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Property Rights and Power

TERRA LAWSON-REMER

Although Jean-Jacques Rousseau lauded secure private property rights as a prerequisite for market exchange and a modern economy, he also argued that the enshrinement of property rights in the social contract was, in essence, a grand theft perpetrated by the rich, clever, and strong on the less well-off. Having obtained *de facto* control over land and resources, the establishment by elites of *de jure* protections for their property rights claims reinforced and perpetuated their tenuous positions. The legal protection of property rights transforms once-contestable political power into claims with strong normative authority, supported by the force of the state.

Too often, power is the fundamental determinant of property rights: Witness Russia, where political insiders managed to seize vast assets during privatization in the 1990s—assets now made secure as private property under law, so long as the oligarchs stay in President Vladimir Putin's good graces.

The conventional wisdom has long held secure private property rights to be essential for a functioning capitalist economy, bringing growth and improvements in living standards. Indeed, the lack of strong private property rights is widely seen as the root cause of the demise of the former Soviet Union and its satellites.

However, this narrative neglects the inconvenient historical fact that global capitalist growth has often been built on the expropriation of valuable resources from marginalized groups without political power. The conventional wisdom also ignores the improvements to efficiency, sustainable resource use and investment, and community resilience that can be generated by community-level collective ownership property rights regimes under some circumstances. And the focus on efficiency gains from private property rights makes invisible the contest over values often at stake as legal regimes change.

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WINNERS AND LOSERS

Protecting the property rights of some people inherently requires preventing others from using the same resources in competing ways. Therefore, property rights must be defined and allocated before their protection can be strong or weak. Property is relational: The possessor of a property right exercises specific claims to a specific resource vis-à-vis other people.

In the English legal case *Sturges v. Bridgman* (1879), which the economist Ronald Coase used in his influential paper "The Problem of Social Cost" (1960) to illustrate the importance of clear property rights for reducing transaction costs, a physician sued to stop his neighbor, a confectioner, from operating his loud mortars to pound sugar. Did the doctor have the right to enjoy silence so that he could see his patients undisturbed, or did the confectioner have the right to produce sugar in his own factory? Coase took no position regarding the just distribution of these rights, but simply pointed out that inefficiencies result when property rights are not clearly defined.

The wide diversity of rights that may be enjoyed as part of a bundle of "property rights" is evident in many emerging economies. Throughout traditional agro-pastoralist regions around the world, one user might have the right to sow and harvest annual crops, another to collect fruit from trees on the same land, and a third to feed livestock on crop residues after the harvest.

In southeast Nigeria and southern Mali, for example, the village leader allocates farming land to family heads based on need but retains the right to reallocate land as group needs change over time, while individuals have hereditary rights to physical structures they build and any trees they plant. One family could have use rights to the soil, while a son of a person who planted nut trees on the same land has the right to gather the nuts. Similarly, in the north-central flood plains of the Niger Delta, where herding, farming, and fishing coexist and are practiced by different ethnic groups, herders have the right to use the land for pasture during the off-season, while farmers use this same land to raise crops during the growing season.

Property rights trace their origin not only to private legal titles issued by the state, but also to local norms and customs; rights to resources often predate the state. "Customary" resource rights are constituted by the collision between preexisting norms and state law.

When some kinds of rights are protected by evolving property rights laws and norms, but other rights are not, the groups whose members enjoy the protected kinds of rights benefit, while those with unprotected rights lose access to formerly shared resources. The enclosure of the commons in seventeenth-century Britain—which reduced overgrazing and increased agricultural investments, helping to jump-start Britain's rapid economic expansion over the coming two centuries—strengthened the property rights security of landed elites but eroded that of cottagers who previously had rights to use the commons.

Aggregate economic growth does not necessarily mean inclusive economic development.

Increasing the security of private property rights for the gentry required expropriating the property of smallholder farmers and pastoralists. The criminal law of eighteenth-century Britain did this by creating new offenses for "crimes" that had previously been understood as customary use, such as deer killing and cutting down young trees. The complex web of usufruct rights in the forest—in which the rights to harvest trees and berries, hunt deer, and clear land for agriculture were shared among many parties—was transformed into unambiguous freehold titles granted to the landed aristocracy.

