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Introduction

This book is about the role of property law in development. It challenges the ubiquitous and rarely questioned assertion that legal property rights are necessary to economic growth and argues that this view is incomplete, misleading, and dangerous. It is incomplete because economic growth can and has occurred without property rights. It is misleading because it implies that property rights *per se* will invariably contribute to economic growth when in fact the role of property rights in growth is contingent on the surrounding social, political, and technological context. It is dangerous because a failure to recognize the complexity of property rights will mislead policymakers in their attempts to bring the world's poorest people out of poverty.

The faith in legal property rights emerged from neo-institutional economics, particularly from the work of Ronald Coase, Harold Demsetz, and Douglass North and their emphasis on the necessity of certain social structures for productive investment and exchange. They took a broad view of the types of institutions needed, as have many legal scholars.¹ They expressly included custom and community norms, but the practitioners who later turned theory into policy narrowed the focus to the formal institutions of the legal system: legal rights found in statutes or judicial opinions and defined, amended, and enforced by courts and other institutions working under legislative and

¹ See respectively Ronald H. Coase, "The Problem of Social Cost," *Journal of Law & Economics* 3 (1960): 1; Harold Demsetz, "Toward a Theory of Property Rights," *The American Economic Review* 57 (1967) 347; and Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1981) and Douglass North, *Structure and Change in Economic History* (New York: Norton, 1990). Notable examples of legal scholars approaching institutions broadly include Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes*, (Cambridge: Harvard University Press, 1994), and Michael Trebilcock, "Communal Property Rights: The Papua New Guinean Experience," *University of Toronto Law Journal* 34 (1984): 377.

judicial authority.² In doing so, these policymakers ignored the broader early approach and distorted the basic theory, but this focus on formal norms and institutions supported by rule of law rhetoric has nonetheless been ubiquitous since the 1980s. It has provided the policy justification for spending hundreds of millions of dollars on legal reform and formed the intellectual foundation for advice given by virtually all agencies and nongovernmental organizations (NGOs) of all political stripes engaged in development assistance across the globe. Not only has much of this investment been wasted, but the results have often destabilized existing property regimes and left societies worse off.³

This book addresses this theoretical and policy failure empirically by examining the experiences of societies from sixteenth-century England to twenty-first-century Cambodia. The goal is not to deny property's importance but to deepen our understanding of its social roles throughout history: to better understand how we conceptualize it; how in diverse cultures property has been created, operationalized, manipulated, and destroyed; and how development practitioners' fixation on property as formal legal rights can lead us astray.

Their fixation is understandable. The translation of the seemingly opaque and inefficient social structures of poor countries into clear legal rules and institutions can make the task of shaping developing countries' societies from the outside at least plausible, if still far from easy. If secure entitlements emerge primarily from the formal system as rights, they can be understood by anyone with legal knowledge and transferred from one society to another through expertise, financial resources, and political will. Focusing on formal law, in other words, allows one to shift one's gaze comfortably from social complexity to the seductive elegance of Demsetzian transaction costs and Coasian bargaining.

The problem, of course, is that empirical reality rests in complexity – which Demsetz, Coase, and North all recognized – and social experience with property has rarely fit the elegance of our projections. Instead, as we shall see, the vigorous enforcement of property rights can, in certain circumstances, prevent rapid economic growth rather than foster it, and the best-practices

² Rhetoric such as the following by the Chief Counsel of the World Bank's Legal and Judicial Reform Practice Group is typical: "A free and robust market can thrive only ... where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts." Maria Dakolias, "A Strategy for Judicial Reform: The Experience in Latin America," *Virginia Journal of International Law* 36 (1995–1996): 167, 168.

³ See Daniel Fitzpatrick, "Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access," *Yale Law Journal* 115 (2006): 996.

form of global expertise often fails when it encounters local circumstances. Failure to meet social scientists' dreams would not be so bad in itself, but there is more at stake. The effort to transform the superficially chaotic norms of a poor country into a coherent, transparent, and open network often destroys preexisting social arrangements invisible to best-practices expertise. What is left is not a replication of the practices of developed countries, but a mixture of old and new, bottom-up and top-down, foreign and indigenous normative structures that all too often fails to deliver social progress or economic growth.

