

FUNCTIONALISM AND FORMALISM:
THEIR LATEST INCARNATIONS IN CONTEMPORARY
DEVELOPMENT AND GOVERNANCE DEBATES

John Willis was deeply engaged with one of the central institutional controversies of his time, the relationship between the courts and the administrative state. He was a deft and ironic reader of the discursive frame in which the controversies over their respective roles was conducted; he was especially well versed in the rejoinders proffered by those who opposed the administrative state in the name of the rule of law; and he was alert to the material interests and venal motives that could be cloaked in the rhetoric of legalism. In short, Willis had a sharp sense of the relationship between professional debates in law and the larger political conflicts and transformations in which they played a part.

John Willis and his contemporaries were proponents of functionalism as a means to resolve regulatory controversies. Functionalism began as an antidote to a conceptualism that attempted to divorce legal reasoning from context in adjudication. The realists debunked the analytic infrastructure upon which formalism rested. They also invoked the demands of modernization and the authority of social science in response to those, including judges, who defended adjudicative practices that were inimical to the expressed desires of democratic electorates in the name of the inherent nature of legal rights and the demands of the rule of law. Instead of the generation of legal entitlements from the germ of a legal idea or concept, they proposed a pragmatic, empirically grounded analysis of the relationship between legal rules and the social world in which they operated and which they helped to construct and a frank balancing of the rights and interests at stake in the choices on offer. As a counter-strategy, a means of ensuring that the space to further democratic political agendas was not crowded out by a muscular judiciary with defensive territorial ambitions, functionalism worked well for a certain period of time.

At the beginning of the twenty-first century, functionalist and formalist arguments in law have resurfaced, albeit in an altered form, as have many of the concerns, controversies, and claims with which they were originally connected. However, the relationship between these arguments and institutional projects is now very different. For example, we are once again arguing about the extent to which corporate activities

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should be regulated for the public good. We are intensely engaged in the relationship of private rights to the advancement of general welfare, and there are debates underway all over the industrialized and developed world about the relationship between legal institutions and economic growth. Within these debates, however, formalist and functional arguments no longer necessarily operate as they did in Willis's day. Functionalist arguments, in particular, have developed a different cast. Although originally deployed to advance or defend the regulatory state, functionalism is now being used to transform the state and dismantle many of its institutions; it has become the instrument of, rather than the answer to, those whom Willis and his ilk originally opposed.

What follows is a reflection on functionalist and formalist reasoning about legal rights and the rule of law in contemporary debates on law and development and in the international financial institutions in particular. By way of preamble, it is useful to know that the issues at stake and the terms in which they are considered are not restricted to the field of law and development; nor will they feel like foreign territory to anyone familiar with Willis's work. Many of the questions that preoccupy scholars and policy makers in that field are fundamentally the same as those that underlay Willis's defence of the administrative state, and they remain both fascinating and deeply important for lawyers working in a variety of areas. Indeed, looking at the debates on governance and law and development is simply a convenient, and often sharply focused, way of identifying a set of controversies concerning the transformation of the state and the place of law and regulation in economic life, controversies and changes in which we are currently immersed. These debates also provide an angle from which to assess the limits of functionalism and to evaluate its dark side. For a variety of reasons, we can now see what Willis and his contemporaries were not yet in a position to see, if only because functionalism in law had not then been through all of the turns of its own life cycle.

One thing that now seems irrefutably clear is the limits of imagining that questions such as the proper locus of decision-making authority, the nature of legal entitlements, or the design of legal institutions in complex industrial societies can be determined (or are likely to be resolved) with reference to ideas like 'social reality' and 'economic progress.' Willis, for example, felt comfortable invoking the complexity of modern economic conditions as the justification for removing regulatory matters from the purview of courts, and sometimes from legislatures too,¹ certain that this complexity provided a compelling defence of the new institutional arrangements over the old. However, it turns out that invoking the

1 John Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 U.T.L.J. 53 at 58.

merits of a pragmatic and empirical approach to the problems thrown up by modern life does not, in and of itself, preclude battles over what such functionalism is for; that is, disputes over the objects of regulation and the purposes that legal institutions and the administrative state should serve in contemporary economic and political life. While during the Depression, and in the era following, it might have been safe to assume a rough social consensus about such questions, any such assumption has now become unsafe: the consensus has been dissipated and what those functions are or should be turns out to be deeply contested.

