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### **Property rights systems and the rule of law**

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## **Abstract.**

Property rights - rights to control, use, or transfer things (broadly conceived) - though not readily distinguished from other rights, comprise a category of rights that both strongly benefit from clear and well-designed legal rules and often are subject to "chiseling" from failures to follow legal rules or from ex post alterations of the rules. Governance systems that limit official discretion to impair property rights, that have institutions and rules that provide clear definition to property rights and that provide predictable and consistent applications of those rights, will accord with the rule of law and generally will also advance social welfare. Some systems will depart quite evidently from this pattern, to the detriment of those societies, allowing too ready changes in law at the discretion of too few officials, too unconstrained by law, as the example of Zimbabwe illustrates. But differences between the good and the bad will not be drawn along simple, discrete lines, a point made by comparing the Zimbabwe example with the United States. The systems most consistent with the rule of law will not be able effectively to bar all changes in the law or to eliminate official discretion. Instead, those systems will limit the avenues for change and the ambit of discretion in ways that make property more secure and impositions on it more predictable without reference to the identity of the individual official enforcing the law or the individual property owners subject to it.

## Property rights systems and the rule of law

Ronald A. Cass\*

Tolstoy's novel, *Anna Karenina*, starts famously with the observation that 'All happy families resemble one another; every unhappy family is unhappy in its own fashion.' The opposite is more nearly true in respect to the rule of law. Though many societies with differing governance structures and legal systems adhere in their own ways to the rule of law, societies that derogate from it do so in more similar fashion. Put differently, it is easier to identify departures from the rule of law than to explain why particular actions conform to it.

The rule of law matters to people around the world because it is a concomitant of a society that is successful and, in all likelihood, just.<sup>1</sup> It does not guarantee justice or social welfare, but it does correlate with justice and social welfare (under virtually any accepted definition of those terms). That is why the concept has such broad appeal.

A critical aspect of the commitment to the rule of law is the definition and protection of property rights – rights to control, use, or transfer things (broadly conceived), including rights in intangibles such as intellectual property. Societies in which it is relatively easy to secure property rights, to protect them against infringement, to gain recompense when rights are infringed, and to transfer property rights in whole or in part to individuals who value them more highly are more likely to succeed.<sup>2</sup> Of course, the substance of the rights matters. Societies that are relatively friendly to property, not only giving it security but also providing broad scope for the

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<sup>1</sup> See Barnett (2001), pp. 136-144; Cass (2001), pp. xi-xii, 3; Harvey (1961).

<sup>2</sup> See for instance O'Driscoll, Holmes and Kirkpatrick (2001).

use of property according to its owners' desires, also will have an advantage (O'Driscoll, Holmes and Kirkpatrick 2001).

Substance aside, however, the degree to which the society is bound by law, is committed to processes that allow property rights to be secure under legal rules that will be applied predictably and not subject to the whims of particular individuals, matters. The commitment to such processes is the essence of the rule of law.<sup>3</sup>

Although societies differ markedly in their commitment to the rule of law, the distinctions often are less clear than might at first blush appear. The ways in which systems manage changes in property rights and in legal rules that affect property rights, along with the ways in which systems constrain official discretion, are the keys to the effectiveness of the rule of law. But the rule of law does not bar change nor does it forbid discretion. Change is a natural part of any legal system, and efforts to limit change must be seen not as ends in themselves but as part of a larger framework for assuring predictable, valid, law-based governance. Discretion to effect changes in the nature of property rights seems an inevitable part of any property rights system. And the division between systems that conform closely to the rule of law and those that depart from it will be tied less to whether discretion to shape and alter the law exists than to the nature of the discretion, to its concentration in few or many hands and its relation to other authority and to other legal and practical constraints. Conformity to the rule of law in the end cannot be measured in discrete increments but must be viewed as the product of a set of related considerations.

### *Property and property rights systems*

The word 'property' does not strike the listener's ear as a particularly abstruse term. We think we understand it instinctively. Property is a thing. Or things are property. But, of course, when we go to say anything more precise, to specify whose property a thing is, and what aspects of it are proprietary, against whom, for what purposes, we realize that property is not so readily self-defining after all.<sup>4</sup> And if we think a bit more, we realize as well that property does not consist only of things, at least not only of tangible things. We call certain types of ideas – or at least certain forms of their expression – intellectual

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<sup>3</sup> See for instance Dicey (1915, p. 198); Oakeshott (1983, p.119); Scalia (1989).

<sup>4</sup> See for instance Singer and Beermann (1993).

property and craft property rights in them. We recognize claims for money, for services that are equivalent to money, or for employment that earns money under the rubric of property rights.<sup>5</sup>

The line between property rights and other rights is a contestable line. This reflects the fact that the notion of property itself – what it is, how it should be thought of, who should have what property rights – has been a subject of controversy across centuries. Philosophers (along with economists, historians, and others) have argued whether property is something natural, existing prior to government recognition of rights, or instead is a positive construct of government.<sup>6</sup> They have contested the strength and provenance of a deep-seated historic impulse to stake out individual rights in property, with contrasting claims that the natural order is not of individual but of communal rights.<sup>7</sup> And they have debated the proper basis for and scope of rights to realty and to personal property, to intangible goods and to government largesse.<sup>8</sup> Modern-day scholars continue the arguments, drawing threads forward from hoary engagements to mix with more current assessments of the effects of inequality or of miscast incentives.<sup>9</sup>

Although the definition of property and delineation of the line between property rights and other rights is contestable, the core notion of property focuses on things, such as land, to which rights may be given as against the world. Where other rights often rest on the existence of some duty that is tied to particular behavior toward a more limited set of individuals, property rights tend to function as rights against the world in respect of the control, use, and disposition of things.<sup>10</sup> And often those things are situated, physically or as the result of legal rules, so that a single set of government decision-

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<sup>5</sup> See for instance *Goldberg v. Kelly*, 387 U.S. 254 (1970); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>6</sup> See for instance Pipes (1999, pp. 5-29) and Christman (1994).