At the core of my argument are two simple assumptions: First, that the level of economic production at a specific time and place depends on the technology available and the incentives for its utilization and, second, that the politically powerful will tend to preserve the social structures most valuable to their own interests. Over the past several centuries, the paradigmatic means of such protection has been a formal legal system with property entitlements designed to preserve the status quo, which is entirely unobjectionable as long as stability remains the goal. Once rapid growth becomes the goal, however, fundamental change becomes necessary and it is rarely easy, especially if the inevitable losers can draw on property rights to protect their interests.⁴ What distinguishes property from other legal rights, after all, is that they provide their owner with power over a resource that can be enforced without reference to relative social value. And it is not simply a question of wealth, which in theory could be redistributed to assuage the losers. Attachment to the status quo does not end with its material benefits. Observers of capitalism from Karl Marx to Joseph Schumpeter to Douglass North have long recognized the tendency of elites to resist socially beneficial change. As Karl Polanyi put it, "[T]he interests of a class most directly refer to standing and rank, to status and security, that is, they are primarily not economic but social."⁵ It is not, in other words, only the impossibility of perfect bargaining that can prevent beneficial change within the existing structure of existing property rights; it is also the desire to retain political power and social status.

It should not be surprising, therefore, that the peacetime destruction of property rights has usually been incremental, rarely straightforward, and virtually always cloaked in obfuscating rhetoric. It has nonetheless proceeded

⁴ Ronald Coase himself recognized that massive transaction costs frequently overwhelm both voluntary exchange and political bargaining. See minutes 37 to 43 of the 17th Annual Coase Lecture by Ronald Coase at the University of Chicago, April 1, 2003, available at www.law.uchicago.edu/video/coase040103.

⁵ Karl Polanyi, *The Great Transformation* (New York: Rineholt, 1957), 153. See North, *Structure and Change*, 180–4, for a discussion of Marx, Schumpeter, and Polanyi on the importance of ideology and the ideological alienation arguably caused by capitalism.

throughout history. Sometimes it has been in response to and productive of normative change, and in Chapter 4 we examine the elimination of the property rights and social status of Japanese landlords to build post-World War II democracy. The destruction of property rights for economic reasons is more central to our concerns, however, and perhaps more surprising, given that property is the very institution that the development canon would have us rely on to produce economic growth. In the case studies of Chapters 3, 5, and 6, therefore, we examine four instances of the destruction of property rights: the elimination of sixteenth-century English villagers' rights to enter their lord's land to allow monoculture and sheep pasturage; the nineteenth-century narrowing of American farmers' right to clean water to accommodate industrialization; the late twentieth-century elimination of Chinese villagers' share of communal production to force market production; and the twenty-first-century dispossession of Cambodian subsistence farmers and small entrepreneurs to make way for more commercially productive large-scale development.

Each of these stories raises important questions about the moral, political, and social costs of economic growth, but both the contemporaneous political rhetoric justifying these changes and the later scholarship analyzing them rarely recognize that property rights have been destroyed.⁶ Demsetz in his iconic 1967 account of the Montagne Indians' individualization of communal hunting grounds talked of the "emergence" and "development" of individualized rights.⁷ More recently, Daron Acemoglu and James Robinson praised the "rationalizing" of "archaic forms of property rights" after England's Glorious Revolution of 1688.⁸ They make no mention of what happened to the preexisting property rights or their owners. On the contrary, Acemoglu and Robinson speak approvingly of the "steadfast enforcement" or "strengthening" of property rights in the very same paragraph in which they extoll their "rationalization" or "reorganization."⁹ It is as if these new "rational" rights appear spontaneously without political action and without affecting existing interests or, equally implausible, as if the beneficiaries of the prior regime graciously yield their "archaic" legal entitlements and the political power, social status, and economic rents they represent in order for the society to make net social gains.