As a strategy, functionalism succeeded, in part, because it seemed to provide a way to depoliticize the process of adjudication and diffuse the conflicts among the courts, the executive, and the legislature. Functionalism appealed because it was scientific, it was modern, and it stripped away mystifying concepts to reveal the real issues at stake. It was also an accredited mode of proceeding because it rested on forms of analysis and argumentation whose merits had already been accepted in other fields.² Arguably, because it reflected a broader zeitgeist as well, functionalism in adjudication helped allay anxieties about the emerging administrative state and its relation to the courts.

However, like the very scientific modernity to which it owed its authority, functionalism has now become a political flashpoint itself. In part, this is because claims made in the name of progress no longer generate the widespread assent that they did in Willis's time. But part of the resistance comes from the particular way in which the functionality of institutions has come to be understood. Legal and administrative institutions are increasingly measured by the extent to which they further efficient transactions and encourage private-sector activity;³ these objectives, in turn, are typically understood to involve creating the legal infrastructure that furthers the interests of investors and capital holders through, *inter alia*, enhanced protection for property and contract rights. However, these developments are profoundly controversial and are contested at the empirical, analytic, and political levels. For this reason, contemporary law and development debates and their domestic counterparts pose a deep challenge to the idea that functionalism is a way to hold either social or professional conflict in abeyance.

On a related point, we can now more clearly assess the risks of investment in professionalism itself. Willis and his contemporaries were deeply immersed in a culture of expertise. They were confident about the capacities of expert administrative bodies and a professional bureaucracy to

2 On this, see Felix S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum.L.Rev. 809.

3 World Bank, Legal Vice Presidency, *Legal and Judicial Reform: Strategic Directions* (Washington, DC: IBRD, World Bank, 2002) 18 [*Legal*].

resolve the social and economic problems of the time, and they viewed professionalism as a way to enhance the degree of democratic control in public life. This was always a problematic, if hopeful, stance, for at least two interrelated reasons. Such a stance, in the first place, downplayed the extent to which, rather than any single 'right' answer, there might be conflict among the interests furthered by particular policy paths and regulatory structures; and, in the second place, necessarily tended to displace democratic, in favour of elite, involvement in the processes of regulatory reform and policy generation.⁴ At the present time, some of these problematic tendencies are especially evident; perhaps the cult of professionalism is even reaching its inevitable endpoint. In contemporary regulatory debates, and in the field of law and development in particular, reliance upon professionalism and expertise is even more in vogue than it was in Willis's day. However, the role of professionals and the use of expertise can no longer (if they ever could) be safely associated simply with the execution of the democratic will. Moreover, the claim that expertise is needed to resolve problems that lie beyond the competence of either courts or legislatures is, in many quarters, as likely to generate unease as to induce comfort.

One reason is the growing engagement of professionals in the generation of governance norms in the new economy. This trend is especially salient in the field of law and development; much of the field is virtually defined by the presence of experts engaged in the identification, analysis, and propagation of 'good' or 'best' practices in legal rules and institutions. This is functionalism on steroids. Cadres of technocrats and professionals, economists in particular, have become not merely servants but architects of the new, improved legal and administrative regimes – those who, in designing rather than merely executing or elaborating institutional structures, set the terms and conditions under which states, markets, civil society groups, and individuals interact and relate in a globally integrated world. Moreover, this burgeoning technocratic expertise is largely allied with the projects of cultural and economic elites, both domestic and international.

Professionalism today has become a means not simply to fulfil but to validate or discredit alternatively a wide range of policy and regulatory options. Despite the efforts by the international financial institutions to present these efforts as merely 'scientific' or technical exercises, this is a contested enterprise. As a wide range of questions is consigned to the domain of experts and separated not only from courts but from legislatures too, it is evident that the deployment of technocratic expertise can be an instrument by which dreams and desires, some of which may have

4 Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stan.L.Rev.* 57.

little to do with or even run at cross-purposes to decisions expressed through democratic political institutions, are furthered.

It is unnecessary to have a romantic view of democratic political processes to observe that these developments might alter the locus of control across a range of fundamental decisions about social ordering, including the distribution of power and resources among different social groups. The dramatic expansion of questions styled merely professional or technical matters and the contraction of the domain of democratic policy making that necessarily results are a marked departure from what Willis and the realists imagined to be the consequences of the functionalist turn. Nonetheless, regulatory reform proposals, some of which would dismay – even horrify – them, are now advanced in precisely the same language and on the same terms that they themselves proposed.

