(Conference Draft)

"The Paradoxical Roles of Property Rights in Growth and Development"

Frank Upham[†]

2015 Law and Development Conference

New Orleans, USA
March 2015

[†] Frank Upham is Professor of Law, New York University School of Law

Keynote speech

This paper introduces my forthcoming book on the role of property in development, provisionally entitled "The Paradoxical Roles of Property Rights in Growth and Development." It challenges the ubiquitous and rarely questioned assertion that legal property rights are necessary to economic growth and argues that this view of development 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 heavily contingent on the surrounding social, political, and technological context. It is dangerous because a failure to recognize the complexity of property rights will mislead policy makers in their attempts to bring the world's poorest people out of poverty.

The faith in legal property rights emerged from neo-institutional economics and particularly from the work of Ronald Coase, Harold Demsetz, and Douglass North and their explicit recognition of the necessity of certain social structures for stable and secure investment and exchange.[1] The early neo-institutionalists took a broad view of the types of institutions needed, but as practitioners turned the theory into policy, they converted social structures into legal rights created, defined, enforced, and amended by the institutions of the formal legal system.[2] In doing so, they ignored the broader early approach and distorted the basic theory, but the narrow focus on formal norms and institutions and "rule of law" rhetoric has been hegemonic since the 1980s. It has provided the policy justification for hundreds of millions of dollars spent on legal reform and formed the intellectual premise for advice given by virtually all agencies and NGOs 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 than before.[3]

This book addresses this theoretical and policy failure empirically by examining the experiences of societies from 16th Century England to 21st Century Cambodia. The goal is not to deny property's importance, but to complicate our understanding of its social roles: to better understand how we conceptualize it, how over history and in diverse cultures property has been created, operationalized, and manipulated, and how the limitation of property to formal legal rights can lead us seriously astray. To achieve these goals we must understand why development practitioners are so deeply attracted to the idea of formal property rights. In a word, simplification makes the task of shaping developing countries' societies from the outside at least plausible, if still far from easy. If secure entitlements emerge primarily from

[1] See respectively R. H. Coase, *The Problem of Social* Cost, 3 J.L. & ECON. 1 (1960), Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV 347 (1967), and Douglass North, xxx. It is important to note that these authors all recognized the complexity of social norms. See, for example, 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>.

[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*, 36 VA. J. INT'L L. 167, 168 (1995-1996).

[3] *See* Fitzpatrick, *Evolution and Chaos*, 115 YALE L.J. 996, 1012 (2006).

the legal 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 all too quickly away from social complexity to the seductive elegance of discussions of Demsetzian transaction costs and Coasian bargaining.

The problem of course is that empirical reality rests in complexity, as North, Demsetz, and Coase 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 engender it, and the best-practices form of expertise, which is the most readily available and easily transferable form of 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 social norms of a poor country into a coherent, transparent, and open network often destroys pre-existing social structures 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, and foreign and indigenous normative structures that all too often combines the worst of all worlds.

Central Claim

The core of the argument is deceptively simple. At its base are two linked but often politically opposed assumptions: first, that optimal forms and levels of economic production are dependent on the appropriate form of technology available at a specific time and place and, second, that a stable society will try to protect the assets and technologies most valuable to its political leadership at a particular point in history. Over the past several centuries, the paradigmatic means of such protection has become property entitlements embedded in a formal legal system. Once a legal framework has developed, it will be available to preserve the existing social structure, which of course is its *raison d'être* and which is entirely unobjectionable as long as stability remains the goal. Once rapid economic growth replaces social stasis as the goal, however, structural change becomes necessary.

Change in this sense is inherently desirable in poor countries, but it can be equally compelling in rich ones when an emerging technology provides an opportunity to become richer faster or when changing social norms make the status quo no longer acceptable. In such circumstances, a clear set of property rights enforced by a robust judiciary is no longer socially beneficial. The distinguishing characteristic of property rights, after all, is that they enable an individual to prevent their violation regardless of changing norms or net social benefit. The neo-classical economists' solution, of course, is the internalization of negative and positive externalities by private bargaining: the holder of the more productive technology will simply buy the necessary property right through a voluntary transaction or acquire the right politically through legislative amendment, making both parties and society better off.

