncertainty that is caused by the unpredictability of other social agents can be mitigated through institutional changes that alter the behaviour of agents. If the State can and will use sufficient force to suppress piracy then the uncertainty of long distance trade is significantly reduced. If the law will with great predictability effectively enforce a contractual term of a certain type specifically, then uncertainties around performance are substantially reduced, perhaps to the level of a calculable risk. Government and law are major social institutions able to reduce uncertainty and allow for productive economic activity. The efficacy of the legal system and the law, the presence or absence of legality, is discernable in its effects upon incentives that operate in society.

Once again the issue revolves around the relative security of agents plans for the future. If social actors are confident that the gains from their efforts will be retained for their own benefit then this provides incentives to investment and effort. However, if they fear expropriation, by the government or more powerful social actors, then their incentives to invest and produce are lessened. It can be very difficult to give convincing reassurance of future restraint from expropriation, especially if the experience of groups within a society

[17] D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005) 17-19.

[18] T. S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1996). Accounts of the incremental and progressive growth of scientific knowledge are common, e.g. J. Gribbin, *Science: A History 1543-2001* (London: Penguin Books, 2009). For an attempt to incorporate the nature and products of scientific research, and the specialisation of labour in knowledge production, see: J. Mokyr, *The Gifts of Athena: Historical Origins of the Knowledge Economy* (Princeton, NJ: Princeton University Press, 2002).

has been that such reassurances have been reneged upon in the past. Often, the only social institutions capable of giving credible assurance of freedom from expropriation are governments and legal systems. However, as North notes governments face a particularly acute problem of giving "credible commitment" to a course of action.[19] Governments find it difficult to bind themselves to act in a certain way in the future, given their power to renege without immediate effective retribution. One of the great challenges for the rule of law is to wrestle with this problem of the restraint of political power.[20] A *practice* of respecting legality is a source of credible commitment governments can offer, and such a practice will find organisational support from professional providers of legal services and organisations that have invested in legal compliance.

The fourth category of uncertainty comprises novel situations that can only be accommodated successfully by the restructuring of beliefs. In explaining this type of uncertainty North uses the idea of a "cultural heritage" that partially explains differences between different societies faced with novel uncertainties. It is not entirely clear how to disentangle the second and third categories from this fourth type of uncertainty. It seems beliefs should be taken to be different from the changing explanations of the second type of uncertainty. Perhaps beliefs involve normative aspects that are not present in the idea of knowledge and explanatory frameworks. Similarly, culture must be taken to be different from the institutional framework as described in the third category. "Culture" is a broader conception, one that includes but is not exhausted by the institutions of a society. Elsewhere North links culture to "artifactual structure", which he defines as "the learning of past generations transmitted as culture into the belief structure of present generations".[21] Perhaps the most obvious extension of the content of culture over that of institutions would be that culture involves both greater normative force and higher levels of generality than specific social institutions. Culture is fairly obviously a product of path dependant development, and includes more than the formal learning and institutional rules of a society. The broader and informal aspects of culture make it resistant to changes imposed by authoritative proclamation, unlike the formal institutional structure of society including law.

It seems possible that this form of uncertainly needs a reconfiguration of the subjunctive worlds of the general population. This idea has no clear authority in North, who does not explore the idea of the subjunctive. Subjunctive worlds are typically built upon repetitive actions or "habits", similar to Aristotle's conception of character built upon habits of

[19] D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005) 66-68.
[20] On the political problem of State credibility see: B. R. Weingast, 'The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development' (1995) 11 J Econ & Org 1; P. Collier, *The Bottom Billion* (Oxford: Oxford University Press, 2008).
[21] D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005) 50.

virtuous action.[22] Habits that make sense on certain assumptions about other people. An example is saying "please" and "thank you" to people who perform some service, whether gratuitous or paid. The gesture of respect makes sense if the person providing the service is worthy of respect, the verbal tick is an acting out of an attitude towards others. The subjunctive is ritualistic in nature, rather than based upon sincerity of feeling. It is a shared practice as much as a shared belief. Law reflects this in many ways, including the rules of communication in court, and the right to an accused to face his accuser and make his defence. It is not necessary to belief a defendant is innocent in order to give effect to the presumption of innocence. Thus, our shared subjunctive worlds are shared ways of being as much as shared ways of understanding. The idea of the subjunctive, as shared ways of being and their associated ways of understanding, seem to capture something of the sense of culture that North tries to express and would serve to distinguish his fourth classification from the second and third categories. It would also explain the extreme resilience of such beliefs in the face of reform attempts. Finally, it would bring into focus another aspect of such features as the rule of law in a society, as it is embedded in practices and ritualistic observances as much as in formal rules and institutions. Belief in legality informs a way of life, hence the difficulty in introducing it where practices are not established that will support it. North's account retains an intellectualist or cognitive emphasis when dealing with culture.[23]

The fifth and final category of uncertainty is that which at any time and place cannot be reduced by rational means, and is therefore consigned by North to irrational modes of explanation and resolution. Life cannot be reduced to regularity by human will. However, humans desire some predictability and order in life, and some of us find it necessary to believe that we can influence those outcomes that we most care about. For North non-rational includes both prayer and ritual behaviour, by which he seems to mean both religion and not stepping on the cracks in the pavement.