On one level, this is old news. Functional approaches to adjudication have been subject to critical scrutiny before, from the left as well as the right.⁵ We know that functionalist arguments can be flipped,⁶ and that both law and economics and critical legal studies are realist progeny. Any historian of the constitutional decisions of the United States Supreme Court so inclined could document the manner in which modes of argumentation, once effectively deployed to secure outcomes deemed socially progressive, at other moments, and in other contexts, led to their opposites.⁷ At least partly on the strength of this experience, some legal scholars in Canada predicted that the entrenchment of the Charter would not necessarily enhance the interests of disadvantaged or disenfranchised groups, many of whom had, historically, fared poorly at the hands of judges. But whether or not it is news, it now seems clear that functionalism has become a weak instrument upon which to ground alternative administrative regimes or justify non-judicial modes of adjudication. It is a still weaker basis upon which to mount a defence of the regulatory state, once fundamental cleavages open up over the purposes of the state and the allocation of legal entitlements and responsibilities among different social, legal, and political institutions. Rather than support the administrative state, functionalism can operate just as easily to undermine it. This is, of course, the moment we are now in.

Some caveats are in order. There is always a question about the extent to which either the design of legal and administrative institutions or the outcomes of particular legal disputes can safely be attributed to either

5 Here, they were Weberians: see David M. Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wis.L.Rev.* 720.

6 Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, MA: Harvard University Press, 1997).

7 Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Cambridge, MA: Harvard University Press, 1992); Joseph William Singer, 'Legal Realism Now' (1988) 76 *Cal.L.R.* 467.

principled or ideological approaches to the rule of law and legal reasoning, whether formalist or functionalist. Perhaps formalism and functionalism serve as vehicles to further substantive social visions; perhaps each may also be used for divergent social and political ends. Perhaps they only exist retrospectively, obscuring the extent to which dispute resolution and institutional design are, in practice, varied, divergent, messy, and altogether much less coherent enterprises than either term suggests. Perhaps there is a considerably more complicated relationship between principle and ideology, on the one hand, and material interests and social outcomes, on the other, than the binary opposition between formalism and functionalism suggests. For example, perhaps images and beliefs about the nature of law and the role of the state come to build social visions, while particular social and political agendas, in turn, help remake the imaginative possibilities around legal institutions and the state. I take no position on this, except to note that all of these possibilities seem to be reflected, to some extent, in current discussions about law and development.

1 Institutional reform within law and development: The place of the state

Virtually all of the central debates in the field of law and development revolve around the transformation of the role of the state in economic life and the associated implications this transformation has for other institutions, such as markets or households, or actors, such as individuals or interest groups. In Willis's day, what was at stake was a choice between a laissez-faire state, whose limits were policed by a judiciary steeped in common law rights, on the one hand, and the newly emerging regulatory state, on the other. Now, the international financial institutions are engaged in a project that can perhaps best be encapsulated in the effort to move from the regulatory, protective, or redistributive state that prevailed at that earlier moment to a new ideal of the 'enabling' state of the global economy. Although the evolution of complex industrial societies is arguably inseparable from the rise of the administrative state, the international financial institutions, and many other architects of global economic integration as well, are currently engaged in a sustained effort to sever post-industrial capitalism from its established moorings in the regulatory state, at least as that state has evolved in the post-war era. To rehearse what is by now well known, a critique of the bureaucratic state and a reformulation of the role of that state in the execution of public policy, in the regulation of economic activity, and in wider social life are central to the emerging ideas about good governance that these institutions are currently authoring. This effort to remake the expectations of and around the state lies at the heart of their project to generate growth and development through private-sector activity in a market-centred, globally integrated economy.

There are multiple, somewhat independent, critiques of the state in play and, consequently, a number of bases upon which institutional reforms are justified. Some purport to be merely descriptive: according to one narrative, maintaining the New Deal or Keynesian approach to regulation is simply not an option, given the transnational character of economic activity and the necessarily limited regulatory scope of the state. Some are disciplinary or methodological: according to one line of argument, if the same assumptions that inform the analysis of markets are applied to governments, the conclusion to which we are necessarily impelled is that the size of the state and opportunities to deploy state powers should be curtailed because they will inevitably be used by bureaucrats and office-holders in self-interested ways.⁸ Still others are frankly normative and ideological: even if it were actually possible to pursue them, the constellation of objectives around which the New Deal state was organized – the promotion of greater equality, the provision of a basic standard of living through social insurance and public goods and services, and the mitigation of market forces, among others – are simply no longer appropriate roles for the state, if they ever were.