⁶ The process has not been completely unnoticed. See, e.g., Stuart Banner, "Transitions Between Property Regimes," *Journal of Legal Studies* 31 (2002): S359.

⁷ Demsetz, "Theory," 350.

⁸ Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Random House, 2012), 102–3.

⁹ *Ibid.*, 198–9.

This consistent avoidance of talk of the destruction of property rights is not an oversight. Hypocrisy, sophistry, and euphemism are integral and necessary devices for the moral and political legitimization of the pain of rapid economic growth. None of the property rights changes this book explores was prevented: English fields were enclosed; American streams were dammed and polluted; Japanese landlords were dispossessed and sent to the trash heap of history; Chinese commune members were set free to produce for the market or go hungry; and Cambodian villagers are being transformed from subsistence farmers to agricultural laborers. Each change caused pain as large numbers of people who did not have the political power to protect their interests had their expectations of a stable life frustrated,¹⁰ but each change (with the possible exception of the ongoing process in Cambodia) also led either to increased productivity or deepened democracy and dramatic gains in net social welfare.

Analogous processes are occurring or should be occurring in poor countries today, and one role of social science scholarship should be to understand and describe how net beneficial change can occur as quickly, efficiently, and justly as possible and to generalize from those success stories. Unfortunately, fundamental social change and the transformation of legal structures that accompany and facilitate it are rarely easy or straightforward. Each instance is different and our understanding, particularly in the development context, is complicated by the natural tendency to search for technical fixes that can be transferred easily from one society to the next. That quest for best practices is futile, however, at least in the sense of providing fail-safe policies on the ground. Human society is too complex, but the impossibility of finding universal explanations for broad social questions does not make understanding past

¹⁰ The overwhelming gain in productivity that followed Chinese reforms may lead the observer to overlook the effect on those ill-equipped to produce for a market economy. The difficulty of the adjustment spawned a genre of post-Maoist literature in the late 1970s and early 1980s known as Reform literature. While recognizing the increased wealth and individual freedom, it stressed both the loss of material security for the weak and the normative impact on society as a whole, as an excerpt from the description of the start of one such novel, *The Descendants of Lu*, portrays:

The Little Carpenter's opening his own carpenter workshop is predicated upon the disintegration of the collective workshop, which does not mean emancipation for everyone. To Fu Kuan, whose laboring capacity is weak and who has a large family to feed, this is a disaster. And more importantly, this brings crisis to the traditional ethics of mutual aid and equality and the socialist ethics.

Jun Xie, "The Wild Individual: Politics and Aesthetics of Realism in Post-Mao China" (PhD dissertation, New York University, 2016), 216. The similar effect of the privatization of state-owned enterprises is dramatically captured in Zhang Meng's movie, *Gang de Qin* (English title, *The Piano in a Factory*).

experience any less vital to coping with the future. This book tries to increase that understanding by examining the range of roles that property rights have played in the growth and development of a range of societies. As we shall see, they have, variously, slowed the process of change, legitimated it, served as the very agent of change, done all three at once, and sometimes played virtually no role at all.

Because the role of property in development has been complex and contradictory, it is important to define my terms and to note what I do not claim. Like the law reform practitioners whom I criticize, I define property rights as *legal* entitlements and exclude the political, social, and ideological structures included by North et al. I don't deny that human beings, whether individual farmers or multinational corporations, require assurance, formal or informal, that they will be able to reap a reasonable return on their investment before they will expend time, labor, or capital. I don't deny that top-down, externally imposed formalization may produce growth. The dispossession of North American and Australian indigenous peoples by European settlers' property regimes are certainly examples, and the account in Chapter 6 of the replacement of existing Cambodian land rights by a new land law created by the World Bank may be another.