Law is clearly of importance for the third, fourth, and fifth types of uncertainty. Rule of law practice gives what effective leverage law has on the incentive structure of society as well as being a distinct and powerful approach to facilitating peoples' confidence in planning for the future. However we finally decide to interpret the fourth type of uncertainty, the beliefs of a

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[22] A.B. Seligman and R.P. Weller and M.J. Puett and B. Simon, *Ritual and its Consequences: An essay on the limits of sincerity;* Aristotle, *The Nicomachean Ethics* (London: Penguin Books, 2004) tr. J.A.K. Thomson.

[23] This is not to say an individualistic approach, as is clear from J. Knight and D.C. North, Explaining Economic Change: The Interplay Between Cognition and Institutions (1997) 3 *Legal Theory* 211; as well at the account given in D.C. North, *Understanding the Process of Economic Change.* North has embraced social distribution of cognitive tasks, following E. Hutchins, *Cognition in the Wild* (Cambridge, Mass: MIT Press, 1995). Incorporation of a subjunctive understanding of beliefs and practices would erode the analytical division between informal conventions and norms (institutions) and cognition (beliefs). However, this seems to be a consequence of incorporating socially distributed cognition in any event. A. Greif, *Institutions and the Path to the Modern Economy: Lessons From Medieval Trade* (Cambridge, Cambridge University Press, 200) is a comparative historical study informed by North's work, and specifically his development of a theoretical linkage between institutions and cognition.

society are obviously both formative of law and its operation, and formed by the same. The legal system and law is an important part of the cultural heritage of society. Such ideas as "justice" and "rights" and "obligations" call forth a normative response beyond any specifically legal or doctrinal importance they might have. In the English language we ask of political systems whether they have "legitimacy". The ideological importance of law and the legal system is active in this sphere. Law can operate directly on incentives by altering the consequences of actions through the use of social force. However, probably far more powerful is the operation of law indirectly on the incentive structure, operating through the beliefs of social actors about what sort of behaviour is right and proper and likely to be rewarded. Traditionally it is this strongly normative aspect of law that has linked the fourth and fifth categories of uncertainly identified by North, as belief in a Divine or providential legal order has been a feature of human society and jurisprudence. However, if culture involves subjunctive ways of being and believing then the link is stronger and more visceral than this. From the invention of war crime trials at Nuremburg to the idea of the final judgment there are strong indications that legal forms frame at least Western perceptions of the unconstrained world.

North has identified questions that are worth asking when trying to establish, or to maintain or strengthen, the rule of law at several levels. At the teleological level he clarifies why the rule of law may be desirable: because it can help in the co-ordination problem that the legal project to facilitate agents' planning raises, and by so doing it can facilitate investment in the future and cooperative behaviour. At the analytical level he identifies sources for the intractability of the concept of the rule of law by identifying its socio-economic roles, as institution and organisation and belief system. At the formal level he makes valuable distinctions in the types of uncertainty that legal reform has to take into account. At the practical level his emphasis on path dependence tells us we need to seek information from the society that reform effort is directed towards, that vital expertise is likely to come from the recipient society. Furthermore he allows us to identify the types of information we will need to bear in mind when attempting legal transplantation or reform, it includes the formal structure of the legal system, but it also involves the existing incentive structures organisations have adapted to, and the beliefs of several sets of social agents.

When one combines North's work with an awareness of the subjunctive in law, whether this is taken from legal theory or from work on ritual and games, then an intriguing relationship between practice, belief, and possibility is revealed. A legal system may be productive of responsive solutions to novel uncertainty, but it may just as much be a barrier to perceiving possible solutions. It is a possibility that opens up a mental space for awareness of the contingency of our current legal approach to problems by allowing us to become aware of our subjunctive world of shared understanding, and thereby of the possibility of different shared worlds, a necessary possibility for those societies struggling to achieve development. It emphasises the vital importance of the subjunctive in practice, for our ways of being and believing determine how we live and how we can imagine living.

Perhaps the single most important lesson for us from North's work is to avoid the allure of standardised solutions to disparate problems. Well meaning efforts at reform have failed to deliver the hoped for benefits in the past, at least in part because it was assumed that societies are all

essentially the same.[24] Reflection on the institutional and organisational structure of societies with awareness of the dynamics of path dependence makes this illusion seem childish. It has been reported that in Niger the formal legal system is modelled on the French Civil Code while the effective legal system is based upon practices that recall the trial by ordeal that the jury was made to replace in the thirteenth century in England and Wales.[25] The reform process has not touched legal practice, and far less the beliefs of its supposed beneficiaries as a facilitative force. Reform should have started with the practices of Niger society, but it started in a law office in the West. The result is an obstacle to effective reform through the promulgation of unimplemented laws, confirmation that the formal rules of law are a farce and people need to seek their remedies elsewhere. North helps to understand how such results are not only possible but predictable if we ignore the relevant features of the society that receives legal transplant or legal reform efforts. Ultimately reform must involve domestic agents in its design and implementation because their knowledge of the subjunctive worlds of their own societies is a vital component in the reform process.

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[24] D.M. Trubek and M. Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States (1974) *Wis L R* 1062.
[25] T.A. Kelly, Exporting Western Law to the Developing World: The Troubling Case of Niger (2007) 39 *Geo Wash Int'l L Rev* 321.