So far, the outcome of all of these critiques is a vastly transformed idea of the function of the state, if one that is still largely idealized rather than actualized. The position maintained by reformers is that the primary function of the state is to establish the incentives for market forces to operate and, subject to the caveat below, to correct for market failures.⁹ Vis-à-vis citizens, the role of the state is to create opportunities for market participation and facilitate other desired events, rather than to guarantee any set of social outcomes per se.

An important operating presumption, one that runs throughout the narrative on governance and regulatory reform, is that the state is inevitably prone to capture or politicization and, for this reason, state ‘intervention’ is likely to be worse than the ill it is designed to cure. This presumption gives rise to the major preoccupation about the state in law and development literature: government failure, a phenomenon that in development parlance is usually just described as ‘corruption.’¹⁰

8 James Buchanan, *The Theory of Public Choice – II* (Ann Arbor: University of Michigan, 1984); James M. Buchanan, Robert D. Tollison, & Gordon Tullock, eds., *Toward a Theory of the Rent-Seeking Society* (College Station: Texas A & M University Press, 1980). For a discussion of its uses in contemporary law and development literature, see Kerry Rittich, *Recharacterizing Restructuring* (New York: Kluwer Law International, 2002) at c. 3.

9 World Bank, *World Development Report 2002: Building Institutions for Markets* (New York: Oxford University Press, 2001).

10 The World Bank identifies corruption as the single most important obstacle to development: it has over 600 anti-corruption projects in place. Combating corruption has a similarly prominent place in the policies of the IMF; see ‘Governance & Anti-corruption,’ online: The World Bank <<http://www.worldbank.org/wbi/governance/>>.

The need for some degree of regulatory oversight, only recently decried and disparaged as undesirable state 'interference' in the economy, is now conceded by the international financial institutions: catastrophic financial crises, privatization schemes that enabled the appropriation of assets by small numbers of well-placed insiders, and assorted other misadventures have induced even the most diehard pro-market reformers to step back from the nightwatchman state as the ruling ideal.¹¹ Moreover, legal systems that are too slow, unpredictable, or cost too much have been identified as impediments to investment and transactions.¹² But the basis of that regulatory oversight has still shifted markedly: it is to correct for market failures, not to protect the weak or ill-informed, respond to imbalances of power, ensure widespread access to goods and services, provide for basic needs, or redistribute resources and entitlements. Doubtless, some of these 'old' regulatory objectives can be recast as responses to market failures or market externalities and justified under the new regime. Nonetheless, observers are not wrong to claim that something profound has occurred. A new logic has been substituted for the old: in the main, institutional reforms are for the purposes of optimizing market performance, and there is enormous pressure to pursue social goals either within the framework of these reforms or outside the state, via the market or civil society.

II *Formalism and functionalism in law and development*

Many of these arguments are post-realist, bearing at least a family resemblance to those put forward by Willis and his contemporaries. What we encounter is a series of functional arguments for the dismantling of much of the regulatory state that is relentlessly consequentialist, pragmatic in orientation, closely tethered to the methods of science and economics, and rooted in claims about the nature of the real world. These arguments, too, are justified in the name of modernization and the imperatives of global social reality. They are even 'empirical' in orientation, if sometimes spuriously so: their proponents typically claim a positive correlation between reforms and enhanced economic growth.¹³ They are also deployed for much the same purposes as functionalist arguments originally were: to advance a project of profound institutional change, if one that moves in a strikingly different direction than that

11 World Bank, *Legal*, supra note 3.

12 For a recent restatement, see World Bank, *Reforming Infrastructure: Privatization, Regulation and Competition*, Policy Research Report (Washington, DC: World Bank, 2004), online: The World Bank <http://econ.worldbank.org/prr/reforming_infrastructure/> [*Reforming*].