<sup>7</sup> See for instance Berry (1980).

<sup>8</sup> See, e.g., Komesar (2002, pp. 125-155); Pipes (1999, pp. 39-63, 225-264); Donohue (1980).

<sup>9</sup> See for instance Barzel (1997); Christman (1994); Hayek (1960); Murphy and Nagle (2002); Nozick (1974); Rawls (1971); Demsetz (1967); Merrill and Smith (2001); Reich (1964).

<sup>10</sup> This line differs from that drawn by scholars who distinguish property rights from other rights along remedial lines, with property rights enforceable through injunctions and other rights providing only an entitlement to money damages. See, among others, Bebchuk (2001); Calabresi and Melamed (1972).

makers will have influence over the value of property rights.<sup>11</sup> That is the type of property – and the aspect of property rights – that is most important for inquiry into their connection to the rule of law.

### *Property rights systems and the rule of law*

This paper tells the tale of two systems – but not truly two separate tales. Western democracies generally have adopted rules that are quite successful at limiting official discretion to alter property rights in unpredictable ways, at promoting stable and secure rights, and at limiting governmental interference with the most productive uses of property, including voluntary transfers of property to those persons who will pay most for it (at least inferentially an indication of higher value). A legal system that allows individuals to order their lives, their personal behavior, and their business conduct secure in understanding the rules that will apply to them provides a critical spur to the investments of money, of energy, of talent that promote progress in human endeavor. Far more than natural resource endowments, sound law and government are markers for a society's success – both for its material success and for its citizens' broader sense of well-being.<sup>12</sup>

To be sure, there is far more regulation of economic activity – and, hence, necessarily of the use of property – in these nations than was common fifty or seventy-five or a hundred years earlier. And the increase in regulation reasonably can be thought to reduce the value of property from what it otherwise might be.<sup>13</sup> Even though many forms of government activity – support for infrastructure, transportation, availability of police protection, support for a well-functioning legal system, provision of a stable currency, and so on – can raise the value of property, still other activity must be recognized as interfering with property owners' interests in order to promote other

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<sup>11</sup> In federal systems with multiple levels of government, more than one government may affect property. But the significant point is that the property is not movable to avoid the edict of the relevant authority.

<sup>12</sup> See for instance O'Driscoll, Holmes and Kirkpatrick (2001).

<sup>13</sup> This assumes that regulation imposes greater burdens on those whose property is affected than the benefits conferred on them through regulation. That is not the same as assuming that regulation has negative net welfare effects for society as a whole, though many commentators have made that case for economically advanced democracies as well.

ends. Some estimates put the cost of economically burdensome regulation at staggering levels for even the least aggressively regulated advanced economies.<sup>14</sup>

Nonetheless, the legal imposition on property owners in these economies has been slight enough that, together with the productivity of resources and the distribution of human resources and capital, the value of property in these societies has reached lofty levels. The total value of real property (obviously only one form of property) in the United States, for example, is estimated to be between \$15 trillion and \$20 trillion.<sup>15</sup> Stock market values, which overlap somewhat with real property but also largely represent other business property, intellectual property, and other intangible value, may amount to more than \$11 trillion (taking the value of shares listed on the major U.S. exchanges).<sup>16</sup>

Beyond factors such as natural endowments and the choices made in crafting substantive legal provisions, the value of property in advanced economies is testament to the societies' commitment to the rule of law. Practical commitment to rule of law values is part of the economic success story, part of the value of property and of property rights. It is part of what sets Western democracies (a term that is not strictly limited to Western nations or to governments that are fully democratic) apart from many other nations.

The core concept of the rule of law includes an understanding that society should be ordered around a set of laws that apply similarly to all on the basis of principles deducible from the rules and not dependent of the identity of the rulers. It includes the expectation that rules of law that seem on their face to apply to all will in fact be read similarly and applied similarly to all – that what seems to be a universal rule will find similar application to the rich and the poor, to high and low born, to those

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<sup>14</sup> See, among others, Crain and (2001), who suggests a figure in excess of \$840 billion for the United States, and Hopkins (1994).

<sup>15</sup> Tapan Munroe, 'Economies of U.S. and Japan', *Contra Costa Times*, Sep. 22, 2002.

<sup>16</sup> Securities and Exchange Commission (2002), 'Table 15: Value of Stocks Listed on Exchanges', *SEC Annual Report 2001*, [Washington, DC: U.S. Government Printing Office], p. 169 (putting the figure at more than \$11.7 trillion). This figure was from 2000, and there has been substantial erosion in the U.S. stock markets since then, making the figure unreliable as a precise measure of current worth. Still, the point in text holds: the value of U.S. stock holdings is very substantial. Further, the stock figure does not include the value of the very large number of businesses that do not have publicly traded shares.

from different religions and tribes and locales, different political parties, different skin colors, different families.

The base proposition for the rule of law is that, in the formulation given by John Adams and David Hume, it intends ‘a government of laws, not of men.’<sup>17</sup> For the laws to govern, for them to play the decisive role rather than for the particular individuals in power to do so, the laws – along with the individuals who apply the law and the institutions that mediate application of the laws – must provide reasonable certainty about the meaning of the rules that govern our conduct. And the reasonable certainty about the rules must be rooted in understanding of the rules as written rather than detailed knowledge of which individuals will ultimately be applying the rules to us.<sup>18</sup>

Hayek (1944, p. 80) framed the point in especially strong terms, saying that the rule of law ‘means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.’ One can argue the contours of the Hayekian requisites for the rule of law, the degree to which rules must be fixed or the command that all government actions be bound in advance by rules. But Hayek’s essential point is correct – that the rule of law directs government to provide fair notice of what rules it will apply, that the rules must allow individuals to plan their affairs with a reasonable understanding of the rules that set the bounds to lawful behavior.

