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INTRODUCTION

MAPPING LAND USE REGULATION IN THE PACIFIC RIM

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This special issue of the Pacific Rim Law and Policy Journal assigned authors the ambitious task of analyzing the range of land use regimes around the Pacific Rim. As the authors and commentators met in October 1997, forest fires engulfed western Indonesia, sending thick smoke throughout Southeast Asia. When Sumatra and Kalimantan caught fire, Jakarta, Singapore, Kuala Lumpur and Brunei literally coughed and choked. Vast tracts of forest were destroyed, local and urban dwellers became ill, and lives were lost directly and in transport accidents caused by haze. The question underlying events was whether this environmental disaster was entirely “natural,” or resulted from forest clearance for logging—possibly illegal, certainly imprudent. Although apparently isolated and “local,” the forest fires played out in microcosm the ways in which policy choices about regulation of land use extend beyond national boundaries in the Pacific Rim.

Who owns—and controls—land is the threshold issue in each of the legal systems examined in this issue. In a preliminary debate, Professor Dan Lev, of the University of Washington, reminded us of an unpleasant truth: from the moment that feudalism breaks down and land is commodified, the land grab begins. The winners are usually existing landowners; the disenfranchised are usually the peasants, or the politically marginalized. The late 20th century complication is that contending interests have multiplied. Land rights struggles are not simply tussles between citizens or binary negotiations between state and citizen or state and corporation. External agents such as multinational corporations, foreign investors, international

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institutions such as the IMF, the World Bank, the Asian Development Bank and foreign countries offering development aid, urge rapid legislative reform to define property rights. These economic and political interests continue to assert a Weberian link between property rights and development.

Certain, transparent and transferable property rights are viewed as necessary preconditions for the full exploitation of land as a resource—and the platform for industrialization and full development of transitional economies in Asia. Internally, indigenous owners, local communities, activist groups and local governments are wary of overreaching actions by central governments that deprive them of control over local resources, livelihoods, culture and living space. Once development accelerates, the question is then how to manage land use and how to conserve property and environments which are historically and culturally valuable. As the Indonesian forest fires confirm, the ultimate outcomes of land rights allocations are not confined within domestic borders, but ripple outwards.

Despite regional interdependence in land use, the contours of the region's land use regimes have yet to be thoroughly mapped. Too often, comparative lawyers have been preoccupied with tracing the common or civil law origins of property rules and institutions transplanted to colonial settings. Only recently have questions been asked about how the legal architecture is actually inhabited, used, renovated, conserved or demolished in individual systems.¹ At first glance, the answers for each system presented in the following articles seem dramatically divergent. In most cases, however, the authors return explicitly or implicitly to one of a number of key themes.

The starting point in most of the articles is the architecture of regulation in the US, Canada, Australia, Japan, China, Korea, Cambodia, Vietnam or Indonesia. Reading Laschever's article against Patterson's, for example, highlights the differences in regulatory form, political processes and local culture between areas in Washington State and British Columbia that are geographical neighbors. Common to both, however, is an account of the shifting balances between property development and growth management, and between environmental protection, provision of infrastructure and "freedom to sprawl." Liebs' study of developments in preservation legislation in Japan could similarly be compared with counterpart regimes in any of the industrialized states of the region. He describes struggles over the definition and construction of what is 'authentic' and worthy of preservation

¹ See, e.g., *LAND ISSUES IN JAPAN: A POLICY FAILURE?* (J. Haley & K. Yamamura eds., 1992); F. Upham, *Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law*, in *POLITICAL DYNAMICS IN CONTEMPORARY JAPAN* (G. Allison & Y. Sone eds., 1993).

which echo similar debates decades ago in the United States. These observations resonate with Chapman's account of the dichotomy in Cambodia between desire to preserve obvious Khmer monuments such as Ankor Wat and the relative official indifference to traditional houses, urban streetscapes and agricultural landscapes. Neither offers an optimistic prognosis. Liebs' study, in particular, suggests that although Japan's preservation regulations date from the turn of the century, and despite considerable economic wealth, significant structures are disappearing. We might conclude that any assumptions about a natural evolution of a conservation ethic in Asia would be misplaced. This kind of architectural comparison usefully illuminates some of the elements in our own system that we assume to be universal. At another level, these articles also clearly identify common intra-systemic tensions between competing groups such as architects, planners, bureaucrats, politicians, foreign investors, citizen activists and advocates.

