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PROPERTY RIGHTS IN LAND: INSTITUTIONAL INNOVATIONS, SOCIAL APPROPRIATIONS, AND PATH DEPENDENCE

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Abstract: This paper addresses critically, from the standpoints of social history and sociology, dominant views on path dependence, institutions and property in the New Institutional Economics and Law and Economics literatures, which we find lacking in what concerns the analysis of concrete social relationships and processes. We argue for an approach to property rights, specifically in land, that goes beyond the perspective on property as an institution and builds on the analytical potential of the definition of property rights as social relations, as well as for the view of property as a bundle of rights and against the revival of the absolute concept of property under a juridical *numerus clausus* of property forms. We submit that it is at this more concrete level of social relations that we may detect the historical sequences of events and outcomes generating path dependence.

Keywords: Institutions, path dependence, property rights, social relations, agrarian history

Resumen: Este texto discute críticamente, desde el punto de vista de la historia social y la sociología, las visiones dominantes sobre la 'dependencia del camino', las instituciones y la propiedad en las literaturas de la Nueva Economía Institucional y Derecho y Economía, visiones que hallamos insuficientes en cuanto al análisis concreto de los procesos históricos y las relaciones sociales. Argumentamos a favor de una aproximación a los derechos de propiedad, específicamente de la tierra, que vaya más allá de la perspectiva de la propiedad como una institución y se apoye en la potencia analítica de una definición de los derechos de propiedad en tanto relaciones sociales, así como en una visión de la propiedad como una 'haz de derechos' en contraposición al renacer del concepto de 'propiedad absoluta' bajo la definición jurídica de un *numerus clausus* de formas de propiedad. Sostenemos que es en este nivel más concreto de las relaciones sociales, en el que podemos detectar las secuencias históricas de los acontecimientos así como los resultados que generan una 'dependencia del camino'.

Palabras clave: Instituciones, dependencia del camino, derechos de propiedad, relaciones sociales, historia agraria

JEL codes: B52, N50, Q15, Z13

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This paper reflects the dissatisfaction that we feel as social historians towards the mainstream theory of new institutional economics, and especially the derived grand narrative of economic development. It primarily reflects our general interest in looking at property rights through the lens of social history and historical economic sociology. Moreover, we approach it here under the heading of path dependence, which is one theoretical cornerstone of the grand narrative of modern economic development in new institutional economic history. This connection is interesting for several reasons. Firstly, because this makes the discussion directly relevant to the overall topic of the Congress, 'The roots of economic development'. Secondly, because as we approach economic and institutional history from the standpoints of social history and sociology, we find the grand narrative of new institutional economic history, including its approach to property rights and to path dependence, provocative and stimulating but also rather wanting and biased both socially and historically, as we shall argue in more detail.

Thirdly, and stemming from the latter, because we believe that the explanatory weight of past historical sequences – the stuff of path dependence –, which mediates between the institutionalisation of a given set of property rights, on the one hand, and the divergent consequences that they may have in different societies, on the other, is largely an effect of what we call the 'social appropriation' of property rights (Congost 2003; Congost & Santos 2010; Santos & Serrão forthcoming), a process engaging multiple actors and too deeply embedded in historical contexts of action to be subsumed in a schematic account of elite organisations and state power (important though these doubtlessly are). Since all of us have mainly researched rural contexts and land is a decisive production factor in preindustrial economies, we opted to narrow down the theme to property rights in land. Needless to say, the overall conceptual questions might be asked of property rights in virtually any kind of asset, or of any other relevant institutions at that. But property in land is certainly a good starting place, from both the historical and the developmental points of view.

The first section of the paper discusses the concepts of path dependence, institutions and organisations, mainly in the work of Douglass North and his associates. The second

focuses the topic on the concepts of property and property rights, discussing their reduction to the conceptual level of institutions and proposing instead that it should incorporate those of social relations, power and authority, and social appropriations. The conclusion summarises and brings together the main propositions in the paper.

1. Institutions and path dependence

The concept of path dependence looms large in new institutional economic history, particularly in the overarching theoretical framework that Douglass North and his collaborators have developed essentially since the late 1980s. It purports to account for the observed long lasting differences in economic growth across economies. The gist of this meta-theoretical narrative is that most societies have not harnessed the potential for modern sustained economic growth, as did a minority of industrialised Western nations, because somehow the former resisted adopting efficient institutions that economise in transaction costs, allow competitive market economies to evolve, and production factors to be allocated in the most efficient ways. Either such societies never tried to adopt such 'virtuous' institutions in the first place, or when they did at some formal political level, as with the US-inspired constitutions in new Latin American countries in the nineteenth century, these were blocked by an adverse pre-existing 'institutional matrix', including informal norms and beliefs inherited from their past histories (those of their earlier colonisers, in the Latin American instance) (North, 1990: 103, 116; North 1991: 110-111; cf. Acemoglu, Johnson & Robinson 2002; Engerman & Sokoloff 2005, *inter alia*).