The classical rule-of-law conception propounded by Hayek and others contains four elemental components.<sup>19</sup> These are rule fidelity (law appliers’ engagement in applying law), principled predictability (foreseeability of rules’ application and meaning), rule validity (the derivation of rules from valid legal authority), and external authority (acceptance of someone other than the rule applier as the source of the rule to be applied). None of these four elements is completely obvious, and each of these elements can be problematic in some settings.

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<sup>17</sup> Constitution of Massachusetts, Declaration of Rights, article 30 (1780, authored by John Adams); see also Hume ([1742] 1985, p. 94). A similar phrase is found in Harrington ([1656] 1992).

<sup>18</sup> See for instance Fuller (1969, pp. 38-81); Schauer (1991).

<sup>19</sup> Cass (2001, pp. 3-19).



Meeting these elements – coming within the classical definition of the rule of law – assures that law is not the whim of an individual, that law is not administered in ways that dramatically empower government officials at the expense of private citizens, that the law’s strictures are not unduly difficult to anticipate. These elements of the rule of law cohere with a system of legal governance, of law-boundedness, that allows substantial scope to individual judgment (and, thus, to varied individual values) in charting the course of ordinary affairs (Oakeshott 1983). Because these elements of the rule of law produce the sort of predictability Hayek sought, they allow individuals to adapt to legal rules in ways most likely to improve social welfare (at least as assessed by a measure of summed individual values) or, put in less positive terms, in ways most likely to minimize social cost. Further, because the rule of law thus defined militates against the sort of whimsical, biased, and dictatorial impulses that often correlate with welfare-reducing rules, the rule of law can be associated with some substantive welfare-enhancing qualities (Cass 2001, O’Driscoll, Holmes and Kirkpatrick 2001).

These rule-of-law elements do not, however, assure that laws are wise or just. The mind of man has been little able to devise precepts that provide coercive power to any group, under any structure, and assure that it will be used exclusively in ways that are wise and just. The focus of the rule of law is not to provide such assurance – neither through procedural requisites nor through definitional assertion – but merely to assure law-bounded qualities that tend in the direction of better and more just legal systems.<sup>20</sup> Adherence to the rule of law slows down changes in the system, increases the foreseeability of change, makes change less the product of one individual’s will than of the more regularized and intricate interweaving of different wills and priorities. The rule of law is a commitment to limitations that guarantee greater stability rather than any specified end-point for law and for government. This process commitment is not the entirety of what one might desire of a legal system – the substance of the rules surely matters as well – but it is an important goal and one that needs attention even in the best, most law-abiding systems, systems that will tend to promote human liberty, security, and economic opportunity.

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<sup>20</sup> Barnett (2001, pp. 136-144); Cass (2001, pp. 15-17); Raz (1979, pp. 213-214, 224-226).

### *Property rights systems and arbitrary rule*

People around the world instinctively recognize the differences among nations' commitment to the rule of law. Western democracies generally rank high on this commitment and are characterized by a set of governance structures that limit individual, official power. But differences across nations, though intuitively evident, are less readily captured by description of what does and does not comport with the rule of law than might initially be thought. Both the variance and the difficulty of bold pronouncements about the qualities of a legal system that demonstrate adherence to or departure from the rule of law can be seen in comparing the situations in Zimbabwe and the United States – one system that appears strongly in derogation of, and one that appears to operate strongly in accord with, the rule of law.

### **Property rights in land in Zimbabwe**

In 1965, the white minority government of Ian Smith declared the British colony of Rhodesia (now Zimbabwe) independent of Britain. The Smith government represented white citizens (who were a very small minority of the population, perhaps two or three percent) and sought to maintain white supremacist policies. Policies long in effect in Rhodesia had limited the right of black African citizens to own land, except in certain designated reserves, and land ownership consequently was heavily skewed toward whites. The breakaway from Britain in 1965 sparked an armed struggle between the Smith government and two black nationalist movements, known generally in the West by the acronyms ZANU (Zimbabwe African National Union) and ZAPU (Zimbabwe African Patriotic Union). The inequality in land holdings was both a symbolic and pragmatic factor in the civil war.

The war ended in 1979 with the victory of the nationalist groups and an agreement (the Lancaster House Agreement) negotiated among the warring groups and the government of the United Kingdom, the former colonial power. The UK, which had not recognized the Smith government's claim to independence and had imposed sanctions against the regime, formally recognized Zimbabwe as an independent Commonwealth nation in 1980. ZANU and Robert Mugabe won elections to form the new government, trumpeting land reform as a prominent part of his platform. Mugabe has held office ever since.

Although land reform did occur, it proceeded at a measured pace. During the 1980s, the government acquired about 3 million hectares of land and redistributed that land to about 50,000 families.<sup>21</sup> Some in Mugabe's government complained that too little was being done and blamed the overhang of colonial rule.<sup>22</sup> The Lancaster House Agreement contained a restriction on forced land redistribution, stating that for 10 years (to 1990) no land would be acquired by the government of Zimbabwe unless there was a willing seller and the government promptly paid 'adequate compensation.' (Human Rights Watch 2002a, p. 6). Following expiration of that stricture, Zimbabwe's constitution was amended to allow the government to take land without the owner's consent. In 1992, legislation provided a new mechanism for calculating the price to be paid for property taken by the government, one that gave substantial power to a small group of administrators.