Unfortunately massive transaction costs frequently overwhelm such bargaining, as Coase himself anticipated. First, even if we assume that the existing political and economic elite put no non-economic value on their status, transaction costs will usually prevent bargaining from

fully compensating them for their economic losses. In other words, even in situations where the increased wealth could be distributed to make the holders of property rights better off materially, transaction costs will often prevent that allocation, thus providing the *ancien regime* more than enough motivation to employ their property rights to resist change. But the attachment to the status quo does not end with its material benefits. Neo-institutional economists like Douglass North long ago recognized the tendency of holders of political power, social position, and other non-material benefits to resist socially beneficial change even when assured of material compensation, which further diminishes the chances of beneficial change within the existing structure of legal property rights.

It follows therefore that property, the very institution that conventional economic wisdom would have us rely on to produce economic growth, must be destroyed to allow new, more productive technology to supplant the old. The villagers' rights to enter the common for turbary (the cutting of peat) and mast (the foraging of pigs) were destroyed by the 16th century enclosure of English fields to allow monoculture and sheep pasturage. The right to clean water was one of many property rights destroyed to allow industrialization in 19th century America; the economic and social status of Japanese landlords was eliminated by land reform in order to build postwar democracy; and the communal right to a village's agricultural production was destroyed with the individualization of agriculture in late 20th century China. Neither the contemporaneous rhetoric justifying nor later scholarship analyzing these changes, however, emphasizes the destruction of property rights. Harold Demsetz in his iconic 1967 account of the Montagne Indians' individualization of communal hunting grounds talked in terms of the "emergence" and "development" of individualized rights.[4] More recently, Daron Acemoglu and James Robinson praised the "rationalizing" of "archaic forms of property rights" after England's Glorious Revolution of 1688.[5] There is no mention of what happened to the pre-existing property rights or their owners. Indeed Acemoglu and Robinson often speak approvingly of the "steadfast enforcement" or "strengthening" of property rights in the same paragraph that they extoll their "rationalization" or "reorganization."[6] It is as if new efficient rights have agency and appear spontaneously without political action and without affecting existing interests or, equally implausible, as if the elites of the prior regime graciously yield their legal entitlements in order for the society to make net social gains.

The avoidance of talk of destroying property rights is not an oversight. Hypocrisy, sophistry, and euphemisms are integral and necessary devices for the moral and political legitimation of the pain of rapid economic growth. None of these processes was prevented: English fields were enclosed; American streams were polluted; Japanese landlords were sent to the trash heap of history; Chinese farmers were set free to produce for themselves or go hungry; and each change led either to increased productivity or deepened democracy and all arguably to dramatic gains in net social welfare.

[4] Harold Demsetz, *Toward a Theory of Property Rights*, American Economic Review, Vol. 57, No. 2 (May, 1967), pp. 347-359, at p. 350.
[5] Acemoglu and Robinson, Why Nations Fail (Random House, 2012) pp. 102-103.
[6] A&R @ 198-199.

Analogous processes are occurring or should be occurring in poor countries today, and one role of social science scholarship should be to describe and understand how net beneficial change occurs quickly, efficiently, and justly and to generalize from those success stories. Unfortunately fundamental social change is rarely easy or straightforward; each instance is different; and our understanding is complicated by the natural tendency to search for technical fixes that can be easily transferred from one society to the next. That quest for best-practices is futile, however, at least in the sense of providing failsafe policies on the ground, but the impossibility of finding talismanic explanations for broad social questions does not make understanding past experience any less vital to coping with the future.

This book tries to increase that understanding by examining the role of property rights in the process of economic growth in a range of societies from the English Enclosure Movement to legal reform in contemporary Cambodia. As we shall see, law and property rights have played a variety of roles: sometimes slowing the process of change, sometimes legitimating it, sometimes becoming the very agent of change, and sometimes playing no role at all. Throughout these case studies, we shall see also that the role of property in economic growth is complex and contradictory. In that context it is important to note what I do not claim. As is implicit in my definition of property rights as *legal* entitlements, I am not claiming that human beings, whether multinational corporations or individual farmers, will invest time, labor, or capital without some assurance that they will be able to reap a reasonable fraction of the fruits of their investment. Nor am I claiming that property rights, even as narrowly defined as judicially enforceable legal rights, are not desirable for functions other than economic growth. Indeed formal property rights are often redefined and reasserted after rapid economic and social change to create the social stability and political legitimacy that are fundamental to a broader definition of development. Even in poor countries desperately in need of rapid growth, property rights can play an important role in social justice, but as we will see in the case studies that follow, they can also be an obstacle to prevent the economic changes that will create prosperity and progress.

