THE GREAT PROPERTY FALLACY

In this groundbreaking book, Frank Upham uses empirical analysis and economic theory to demonstrate how myths surrounding property law have blinded us to our own past and led us to demand that developing countries implement policies that are mistaken and impossible. Starting in the sixteenth century with the English enclosures and ending with the World Bank's recent attempt to reform Cambodian land law – while moving through nineteenth-century America, postwar Japan, and contemporary China – Upham dismantles the virtually unchallenged assertion that growth cannot occur without stable legal property rights and shows how rapid growth can come only through the destruction of preexisting property structures and their replacement by more productive ones. He argues persuasively for the replacement of Western myths and theoretical simplifications with nuanced approaches to growth and development that are sensitive to complexity and difference and responsive to the political and social factors essential to successful broad-based development.

Frank K. Upham is the Wilf Family Professor of Property Law at New York University School of Law. He teaches Property, Law and Development, and various courses on Japanese and Chinese law and society. His book, *Law and Social Change in Postwar Japan*, won the Thomas J. Wilson Prize from Harvard University Press. In addition to having taught property law for over thirty years at several American law schools, he has taught in Argentina, China, Israel, Japan, and Taiwan. Upham has also worked as a World Bank consultant on the reform of property law in Southeast Asia.

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THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES

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For Leslie

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Preface

This book comes out of the confluence of my teaching and scholarship. I began teaching American property law over thirty years ago, not because of any interest in the subject, but because first-year Property was the course that Ohio State College of Law needed me to teach. I enjoyed teaching Property but my scholarship was focused on comparative law and specifically Japan and later China. Two developments in the late 1980s brought these parallel tracks into contact. First was the economic growth of China without a robust legal system. Second was the "second law and development movement" stimulated by the World Bank's adoption of neo-institutional economics and its focus on legal institutions as a prerequisite to growth. The immediate catalyst was a World Bank consultancy to the Lao People's Democratic Republic (PDR) to lecture on the reform of Laotian land law. I was not the Bank's first choice. They had appropriately hired someone with greater scholarly accomplishments in property law and especially in civilian property law. That person withdrew at the last minute, however, so I went in his stead.

I was allowed to structure the lectures on my own with two exceptions: I was to stress that land must be privately owned and that any land taken by eminent domain was to be compensated with the fair market value of the land. I was also, less formally, asked not to use the People's Republic of China (PRC) as a model for Laotian reforms. I was puzzled by these restrictions for several reasons. First, of course, was the fact that China was already the leading recent example of rapid economic growth. It was also, unlike, e.g., France, a foreign country whose land law I knew something about, but I was not so naïve that I did not understand (or think I understood) why the World Bank did not want China to be Lao's model. More troubling was the substance. Neither individualized private ownership of land nor fair market value compensation seemed to me to be necessary to growth or development. Indeed, America's own experience, much less that of China or Vietnam, contradicted both stipulations,

and the ideological transformation that either would require of the Laotian government seemed too much to ask of a very poor country and irrelevant in terms of growth and development. Nonetheless, I toed the line. The World Bank was my client, it had great depths of expertise in the area, and it was paying me well.

After the end of my consultancy, I began to pay attention to the discourse around international development efforts with particular interest in what type of property law was said to be necessary for growth to occur. I discovered that even more than individual private property and conformity to market principles, the most consistently and confidently repeated prescription for growth was the need for formal, stable property rights. I was struck by the direct contradiction to much of what I teach first-year law students, which is not how courts preserve property rights but how they and legislatures legitimately change them. By this time, I was also becoming interested in the relative lack of formal law and courts in Chinese growth and development. Both my teaching and scholarship, therefore, led me to the conclusion that contemporary development practice did not match and, indeed, contradicted the historical experience of the societies with which I am most familiar and which represent the world's most economically successful societies. Instead of learning from actual experience, it appeared to me, development professionals were urging poor countries to adopt an imagined and idealized version of Western property systems that have never actually existed anywhere.

I decided to look more closely at the theory of economic development to see if the discrepancy had come out of economists' different understanding of the nature of property rights. I began with Harold Demsetz's story of the Montagne Indians, which is standard fare for American property courses. A more conscientious reading of Demsetz, however, only deepened the mystery because the moral of the Montagne story is the need to change, not preserve property rights. I then moved on to the larger economic theory within which Demsetz resides, neo-institutional economics and, specifically, the work of Douglass North. Far from clarifying matters, however, the mystery deepened since North too is all about change, not stasis. Furthermore, he points out forcefully the political contingency of any set of property rights, bringing into question another staple of development rhetoric: the need for apolitical, independent courts, what was often referred to as a rule of law system. Since American common law courts have been anything but apolitical, I was again struck by the otherworldly nature of the legal side of current development rhetoric and practice, and realized that the gap was not just between practice and experience but also between practice and economic theory.

This book is the result of my attempt to understand this anomaly.

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