Despite the change in law, the pace of land reform actually slowed in the 1990s, with government responsible during the decade for settlement of perhaps forty percent as many families on less than one-third the land transferred in the 1980s. One reason is that the funding for the land purchases of the 1980s very largely came from the UK and other Western nations through grants that had been exhausted by the end of the 1980s (Human Rights Watch 2002a, p. 7). Outside commentary – widely reported, though denied by the government of Zimbabwe – also suggests that much of the benefit of government land reform programs went to well-placed officials and influential supporters of President Mugabe rather than to the poor Zimbabweans for whose ostensible benefit the reforms were designed.<sup>23</sup> Poorer Zimbabweans and soldiers who had fought for ZANU during the civil war took matters into their own hands in many parts of the country, occupying land owned by white farmers without formal government sanction.

Responding to pressure from constituents, Mugabe's government proposed a reformed constitution that would, among other things, allow the government to take land without payment to the owners. The new constitution, however, was defeated in a popular referendum. Nonetheless, in the spring of 2000, the ZANU-dominated

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<sup>21</sup> Human Rights Watch (2002a, p. 6).

<sup>22</sup> Human Rights Watch (2002b, p. 4).

<sup>23</sup> Human Rights Watch (2002a); Mitchell (2001, p. 599). But see Zimbabwe government web site.

parliament adopted the amendment providing that the government could condemn and acquire land free of any obligation to compensate the owners, asserting instead (unilaterally) that Britain had the obligation to provide recompense.<sup>24</sup> And President Mugabe, exercising authority to enact legislation temporarily under a law giving the president extraordinary powers to deal with emergencies, amended the Land Acquisition Act in accord with the newly altered constitution to permit uncompensated takings. Six months later, the parliament adopted legislation to the same effect (Human Rights Watch 2002a, pp. 10, 13; Human Rights Watch 2002b, p. 15).

The changes in the law were accompanied by a surge in land seizures by former ZANU fighters and others. Within a year, about 100,000 squatters occupied almost half the farms targeted by the government for acquisition (Human Rights Watch 2002a, p. 11). Within two years, according to some reports, as many as 300,000 families occupied some 11 million hectares of land formerly owned by white farmers.<sup>25</sup> While some white farmers abandoned their property in the face of rising violence, others resorted to armed resistance, long a part of white minority rule in Africa and particularly in Zimbabwe-Rhodesia.<sup>26</sup> Press reports link the violent seizures of farms to groups associated with Mugabe.<sup>27</sup>

An umbrella group for larger commercial farmers, though lacking the political standing to reverse Mugabe's policy, both tried to persuade the government to alter its policy

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<sup>24</sup> Constitution of Zimbabwe, § 16A. Human Rights Watch (2002a, p. 10); 'Parliament Approves Land Reform Bill', World Markets Analysis, April 7, 2000.

<sup>25</sup> See 'Zimbabweans Reclaim Birthright', The Herald (Harare), Dec. 10, 2002. Although it is the only figure I have found for this time frame, it is not entirely clear that this is a credible figure. Other sources list under 4.5 million hectares as resettled a year earlier with a little more than 9 million hectares scheduled by the government for acquisition. See Human Rights Watch (2002a, p. 11). It would seem unlikely that eighty percent of the land potentially to be acquired would so quickly have passed out of the control of the land owners. It is possible, however, that the figure is high because it includes land that is occupied by squatters even though not formally listed for potential acquisition by government. See Human Rights Watch (2002a, p. 13).

<sup>26</sup> 'The Great Terrain Robbery', The Economist, Aug. 17, 2001, p. 37; Human Rights Watch (2002a).

<sup>27</sup> See for instance The Economist, supra; PRS Group (Dec. 1, 2001), Zimbabwe: Politics, East Syracuse, NY: PRS Group; Daniel Foggo, 'VC Hero Forced Off Land by Mugabe Thugs', Sunday Telegraph, Dec. 8, 2002, p. 3. See also Commercial Farmers Union v. Minister of Lands, Agriculture & Resettlement, Zimbabwe Supreme Court, Judgment No. SC-132/2000, Dec. 21, 2000.

(attempting to negotiate an expanded, voluntary land reform program) and also went to court to block the land seizures. In December 2000, the Supreme Court of Zimbabwe agreed with the farmers that the government could not take away their property without compensation. The Court found that the land acquisitions being carried out did not conform to legal requirements of the Land Acquisition Act, including matters such as the right to judicial review of decisions on compulsory takings, and that the program also did not conform to requirements of the constitution of Zimbabwe (Human Rights Watch 2002b, pp. 14-15). Among other things, the court found that the constitutional requirement of an established program of land reform prior to land confiscation was not met. The judgment declared that

the settling of people on farms had been entirely haphazard and unlawful: a network of organizations, operating with complete disregard for the law, had been allowed to take over from the Government. War veterans, villagers and unemployed townspeople had simply moved onto farms, encouraged, supported, transported and financed by [ZANU] party officials, public servants, the Central Intelligence Organization and the army.<sup>28</sup>

For devotees of Administrative Law, the judgment is notable for its invalidation of the law permitting President Mugabe to exercise legislative authority for temporary periods of time, the Presidential Powers (Temporary Measures) Act. The court struck this law down as an unconstitutional delegation of legislative power.

If we stop the story at this point, it seems a story about the efficacy of the rule of law. The courts stepped in against a very determined government led by a long-time president to protect the rights of property owners and to enforce legal rules. That is the role of courts operating under the rule of law.

But the story goes on. President Mugabe, displeased at the ruling, replaced the Chief Justice of the Supreme Court (whose resignation was widely reported as being

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<sup>28</sup> Commercial Farmers Union v. Minister of Lands, Agriculture & Resettlement, Zimbabwe Supreme Court, Judgment No. SC-132/2000, Dec. 21, 2000.

forced by Mugabe).<sup>29</sup> The new Chief Justice then named three more new judges to the Supreme Court. With the newly reconstituted bench, the land acquisition case was then reconsidered by five members of the court. Apparently the Chief Justice selected which five judges would hear the case. This time, the judges decided that the law met both constitutional and other legal standards. The four judges voting to uphold the law were the four new additions to the court (Human Rights Watch 2002b, p. 15). The lone dissenter subsequently stepped down, also reportedly under pressure from the government and its supporters.