According to this theory, as a rule centralised, redistributive, state-ridden societies with insecure property rights reproduce and tend to perpetuate their 'perverse' incentive systems in most historical and contemporary societies. According to its most recent developments, such was the way of 'natural states' as they emerged to curb violence and impose some degree of social order on the growing complexity of societies. A few de-centralised societies with competitive markets and polities somehow evolved out of that state and became able to sustain growth, whereas most societies did not. Why? Ay, there's the rub. 'Understanding the transition is the holy grail, for it is the process of modern social development.' (North, Wallis & Weingast 2006: 6)

Enter path dependence. According to the well known 'Clio and the economics of QWERTY' (David 1985), if contingent sequences of events lead to a technology being adopted at an early stage by a large number of users, eventually the market's opportunity set

may shrink around that technology, regardless of its relative efficiency as compared to later failed competitors. Thus whereas under standard neoclassical assumptions competitive markets would select for efficiency and converge to an optimum, the historical sequence of events may lead to 'locking in' less efficient solutions (Arthur 1989). In mathematical jargon such systems are 'non-ergodic', i.e., the effects of past events do not get averaged away as the system evolves (David 2007).

If one substitutes 'institutions' for 'technology', the role of path dependence in the new institutional meta-narrative becomes clear. Contrary to neoclassical equilibrium models, North (2005, *passim*) insistently claims, we live in a non-ergodic world where change is omnipresent, uncertainty prevails and history matters. Each country's individual history in a more or less remote past has set an institutional matrix that generates economic rents for ruling elites and their organisations – the most important of which is the state itself –, who have no incentives to change those institutions and indeed strive to keep them and the beliefs upholding them. Because elites' coalitions hold the power, the resources and the redistributive capacity to garner social support, the social system gets locked in those institutions which advantage them, irrespective of their efficiency for societal economic growth, and the society is locked in that institutional matrix. Thus, according to North,

> Institutional change is typically incremental and is path dependent. It is incremental because large-scale change will create too many opponents among existing organizations that will be harmed and therefore oppose such change. [...] Path dependence will occur because the direction of the incremental institutional change will be broadly consistent with the existing institutional matrix [...]. (North 2005: 62)

(Cf. the homologous argument in Bhaduri 1991about class vs. societal economic efficiency of agrarian and credit contracts, which however pays much more attention to context and social relations.)

The theory goes on to say that in the evolution from primitive towards complex societies, the initial stages created institutional matrixes fit to ensure social order and a modicum of economic growth. However, they are adverse to *modern* economic growth because they are based on 'limited access' to economic and political resources in order to generate rents for the elites, which was the necessary condition for them to coalesce and impose order in the first place.

In this meta-narrative, then, rather than the persistence of 'natural states' the real historical puzzle is the exceptional historical circumstances that, quite unintended by their elite protagonists, have made it possible for a handful of north-western European nations to make the unlikely transition out of 'natural states' into competitive 'open access' social orders, necessary to enter the path of modern economic growth. Such 'open access orders' create 'virtuous' institutional matrixes with democratic institutions, a rule of law that protects property rights and free initiative and makes commitments credible by enforcing contracts – first and foremost the constitutional commitments of the state unto its citizenry. Their elites capture benefits through organisations in a competitive political and market environment, which thrives in diversity, stimulates innovation, selects for efficiency, and produces positive societal externalities in the form of economic growth and opportunities for social mobility, among other public goods. (One could note in passing that if the neoclassical 'ergodic' vision of a self-regulated system of markets is a utopia, then North's vision of 'adaptive efficiency' in 'open access' orders certainly seems to come as close to it as is possible in this our 'non-ergodic world'. In fact, it bears a striking resemblance to Alchian's (1950) model of evolutionary selection of firms in competitive markets.)

According to the theory, the transition from limited to open access orders is a difficult one, which requires a set of contingent power disequilibria within the 'natural state' that create the incentives for (some of) the dominant elites to promote institutional innovations that eventually break out of the 'limited access' lock-in. This is where the theoretical meta-narrative turns into a set of historical narratives of successful breakthroughs, looking for the critical conditions that led some nations to build growth-inducing institutions (e.g., North & Weingast 1989). Permanence in a 'natural state order, on the other hand, rather seems to be the ordinary way of things (Weingast 2009).

In sum, the new institutional meta-narrative invokes path-dependence in two quite different ways:

- First, is means a of early historical societies to lock-in 'limited access orders' and the unlikelihood that they evolve transitions to 'open access orders', which explains why most nations do not get on the path to economic development.
- Second, it means the particular and historically contingent transitions initiated by north-western societies, from that primary lock-in into a new one of 'open access orders', which explains why those nations *did* embark on the path of economic development.