13 World Bank, *Doing Business in 2004: Understanding Regulation* (Washington, DC: World Bank, 2004) [*Doing*].

envisioned by the realists. They are realist in their genesis as well: the law reform project is almost entirely a professional production, one generated by bureaucrats trained in the social sciences, who have come to believe that law is critical to their main concerns, promoting economic growth and global economic integration. However ruefully, it must be conceded that realist tools are being used quite effectively to dismantle the realist house.¹⁴

A THE NEW FUNCTIONALISM

Yet while many of the elements of functionalism are recognizable, this is also a new moment in legal functionalism, and functionalist arguments are also being applied in different ways.

To reiterate, the functionality of legal institutions is now understood in a quite particular way. Rather than seeking a greater congruence between law and social life and the furtherance of legislative or democratic objectives (as opposed to a state governed by an idealized notion of the rule of law), the aim of legal reform has been reduced and the reform project redirected toward the promotion of efficient economic outcomes. While this was, of course, always one of the objectives furthered through regulatory or administrative intervention, what is noteworthy is how much efficiency has displaced other objectives. Recent policy statements are more likely to make reference to the need for anti-discrimination norms and consumer protection;¹⁵ they may even contain references to social security.¹⁶ However, this is a far cry from a defence, in either form or purpose, of the legal and administrative regimes through which such goals have been realized since the New Deal. As often as not, their principal aim is to encourage market participation by traditionally excluded groups.

The realists made the case for the empirical analysis of law as part of their argument about the importance of analysing the effects of legal rules in action in particular contexts. However, although empirical analysis remains central to the field of law and development, much of the research, particularly that conducted by international financial institutions, is designed to establish the general validity of model regulatory arrangements that have already been designated as 'best practice' in market societies.¹⁷ Many of these arrangements are themselves derived either from theoretical models – see, for example, the proposals to

14 With all debts to Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984).

15 See World Bank, *Legal*, supra note 3 at 73.

16 Robert Holzmann, Lynne Sherburne-Benz, & Emil Tesliuc, *Social Risk Management: The World Bank's Approach to Social Protection in a Globalizing World* (Washington, DC: World Bank, 2003).

17 A classic example would be World Bank, *Doing*, supra note 13.

deregulate labour markets that assume that these markets will respond in accordance with neoclassical models¹⁸ – or from some idea of what legal rules in ‘normal’ market societies look like. Nor, at least until recently, has the empirical work taken into account the interaction of formal law with other normative orders, a hallmark of realist jurisprudence and scholarship.

Moreover, contemporary arguments about the merits of functionalism in legal institutions are associated with the right, not the left. A series of efforts is underway to address the ‘social deficit’ of globalization and to respond to the critiques that standard reforms routinely generate greater inequality and visit harm and pain on particular social groups. For this reason, reform proposals now often include references to concerns such as human rights and reflect a greater focus on legal reform and the rule of law. But, notwithstanding second-generation reforms,¹⁹ third-way variants, and other efforts to assimilate a range of social objectives – from environmental protection to gender equality – into the institutional reform project, reforms designed to make institutions more ‘functional’ – in the sense of responding better to the needs of the global economy – remain largely oriented to the protection of ‘private’ rights. One recent World Bank report on legal reform for development, for example, baldly asserts that the most economically successful countries are those that regulate least.²⁰

It seems important to note that this need not be so: there are many good arguments, some with long and distinguished pedigrees and some of which date back to the New Deal, for a considerably broader understanding of the institutional elements that comprise efficient, functional market societies.²¹ Indeed, the international financial institutions themselves were created as part of a larger institutional reform project in which states with considerable redistributive and regulatory capacity were regarded as a necessary part of ensuring global economic and political stability.²² Nonetheless, within the international financial institutions,

18 ‘World Economic Outlook: International Financial Contagion, May 1999,’ especially at c. 4, online: International Monetary Fund <<http://www.imf.org/external/pubs/ft/weo/1999/01/index.htm>>.

19 For a classic statement of the new vision, see James D. Wolfensohn, ‘A Proposal for a Comprehensive Development Framework, January 1999,’ online: The World Bank <<http://www.worldbank.org/cdf/cdf-text.htm>>.

20 World Bank, *Doing*, supra note 13.

21 See Simon Deakin & Frank Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in Hugh Collins, Paul Davies, & Roger Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000) 29; Diane Elson, ‘Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues’ (1999) 27:3 *World Development* 611.