Chapter Outline

Chapter Two: The Theoretical Framework

The next chapter sets the stage for the case studies that follow by presenting the framework of neo-institutional economics founded by Douglass North, Harold Demsetz, and others. It foregrounds their most basic insight, one that is more honored in the breach than the observance: the need for institutional change and specifically change in property rights when societies are faced with normative or technological opportunities or threats. It emphasizes that these economists recognized informal as well as formal means of property rights creation, maintenance, and modification, in other words, that property can be protected by social norms, community customs, and political action as well as through legislation and litigation. It then asks why the recognition of the need to adjust property entitlements – what in the interest of avoiding euphemisms I here call the destruction of property rights - and of the importance of non-legal forces in that process has largely disappeared as the emphasis on institutions spread from Demsetz and North to development economics more generally and to law and development practitioners.

I will argue that development agencies have focused on formal legal institutions for several understandable reasons. First, explicitly changing the social and political norms of a country would violate the charter of the World Bank and perhaps other international organizations and might be considered over-reaching even by bilateral donors. Second, changing the fundamental normative structure of a society is difficult and time consuming, especially for outsiders. The initial question must be what norms to engender. Developmental economists and American aid workers may answer confidently that individual market rationality should be a prominent, if not overriding, goal, but the choice is a fundamentally political question that developing countries may not enthusiastically delegate to foreign consultants and that may require knowledge of the subject society's existing norms that will be difficult to attain quickly and cheaply. Then there is the complicating reality present in many developing countries that the often fragmented normative structure of former colonies must be unified or integrated, another time consuming and difficult task. Each of these choices and tasks would require control over a society and culture that would be difficult for foreigners to achieve even within a single poor country, Cambodia, for example. When the reformers' ambition encompasses all the developing countries in the world, the task of normative re-structuring as identified by the early institutional economists becomes daunting indeed.

These factors, the political sensitivity, the sense of urgency, the variety of social conditions, all militate toward a technical solution, a technology that can be gleaned from the nature of current institutions in rich countries and the experiences of successful developing countries but that is generalizable enough to be within the institutional competence and epistemological capacity of outside reformers. The answer might have been "governance" as initially identified by World Bank General Counsel Ibrahim Shihata, but governance is too vague, too political, too encompassing to solve any of these issues, so the language of law and specifically the "rule of law," which has the allure of being technical, transferable, and politically unassailable, became almost by default the mantra of development rhetoric and practice.

Chapter Three: Market Opportunities and Property Rights

Against the theoretical backdrop of Chapter Two, Chapter Three describes how two societies different in time and space adjusted existing property rights in response to market opportunities. The first examines the slow motion destruction of property rights during the more than three centuries of the English Enclosure Movement. The simple version of a story that is anything but simple is that villagers lost a wide range of rights to use common land so that the owners of the village manors could use the land more profitably. In vulgar Marxist terms, the lords of the manors dispossessed poor villagers to enrich themselves unjustly and illegally. In neo-Marxist terms, the lords manipulated the legal system to acquire the property rights of commoners. In contemporary law and development terms, individualized unitary property rights somehow bloodlessly "emerged" as English agriculture anthropomorphically "adjusted" to exogenous market opportunities.