Both underdevelopment and development are conceived as path dependent, and consequently so is the dovetailing between them in the history of the world. Somehow, developed countries or regions 'got lucky' in how particular sequences of events turned out to change the course of their histories.

We must note that at this level of theoretical abstraction, the former meaning is really not a case of path dependence at all. If *all* historical societies evolved to 'natural state' social orders which then tend to perpetuate, there is no divergence of paths due to contingent historical processes. This is more akin to a general law statement than a path dependent process (Goldstone 1998: 833-835). The permanence of underdevelopment is not derived of each society's history, but rather of a general lock-in law that applies to most societies as if by default – which is actually quite ergodic, since whatever jolts those societies may have suffered, such as US-inspired constitutions and development aid programs, their effects got averaged away as the inherited configuration of organisations, institutions and culture brought societies back to long term 'limited access orders', regardless of intervening changes in the elites ruling them.

Conversely, modern development in but a handful of societies *is* path dependent, since exceptional courses of historical events starting from within the 'natural states' bifurcated their paths away from them into a 'virtuous' lock-in – such as the historical sequence in seventeenth century England leading from the Crown's fiscal rapacity under the Stuarts to the Glorious Revolution and the resulting constitutional accountability of the Crown, bringing about more secure property rights and setting England on the 'doorstep conditions' of a transition to an 'open access order' (North & Weingast 1989, Weingast 2009).

It is our critical view that this approach lumps together quite different phenomena under the same umbrella notions, as those of institutions and organisations, in a way that conflates different levels of abstraction into the same definitions and obscures the relationships between them (Portes 2010: 48-51). Granted that theory and comparative analysis require abstraction, they do so in order to direct attention to crucial characteristics of the phenomena under scrutiny. In this case, however, the vision is much too biased towards the state and the elites at the nation-state level, and towards macro-level institutions and organisations to the detriment of social relations and action. This ultimately treats effective everyday processes of social reproduction and change as black boxes. We contend that is only by opening those black boxes and delving deeper into concrete social processes that we can

give history back its due in ascertaining the extent and the mechanisms of path dependence in *both* reproduction and change.

Of key interest here is the relationship between institutions, organisations and action. Institutions do not act. They are '[…] the grin without the cat, the rules of the game without the players', as put by a leading textbook in new institutional economics (Furubotn & Richter 2000: 7). They both constrain and enable action, but their effects on society and the economy are of necessity mediated by how social actors, pursuing different interests and endowed with unequal resources, process institutional constraints and use institutions in their (inter)actions.

Standard new institutional economic theory postulates that the relevant social actors are organisations, defined as '[…] a group of individuals pursuing a mix of common and individual goals through partially coordinated action'; especially elite organisations (North, Wallis &Weingast 2006: 12, 14). While it is an acceptable proposition that organisations act and make choices, to the extent that they have some sort of formal hierarchy, decision-making procedures and enforceable compliance rules binding their members, it is not only organisations who act and choose. Focusing solely on organisations, and elite organisations at that, assumes away individual and non-organised collective action embedded in everyday social relations. (Unless, that is, their rather loose definition of 'organisation' is stretched to mean virtually all forms of collective action, even such loose collectives as 'a market community' [Furubotn & Richter 2000: 7]. The concept is thereby rendered virtually useless as an analytical tool. Social networks and ad hoc groups neither act nor make choices as discrete actors, except in a very imprecise metaphorical sense, yet they allow participants to partially coordinate their individual choices and actions and to act collectively.) New institutional economists and economic historians have for some time highlighted the importance of informal institutions (e.g. binding customs, moral codes) alongside formal ones (e.g. the law). This is of course important but it begs the question. Informal rules norms and enforcement arrangements still remain a grin without a cat – and even then it is a gross oversimplification to assume that there is but one grin and that informal institutions mainly fill in the gaps left by the inherent incompleteness of the formal ones (Furubotn & Richter 2000: 15).

Focusing solely at the nation-state level, on the other hand, eludes the possible variance between national and local level institutions and spheres of action (Hopcroft 1998). It sidesteps the role of non-elite social actors, groups and communities in more or less selectively adopting, adapting and resisting institutions and institutional innovation in the

contexts where actions take place (be they village communities, markets, households, farms, factory work floors, etc.). In such practical environments, local actors hold context-specific powers and their (inter)actions are constrained and enabled both by local level institutions and by ongoing social relations, besides macro-level ones. Other than supplement, informal and local institutions and the everyday practice they legitimise may quite well subvert or even overtly oppose formal ones (Scott 1985: 314-350). Thus formally identical institutions may produce divergent results, contingent on how they are embedded not just in macrossocial orders (as in North, Wallis & Weingast 2006: 27) but also in concrete social relations and how these change over time.