22 John G. Ruggie & George Kell, ‘Global Markets and Social Legitimacy: The Case of the “Global Compact”’ in Daniel Drache, ed., *The Market or the Public Domain: Global Governance and the Asymmetry of Power* (New York: Routledge, 2001) 321.

many of the institutions and entitlements that are designed to redistribute power or reallocate resources to those other than investors and capital holders are now subject to the presumption that they will interfere with growth. Two important counter-trends should be noted, both of which reflect some awareness of the complex relations between efficiency and equality. The first concerns regulatory reforms that correct recognized market failures so as to enhance efficiency and ease transactions; the second concerns reforms that promote greater market participation or are identified with the protection of 'basic' human rights. However, one of the most noticeable changes lies in the argumentative strategy that is deployed to advance reforms. More frequent now are claims that legal entitlements such as property rights – rights whose original justification was the expectations and demands of investors – are themselves both the most important anti-poverty devices *and* more important to the socially excluded than to anyone else.²³ To put it another way, there is as much effort to shift the justification for reforms so as to present them in a more socially appealing light as to alter the standard package of entitlements themselves.

What is fascinating is that reforms are justified not simply in practical and economic terms but also in legal terms. As a field, law and development is marked by a resurgent neo-formalism. Arguments for institutional reform are as often abstract and deracinated as they are contextual and consequentialist. Quite specific legal arrangements are connected to the rule of law; specific legal entitlements are defended in strikingly conceptual ways. As a result, contemporary law and development discourse ends up being an amalgam of functionalism and formalism. Rather than radio buttons or binary opposites that permit only an either/or strategy, functionalism and formalism now exist in different, more compatible, configurations. Whether as an approach to the adjudication of legal rights or as a justification for the design of regulatory structures and administrative regimes, functionalism now seems perfectly capable of co-existing with the very formalism that it was originally imagined to discredit and displace.

B THE RETURN OF FORMALISM

The presumptions embedded in the canons of judicial construction noted by Willis have once again resurfaced in development policy. These include presumptions against altering common law rights and presumptions against taking away property without compensation.²⁴ However, this time they appear in the form of what might be called 'canons of institutional design,' otherwise known as 'best practices' or simply 'good

23 World Bank, *Land Policies for Growth and Poverty Reduction*, Policy Research Report (New York: Oxford, 2003).

24 John Willis, 'Statute Interpretation in a Nutshell' (1938) 16 Can.Bar Rev. 1 ['Nutshell'].

governance,' rather than as canons of judicial construction. To this reader, there is a remarkable degree of resonance between these presumptions and the parameters of contemporary legal reform projects.

The protection of property and contract rights has pride of place within law reform projects associated with development.²⁵ Apart from laws ensuring basic personal safety, they are the only substantive rules that are sure to merit inclusion in the list of fundamental legal reforms. In the field of law and development, they are regarded as both essential to economic growth and foundational to rule of law-respecting societies.

All this may sound uncontentious, perhaps even totally reasonable, until placed in the context of the realist critique. The observations Willis made about the constraints these canons place on legislation remain germane in the context of current debates about institutional reform: any legislative scheme involves taking away rights from someone, and almost all social legislation involves redistribution of property in one way or another.²⁶ In short, these canons are remarkably effective devices for constraining democratic choices and delegitimizing institutional reforms that seem to interfere with property and contract rights. For this reason, it is not surprising that they might operate now against the social, broadly conceived as efforts to provide a counterweight to market forces by altering the structure of rules and entitlements that governs economic transactions. However, now these presumptions enter into the picture, not in the context of adjudication, but at a much earlier, and arguably more critical, point: the moment of institutional design. This, notwithstanding that they seem even more vulnerable to the critique levelled by the realists against the judges: presumptions against interference with property and contractual rights are inevitably circular, even meaningless, when the issue is, as it must be when matters of institutional design are on the table, what those property and contractual rights should themselves be. More important, these canons still operate to obscure what Willis and others laboured to make clear, which is that, in 'market' as well as in 'social' legislation, rights are being allocated to some and altered for others, with discernible, if varied, outcomes in resources and powers.

C THE USES OF THE RULE OF LAW

John Willis noted the propensity of legislatures to restrict the jurisdiction of courts and the tendency of courts to counter with 'oratory about justice and the rule of law and by denunciations of despotism and bureaucracy.'²⁷ Although the response now comes from the international

25 For a discussion, see Rittich, 'Who's Afraid of the *Critique of Adjudication?* Tracing the Discourse of Law in Development' (2000) 22 *Cardozo L.R.* 2.