My point, therefore, is not that such growth can never be desirable from the perspective of aggregate wealth but simply that it will almost invariably eliminate existing social structures. Nor do I claim that property rights, even narrowly defined as judicially enforceable rules, are only desirable for economic growth. Indeed, one of the cornerstones of development, as opposed to growth, is the re-creation of stable property rights after periods of change. Even in countries desperately in need of rapid growth such as late twentieth-century China and contemporary Cambodia, property rights can play an important role in the achievement of social justice. But as we will see in the chapters that follow, they can also be an obstacle to the structural changes that will contribute to prosperity and progress.

THE STRUCTURE OF THE BOOK

Chapter 2 sets the stage for the case studies by tracing the emergence of neo-institutional economics founded by Coase, Demsetz, North, and others. It foregrounds their most basic insight, one honored more in the breach than in the observance: the need for institutional change when societies are faced with normative or technological opportunities or threats. It emphasizes that these economists recognized informal as well as formal means of creating, maintaining, and modifying property, and understood that entitlements can

be protected by social norms, community customs, and political bargaining as well as through legislation and litigation. It then shows how the recognition of both the need to adjust incentive structures – which, in the interest of avoiding euphemism, I call the destruction of property rights – and the importance of both legal and nonlegal mechanisms in that destruction has largely disappeared as the attention to institutions migrated from Demsetz and North to development economics more generally and eventually to global legal reformers.

Against the theoretical backdrop in Chapter 2, Chapter 3 describes how two societies, different in time and space, adjusted existing property rights in response to market opportunities. It examines the slow-motion destruction of villagers' property rights during the more than three centuries of the English enclosure movement and the nineteenth-century narrowing of American farmers' right to clean water. In England, the lords first used legal institutions to dispossess their fellow villagers, then legal rhetoric to legitimate the result, but what makes the enclosures iconic in legal history is that commoners used the same legal system to delay and sometimes frustrate the process, eventually stretching it over centuries. That the powerful could use law to oppress the weak should not be news; that the weak could use law to resist has been seen as an initial step not only toward modern law, but also in the development of democracy itself.¹¹ In the American instance, the law, instead of delaying the dispossession of the weak by the strong, became the mechanism by which emerging industrial interests destroyed the property rights of the dominant agrarian classes. Both cases qualify, in Polanyi's terms, as "revolutions of the rich against the poor."¹² In both instances, the destruction of legal entitlements allowed new technologies to take advantage of market opportunities.

Chapter 4 turns to a case that is quite the reverse: land reform in post-World War II Japan. Here, reform took land from the rural elite and gave it to their tenants and it was politics, not market forces, that drove the change. Neither the land reform itself nor the agricultural policy that has maintained small-scale independent family farmers ever since was designed to increase agricultural efficiency and production, and in this respect, there have been no surprises. Japanese agricultural policy has not made anyone rich, least of all the consumers of Japan. What links these three case studies, therefore, is neither the political direction of legal change nor the relationship between the

¹¹ See, for example, Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (New York: Beacon, 1967); E. P. Thompson, *The Making of the English Working Class* (New York: Vintage, 1963); and Polanyi, *Great Transformation*, on the long-term political effect of the enclosures.

¹² Polanyi, *Great Transformation*, 35.

law and market opportunity, but the manipulation of law to destroy property rights in the service of social change.

Chapter 5 turns to an entirely different case, post-reform China, which demonstrates that economic growth is possible in the absence of formal property rights. While China has been constructing a “rule of law with Chinese characteristics” for more than thirty years, formal legal institutions have rarely played the conventional role of providing the security of investment that economic growth demands and perhaps even less in legitimating the changes in property allocation that have stimulated and facilitated growth. Yet China has created precisely the kind of vibrant, deep, and broad markets that most economists and development practitioners insist can develop and function only with the formal legal institutions that China largely lacked during this period.

