



# The Legal Environment and Incentives for Change in Property Rights Institutions

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**Summary.** — Land conflicts in many parts of the world indicate pressures for change in the property rights institutions governing land acquisition and land use. Whether or not institutional change occurs depends on the incentives and capacities of political actors. This article argues that the legal environment is one factor influencing incentives for institutional change. Three case studies of land governance in Southeast Asia’s palm oil industry illustrate three types of legal environment—rule-by-law legalism, legal pluralism and lawlessness, or routinized illegality. The cases show that the legal environment shapes modes of resistance to property reallocations in the palm oil industry. Rule-by-law legalism supports legalized modes of resistance through the court system. In contrast, legal pluralism and lawlessness favor the use of political strategies to contest property reallocations. The mode of resistance in turn determines whether actors acquiring property have incentives to gain legal cover, or whether investing in political resources is more rewarding. Although the effectiveness of resistance is largely determined by the distribution of political resources, the mode of resistance helps explain whether there is demand for property rights institutions that offer generalized legal certainty in property protection. Path-dependence arising from the legal environment therefore influences the direction of institutional change.

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*Key words* — property rights, institutional change, law, legal pluralism, Malaysia, Indonesia

## 1. INTRODUCTION

In many developing countries, property rights institutions governing land access and ownership are complex, changing, and contested (Boone, 2014; Hall, Hirsch, & Li, 2011; Neef, 2014). Large-scale land acquisitions for plantation agriculture have raised the visibility of property conflicts and drawn attention to the diversity of property regimes across the world (White, Borras, Hall, Scoones, & Wolford, 2012). Amidst this complexity and change, it is often not clear what change is occurring and why, particularly in terms of the relationship between property rights and law. Legal certainty in property rights protection is influentially argued to be the pivot upon which “high-quality” development depends (Acemoglu, Johnson, & Robinson, 2001; Bates, 2001; Rodrik, 2000). Yet reforms intended to create greater legal certainty in property rights protection have in many cases produced perverse social effects and privileged political insiders (German & Schoneveld, 2013; Oldenburg & Neef, 2014; Peters, 2014). Land conflicts are often shaped by processes of social negotiation and interpretation rather than by legal rules (Van Leeuwen & Van Der Haar, 2016). In part because legal reforms to property rights systems often fail, increasing scholarly attention has been directed to explaining change in property rights institutions.

Such institutional change is a fundamentally political project. Land tenure regimes, understood as “property regimes that define the manner and terms under which rights in land are granted, held, enforced, contested and transferred”, constitute political order and shape patterns of land conflict (Boone, 2014, p. 4). Change in the property regime is therefore inevitably political, but it is structured by institutional context. This article examines property rights institutions as they have governed land acquisition and land use in a large-scale and rapidly growing industry, Southeast Asia’s palm oil industry. It argues that both the legal environment and the distribution of political resources affect incentives for change in the property rights

regime. In making this claim, the article proposes that the legal environment can be usefully differentiated in ways that go beyond the issue of “more” or “less” legal certainty or distance from the rule of law. Three cases from Southeast Asia all show large deviations from the rule of law, or generalized legal certainty in property rights protection, but in different ways. “Rule-by-law legalism” prevails in the case of Sarawak in Malaysia, “legal pluralism” in West Kalimantan in Indonesia and “lawlessness” or routinized illegality in Indonesia’s Riau province. These differences in the legal environment have shaped patterns of resistance to property reallocations in the palm oil industry and incentives for change in the property regime. Incentives for institutional change thus reflect path-dependent processes arising from the legal environment, as well as exogenous change to the distribution of political resources.

The Sarawak case shows that the legal environment exerts an independent effect despite a high level of political centralization and very few constraints on those holding political power. Sarawak’s legal system has been functional and legalism, or “rule by law”, is entrenched as a mode of governance. This has opened up legalized avenues of resistance and—even though such avenues have led to very limited successes on the part of those contesting coercive property reallocations—an incentive to secure legal cover for property acquisitions by the powerful. Path dependence arising from the legal environment can also be seen in the cases of Riau and West Kalimantan in Indonesia. Here, decisive political change in

\*The author thanks three anonymous reviewers whose constructive comments improved the article greatly. Excellent research assistance was provided by Jonathan Chen, Devina Anindita, Wilson Gan, Fong Chia Wen, Surjadi and Yue Kim Ming. All errors of fact or interpretation are the responsibility of the author alone. Research for this article was supported by the University of Auckland Business School through the Faculty Research and Development Fund, Project No. 3700883, Institutions and Land-Based Industries. Final revision accepted: December 1, 2016.

the form of decentralization and democratization from 2001 diffused political power and introduced constraints on those holding political office. But Indonesia's chronically dysfunctional and confused legal system meant that in both the authoritarian and democratic eras, property rights have not been enforced using legal means. However, an increase in the status of customary law has created an environment of legal pluralism in West Kalimantan. This has led to customary law figuring in the property regime as a negotiating resource in this province, and in this way law has become a factor shaping outcomes in property conflicts. In contrast, in Riau, there has been almost no recourse to customary law in property conflicts and the property rights regime governing land for palm oil remains "lawless" in the sense that legal restraints have little effect on the ground. In consequence, resistance to coercive property reallocations in Riau has largely not taken legal form and those benefitting from such reallocations have little incentive to gain legal cover for their acquisitions.