### **Zimbabwe and the rule of law: first cuts**

At this juncture, having gotten to the end, the story looks like a classic breakdown of the rule of law. It is a story about using legal forms to implement the will of the rulers, specifically President Mugabe.

The law prevented Mugabe from doing what he needed to politically in order to stay in power or at least to be more secure in power. Legal rules prevented him from taking property that belonged to some citizens (the white minority) in order to give it to others (veterans, militia members, government officials, other supporters) who were more critical to Mugabe's political future.

So Mugabe changed the law and he changed the personnel who interpret the law. Mugabe changed the law by using special powers conferred on him to amend the law and by using his parliamentary majority to amend the law, including amendments that purported to apply retroactively (Human Rights Watch 2002b, p. 15). And Mugabe changed the law-readers by using his power to replace judges who opposed him with judges who were more compliant, more willing to accede to his desires. The judges who stepped down were pressured by government officials and by others. The judges were subject not merely to criticism or threats of reduced resources or of having government ignore their rulings. The judges faced death threats, threats they apparently viewed as more than mere rhetoric.

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<sup>29</sup> See, e.g., PRS Group (Sep. 1, 2002), Zimbabwe: Country Highlights, East Syracuse, NY: PRS Group; 'Magistrates Put Under Pressure in Land Rulings', Zimbabwe Independent, Sep. 20, 2002. The former Chief Justice, Anthony Gubbay, apparently had received numerous death threats following the ruling on land reform. See for instance Human Rights Watch (2002b, p. 15).

There is little that is more at odds with the rule of law than the use of raw power to bend legal judgments to the will of an individual. There is little more at odds with the rule of law than, in the midst of a legal controversy, changing who reads, who interprets the law in order to change the reading – much less to do so after the law has been read. There is little efficacy to property rights when they can be abrogated so easily to serve the purposes of a ruler. Zimbabwe’s treatment of property rights and its treatment of the legal system that defines those rights fails the rule of law because it is a story of the exercise of arbitrary, dictatorial authority.

#### *Arbitrary rule or rule of law?*

As obvious as the disconnect between the events in Zimbabwe and conformity to the rule of law is – and it should be quite obvious – the line between blatant derogation from the rule of law and conformity to the rule of law, between behavior consistent with legal protection of property rights and total disregard of those rights, is not so easily drawn on conceptual grounds. The line rests on differences in degree in several respects and, most of all, on the combination of circumstances that free the decisions in Zimbabwe from control by valid, external authority, independent of the identity of the decision maker.

#### **Rule of law and changing law**

Consider, for instance, the change in governing law. Property rights will not be secure if the law governing them is subject to change. Much of the rule of law focuses on predictability, and so, too, much of the security for property turns on predictability.<sup>30</sup> Recall Professor Hayek’s assertion that the essence of the rule of law is ‘that government in all its actions is bound by rules fixed and announced beforehand,’ and that the rules must ‘make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge’ (Hayek 1944, p.80). Even for those who reject the Hayekian approach, predictability has been the touchstone of well-ordered legal systems for a

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<sup>30</sup> See for instance Barnett (2001, pp. 89-90); Fuller (1969, pp. 38-81); Hart (1961, pp.123-128); Holmes (1897); Siegan (1997).

broad array of scholars and judges (Fuller 1969 and Holmes 1897). So, changes in law of the sort made in Zimbabwe – to change the procedures to make it easier to take property, to remove the protections against arbitrary selection of the properties to be taken, to eliminate the guarantee of compensation for property acquired by the government – seem incompatible with well-functioning property rights systems.

a. Legal change under the rule of law

Yet, it is not the mere fact of changes in the law that makes this so. There is no way to bar change in the law or to make property rights absolutely secure against such change. And no legal system has done that.

The United States, which takes pride in its legal system's protection of individual rights, including rights to property, has never proscribed all changes in law that reduce the value of property rights. It has never adopted a blanket prohibition of changes that take away or reduce the value of property rights without compensation. Certainly, evolution of the common law includes decisions that look a great deal like changes in the law that introduce new liabilities, many of which impose burdens on rights to use or dispose of property.<sup>31</sup> Bolder changes in legal rules also take place through legislation or through administrative action. Taxes are raised on some types of property, lowered on others, newly imposed on others; regulation takes away some economic opportunities that existed and imposes new costs on other uses of property. Proposals to implement new taxes on property or to alter the mix of taxes – lowering income taxes, increasing sales taxes, abolishing or raising or changing rules for estate taxes, eliminating the double taxation of income distributed as corporate dividends – like changes in regulatory regimes can, and often do, significantly alter the value of property rights. U.S. law, however, allows many of these changes to take place without requiring transfer of public funds to those citizens whose property values are diminished.<sup>32</sup>

Some commentators have opined that U.S. law should do more to protect the value of property rights against changes in the law.<sup>33</sup> But given the number of moving

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<sup>31</sup> See, e.g., *Henningsen v. Bloomfield Motors*, 32 NJ 258, 161 A.2d 69 (1960).

<sup>32</sup> See, e.g., *Penn Central Transportation Co. v. New York City*, 438, U.S. 104 (1978).

<sup>33</sup> See for instance Epstein (1985) and Siegan (1997).



parts in the system of law and governance, almost everyone who looks at the issue recognizes that prohibiting changes in the law that reduce the value of existing rights would be paralyzing. It is the functional equivalent of a unanimity rule for governance. However desirable such a rule would be in theory, the costs of implementing such a rule in practice are prohibitive when we move beyond the smallest of groups.<sup>34</sup> Among other reasons, such a rule dramatically increases the costs of potential hold-outs, granting individuals strategic power to extract more from fellow citizens than the value they would sincerely place on assent to a given change (Buchanan and Tullock 1962, Epstein 1985). And each hold-out potentially can extract the full social value of a change (Epstein 1985). Although it is not likely that decisions subject to unanimity will face this doomsday scenario, it is quite likely that many such decisions will be very costly to make under a unanimity rule.