Whatever one's preferred ideological lexicon, it is a deeply legal story. The lords first used legal institutions to dispossess their fellow villagers and then used legal rhetoric to legitimate the result, but what makes the enclosures iconic in the history of the rule of law is that

commoners simultaneously used the same legal system to delay and sometimes frustrate the process of enclosure, 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 to modern rule of law but to the development of democracy itself.[7]

The second case study takes a different perspective on the same phenomenon of market driven rights destruction. This time, instead of accentuating the weak's use of law to delay their dispossession by the strong, the emphasis is on the legal mechanism that the strong used to destroy the property rights of the relatively weak. The chapter uses the 19th Century American case of Pennsylvania Coal Company v. Sanderson and Wife to exemplify the legal system's role in the destruction of property rights necessary to accommodate the shift from agriculture to industry and the concomitant increase in commercial activity. In *Sanderson* an owner of farm land, suing in her husband's name because of the marital doctrine of coverture, tried to protect her water rights against a polluting coal company. Common law at the beginning of the century granted riparian owners the right to the "natural flow" of water over their land. Each owner could use the water only to the extent that his use did not affect the flow to those downstream. Since this right was a property right, enforceable by an injunction, each riparian owner had the theoretical power to stop any "unnatural" use of the water upstream. In social terms, any downstream farmer could stop any upstream industrial use from polluting his water and hence threaten to halt industrialization in its tracks.

Industrialization was not stopped of course, but not because the more socially valuable coal mines bought out the riparians' water rights. The transaction costs inherent in negotiating with farmers from central Pennsylvania to the Chesapeake Bay ensured that this instance of Coasian bargaining would fail. Nor did the coal industry create a coalition with other industrial interests to change property law legislatively. Agricultural interests were too powerful and entrenched to allow property rights to be so readily disposed of through the political process, and there was the constitutional and financial issue of compensation for statutorily deprived property rights. Instead, the coal mines simply polluted and hoped that they would not be enjoined. They were not, and how the Pennsylvania judiciary disingenuously distorted "natural" to include polluted run-off from coal mining can serve as an example of the courts' recurrent, if rarely acknowledged, role in the destruction of property rights when the latter lose relative economic value or become otherwise socially unacceptable.

Chapter Four: Fostering Democracy, Ignoring the Market

Both the enclosures and 19th Century industrialization involve the re-structuring of pre-existing legal entitlements to allow new technologies to take advantage of market opportunities. If both could also be characterized in class terms as stealing from the poor to give to the rich, the Japanese land reform described in Chapter Four was the reverse. First, it took the land of the rural elite and gave it to their landless tenants. Second, it was politics, not market forces, which drove the change. Neither the land reform itself nor the agricultural policy that has maintained independent family farmers since was designed to increase

[7] Barrington Moore, E. P. Thompson, Polanyi, etc., on the long term political effect of the enclosures.

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 the three case studies, therefore, is neither the political direction of legal change nor the relationship between the law and market opportunity, but rather the manipulation of law, specifically the destruction of property rights, in the service of social change. In Chapter Three stable property rights yielded to economic growth; in Japan they were destroyed to promote democracy. Despite the radically different social, political, and cultural contexts, the underlying social and political processes were the same.

Chapter Four begins with the elimination of the landlord class and the transformation of rural Japan from the perceived cradle of imperialist aggression to one of the building blocks of postwar democracy. By 1945 both foreign and domestic observers had identified widespread tenancy and absentee landlords as among the main causes of the collapse of Japanese democracy and the rise of militarism in the 1930s. The Americans put land reform at the top of its priorities for the Occupation and by 1950 the sociology of rural Japan and the structure of Japanese agriculture had been utterly transformed. Any land beyond what one family could cultivate was taken from landlords and given to their tenants. As with the enclosures and industrialization, due process and legal form, if not substance, was largely followed. The government took the land by eminent domain for "public use" and compensated the landlords "justly" as required by Article 29 of the new Constitution. The problem from a legal point of view was that the government bonds used for compensation were grossly inadequate, at least if the measure of just compensation was either market value or productive capacity. Nonetheless, the Japanese judiciary signed off, as all knew it would.

Chapter Four concludes with a coda to the dispossession of the landlords. Although seen by most observers as initially increasing agricultural productivity, the land reform was just the beginning of political restrictions on agricultural land. Determined to preserve a democratic rural sector, a social welfare safety net for times of economic downturn, and, not incidentally, reliable supporters of the dominant Liberal Democratic Party, the Japanese government continued to limit agricultural landholding to small scale family farmers. The regulatory scheme was complex and the results contradictory. On the plus side, Japanese farmers were a pillar of postwar democracy, and the family farm was a haven for many at the bottom of Japanese labor during the ups and downs of the high growth era. On the negative side, Japanese agriculture has become extraordinarily inefficient in market terms; Japanese consumers pay among the world's highest prices for food; rural areas are depopulating; and the accompanying protectionist trade policies are a significant limitation on Japan's participation in international trade agreements. Whether the trade-off was worth it in aggregate social welfare terms is perhaps unanswerable, but as we see in the subsequent chapter, Japan's experience is relevant to the choices facing contemporary China.