We submit that it is very much at this level, rather than just at the macro-political level of the state and national elite organisations, that institutionalised norms, rules, beliefs and roles are acted upon, adapted, reproduced, innovated or resisted against in everyday life, and social and economic outcomes – path dependent ones included – emerge out of action and social relations. This is what we have set out to discuss in the more specific realm of property rights.

2. Property rights, power, social appropriation, and history

2.1. Social relations vs. institutions

Following from the above argument, we challenge the definition of property as (solely) an institution, which abstracts the normative and, in the last resort, legal and state-centred view of property out of its social contexts, which we feel needs to be disputed by historical and social studies. Our view entails an understanding of property rights as *social relations* – in the weberian sense of courses of action which made probable because they are reciprocally referred among a plurality of social actors (Weber [1922] 1979: 21) –, rather than as only the abstract institutions that frame them.

Defined as a social relation among persons, which pertains to the socially acknowledged right of some to use and dispose of things to the exclusion of others, property is power: the ability that asset owners detain to dictate, influence or coerce the behaviour of others in respect to those assets. Domination, or the probability that this power is consented to and obeyed, varies with the extent that it is perceived as legitimate within a given historical context (i.e., to the extent that it constitutes authority) (Carruthers & Ariovich 2004: 23-24, 29; Getzler 1996: 655; Weber [1922] 1979: 30, 43, 170-171). Therefore, property is not

simply an institution, but rather a set of social power relations, status and roles, legitimised by institutions enforced by organisations and diffuse social control, and which manifests itself in social action. This distinction is important because it carries with it both the relationship and the difference between abstract values at a deep cultural level; norms, rules and guidelines at an intermediate institutional level; and concrete social relations that (re)interpret them and (re)act on them (Portes 2010: 51-55).

Property institutions enshrined in law and custom are symbolic templates which embody and confer legitimacy on those power relations. How they come to operate in practice – including their economic effects – will depend on which actors appropriate that power, how they act upon it, and also on the extent that it is socially consented or disputed by social action, possibly predicated on alternative and competing sources of legitimacy (e.g. local or group-specific institutions, the 'moral economy', religious beliefs, etc.; cf. for instance Buoye 2000; Thompson 1977).

Here too, there is much more to how 'history matters' than just the capture by elite organisations. Formally identical property rights regimes may produce different effects depending on the pre-existing institutions, social relations and power structures upon which they were overlaid and which will not simply fade away, and on the contingent histories of how they were adapted to those contexts and appropriated by different social actors. For instance, a contingent sequence of Portuguese Crown acts shifting the power balance between landowners and tenants in favour of the latter was better taken advantage of by large tenants, which (quite contrary to the Crown's purposes) contributed to consolidate a *latifundium* agrarian class structure in late 18th century southern Portugal that long survived the laws themselves (Santos & Serrão forthcoming).

2.2. On the historicity of any concept of property

Property as merely a set of institutions is but one rather rarefied layer in the analysis of property as a social and economic phenomenon. It becomes even more rarefied if social norms, rules and enforcements of property are assumed to be coherent, and the discourse becomes about property as *an* institution, abstracted out of a possible historical plurality of institutions being used to legitimise competing appropriations at given points in space and time. We view as our task as historians and social scientists to embrace the plurality and plasticity of property institutions and social relations: how they are disputed and turned to power relations; by which social and political processes one given set of cultural values,

beliefs, institutions and social relations weaved around property came to dominate in specific societies and times, to what degree of hegemony, resistance and hybridising; with which economic consequences, not just in terms of wealth creation but also of wealth distribution, social stratification and power structure (Congost 2007). It is within this framework of concrete historical processes that we believe path dependence belongs as an inherently historical concept.

To be sure, current discourse owes much of its strength to the fact that it assumes property, in its contemporary commonsense meaning, as a-historical and taken for granted. But to take any discourse on past or present property as autonomous of its social and economic context will prove a serious hindrance to historical analysis. Current vocabulary constantly lays traps for social scientists which we must detect and dismount. On the one hand, the very term 'property *rights*', if used a-critically, compels to acknowledge as rights, in a normative sense, practices of land use and exclusion that were historically created by powers and enforced by processes which we would hardly consider those of the rule of law – and which were probably best qualified as based on past privilege and abuse, however naturalised and legitimised by current property institutions. Conversely, it may lead us to treat retrospectively as illegitimate customs, malfeasance, and at any rate not as rights, past land uses that in the context of their day and place were quite legitimate, and of which their holders were expropriated by states under a rule of law and strictly lawful definitions of what property *should* be as a *natural right*. 'The law can simply refuse to recognize a person's property right […] as in the extinguishment of "uncertain" and "unreasonable" common rights during enclosure" ' (Getzler 1996: 657).