26 Willis, 'Nutshell,' *supra* note 24 at 20.

27 *Ibid.* at 22.

financial institutions rather than the courts, Willis's observation still gives a representative sense of the tenor of current debates around governance and legal reform in the field of development.

One of the hallmarks of contemporary development policy is the prominence given, not simply to legal institutions, but to the rule of law and to reforms to the judicial system. A recent restatement on legal and judicial reform for development begins with an ode to the rule of law;²⁸ like examples could be found in virtually any recent piece of legal reform literature emanating from the international financial institutions. Courts have a very high profile in current development policy, and judges have iconic status as guardians of democracy.²⁹ For example, the World Bank identifies judges, rather than electorates, as the main mechanism for ensuring the accountability of governments.³⁰ State agencies, by contrast, are figured as repositories of corruption and the source of arbitrary interference with rights.

Some of the enhanced interest in the rule of law and judicial reform may be attributable to the effort to incorporate human rights into the development project, the reformulation of development as the promotion of freedom, and the enhanced interest in access to justice, all of which mark second-generation reforms.³¹ However, arguments about the rule of law predate these reforms, appearing first in connection with anxieties about the protection of property and contract rights. Although arguments from the rule of law run like a thread throughout the twists and turns of regulatory discussions, providing support for a variety of reform proposals, this attachment to the rule of law may be as much ideological as empirical.³² The connection of the rule of law to the generation of economic growth is notoriously hard to establish. Efforts to reform the behaviour of judges have been marked by repeated failure, and the connection between judicial reform and economic development remains tenuous as well. Moreover, the commercial actors whose activities are the object of attention often prefer alternative modes of dispute

28 World Bank, *Legal*, supra note 3 at 1.

29 Duncan Kennedy, 'Two Globalizations of Law and Legal Thought: 1850–1968' (2003) 36 *Suffolk U.L.Rev.* 631 at 632–3.

30 World Bank, *Legal*, supra note 3 at 5.

31 This is discussed more fully in Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (forthcoming) *Mich.J.Int'l L.*

32 Others have suggested that judicial reform may serve useful political and strategic purposes for local elites, purposes that are unconnected to economic growth at all. See Yves Dezalay & Bryant G. Garth, eds., *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002); Yves Dezalay & Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002).

resolution, such as arbitration. The point of these observations is not to query the importance of the rule of law or to detail what the rule of law does, does not, or should entail; it surely operates in very different ways in different contexts. But the references to the rule of law generously, and somewhat randomly, sprinkled through what are essentially economic policy discussions and the thin empirical basis for assertions about the importance of the rule of law to economic development together suggest that there is something more going on than a simple cause-and-effect relationship between the rule of law and economic growth, or even a desire to ensure the framework conditions for broader democratic life.

In 'Statute Interpretation in a Nutshell,'³³ Willis observed that what began as a mode of ensuring parliamentary or legislative supremacy had, in the modern era, become a means by which the judiciary exercised control over Parliament. This rings true in contemporary development policy, except that the control does not emanate simply from judges, and the ways in which the rule of law is used to discipline democratic initiatives have become much more elaborate. Willis was concerned about invocations of the rule of law on the part of judges, typically in the context of judicial review. Now, expansive proclamations about the inherent limits of legislatures in rule of law-respecting societies emanate from the international financial institutions. Even though the justification for invoking the rule of law is acknowledged to be the protection of the rights of minorities and the defence of the individual against the overweening power of the state, in the field of law and development, the rule of law seems to operate well beyond this sphere to justify a set of inherent limits on institutional arrangements and policy priorities. The rule of law is not the only means by which democratic initiatives are limited; for example, regulatory pre-commitment may also be extracted from states through 'hard,' quasi-constitutional instruments, such as trade and investment agreements.³⁴ However, whether by design or merely by effect, the soft power of the rule of law appears to be one of the tools in the arsenal, too.

Although it is possible to trace the history of the rise of the rule of law in the field of development, it is frankly difficult to account fully for the immense interest and investment in the rule of law that now prevails among market reformers. The salience of the rule of law seems directly related to the presumption that the state is dysfunctional; indeed, the principle of the rule of law may draw its power directly from this presumption. It is hard to overstate the extent to which the international financial institutions inveigh against the evils of corruption and the

³³ Willis, 'Nutshell,' *supra* note 24.