Chapter Five: China's Growth and Property Rights

If the first three case studies give us three distinct roles of property law in development, Chapter Five stands for the proposition that law may play no direct role at all, at least if we focus solely on economic growth, rather than the more social and political sides of development. While China has been constructing a "rule of law with Chinese characteristics"

for over 30 years, formal legal institutions have played little role in providing the security of investment that economic growth demands and perhaps even less in legitimating the property changes that have accompanied growth.[8]

Even in the most superficial sense of law on the books, China did not fully protect private property until the Property Law of 2007. Of course even at the height of the Cultural Revolution if someone took your bicycle or cooking pot or other "living materials" without permission, you could bring in the police, but private property was *de jure* on a lesser level than state or collective property.[9] Even after private property was given equal status, the idea that a Chinese court would protect private property in a significant case against the state, a local government, the Communist Party, or other powerful entity was more likely a cruel joke than an effective strategy.[10] Chinese courts often simply refused to accept cases against powerful defendants that had illegally taken farmers' land for urban expansion or denied them adequate compensation.

The absence of law was not cultural, some Northeast Asian manifestation of the Confucian "weak legal consciousness" that was widely used to explain the relatively low profile of the Japanese legal system during its decades of rapid economic growth. On the contrary, Chinese citizens appear to believe in private property as much as anyone else. Dispossessed individuals and groups used property rights rhetoric that would have made the most energetic American property rights advocate proud, and by the turn of the century the government expressly recognized land disputes as the single largest source of social conflict. The judiciary and all other formal legal institutions, however, remained largely on the sidelines especially when it mattered most.

The first claim of Chapter Five, therefore, is that economic growth is fully possible in the absence of property rights. Since even the World Bank has recognized that contemporary China has succeeded in bringing more people out of extreme poverty than any other society in human history,[11] simply pointing out this fact to a property rights fixated world might be enough, but doing so would miss the most striking part of the picture, which is the thoroughly capitalist nature of Chinese growth. It has not been a re-run of Stalinist forced-march industrialization, but a vindication of the power of markets. China created vibrant, deep, and broad markets without formal property rights. These markets are not limited to close-knit groups of co-religionists or kinship networks but extend to millions of strangers.[12] Indeed China has become the world's largest destination for foreign direct investment. These are, in other words, precisely the kind of markets that most economists and development

[8] Cite to CHEN Weitseng's paper about security of FDI.
[9] Note that land cannot be privately owned in China so we are discussing land use rights, rather than ownership per se. Cite to Wang's MS?
[10] Qiao Shitong's paper
[11] Ravalion
[12] Instead, at least in the small property rights context, the markets depend on what Shitong Qiao has called relational property rights. See Qiao and Upham, *China's Changing Property Law Landscape* (forthcoming in the Research Handbook on Comparative Property Law) and *Relational Property and the Evolution of Property Rights:*
The Case of Chinese Rural Land Reform (forthcoming in the Iowa LR).

practitioners are convinced can function only with the rule of law institutions that China clearly lacks.