It is all too frequently that the discourse of history and the social sciences harbours taken for granted, abstract and universal categories about property and the law that historians and social scientists should seek to debunk and de-naturalise. Furthermore, the adjectives that we often use to qualify them – such as 'perfect' and 'natural' – have reinforced the ideology of the superiority and the ultimate achievement of those categories, be it on economic, political or moral grounds. Such historical and social science discourse has tended to naturalise the idea that property rights have evolved (and *should* evolve) towards that ideal of perfection and that this ultimately would come to ensure economic growth, progress and liberty.

Yet in spite of their apparent neutrality and universality, such categories and concepts which we are forced to use in our studies are in fact the product of concrete historical contexts

in which they were articulated and designed, which explains both their success and their evolution.

2.3. The historical contexts of the triumph of the idea of absolute property

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. (Blackstone [1753] 2011: 304)

The famous quote of William Blackstone' *Commentaries* epitomizes the idea of absolute property, just as it was on the path to become dominant in Europe. Significantly, the appropriation of land for agricultural use played a pivotal role in the 'historical' justification for absolute property, like property itself did in the genesis of civil society with its 'long train of inseparable concomitants': states and government, law and enforcement, public religion, the useful arts and science (Blackstone [1753] 2011: 307-308). Absolute property in land became the seed of all human liberty and progress:

> And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner. (Blackstone [1753] 2011: 311-312)

Abstraction played a major part in the historical construction of this ideal of property, which proved highly performative in changing social structures along with the appropriation of resources. It became pervasive in England and France by the end of the 18th and the beginning of the 19th century, and swiftly extended to other countries. It actually overrode the difference between the two main European legal traditions: English rulers promoted absolute property in land by jurisprudence and the French supported it with recourse to the Roman Law tradition and, from the 19th century on, in the Civil Code of law, as in time did most states in continental Europe. In both legal traditions, jurists used and reshaped a discourse on property and progress which absolutely identified property, however distributed, with the interests of society at large.

The success of this paradigm certainly owes to its abstract nature, which allowed it to justify quite contradictory land property policies in the late 18th and the early 19th centuries,

from enclosures and the abolition of communal rights in England to the abolition of feudal rights and the sale of national assets in post-Revolutionary France. That is probably why in the former case it was popular protest that denounced the abstract concept of absolute property in defence of their customary rights, while in the latter it was the aristocrats who played that part in defence of their privileges of rank. In fact, some French counterrevolutionary discourses are more radical – in the sense that, like the English anti-enclosure protest, they were the ones bringing up political issues of class struggle over appropriation – than much revolutionary discourse that held on to the abstract virtues of absolute property.

One of the dogmas that most favoured the superiority of absolute private property was the idea – which we can find in both Quesnay and Adam Smith – that large scale farming based on it provided the most benefits across the whole society by increasing overall wealth and relying on the 'invisible hand' to redistribute it. This provided the ideological justification both to support large land ownership where it existed and oppose land reform, and to expropriate and privatise common rights in land. Thus the concepts of perfect absolute property and economic growth were construed by abstracting from coterminous historical processes of expropriation and social inequality.

2.4. The historical contexts of the triumph of the idea of property as a bundle of rights

> [A factor of production] is usually thought of as a physical entity […] instead of as a right to perform certain (physical) actions. We may speak of a person owning land and using it as a factor of production, but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions.' (Coase, [1960] 1990: 155)

The equally famous quote of Coase also epitomizes the concurrent approach to the concept of property, which has dominantly informed the development of new institutional economics and of law and economics. According to two recent critics, Coase's development of this principle was a corollary of the success of the legal realists' school in law studies, which had succeeded since the 1920s in imposing the doctrine of property as a bundle of rights: '[…] property consists of nothing more than the authoritative list of permitted uses of a resource – posted, as it were, by the state for each object of scarcity' (Merrill & Smith 2001: 366). Accordingly, '[i]t is not *the* resource itself that is owned; it is a bundle, or a portion of rights to *use* the resource that is owned' (Alchian and Demsetz, 1973: 17, emphases in the

original). One major property right is precisely '[…] to transfer *all rights* in the asset through, *e.g.*, sale, or *some rights* through, *e.g.*, rental' (Furubotn and Pejovitch, 1972: 1140, emphases in the original). Therefore, the bundle of property rights in an asset may be distributed among several parties, without the physical asset itself being partitioned (Alchian and Demsetz, 1973: 17). Crucially, '[…] property rights do not refer to relations between men and things but rather, *to the sanctioned behavioral relations among men that arise from the existence of things and pertain to their use*' (Furubotn and Pejovitch, 1972: 1139, emphasis in the original).