The second focus chosen by most of the authors is how land as a resource is divided, managed, and used in reality. Formal legal regimes tend to privilege some interests over others. This phenomenon emerges clearly in systems where legal pluralism allows us to compare the rights embedded in different strata. The articles by Tehan and Lindsey, for example, detail ways which traditional land owners in Australia and Indonesia have been displaced by elites through government intervention. Not surprisingly, the result is considerable slippage between the dominant system of formal law and subordinated systems of indigenous law, custom or practice. Tehan and Lindsey critique, in different ways, the inadequacy of formal law as a medium for giving expression to indigenous or customary rights. Tehan argues that the effect of recognizing native title in Australia may be to diminish traditional cultural interests in land that have not been conceptualized as title. During debate, Professor Lev commented, in essence, 'twas ever thus'. He cautioned against being overoptimistic about the capacity of indigenous law to protect and advance land rights, where what is "indigenous," "traditional" or "customary" is ultimately constructed by the state, not the group in question.

Bae's article on Korean green belt legislation in Seoul explores the obverse situation—where the interests of green belt residents and Seoul citizens' access to recreational space have been legislatively entrenched, but have atrophied. Green belt residents find their land use rights frozen, leading to illegal uses in an attempt to improve the returns on economically unviable agricultural plots, while taxpayers, it is argued, pay a premium to preserve land which in many cases is in the defacto control of *chaebol* conglomerates

and has the effect of artificially inflating residential land prices in the rest of the metropolitan area. Chapman's study of Cambodia provides a different illustration of legislative erosion—what happens when total state ownership of land is transformed within seven years into almost complete private ownership, subject to arcane and largely ineffectual planning approvals.

The message from China, on the other hand, is that the state is not what it was. Chan and Kremzner suggest, from different angles, that the key struggle over land use in China is between different levels of government, exemplified by regulatory chaos which allows many players to simply ignore regulations which prove inconvenient. Kremzner argues that local planning and approval processes pose a challenge to dominance by the central government, asking whether Chinese land use regulation is better characterized as statist or dependent development. Chan argues that the enormous infrastructure expenditure required to fully utilize China's land resources will necessitate fundamental reforms of the banking and tax systems. Both Chan and Chapman's articles highlight foreign investment and aid as the visible hands in market reform of transitional economies: China's infrastructure needs can only be funded through foreign investment; Cambodia remains the non-governmental organization capital of the world.

Foreigners, however, often fumble attempts at reforming land use. During debate, Professor Chapman revealed that the restoration of a former palace as a museum in Cambodia has taken an unexpected turn. Bats had taken up residence in the building, prompting the aid donor, Australia, to declare them a rare colony meriting conservation. The result is a restored museum, complete with urban bat colony, and visitors who are momentarily awed and then exit rapidly, covered in bat fleas.

The third theme of these articles, then, is how we might understand the impact and interaction of these contending forces. One of the conventional tools of analysis has been the concept of legal pluralism. Two versions of legal pluralism are familiar to most legal scholars: the stacked tier model, where indigenous customary law is preserved but subordinated to a later overlay of colonial and post-colonial laws. In this issue, this form of legal pluralism is illustrated by Lindsey's discussion of how formal national law and policy has sought to compress the scope of indigenous adat land rights in Indonesia. An alternative model is where a particular group orders itself outside the formal legal system, according to group norms or non-legal rules. Both formulations invite criticism. In this collection, Gillespie provides a sustained critique of standard accounts of legal pluralism, using Vietnam as the illustration. He argues that the conceptual markers such as "state" and

“formal law” have limited utility for a system such as Vietnam’s, where “formal law” lacks a priori legitimacy. Using Habermas’ theory of communicative rationality as metaphor, Gillespie highlights instead the role of government officials as conduits for both government and social norms.

Gillespie’s argument provoked much post-Symposium debate. Does this aspect of Habermas’ theory provide a sufficient basis for characterizing land use regulation in Vietnam? Does it illuminate the workings of systems outside Vietnam’s? What might this perspective mean for frameworks of comparative analysis in which Asian legal systems are explored? This collection offers no definitive answers, but both the articles and the participants broadly concurred about two major propositions. The preliminary finding is that the comparative legal architecture of land use is fascinating and under-researched. Second, that in order to grasp how land use regulation is formulated, manipulated and lived, we need more than the templates of conventional comparative law or the theories about hierarchically ordered legal pluralism. The future research agenda is a complex one. Certainly we need careful fieldwork documenting both legislative changes and the internal operation of individual systems. Although the starting point is different in each case, most states in the region are engaged in a program of privatization, re-regulation, and market liberalization that will result in state regulatory power taking new forms. Future interdisciplinary research that seeks answers to “legal” questions in the region needs to proceed from an understanding of the ways in which the accepted notions of state in both industrialized and developing economies are changing.