SPOILS TO THE STRONG

Globally and historically, capitalist growth has often been built on the expropriation of valuable resources from powerless, marginalized groups, and the reallocation of these resources to more politically powerful, and sometimes more economically productive, new owners.

In the United States, the dispossession of Native Americans allowed the expansion of large plantations and the widespread establishment of small freehold farms for white settlers during the eighteenth and nineteenth centuries. Over 100,000 Native Americans saw their eastern homelands seized, opening 25 million acres for settlement; the Cherokee, Chickasaw, Choctaw, Creek, and Seminole suffered wholesale legal expropriation and were forcibly removed to marginal land by the Indian Removal Act of 1830. Later, 14,000 Cherokee men, women, and children were marched overland, at gunpoint, by the US Army in the summer of 1838. In short, the widely lauded secure private property rights enjoyed by homesteading American farmers in the nineteenth century were made possible by the property insecurity of Native Americans.

More recently, when copper was discovered in Bougainville, Papua New Guinea, the government sold the mining concession to multinational investors and forcibly relocated entire villages. Traditionally, land in Bougainville was collectively owned through matrilineal clan lineages, with use rights shared by all members and ownership recognized as inalienable and nontransferable. The prioritization of the state's and the multinational investors' property rights at the expense of the Bougainvilleans' initially generated high economic returns: For nearly two decades the copper mine contributed 16 percent of Papua New Guinea's GDP and 44 percent of its exports. However, at the end of the 1980s, a convergence of grievances regarding the effects of mining, the inequitable allocation of revenues, and long-standing political exclusion provoked a Bougainvillean rebellion, plunging the region into a long civil war.

Dams, roads, urban stadiums, and other development infrastructure generate economic growth, but sometimes at the cost of displacing vulnerable groups who live in the way. Brazil is a rapidly growing middle-income country with strong property rights protections for a broad cross-section of citizens and for foreign investors, but also a high level of property insecurity for marginalized groups and the poor. In cities where construction for the 2014 World Cup and the 2016 Olympics is well under way, over 100,000 favela residents now face forced evictions, as their homes are razed to make way for mega-stadiums. In rural areas, over 50,000 indigenous people have been displaced and resettled due to dam construction since the mid-1980s, with a majority of resettled households left worse off than they had been before. Recently the government approved construction of the world's third-largest hydroelectric power plant on the Xingu River, a large tributary of the Amazon. Projected to generate 11,000 megawatts, the Belo Monte dam will provide much-needed power for Brazil's fast-growing economy while displacing approximately 20,000 to 40,000 indigenous Amazonian Indians.

SECURITY FOR WHOM?

As damning as the historical record may be, secure property rights are often the linchpin of sustained capitalist prosperity. At a micro level, property rights generate economic growth by incentivizing efficient levels of investment, ensuring that resources are neither unsustainably overexploited nor underutilized; by reducing transaction costs, allowing the reallocation of resources to more efficient users; and by facilitating access to credit because the underlying asset can serve as collateral, making repayment promises credible.

At a macro level, the economic security that property rights provide can act as a safeguard against the potentially totalitarian power of the state, as individuals may be more likely to actively oppose government policies when they know their livelihoods are not at risk. The resulting political accountability to a broad cross-section of the population encourages governments to implement economic policies that benefit society as a whole and are broadly growth enhancing, rather than beneficial only to rent-seeking elites.

But the relationship between property rights and economic development is not static: It matters whose property rights are secure. From a micro perspective, secure property rights for those with skills and investment capital are the only kind that generate economic growth. From a macro perspective, secure property rights for those who will use their political voice to agitate for growth-enhancing economic policies are the only kind that matter. In short, growth can occur when property rights are broadly secure but marginalized minorities face a high risk of expropriation, because resources may be reallocated into the hands of investors with access to knowledge, capital, and other complementary production inputs. And secure property rights for marginalized minorities are not required to give governments an incentive to adopt broadly growth-enhancing economic policies. Security of property rights for elites can increase accountability of governing elites toward other elites with divergent interests, while broad but not universal property rights security can generate accountability of public officials to the majority.