Instead Chinese markets rely on a complicated range of formal and informal norms and institutions and Chapter Five will briefly review the social science literature describing the process in two settings: the township and village enterprises (TVEs) of the first two decades of reform and the illegal "small property" real estate markets that developed in the 1990s and that continue to play a significant role in large Chinese cities. Both phenomena represent imaginative alternatives to the paradigmatic roles conventionally attributed to formal law, but the goal is not to describe the myriad structures in detail or to abstract from the variety a Chinese "model" of non-legal economic growth. Generalizing from China's success is as difficult but also as important as learning from the English, American, and Japanese experiences, but the telling point for our purposes is the effect of China's success on global development theory and practice. To simplify, that effect has been virtually nil. As China has grown exponentially since the 1980s, so has the global enthusiasm for law reform in other poor countries. If this "second law and development movement"[13] were stressing the political and social importance of law, the lack of attention to China might be understandable. Law has been as absent in the political sphere as in the economic but with less attractive results, but the exact opposite has been the case. Instead of emphasizing the roles that formal law could play in realizing the "human freedoms" that Amartya Sen argues should be at the heart of development efforts,[14] the prescription for poor countries has been the formal property and contract rights that the neo-classical economics of the 1980s and beyond believe are the *sine qua non* of growth. Had the Chinese experience vindicated the conventional wisdom, it is hard to imagine the enthusiasm being any greater; conversely that it has dramatically contradicted the conventional wisdom seems to have mattered not at all, as the story of Cambodian land law reform recounted in Chapter Six demonstrates.

Chapter Six: Rebuilding Cambodian Land Law

In the final case study, we use the re-creation of Cambodian land law to assess institutional economics and contemporary development theory in action, both to understand them on their own terms and to see what insight the Cambodian experience can give us into the previous case studies. The English, American, and Chinese case studies, although they represent widely different roles for legal property rights, arguably share several important characteristics. Social change in each was fragmented, incremental, and dependent on local circumstances. The enclosures stretched over centuries and varied from county to county, and although we focus on one Pennsylvania Supreme Court water law case, the shift in American property law that it symbolizes took the greater part of the 19th Century and varied from doctrine to doctrine and from state to state. Chinese economic growth in comparison has been breathtakingly rapid and can legitimately be characterized as initiated by top-down government decisions, but once one goes beyond the superficial image of a Leninist regime,

[13] The first law and development movement collapsed at the end of the 1960s. See Trubek and Galanter, *Scholars in Self-Estrangement*, and Trubek, ….
[14] Development as Freedom.

the PRC story is one of fragmented experimentation and uneven incremental change spread over forty years, and far from complete.

If these three represent decentralized ad hoc structural change, the rebuilding of Cambodian land law presents an entirely different picture. While still in its early stages, its authors are following, undoubtedly unconsciously, the top-down pattern of Japanese reformers of 50 years earlier. Like Japanese land reform legislation, the first iteration of which was passed just four months after Japan's surrender, the Cambodian Land Law of 2000 transformed legal land ownership virtually overnight. Pre-existing de facto possession was formalized and subsequent informal possession prohibited. Ownership that previously had depended on local knowledge and custom was henceforth to be determined centrally by a computerized cadastral registry developed with satellite technology that, when completed, would eventually enable anyone in the world to discover conclusively the ownership of a parcel anywhere in Cambodia with the click of a computer key.

Again like Japan but more profoundly, the transformation was imposed by foreigners. In the Japanese case America and its allies were militarily occupying Japan. Although they had domestic supporters, the Occupation demanded land reform and the Japanese government complied. In Cambodia the imposition is less formal. Cambodia is not militarily occupied. Vietnam had defeated the Khmer Rouge twenty years before (when the Khmer Rouge was diplomatically supported by the United States), but it was happy to leave land tenure alone.[15] The Vietnamese had no nation building aspirations for their neighbor and once they had halted the genocide, they were more than willing to relinquish control once the rest of the world showed some interest.

And eventually the world became interested, very interested. Cambodia appeared as a tabula rasa for national and international development agencies and global NGOs eager to help create a new state and society with the institutions necessary to re-enter the world of nations. Cambodia was sovereign in name but overwhelmingly dependent on assistance. When over XX% of your national budget comes from foreign aid and you lack even the rudiments of an experienced, competent, or educated civil service, rejecting advice coming from the highly educated and well-meaning employees of your donors may be as difficult as it was for the Japanese to say no to General MacArthur in 1945.

In any case, the Hun Sen regime has not said no. In fact it said yes to two different visions of the ideal 21st century property law. First came the Australians. With Asian Development Bank sponsorship, they created with almost no Cambodian involvement the Land Law of 2002, which promises to provide cheap, efficient, and conclusive access to title information for any parcel virtually instantaneously once the computerized cadastral maps have been completed. The efficiency and certainty of the system is attained by its exclusion of all facts on the ground; informal possession or other claims to land will not be recognized. Cambodia's title registration system will be as neat and orderly as the Australian Torrens system after which it was modeled.

