**Manufacturing Property Rights**

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**An exercise in “Reverse Engineering” of Property Institutions**

- “The Choice of Titling System” (JLE, 05), with N. Garoupa
- “Property Enforcement as Organized Consent” (JLEO ’03)
- “Role of Title Insurance in Different Systems” (GPR/ ‘01)
- ‘Economics of Notaries’ (EJLE, ’96)
- “How to Simplify Business formalization” (IADB 05)
- “Are Lawyers Needed in Conveyancing” (UPF WP)
- “Judicial Rulemaking” (Handbook NIE, 05), with V. Andonova
- “Judges Cognition & Market Order” (UPF WP), with V. Andonova
- “Judicial Rulings & Market Outcomes” (UPF WP), w. M. Casari

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**The path to growth**

- Growth requires not only “investment” but specialized and well allocated investment
- Therefore requires that people hold rights on things:
  - Secure: enforcement
  - Multiple: many people for each thing
  - Transferable: low transaction costs

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**Gap in knowledge**

- Huge demand of knowledge
  - Property → collateral → credit → investment → growth
  - Easy formalization → more firms → growth
- Little supply: “blueprints lost” (?)  
  - Law & Law & Econ: local, fragmented, but useful  
    - Calabresi & Melamed’72, Baird & Jackson’84, Rose’88, Heller’99, Merrill & Smith’00, Hansmann & Kraakman’02  
  - Empirical studies often treat institutions as black boxes  
  - Or as cancer tumors, when measuring only costs (DB)

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**Law: Two types of rights on things**

- **Contractual** rights (personal)  
  - Valid against specific persons  
  - Do not run with the asset
- **Real** rights  
  - i.e., in rem—“property rights” in USA law  
  - Valid against all persons  
  - “Run” with the asset

(A distinction mostly ignored—see, e.g., Arruñada’96)
The tradeoff of real rights

- Enforcement advantage: consent of rightholder required for a right to be damaged
  - Example: Mortgage → no default risk
- Higher transaction costs when real rights (e.g., mortgage) may survive transactions (e.g., sale) →
  - If hidden mortgage enforced, uninformed parties are reluctant to buy, or to lend even with mortgage

Solution: Public intervention to reduce transaction costs

- Publicity required for a mortgage to be enforced in rem → 2nd lender or buyer knows & requires 1st mortgage removed.
- Consequence: 2-step contracting
  - 1st b/w parties (borrower and 2nd lender or buyer)
  - 2nd b/w parties and third parties (the 1st lender)
- Implementation: Switch adjudication or priority rule
  - Privacy: first in contract first in right
  - Publicity: first in publicizing, first in right

Privacy
(England before registration implemented 1897-200x)

- Incomplete private title report
- Private contract between parties
- Second ‘contracts’ with third parties: Consent of affected right holders voluntarily gathered
- Deeds in the grantor’s chain of title
- Court judgment
- Sentence
- Hidden evidence

Recording
(France, USA)

- Potentially complete private title report
- Private contract between parties
- Second ‘contracts’ with third parties: Consent of affected right holders voluntarily gathered
- Recording of deeds: - unexamined claims
  - unpurged claims
  - purged claims
- Court judgment
- Sentence

Registration
(Germany, Australia, Spain, UK)

- Registration certificate
- Private contract between parties
- Second ‘contracts’ with third parties: Consent of affected right holders achieved or damage removed from private contract
- Presentation filing (priority)
- Court judgment
- Registration
- Registration certificate
- Register of rights

(c) Privacy
(England before registration)

- Registration certificate
- Private contract between parties
- Second ‘contracts’ with third parties: Consent of affected right holders achieved or damage removed from private contract
- Presentation filing (priority)
- Court judgment
- Registration
- Register of rights

(b) Recording
(France, United States)

- Recording of deeds: - unexamined claims
  - unpurged claims
  - purged claims
- Court judgment
- Sentence

(a) Registration
(Australia, England, Germany, Spain)

- Registration certificate
- Private contract between parties
- Second ‘contracts’ w. 3rd parties
- 1st “contract”
- 2nd “contract” w. 3rd parties
- Conclusive allocation of property and contractual rights

Common product
### Comparison (1): Purging of conflicting rights
- Voluntary & incomplete in privacy & recording
- Mandatory & complete under registration
- artisan versus industrial production of property rights

### Comparison (2): Functional equivalencies
- Old civil law notaries = Title “Insurance” Cos.
- Registration = Recording + Courts
- Same effects after public intervention, but this intervention is:
  - ex post (judicial) & occasional in privacy & recording
  - ex ante & general in registration → innocent acquirers protected in rem

### Comparison (3): Common organizational principles
- Competition in the first, private, contract b/c it has only or mostly effects b/w parties
- Territorial monopolies in the second, public, “contract” b/c it has effects on third parties
  - Recording → priority
  - Registration → rights

### Three policy questions
- How to regulate private contracting?
- How to organize publicity?
- How to ensure that judges do enforce rights?

### Diminishing demand
- Evolution of titling systems
  - Privacy: search, guarantees, depositories, authentication
  - Recording: search, guarantees, depositories, authent.
  - Registration: search, guarantees, depositories authentication (until info tech)
- Changes in parties and transactions
  - Parties: large, reputed → info asymmetry irrelevant
  - Transactions: standard, mandated → no contract design

### 1. Private contracting
Tentative policy implications

- Doubts on timid policies, freeing:
  - prices (as in The Netherlands) → Bigger rents
  - or even entry (Portugal) → Rent dissipation
- More drastic restructuring viable:
  - Making intervention by notaries voluntary, as in Italy (for cars!) and Portugal (companies, land?); or by lawyers (16 USA states where only DIY allowed)
- Serious doubts of reform proposals (NZ, Eng) to allow conveyancers to register

Recording or registration?

- Recording supposedly less costly
  - Voluntary purging—but duplication
  - Private incentives—but heavily regulated monopolies
- Registration supposedly more effective
  - Greater security—but:
    - hard to reach & maintain, falling back to recording
    - incomplete—e.g., “overriding interests”
    - too effective causes “generalized gatekeeping”

“Choice of titling system”
(Arruñada & Garoupa, JLE, 2005)

Choice based on adaptation

- Demand for standardized, zero-defects, Toyota-like property rights
  - Parties: anonymous
  - High land turnover
  - High land value
- Supply: IT → costs down + new possibilities
  - e.g., electronic signature or “notarization”
Conclusions for institutional analysis

- Knowing the "technology" of the institution essential for creating, repairing, driving or even measuring it
- Reverse engineering
  - Existing institutions in developed countries are the best source of information for creating institutions in developing countries
- Comparative analysis
  - Fruitful when driven by theory & facts instead of stereotypes such as "legal systems"
- Interdisciplinary
  - Law describes the machines—its process and products
  - Economics of organization—effectiveness
  - Cognition: failures in rationality—enforcement

Thanks