THE FIJIAN WAY

Secure property rights are critically important for economic development, but private, individualized title is not the only way to make tenure secure. Indeed, in many circumstances collective resource ownership is actually more functional and effective than individualized ownership. It can be the best approach to promote sustainability and environmental conservation, improve the livelihoods of the poor, provide a safety net for the most vulnerable in times of crisis, and conserve important values that are impossible to capture through the market.

There is a common perception that collective ownership is equivalent to the absence of property rights. This is not the case. There are three fundamentally different types of property rights regimes: open access, collective property, and private property. Private property vests a bundle of rights in a single owner. Open access is equivalent to a no-property regime, where no one has greater rights to a resource than anyone else. Collective ownership is characterized by defined boundaries, clarity regarding the identity of individuals who have a right to exercise resource claims, community-level decision-making regarding resource use rules, and internal enforcement of rules by community members.

In Fiji, for example, ethnic Fijians hold clan-based rights over virtually all arable land and inshore reef fishing grounds. An individual's rights to both land and sea exist as part and parcel of hereditary group membership, are inalienable and nontransferable, belong to the clan group as a whole in perpetuity, and are indivisibly tied to place.

Strong systems of collective ownership for common pool resources can promote efficient investment and resource use, fostering sustainability as well as bringing welfare benefits to the resource owners. Common pool resources consist of both an underlying stock, such as ecosystems and fish populations, and a harvested flow like fish or irrigation water. These types of resources are difficult to privatize because allocating private resource rights to them and monitoring and punishing theft are practically impossible. Yet state ownership is also woefully ineffective at preventing overexploitation because enforcing resource use restrictions is often costly, especially in remote regions, and can be undermined when corrupt officers take bribes to ignore rule-breaking. Indeed, individual and state titling has often led to resource degradation.

In contrast, strong collective ownership rights allow customary tenure holders to enjoy or suffer all costs and benefits of resource exploitation, encouraging both investment and sustainability. Moreover, when the resource owners are also the agents responsible for monitoring and enforcing restrictions on resources—as is the case in Fiji's collectively owned fisheries—they have an incentive to enforce rules because the benefits accrue to them. Maintaining order is also easier: Local fishermen and villagers can guard against rule violations and outsider encroachment while sitting on their stoops or rowing around in their fishing canoes, and village neighbors can employ informal social sanctions to enforce restrictions.

Capitalist growth has often been built on the expropriation of valuable resources from marginalized groups.

Collective ownership can also safeguard against severe deprivation for the most vulnerable. The livelihoods of rich and poor alike are threatened by severe droughts and rare storms that wither fields or wash away homes, and by personal tragedies like the death of a household breadwinner. The rich have deep pockets, or paid-for insurance, or siblings with money. The poor, already on the edge of survival, have no buffers against unanticipated catastrophes. A right of access to collectively owned resources can be vital insurance for the rural poor, particularly in developing countries where ineffective governments cannot or will not provide even a rudimentary social safety net.

LAND GRABS

Nowhere is the conflict between property rights for the powerless and economic development—between equity and growth—more apparent today than in the land grabs currently unfolding across much of the global South. Since 2000, transnational investors have acquired at least 80 million acres of land in developing countries, predominantly in Asia and Africa. Many more acquisitions involve 99-year leases rather than outright sales, so they are even harder to trace and count. The majority of investors are from China, the United States, Europe, and the Persian Gulf states. Large-scale land acquisitions are most often intended for the production of biofuels, food, forest products, and agricultural commodities.