[15] Stephen J. Morris, Why Vietnam Invaded Cambodia (Stanford U. Press, 1999).

For better or worse, however, the Australians did not close the legal reform door as they left, and in came the Japanese as authors of the Cambodian Civil Code of 2008. Although the Land Law remains the sole source for the title registration system itself, the Civil Code has overlapping jurisdiction over land disputes, and the Japanese appear to have a greater tolerance for messy facts than the Australians, at least as exemplified by this iteration of legal reform. The Civil Code makes registration only presumptive evidence of ownership and recognizes the legitimacy and evidentiary value of actual possession. It is too early to tell how or perhaps whether this confusion will be resolved, and it will likely complicate implementation in the years to come, but it has the virtue for academic purposes of allowing us in Chapter Six the unusual opportunity to trace and provisionally evaluate two contrasting approaches to designing, creating, and operationalizing an ideal neo-institutional regime in an almost laboratory setting.

Chapter Six: The Role of Property Rights in Changing Societies [To be written]

A series of case studies cannot prove much. Alas, unlike quantitative data, no matter how flawed, it cannot even *appear* to prove much. If done well, it can disprove or complicate presumed universal truths, in this instance that economic growth requires formal property rights, but even well done case studies, especially if they originate in historically different periods and across a wide range of social, cultural, and political contexts, cannot provide the best-practices models that contemporary law and development practice needs to design state-of-the-art institutions around the developing world. The concluding chapter, therefore, does not make the attempt. Nor will it attempt to provide the general but abstract insight into social structure found in *The Problem of Social Cost* or *Toward a Theory of Property Rights*.

Instead it will use the comparative and historical data of the case studies to deepen but complicate our understanding of the role of property and property rights in changing societies. In other words, it will not create a vision of the world but deconstruct our contemporary paradigms. An initial goal will be to de-stabilize the theoretical certainty and reliance on technical knowledge that currently characterize the contemporary shaping of poor societies' legal systems around the world. In other words, I hope to contribute to the success of the difficult, but inevitable work of law and development practitioners especially as it relates to the reform of property law. But my ambition extends beyond property law itself to questioning the simplicity of the rule of law movement more generally by shifting our focus from the universal aspirations of our dreams for legal systems to the messy and unsatisfying variety and complexity of their histories. In doing so, I hope to 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.

A second goal is to tell us more about the role of formal property rights in developing countries. Popularized by Hernando de Soto's *The Other Path* and *The Mystery of Capital*, formalization of informal property has become part of development's standard tool kit. Results have been mixed, literally. Sometimes formalization provides net social benefit as in de Soto's home Peru. Although clear formal title did not produce the commercial access to credit that de Soto predicted – the poor were, alas, still poor – there were important indirect effects that had not been anticipated, such as increased labor participation and school

attendance as families had less need to self-police their land and homes. In other instances, formalization has been little more than governmentally facilitated theft.[16] Such appears to have been the case with Boeung Kak Lake and perhaps more generally in the many land concessions granted by Cambodia to foreign agri-businesses. It was also the case with North American settlement. As Stuart Banner detailed in *How the Indians Lost Their Land: Law and Power on the Frontier*, the dispossession of American Indians was accomplished not only or even primarily by slaughter but also by treaty ratification of one-sided sales and later the individualization of tribal land and its subsequent sale to non-Indians. Even in China where the citizenry has not been as brutalized and fragmented as in Cambodia and America, the privatization of TVEs and other collectively owned enterprises has often shortchanged the titular owners and corruptly enriched local government and Party leaders and their families. Whether the eventual formalization of irregular interests such as small property rights will similarly redistribute broadly owned informal property to a narrower range of formal owners remains to be seen, but if it does, it will be consistent with the results of land titling, individualization, and privatization processes across time and space.

The final goal of the conclusion is to relate the processes described in the case studies, all of which concern developing countries, to analogous processes in rich countries, specifically the United States. Changing technology has revolutionized property rights in a range of industries affected by digitization. …

[16] Egypt, Kenya, Ethiopia, etc.