## 2. THEORIZING CHANGE IN PROPERTY RIGHTS INSTITUTIONS

Formal property rights defined in law and enforced in ways that give rise to generalized expectations of property rights protection through legal means have come to represent something of a gold standard for property rights institutions in mainstream development policy circles (Haggard, MacIntyre, & Tiede, 2008; North, 1995). Broadly liberal approaches to property rights that uphold this view link property rights institutions and the rule of law through the stipulation that secure property rights are defined in law and protected through legal means, at least consistently enough to ensure generalized expectations of enforcement. The rule of law thus becomes an element of a desirable property rights regime.

The rule of law has different facets and is subject to competing measures (Haggard & Tiede, 2011; Skaaning, 2010). A general definition holds that the rule of law is "a system of previously enacted clear and general rules accompanied with abstract reasoning that constrains the discretion of a governing body" (Hadfield & Weingast, 2014). Property rights institutions that reflect the rule of law are therefore ones where property rights are bestowed and transferred according to processes recognized in law.

### (a) *Political conditions*

How do formally legalized property rights institutions come about? The New Institutional Economics (NIE) school has set out a theory of institutional change that resonates with liberal approaches in depicting a "virtuous circle" of political pluralism leading to the rule of law and generalized legal protection of property rights (Acemoglu & Robinson, 2012). In this line of thinking, institutional change is driven by the need of an absolutist political ruler to strike a bargain with other actors, very often commercial elites on whose investment the ruler depends (North & Weingast, 1989). In order to commit credibly to such a bargain, a ruler needs to limit his or her own capacity for capricious behavior. This may lead rulers to introduce institutional innovations that create self-binding mechanisms, such as judicial independence or the devolution of power to parliament (Stasavage, 2002).

In the post-decolonization era, international development organizations such as the World Bank have attempted to bring about institutional change in the direction of the rule of law and liberal property rights institutions.<sup>1</sup> From the Cold

War-era "law and development" movement to its current incarnation in governance reform and rule of law advocacy (Krever, 2011), such efforts have supported legal reform programs through actions such as funding national land titling schemes or providing legal expertise. However, many legal reform programs failed to produce their intended outcomes. The outcomes associated with reforms to legalize property rights are very mixed, and reformist projects frequently have adverse impacts on local livelihoods and access to land (Hall *et al.*, 2011; Oldenburg & Neef, 2014; Peters, 2014; Spiegel, 2012).

Such failures point to the need for local actors to champion reforms if they are to be effective (Newton, 2008). Following this pathway, a key determinant of institutional change toward a liberal property rights regime that protects the interests of the vulnerable and politically marginalized is the existence of influential actors with an interest in generalized property protection. We can assume that all holders of property prefer that their own claims be made secure at the least personal cost. This does not always translate into a preference for generalized, legal property protection. Empirical studies have found widespread support for formal titling and legal enforcement of such titles, both on the part of those whose property claims remain insecure and by powerful actors able to use the titling process as a route to acquiring property (Hall *et al.*, 2011). Yet, influential actors have not always favored generalized or clear property rights regimes (Binswanger, Deininger, & Feder, 1995). In Southeast Asia, colonial authorities attempted to introduce "modern" property rights regimes defined in law, meeting strong opposition from rulers in independent Siam, who understood the reforms as threatening (Larsson, 2013). In practice, colonial authorities—and their post-independence successors—were highly selective in terms of who was accorded legal rights to property in land.

The time horizon of ruling elites may explain whether they have a preference for generalized, rule-based property protection (Acemoglu, Johnson, & Robinson, 2002). Uncertainty also tilts preferences toward a property regime that provides for generalized clarity and security in property rights. Faced with uncertain on-going political protection, for example, Russia's post-transition "violent entrepreneurs", who accumulated wealth through coercive and extra-legal means, developed preferences for more legalized protection (Volkov, 2002). Investors facing such uncertainty have in some places formed coalitions to promote a generalized, rule-based property protection regime (Markus, 2012).

Fundamentally, uncertainty occurs when rival claimants (whether dispossessed original owners or newcomers) can impose costly resistance on those favored by particularistic protection. Coercively imposed property regimes incur monitoring and enforcement costs (Levi, 1988). More generally, a lack of state legitimacy in the eyes of the society it governs undermines the rule of law (Dawson, 2013). As resistance to coercive reallocations of property rises, the more those benefitting from such reallocations will need to spend on particularistic protection. At some point, even those actors who previously benefited from particularistic property protection (and the insecurity of others' property rights) will prefer a property regime that provides for generalized security. Resistance, therefore, is an important determinant of change in the property rights regime.

Resistance may also shape the property rights regime more directly, as both overt resistance and low-profile acts of evasion (Scott, 1990) produce changes that are institutional as well as political. As shown in the work of Scott (1990,

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