Like the North American forests and plains "discovered" by settlers 300 years ago, these vast tracts of newly acquired land throughout Asia and Africa are not actually vacant. Although much of the land being sold to transnational investors is indeed legally "owned" by the state—often a legacy of the wholesale expropriation imposed by colonialism—most of these forests, fields, pastures, savannahs, and marshes have in fact long been occupied by local resource users. These lands are used and managed according to customary tenure norms, through a complex web of traditional usufruct rights and collective ownership rules. They are the primary source of sustenance and survival for many rural poor people. Large-scale land acquisitions, which some well-intentioned domestic political leaders may hope will reduce poverty by bringing growth, actually exacerbate food insecurity by dispossessing subsistence farmers and pastoralists.

When these poor and marginalized resource users are displaced by land acquisitions, they are rarely adequately compensated. Since customary resource owners often lack private legal title to the land that their families have occupied for generations, they are likely to receive meager remuneration. If they receive anything at all, often it is no more than the very small value of their hut or that year's crop—far less than the actual value of the land resources on which their livelihoods depend, and nothing compared to the profit that will be made from new mining or agricultural enterprises.

The wholesale dispossession of the rural poor is not the fault of transnational investors acting alone. Domestic elites are often the primary architects of transnational land sales, catering to foreign buyers in exchange for infrastructure investments, government revenues, or personal benefits. While these elites may be drawn to such deals by the promise of economic growth, too often they also pocket corrupt kickbacks.

Only time will tell, but the current wave of transnational land grabs is indeed likely to generate economic growth and raise per capita GDP in targeted countries. New investors have the technological knowledge and financial capital to transform underutilized subsistence agricultural and forestry land into commercial tracts geared toward commodity production, efficiently growing monoculture biofuels and food crops for export. But if history is any guide, the benefits of this growth are unlikely to reach the newly dispossessed rural poor, at least in the short term.

The type of economic growth that brings widely shared benefits can be generated by manufacturing and industry, which create jobs that are the first rung out of poverty for urban workers, and which catalyze the technological innovation that drives economic development over the long term. Education and health investments to improve the human capital of the poor, and support for small entrepreneurs and smallholder farmers, are also critical components of pro-poor growth. In contrast, land grabs and the corresponding property insecurity for poor and marginalized groups that they entail may bring economic growth, but they also deepen existing divides between haves and have-nots instead of expanding opportunities for the global poor.

UNEVEN PLAYING FIELD

The privileging of private property rights for foreign investors over the customary collective ownership rights of local resource users is reinforced by international economic law, which is designed to promote global macroeconomic stability and facilitate investment and trade flows between major economic partners, not to reduce poverty or foster inclusive development. Vulnerable groups in the global South often suffer the law's unintended impacts.

Take, for example, bilateral investment treaties (BITs), which guarantee foreign investors protection against government expropriation and the ability to bring international arbitration lawsuits against host country governments when their property rights are threatened. Over 3,000 BITs are now in existence; every major economy except Brazil is a signatory to multiple agreements. They are intended to promote investment and economic growth by protecting private property rights against the arbitrary and capricious whims of unaccountable governments.

These agreements safeguard the private property rights of foreign investors, but not the customary tenure rights of local resource owners. If the latter were adequately protected in domestic law, this disparate treatment would not be a problem, since local claimants would be able to exercise their rights through local courts. Indeed, the premise of BITs is that host country legal systems are more or less sufficient to meet domestic needs, but fall short in their ability to treat foreign investors fairly. BITs are supposed to level this playing field.

However, as is abundantly clear in the history of global capitalist development generally, and in the recent surge of large-scale, global South land acquisitions more particularly, the customary property rights of subsistence-level local resource owners are often not adequately recognized by state law, and are ignored by local elites looking to seize and reallocate valuable resources for their own benefit. Lands are taken from their original occupants, who have long exercised resource rights based on customary tenure, and then sold to foreign investors. These sales are protected by international law through BITs, but customary resource users are left without any viable legal recourse to challenge the expropriation.