Once the prospect of change without fully unanimous consent is admitted, it is obvious that there will be change that adversely affects individuals and that the harmed individuals will have to bear costs from the change. Unless there is a perfectly error-free way to determine the value of change, positive or negative, and to arrange payments that perfectly adjust for the changes in value experienced by each citizen – a prospect beyond the dream of the most ambitious central planner – there is no way to avoid this outcome.<sup>35</sup>

The prospect of legal change that is permitted and is not limited by a requirement of fully offsetting compensation may be positively beneficial, rather than simply an accommodation to the costliness of centralizing the compensation decision. Individuals acting on their own behalf often are best positioned to make adjustments to the possibility of legal change, including changes that affect property. There is an enormous array of settings in which the value of property rights may be affected and an equally broad variety of ways in which those who hold the rights may assess the risk and calculate the implication for their rights' value. The approach in market economies generally has been to recognize the difficulty of centralizing choices when the welfare effects of a choice are dependent on myriad individual valuation decisions.

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<sup>34</sup> See for instance Buchanan and Tullock (1962), Mueller (1989, pp. 43-55, 101-111).

<sup>35</sup> This has been a staple part of the long-running argument over use of Kaldor-Hicks-type efficiency criteria for governmental decisions.

The dominant strategy in such situations is to set only basic ground rules and leave each individual free to choose the means of enhancing and protecting his or her investments that seems best suited to that person's individual preferences and expectations.

A regime with little specific legal proscription against – and little specific compensation for effects of – legal change can be assimilated to the approach taken with respect to the general run of social choices in market economies. A now-standard argument regards legal change to be indistinguishable from other changes that affect the value of property rights, such as changes in market conditions, in supply costs, or in consumer tastes (Kaplow 1986). First-party insurance (formal insurance or behavior tantamount to insurance) arguably is better suited to protect against the risk of change than are efforts to constrain the ambit of government action. This is so precisely because it allows each individual to decide how much the insurance is worth and how best to adjust his own conduct to limit the risks associated with change. Constraints on legal change are more likely to be blunt instruments, less subject to tailoring to particular circumstances and values.

#### b. Restraints on legal change

Legal rules and institutions in the United States, do, however, put limits around how far government can go in changing laws. First-party insurance is only arguably better, not certainly better. There are settings in which the change in the law is manifestly subject to the sorts of welfare-reducing manipulations that are inconsistent with rule-of-law values. U.S. law – like the law of other economically advanced democracies – puts both procedural and substantive constraints on such change rather than shifting to the affected parties the burden of insuring against it.

So, for example, changes that affect particular, identifiable individuals, rather than a broad, diffuse class of people, are generally suspect. Often the individuated decisions are retrospective and can impose burdens that are particularly difficult to adjust (Cass 1995 and Fuller 1978). But even when prospective, they are associated with a variety of potential decisional biases. For that reason, administrative bodies must give individualized hearings to the affected parties in most settings in which the parties

will bear individually differentiated burdens.<sup>36</sup> This requirement has been found in the United States Constitution's prohibition of the deprivation of property without due process, as well as in a variety of statutory enactments.<sup>37</sup> The U.S. Constitution also prohibits the national legislature from singling out individuals for special burdens, and most state constitutions in the U.S. have more general proscriptions against legislation that is aimed at particular individuals rather than at generic classes.<sup>38</sup>

Two other headings relevant here that prevent changes in U.S. law are the 'contracts clause' and the 'takings clause' of the U.S. Constitution. The first of these forbids states from impairing the obligation of contract.<sup>39</sup> This clause has not been interpreted as banning without exception any state law that affects existing contractual rights, having historically been seen as permitting the adoption of regulations aimed at protecting the population's health and safety even if the regulations change the existing balance of benefits and burdens under contracts.<sup>40</sup> The concern of the clause's drafters appears to have been legislation aimed specifically at altering contractual commitments, at relieving, for example, debtors of the obligation to pay their debts.<sup>41</sup> Efforts to proscribe that sort of impermissible government law-changing, to circumscribe that set of laws, have been criticized as yielding too modest a constraint (Epstein 1984). Still, the clause does stand as an impediment to a class of possible changes to the law.<sup>42</sup>

The second of these constitutional prohibitions, the takings clause, also has a limited application but clearly constrains some government conduct and has enjoyed something of a renaissance in recent years. This clause prohibits government from taking private property for public use without just compensation.<sup>43</sup> Government regulations that address perceived matters of public welfare – from nuisance abatement

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<sup>36</sup> See, e.g., *Goldberg v. Kelly*, 387 U.S. 254 (1970).

<sup>37</sup> Compare *Londoner v. Denver*, 210 U.S. 373 (1908), with *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).

<sup>38</sup> U.S. Constitution, Article I, § 9, clause 3; Constitution of Colorado, Article V, § 25; Constitution of Georgia, Article 3, § 6, ¶ 4; see *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>39</sup> U.S. Constitution, Article I, §10, clause 1.

<sup>40</sup> See, e.g., *Manigault Springs*, 199 U.S. 473 (1905). For a similar construction of the due process clause of the U.S. Constitution, see *Mugler v. Kansas*, 123 U.S. 623 (1887).