The 'bundle of rights' metaphor took two quite different meanings, both related with the idea of a social function of property but with opposite implications, ranging from more or less radical reformism to a renewed faith in market efficiency to promote social welfare. The notion of a social function of property is linked to the name of the French scholar and publicist Léon Duguit, influenced by Durkheim's theory of organic social solidarity. As a recent reviewer of his theory put it, '[a]s Blackstone represents "despotic ownership", so Duguit has come to represent property's "social function" ' (Mirow 2010: 195). Duguit wrote in 1912 that '*[l]a propriété n'est plus le droit subjectif du propriétaire; elle est la function sociale du détenteur de la propriété* [Ownership is no longer the subjective right of the owner; it is the social function of one who detains the wealth]' (Duguit 1920: v) (in line with the reformist outlook of early American economic institutionalism, in authors like Commons and Veblen, among others). In the American economist Frank Knights' words in 1921, the feeling for the large property-owner was that '[…] *[h]e is really a social functionary now*' (Knight 1921: 359, emphasis in the original).

According to Merrill & Smith (2001), the first legal realists in the US were reformists pleading for the desecration of absolute property for the state to intervene in the allocation of property rights, in order to optimise social welfare. This was a time of structural change in the shaping of modern corporate capitalism in the US and in Europe ('The capitalist process, by substituting a mere parcel of shares for the wall of and the machines in a factory, takes the life out of the idea of property.' Schumpeter [1943] 1994: 142) and of intense social struggle, when the response to economic and social crises led state policies away from the golden age of invisible hand liberalism and further into interventionism.

> […] T]he motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that

> property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. […]
>
> Not coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded. (Merrill & Smith 2001: 365)
>
> Indeed, in the most tendentious versions of the [bundle of rights] picture, the traditional baselines of the law were mocked, and the idea was to dethrone them in order to remove them as barriers to enlightened social engineering. (Smith 2012: 1697)

Both legal realism and the early economic institutionalism converged then on promoting the relativisation of property rights to harness wealth creation and distribution in the interest of higher social purposes – a political view of the social function of property underlying much of what has since been called 'welfare capitalism'. This is the main target of the most outspoken reactions to this approach in the field of law and economics, by scholars who propose a qualified return to the Blackstonian idea of property as a natural right: 'Those who persist in calling property a bundle of sticks are either too lazy, indifferent, or, I suspect, too hostile to the institution to try to describe how it really works and why' (Merrill 2012: 155).

Yet the bundle of rights approach was refashioned by Coase, and since by new institutional economists and most law and economics scholars, in a very different context and to quite different purposes. Put briefly, the goals were those of making a theory of organisations and firms endogenous to general economic theory, including the search for the most efficient allocation of property rights in the firms' assets to different corporate actors; and of designing laws that facilitate the delineation and enforcement of property rights and transactions, and the prevention or redressing of negative externalities at the minimum social cost. This entails a quite different political idea of the social function of property, namely that of devising incentives to maximise wealth creation in and between complex organisations while reducing the negative externalities of their free operation.

Land was by then no longer the most important production factor in the industrialised world, and the development of corporate property and managerial control required a new sophistication of both economic theory and legal devices to deal with the fragmentation of control over assets in complex organisations. Ironically, these set out to accomplish much the same role for the property and the governance of corporate capital and its financial markets,

as absolute property had for land and capital ownership just before and in the earlier stages of industrialisation – that is, to achieve the most perfect legal delineation of discrete property rights allocated in each bundle and to enforce them efficiently, in the interest of securing property and easing market transactions, albeit at the cost of sacrificing the absoluteness of property. But also, and more strategically from our point of view, new institutionalists since Coase arrived at this by abstracting property rights as stylised institutions enshrined in law and court rulings, away from the social relations and practice that their very initial definition entailed, of which legal legitimation is but one dimension.

2.5. Reality or metaphor? The role of abstraction in the historical construction of property

Thus we can point out one feature common to all discourses on property, as they are articulated at the level of institutions alone, and especially at that of the state. In line with what we have stated earlier about institutions, 'perfect property' – as indeed all things perfect – has been construed as an abstraction away from social practice.

Abstraction always requires an exercise of imagination. Imagining absolute property over vast expanses of land on a nation-state scale entails imagining a 'legibility', control and enforcement system that would not often be available as such discourse emerged (Scott 1998). Imagining a bundle of perfectly delineated property rights allocated across different persons in the most efficient way entails abstracting from the power relations presiding over that allocation and in turn resulting from it. Indeed one might ask, as E. P. Thompson asked about 'the market', whether when we talk about 'property' we are in fact conceptualising reality or forcing a metaphor on it. Out of the social appropriation relations standing at one historical time and place – say, eighteenth century England or France –, some objects ('things'), subjects (individual or collective 'persons') and modes of appropriation (sets of 'actions' the subjects can perform with the objects, or with each other pertaining to the objects) were abstracted as the 'real', 'natural' and 'legitimate' meanings of 'property', while others – no matter how grounded in previous social practice and legitimised by preexisting institutions – were declared 'trespass' or 'abuse'.