Although China’s stunning success has directly contradicted the conventional wisdom, law and development experts have largely ignored it, as the story of Cambodian land law reform, recounted in Chapter 6, demonstrates. The chapter examines two projects, the Boeung Kak Lake real estate development and the creation of the Koh Kong Sugar Plantation, which involve, respectively, prime Phnom Penh real estate and remote agricultural land. In each case, despite the elaborate, best-practices planning and control exerted by foreign experts, residents’ long-standing rights to land were ignored and statutory language was manipulated to facilitate the transfer of the land to more powerful and ostensibly more productive users. As the chapter shows, the implementation of the Land Law did not realize its creators’ dreams, but may, nonetheless, result in accelerated economic growth, if not development as more broadly conceived.

TWO LESSONS

A set of case studies can only prove so much, whereas quantitative methodologies and rankings can *appear* to prove a great deal, even when the data on which they’re based are acknowledged to be flawed or nonexistent and the resulting models ambiguous or misleading.¹³ Of course, a World Bank or

¹³ See discussion of Daniel Kaufmann et al., *Governance Matters*, 21 (World Bank Institute, Policy Research Working Paper No. 2196, 1999), in Frank K. Upham, “From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory,” *Journal of International Law and Politics* 41 (2009): 551–602, 558–9. See also Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, “Economic development, legality, and the transplant effect,” *European Economic Review* 47.1 (2003): 165–95. For an excuse, if not justification, for the use of admittedly incomplete and inaccurate models, see Paul Krugman, “The Fall and Rise of Development Economics,” <http://web.mit.edu/krugman/www/dishpan.html>: “The problem is that there is no alternative to models. We all think in

USAID official trying to choose between two possible loan recipients needs both information to help make the decision and authority to justify it. The numbers produced by quantitative methodologies can appear to produce both; case studies only the former. But case studies are ideal when we need not to oversimplify and take for granted presumed universal truths but to deconstruct and complicate them. The book concludes in Chapter 7 by doing precisely that.

The book does not offer the kind of general but abstract insight into social structure found in Coase's *The Problem of Social Cost* or Demsetz's *Toward a Theory of Property Rights*. Instead, it uses the comparative and historical data of the case studies to deepen our real-life understanding of the role of property and property rights in changing societies. From its examination of the actual roles of formal legal institutions in five disparate contexts two critical lessons emerge. The first is that formal property rights are not the simple and straightforward drivers of economic progress portrayed in World Bank literature or Hernando de Soto's *The Other Path*. On the contrary, they are deeply complex in nature and have played a wide variety of social, political, and economic functions in recent history. Their enforcement has slowed economic growth and stimulated political development; their destruction has facilitated growth and legitimated governmental theft; they have favored the powerful, but they have also mitigated the pain of adjustment for the weak; and in some instances they have played virtually no role at all. The deeper lesson is that pat generalizations of their role in a specific instance are not only likely to be wrong but also, and more importantly, may produce unexpected and undesired results.

The second critical lesson extends beyond property law to the "rule of law movement" more generally: legal reform is invariably political. Theoretical certainty and a naïve faith in the objectivity and rationality of technical knowledge drive contemporary law and development practice. But the belief that a computerized land registry based on a satellite-created cadastral survey will create the same land market in Cambodia as in Australia, for example, defies human experience. Too often, such utopian beliefs drive rule-of-law advocates to treat formal legal institutions as the only means by which developing societies can effectively create and protect economic assets, regulate markets, resolve disputes, and foster productive exchange. As a consequence, vast amounts of time, money, and expertise are wasted attempting to establish first-world legal systems where they are unlikely to thrive and may well displace preexisting normative orders that might be more suitable to the

simplified models, all the time. The sophisticated thing to do is not to pretend to stop, but to be self-conscious – to be aware that your models are maps rather than reality."

complicated tasks of economic growth and political progress. In other words, instead of focusing on the universal aspirations of our dreams for legal systems, we should be willing to deal with the messy and unsatisfying variety and complexity of law's historical role in growth and development. In doing so, we can give depth to the cliché that “one size does not fit all” when it comes to legal reform and provide a cautionary note as we consider policies for poor countries in the future.