³⁴ David Schneiderman, 'Investment Rules and the New Constitutionalism' (2000) 25 *Law & Soc. Inquiry* 757.

extent to which they attribute lack of economic development to the failings of the state. This, on its own, virtually sets up the conditions under which the rule of law becomes 'the answer.'

While the interest in the rule of law may not seem very significant on its own, such interest does cash out in some interesting ways. Along with the critique of the state and the rise of efficiency in the regulatory calculus, much of the case and place for specialized boards and tribunals disappears in the new institutional vision. Although it might appear that specialized boards serve precisely the ends of efficiency, expertise, and cost-containment that are so central to that vision, they seem not to be conceived that way. In the eyes of reformers, those merits are swamped by concerns about burgeoning bureaucracies and the malignant possibilities of the unfettered exercise of discretion on the part of administrative decision makers.

Moreover, rule-of-law arguments are also deployed not only to constrain the behaviour of bureaucrats and administrative decision makers but to discredit particular modes of decision making associated with the administrative state. In the view of market reformers, all decision making must be subject to the rule of law. However, the World Bank has also recently asserted that the rule of law requires that decision making be made in a particular 'legal' way.³⁵ Among the faults identified with administrative decision making are the failure to follow binding precedent and the associated failures to ensure that decision making is predictable and that like cases are always decided alike. Anyone familiar with administrative law will understand that this is a critique not simply of the abuses of administrative power. It is a more radical attack on the very motivation and rationale for the creation of administrative bodies; it is an effort to constrain the factors that can be legitimately considered in disputes; and it works to narrow the procedures by which they can be 'legally' resolved. It is, of course, also stunningly divorced from the disputes, controversies, and problems that gave rise to alternatives to the courts in the first place, none of which has yet disappeared.

Especially when read within the larger context of institutional reform that the international financial institutions are so avidly promoting, such claims also call to mind one of Willis's observations: attacks on procedure are almost always attacks on the substantive provisions of the legislation itself and 'many of the onslaughts against administrative tribunals made by lawyers and businessmen are, at bottom, onslaughts against government regulation itself.'³⁶

³⁵ World Bank, *Reforming*, supra note 12 at c. 2.

³⁶ John Willis, 'Administrative Decision and the Law: The Canadian Implications of the Franks Report' (1959) 13 U.T.L.J. 45 at 49.

Functionalism is a mode of legal analysis that arose at a particular historical moment, in response to legal formalism and in conjunction with a set of particular political concerns. However, as its fate in twentieth-century adjudication and its varied offspring in legal analysis – legal process, law and economics, and the various schools of critical thought – demonstrate, functionalism remains, to some degree, separate from the substantive social and political agendas from which it emerged.

Contemporary debates about the place of the state, the role of law, and the relative powers of the judiciary, the bureaucracy, and the legislature remind us that the success of functionalism and its capacity to counter the claims of the privileged – advanced in the name of the rule of law, in particular – are predicated upon a broad social consensus about at least one of two foundational issues: one is the direction of political reform; the other is the role of legal and administrative institutions in furthering political goals. This suggests that it may be political consensus itself that enables legal reform to do the work of generating social reform through the courts. If there is anything to this, rather than the inherently viable and desirable approach to legal reasoning envisioned by Willis and others, functionalism's virtues and vices, possibilities and limits, successes and failures are to be attributed, not to anything absolute, but rather to the political substratum on which they rest.

A remaining paradox is that institutions such as the World Bank and the International Monetary Fund are nothing if not global administrative agencies. They are large institutions, tightly bound by their own administrative cultures; they suffer from institutional inertia; they can be remarkably impervious to external critiques; their structure leaves them open to capture by the projects of professional and disciplinary elites as well as by the interests of the economically powerful states; and they arguably fail to respect basic elements of the rule of law in their own operations.³⁷ In other words, they are arguably replete with the very ills of the state bureaucracies they so disparage. Nonetheless, they are central international institutions in the new global order; proposals that extend beyond minor reforms and that would curtail the scope of their operations and reorient their activities in more radical ways are unlikely to get a receptive hearing.

A little irony would be nice.

³⁷ On this last point, see Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2000) 32 *N.Y.U. J. Int'l. Law & Pol.* 243 at 270–1.