A *numerus clausus* of legitimate property forms, Merrill & Smith (2000) argue, was built explicitly into civil law systems and implicitly, by court practice, into common law systems. These abstract legal 'templates' of property became the dominant metaphor for property relations. They were enshrined in law and more or less effectively socialised into custom and enforced into practice. To the extent that they were abstracted away from long

standing social relations and institutions in order to embody a 'natural order' of property, they are of essence a-historical in their terms, if by no means in their origins. Not surprisingly, the *numerus clausus* principle is at the core of the arguments of recent essentialist criticism against the relativism of the bundle of rights approach in law and economics (Merrill 2012: 154; Smith 2012: 1698).

Moreover, the same property templates were progressively exported to new and very different contexts to those in which they had originated, or brought back into contexts that had since experienced radically different property relations, as for instance in ongoing post-Socialist transitions. On the other hand, both at home and abroad their implementation met (and still meets) with more or less resistance, as they were imposed, adapted and hybridised by practical compromise according to inherited cultural blueprints and the concrete power relations at play. And here we should recall path dependence, concerning the specific historical trajectories and possibly divergent outcomes of these transitions.

There is nothing about the idea of historically bounded *numeri clausi* of property forms that feels inherently strange to a sociologist or a historian. It is a plausible enough hypothesis that all historical societies had some such menu standardising and legitimising, in law or custom, existing power relations concerning the appropriation of resources (Santos 2010). (Or rather several menus might coexist, according to varying social scales at which binding rules could be set, as the dominance of the nation-state scale cannot be universally assumed.) The point is that the abstraction, articulation and enforcement of such templates for property – their contents, how, to what extent and by whose actions they became dominant, how and by whom they were resisted – is part and produce of social processes which must be empirically studied and analysed in their own terms and contexts, and only then classified for comparative purposes rather than relying on *a priori* generalisations (cf. Ostrom 2009: 27-28). That – and not because we are particularly lazy, indifferent or hostile to the idea of property – is why in spite of insightful criticism, we still feel the bundle of rights approach to be more operational when it comes to understanding '[…] the heterogeneity and plasticity of property [… and how] it can be deployed toward an endless variety of purposes' (Merrill 2012: 153) – provided that 'property rights' is given its sociological meaning and not stylised as a disembodied institution. A major epistemological obstacle on that path is the taking for granted of currently dominant templates of property, either directly as a fit-for-all theoretical metaphor or indirectly as a yardstick against which to assess all societies' social appropriation arrangements as to efficiency, perfection or indeed the very existence of property.

In sum, echoing calls in earlier social historiography to contextualise the 'principle of property' and its outcomes (Thompson 1977, 1991; Vilar [1973] 1982), we ought to avoid the essentialist concept of a preset *numerus clausus* of juridical forms, by evidencing how such 'templates' of property rights historically varied, were construed, upheld, resisted against, changed and appropriated, and to what social and economic effects (as for instance leasehold tenancy in land, Schofield & van Bavel 2009). Only the analysis of concrete historical contexts and processes may bring us understanding of how and why some 'things' could be appropriated in specific ways in some contexts and not in others, some 'persons' could hold property and not others, some 'actions' gained or lost acknowledgement and enforcement as property rights, and new kinds of 'things', 'persons' and 'actions' were socially constructed and old ones destroyed to meet newly prevalent needs and interests (Carruthers & Ariovich 2004: 33-34; Congost & Santos 2010). It is in the detail of such processes that, in respect to property, we may expect to find and explain the '[…] social dynamics (involving social interactions among economic or political agents) that are characterized by positive feedbacks and self-reinforcing dynamics' (David 2007: 92) that may have set and kept economies on divergent paths. Here are a few instances of processes that would be worth looking at from this perspective:

- Human beings can in specific historical social contexts be constituted as ownable 'things', while in others they are placed outside the legitimate realm of ownership and trade. The change from one to the other often had drastic impacts on the governance of farm labour, which translated to new arrangements of property rights in land such as servile tenures and sharecropping.
- Natural resources like woodlands and water have varied amply in their status as ownable 'things'. Specific 'actions' concerning them (e.g. grazing, collecting, timbering, hunting, fishing, passing through and roaming) were variably acknowledged and their allocation has shifted among communities and users' collectives, private persons and organisations, and the state.
- As European empires and the new nation-states that emerged in their wake colonised overseas territories, the property templates that migrated with them were sometimes imposed over the pre-existing autochthonous ones, defining anew what could be constituted as property, owners and rights, and shaping radical re-appropriation of land in favour of colonists; sometimes they translated and adapted the autochthonous ones in order to appropriate an redistribute land rent in favour

of specific groups of colonists and colonial powers. Social and economic effects are likely to have varied amply and lastingly according to which path was taken.