RIGHTS AND VALUES

As property rights are realigned and redefined in order to provide the foundation for the development of capitalist market economies, the notion that a given resource should be treated as a commodity to be bought and sold on the market can collide with alternative pre-existing beliefs, in which the same resource is seen instead as a basic human right, or part of an inalienable cultural or spiritual legacy. For example, the treatment of water as a commodity is difficult to reconcile with the belief that water is a basic human right.

This clash between water-as-commodity and water-as-human right was potently at play for nearly two decades in Bolivia. In the mid-1990s the World Bank recommended privatizing municipal water supply companies as a strategy for increasing the availability of potable water, given the inefficient ineptitude of local public utilities. The Bolivian national government acquiesced. A popular opposition movement soon arose. Millions of Bolivians participated in a general strike and marches, and clashes over water rights caused several deaths. Demonstrators asserted that water is the collective heritage of all mankind.

Likewise, in Fiji, Colombia, Nigeria, and other countries where some tribes and clans own resources collectively according to customary norms, land and sea are intrinsic to group identity, not viewed as commodities that can be bought and sold. The clan belongs to "their" mountains and fields and ocean reefs; the land and sea do not "belong" to them.

The spheres of the family, religion, and the market economy are examples of different social fields, each governed by distinct value regimes. The regulative principles within each field and the boundaries among them are founded on collectively shared but unspoken understandings. In markets, participants exchange money for goods and services based on the simple arithmetic of supply and demand. Exchanges within families lack this quid pro quo aspect, and are geared instead to cementing social bonds through a tangled web of enduring relationships (the difference between markets and families is the difference between prostitution and marriage).

The logic of human rights makes individual rights inviolable and obligates states and societies to protect and fulfill these rights, regardless of the ability of individuals to pay. Property privatization can extend the sphere of economic logic to interpersonal relations that may have formerly been understood in different terms, according to human rights principles or norms of reciprocal obligation, with potentially corrosive effects on social relations and the social contract.

Troubling trade-offs

While the expansion of private property rights and the erosion of customary tenure may be both the inevitable consequence of, and in some circumstances, a necessary prerequisite for, capitalist economic growth, these transformations are not a uniformly positive force. There are often troubling trade-offs between efficiency and economic growth, on the one hand, and other important values, including equity, human rights, poverty reduction, resilience for the most vulnerable, and environmental sustainability.

For example, if aggregate economic growth is the objective, then policy makers may wish to ignore (or encourage) the expropriation of land and resources from marginalized groups, and the reallocation of these resources into the hands of more productive investors. But if broadly inclusive economic development that reduces poverty and socioeconomic exclusion is the goal, then attention must be paid to distributional consequences. Since economic power translates into political power, it is impossible to first grow the pie and then better share the pieces (as a simplistic understanding of economic theory would suggest), because those with resources will not relinquish their spoils unless forced to do so.

Economic growth is indeed critically important for poverty reduction. Historically, countries that have experienced the longest and most consistent periods of economic growth have likewise seen the greatest reduction in poverty, and richer countries generally have substantially lower poverty rates than do poor countries. Yet high levels of inequality and severe property insecurity can precipitate instability and conflict, which undermine growth. And growth that destroys resource and family safety nets without replacing them with effective social insurance can leave the poor even more vulnerable.

When should a government pursue a set of policies that would promote high growth rates, but at the cost of increasing inequality or vulnerability, or eroding the livelihoods of some of the poor? Are secure property rights an end in themselves, regardless of any effects on economic outcomes—as a rights-based framework would suggest? Or are secure property rights justified only on social welfare grounds? Is the policy goal a reduction in the number of poor, or a reduction in the severity of poverty for the poorest, or higher incomes for the majority, or improvement in some other measure of well-being, and over what time horizon?

Among these trade-offs, one implication is clear: Aggregate economic growth does not necessarily mean inclusive economic development. Those with the least power and voice may be left out and left behind by growth-enhancing policies that strengthen the property rights of those with access to capital and political influence while weakening the property rights of marginalized groups. A narrow focus on aggregate growth—without specific attention also to political and economic inclusion and the property rights of the powerless—can exacerbate poverty and socioeconomic exclusion and hurt the most vulnerable. ■