<sup>41</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. 87 (1810); *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

<sup>42</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>43</sup> U.S. Constitution, Amendment V, clause 5.

to protection of historic landmarks – may be upheld despite substantial impact on particular property.<sup>44</sup> This leaves some burdens – sometimes, substantial burdens – to be borne by those whose property is affected. But if government wants to acquire property or if it imposes burdens on it that essentially amount to an acquisition, the takings clause requires the government to pay for the privilege.<sup>45</sup> Regulation of property, if it is not to be deemed a confiscation for which compensation is due, must demonstrate a substantial connection between the regulation and its ostensible goal.<sup>46</sup> Even if a regulation meets this test, the regulating jurisdiction cannot avoid paying compensation if the regulation essentially deprives the owner of economically viable use of the property.<sup>47</sup> And the exaction required of a property owner cannot place a disproportionate burden on the property but instead must be reasonable ‘both in nature and extent to the impact of the proposed development.’<sup>48</sup>

Putting aside the question whether the requirements are set out in tests that have sufficiently low administrative costs and other error costs to be deemed welfare-enhancing overall, the requirements do set out rules that should increase the alignment of government action with social welfare.<sup>49</sup> The connection between means and ends should reduce the prospects for the sorts of exactions that are so obviously welfare-reducing that officials would never justify them on their actual grounds. The requirement that exactions must be reasonable in nature and degree relative to the proposed improvement also should increase the probability that the government acts to improve welfare, as that presumably is implicit in the reasonableness judgment. The requirement to pay for regulatory change that effectively removes all economic value also should promote welfare, as the regulating authority should be willing to make that

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<sup>44</sup> See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

<sup>45</sup> See, e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter*, 458 U.S. 419 (1982).

<sup>46</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

<sup>47</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>48</sup> *Dolan v. City of Tigard*, 512 U.S. 344 (1994).

<sup>49</sup> See Siegan (1997). But Komesar (2002), argues that the tests correct for some types of welfare-reducing incentive problems but exacerbate others.

trade-off if the benefit of the regulation exceeds its cost.<sup>50</sup> The welfare-improving characteristics of the takings rules help constrain changes in ways that also increase predictability and effectively limit official discretion.<sup>51</sup>

These rules do not assure that no change in the law occurs in the U.S., or that all applications of the law are fully anticipated, or that changes in the law or its application do not impose uncompensated harm. The rules do, however, militate in favor of increased restraint on official power and increased predictability in its exercise.

Even more than the legal rules, the barrier to unpredictable action in the United States is the systemic structure that checks government power, that divides authority, that creates governance institutions that make strong, rapid change in law difficult. Law-making in the United States is a slow and cumbersome affair. Government power is divided among national, state, and local competencies and among a variety of officials. When law cannot be changed quickly, when a change requires consent of large numbers of people, it is more likely that those who will be most affected will be able to anticipate and adjust to the change.

Important constraints on using faster, easier procedures are contained in the United States Constitution, and the processes for constitutional change place substantial impediments to easing those constraints. Despite many efforts to amend the Constitution, following the framing era only seventeen amendments have been adopted in a span of more than 200 years.<sup>52</sup> The paucity of amendments reflects widespread acceptance of the governance system. That acceptance acts as a check on many

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<sup>50</sup> Of course, that statement puts a bit of a rabbit in the hat by assuming that regulators are motivated to improve overall social welfare – an assumption that is routinely called into question. The literature on public choice (among other writings) suggests numerous ways in which government officials' incentives diverge from pursuit of overall social welfare. See for instance Buchanan and Tullock (1962); Olson (1965); Shepsle and Bonchek (1997).

<sup>51</sup> In part, the rules increase congruence with the rule of law by making it more likely that official decisions will be reasonable. Reasonableness is a relevant concern when there is not a clearly formulated, formally promulgated regulation. See Cass (2001, pp. 12-15); Fuller (1969, p. 138); Schauer (1991). It also is relevant to interpretation of formally promulgated regulations, where a construction that produces unreasonable results could lack sufficient predictability to meet rule of law requisites. See Fuller (1969) and Schauer (1991, pp. 222-223).

<sup>52</sup> These amendments primarily have expanded the democratic franchise, filled in details for government continuity, or granted rights against government power to groups that had been especially vulnerable.

potential threats to the system. The commitment to the U.S. governance system is so thoroughly ingrained in the public psyche that even Presidents whose political survival is threatened have been unwilling to challenge the system directly (Cass 2001, pp.34-35).

Although changes in law are accepted in all nations, the commitment to limited and divided power that restrains legal change, and to legal rules that limit the scope and impact of such change on property rights, appears far greater in nations like the U.S. than in Zimbabwe. The combination of procedural and substantive rules in law-governed nations such as the United States limits the likelihood of legal changes that impose harm on individuals far out of line with what might reasonably have been anticipated. That difference makes change of law in the U.S. more likely to comport with the rule of law and less likely radically to alter established property rights.

### **Legal change and land reform**

The problem of changing law in ways that affect property rights is especially acute when there is pressure for radical change, such as land reform. Societies, like Zimbabwe, that begin with extreme inequality in distribution of resources, typically land, rarely can address the distributional asymmetries without altering expectations of property rights owners.

Although faulted by the Zimbabwe Supreme Court and others for failing to engage land reform seriously, the genesis for the actions of the Mugabe government lies in the perceived need to spread land ownership more broadly, a special problem for a society that has little wealth apart from land (Mitchell 2001). Mugabe tried to justify the lack of compensation for the land grab by declaring that the black citizens who would now occupy the land collectively represent those from whom whites had stolen the property long ago. His message was not that former owners would get back parcels they had owned – prior to the European colonization of Zimbabwe, there apparently was no developed system of individual land ownership and certainly no recording system that would permit assignment of current land to former owners. Mugabe's assertion, rather, was that the colonization and land division subsequent to colonization constituted theft from the indigenous Zimbabwean population.