For instance, the English rulers not only kept the Roman law institute of emphyteusis in South Africa in the 18th century as it had been instated by the Dutch rulers, mixing common law and Roman-Dutch law traditions, but actually later expanded it into Lesotho and Botswana (van Niekerk 2011). This 'imperfect property' contract seems to have proved very adequate to translate and therefore control native forms of customary tenancy by European rulers.

- Since engineered genes have been construed as ownable 'things' via intellectual property rights, genetically modified seeds were made available to farmers through contracts that attenuated their property rights in the land, shifting effective control to biotech corporations.

These are but so many examples of processes where detailed historical analysis should go beyond the schematics of institutions to see how they interplay with social relations to produce the effective appropriation of resources, and with what outcomes. Let us sketch out one more detailed example.

2.6. An example: The 'principle of discovery' in the United States

No handbook in US property law neglects to mention the 'principle of discovery' as one of the 'original acquisition' ways. The principle of discovery acknowledges the right of the first claimant to absolute property in an asset. In establishing private property in land in the early US, it was used to override the principle of 'first possession' by earlier occupants, the Native Americans, because the use they made of it did not conform to the European standards of property. The process is currently narrated as follows: as the Europeans arrived in North America, they found territories occupied by Native Americans who had no interest in property in land and to whom only a right of occupation might be acknowledged. The state, convinced of the need to establish the principle of absolute property, intervened between the natives and the new colonists, who did wish to enjoy property rights. The state thus stood over for the first claimants and took onto itself the property rights on native land, indemnifying the native communities for the loss of their right of 'occupation', not 'property' – in fact forcing them to 'sell out' their rights to a state monopsony that later allocated them to European settlers.

The historical study of court sentences show that in fact this principle prevailed only from the 1820s on. Prior to that, during the colonial era, European settlers had often negotiated and bought land directly from the natives. It was the federal government of the new USA that downgraded the Native Americans' property rights to a simple occupancy right and took over all that remained under the principle of discovery – a very interesting subtle twist that spared the resource to the contestable legitimacy of a 'right of conquest'. (In fact, Blackstone had written long before that '[o]ur American plantations [… were] obtained in the last century either by right of conquest and driving out the natives, (with what natural justice I will not at present inquire,) or by treaties.' Blackstone [1753] 2009: 86.) Under the legitimacy of this new regime of absolute property and backed by armed force, successive US governments forced Native Americans to relocate to new territories, to underwrite treaties committing themselves to reserves, and to accept the partitioning of their land in individual plots (Banner 2007; Cronon 1983; Horwitz 1992; Merril & Smith 2010, ch. 2).

Thus the state, reflecting prevailing interest groups, could strategically use the common law to create a new mode of 'original acquisition' allowing a 'lawful' expropriation of Native American communities. The US state was able to transfer the vast amounts of acquired land property to the interested settlers at very low cost and lay the bases of agrarian structures and markets in land. Though to our knowledge no counterfactuals have been offered, this historical development can hardly be construed as the only possible one. It was prompted by political and social interests in land appropriation, and it certainly laid the path for early USA inner expansion and agrarian growth, but also to persistent patterns of social and ethnic inequality.

Conclusion

We have argued for an approach to property rights that goes beyond the perspective on property as an institution (whether formal or informal), which is prevalent in the new institutional economics and in the law and economics literatures, and builds on the analytical potential of the initial definition of property rights as social relations. Concurrently, we argued for the view of property as a bundle of rights and against the revival of the absolute concept of property under a juridical *numerus clausus* of property forms. We do not claim that these do not exist, but rather that any such property templates and *numeri clausi* that have become institutionalized in a given space and time are themselves social constructions, which both express and legitimise power relations among individual and collective social actors. Those

social relations take place at local as well as national and intermediate scales, in the course of which some have had to cede some rights in favour of others as result of dispute, conflict and negotiation. They are as likely to change and resist change as any other social institutions.

We do not believe, therefore, that institutions have a stand-alone explanatory power regardless of how they are concretely acted upon in social relations. Placing explanatory models at the abstract level of institutions and elite organisations seriously risks the fallacy of misplaced concreteness. Neither should we take institutional hegemony for granted, as competing sources of legitimacy can coexist in the same society, dispute or ignore those upheld by the state, even force them to adapt and change. To acknowledge this should lead to dynamic and empirically grounded analyses of practice in relation to rights in land and their dispute, and to take stock of the diverse forms – new and old, legal and customary – that interacted and claimed legitimacy in specific historical contexts. This should allow us to assess not just how landed resources were socially appropriated, but also how the institutions themselves were appropriated as resources conferring or contesting authority in property relations.

We submit, finally, that it is at this more concrete level of social relations that we may detect the historical sequences of events and outcomes that paved the paths on which subsequent change may have become trapped, and understand the causal mechanisms underlying lock-in. Without such previous empirical and analytical research, any attempt to articulate general models of how property rights (and institutions at large) have conditioned societies' historical developments will remain extremely precarious.

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