When do such general historical grievances provide a basis for undermining established property rights? In the United States there have been at least three occasions for confronting this question. First, there was a protracted, agonizing debate over the treatment of slaves, which were treated as property in the Southern states. President Lincoln had proposed a \$400 million fund to compensate former slave owners for the lost value of their slaves, a proposal unanimously opposed by Lincoln's cabinet.<sup>53</sup> Instead, the Thirteenth Amendment to the U.S. Constitution recognized the freedom of former slaves and forbade slavery, without any provision for compensation to those who, in keeping with the laws of their time and place, had regarded human beings as property. A second episode, also unconscionably protracted, addressed claims of indigenous Americans for land taken from them. Although the U.S. government for years was scandalously unfaithful to its treaties with Indian tribes and continues to follow the legal rule that the national government can abrogate aboriginal claims to land without compensation, the government also has continued to provide funds for settling claims of aboriginal title to lands in the Eastern United States and to provide property in the Western U.S.<sup>54</sup> Moreover, Indian land claims based in deprivation of property for which title was recognized in a valid treaty have been entertained long after the deprivation.<sup>55</sup> Finally, there was the much needed land reform in Hawaii, where, as the residue of a feudal landholding system, more than 95 percent of the land was owned by the government or by merely 72 private landowners.<sup>56</sup> In the 1960s, Hawaii passed a land reform law that allowed large landholdings to be broken up, with compensation then paid to the owners for the value of the redistributed land.

The extraordinary injustice of the property holdings in each case – the manifest injustice of slavery, the dispossession and large-scale devastation of aboriginal peoples, the historic anomaly of excessively concentrated landholding in Hawaii – make the

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<sup>53</sup> See Jay Winik (2001), April 1865: The Month That Saved America, New York: Perennial, p. 34. Lincoln previously had by executive order decreed the freedom of slaves in states that were engaged in armed rebellion against the federal government.

<sup>54</sup> See, e.g., Florida Indian Claims Settlement Act, 25 United States Code § 1741 et seq.; Maine Indian Claims Settlement Act, 25 United States Code § 1721 et seq.; Rhode Island Indian Claims Settlement Act, 25 United States Code § 1701 et seq.; Canby (1998, pp. 343-364).

<sup>55</sup> See *United States v. Sioux Nation*, 448 U.S. 371 (1980); Canby (1998, pp. 352-353).

<sup>56</sup> See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

claims for redistribution, for alteration of existing rights, compelling. And each seems sui generis, separate from other aspects of U.S. law. Had the emancipation of slaves not been concomitant to armed rebellion, there doubtless would have been substantial compensation. Apart from its special nature, the emancipation of slaves is unlikely to create problems with future investment in property and future expectations of the American legal system. It is obviously a very special case. So, too, are our relations with Native Americans. The initial eviction of aboriginal peoples differed from other European colonizations in its attention to the forms of legality, though the claims for compensation from the government later received a more sympathetic hearing than has been common elsewhere. As Alexis de Tocqueville ([1848] 1899, pp.360-361) observed in the mid-nineteenth century, ‘The conduct of the Americans of the United States towards the [Indians] is characterized . . . by a singular attachment to the formalities of law. . . . It is impossible to destroy men with more respect for the laws of humanity.’<sup>57</sup> However unjust, there is no current implication for the U.S. rule of law – no one is apt to see the treatment of native peoples today as the bellwether for property protection in general. Finally, the Hawaii experience is a relatively benign and law-bound example of land reform to address historic problems.

Claims for redress of historic grievances are unusual and stretch the bounds of legal systems. Apart from such claims for radical reform, Western legal systems generally create barriers to direct redistribution of property other than through voluntary exchange, even when misbehavior of some sort contributed to an earlier transfer of the property. So, for example, the commercial law protects purchasers of property from various claims of third parties if they have purchased the property in good faith for value (White and Summers 1995, pp. 186-190). This treatment reduces the risk to market transactions, placing the onus for protecting property on the original owner, who is left with a claim for subsequent compensation from the misappropriating party. In cases of serious historical grievance, however, it is understood that different rules may be needed and that, where land redistribution is the issue, full compensation to those whose rights are affected may not be possible within the budget constraints societies face. In such instances, as in Hawaii’s example, the requisite effort seems to be to

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<sup>57</sup> I am indebted to Allan Macurdy for bringing this quotation to my attention.



provide an orderly transition and sufficient compensation to reasonably accommodate expectations.

If the Zimbabwe land reform saga seems to augur a more general departure from the rule of law, the defect in Zimbabwe is not in the endeavor to reform land ownership nor is it in the failure to provide compensation fully satisfactory to current owners. The owners might not have foreseen the exact shape of the land reform measures and certainly would have expected some compensation, but they surely anticipated some reform measures. The derogation from rule of law values must inhere in some other aspect of the Zimbabwe story.

### **Legal change and discretionary authority**

The process by which the Zimbabwe land reform law was changed appears strongly at odds with legitimacy requisites of the rule of law. The process is not flawed simply because it failed to follow the law of Zimbabwe fully. In many settings, that failure could be cast as one that deprived provisions of the new rules of legality but not of more fundamental legitimacy, though the term legitimacy is sometimes used to connote this more technical aspect of legality. Rather, the process in Zimbabwe is flawed because even the steps taken in conformity to law – such as Mugabe’s use of legally conferred emergency powers – confer too much power in too few hands. It is an objection not to the formal legal validity of the steps taken by Mugabe but instead to the absence of sufficient governing external authority to make the power exercised by Mugabe law-governed (Cass 2001, pp.12-18).

This objection is critical to rule of law values, but it is not an easy one to pin down. It is an objection to the scope of discretion given to one person. Too much discretion in any person creates the rule of men, the antithesis of the rule of law. Yet, there is no clear test for the permissible scope of discretion acceptable under the rule of law, and the rule of law necessarily accommodates some scope for official discretion. Differences in judgment about the legitimate scope of discretion that can be vested in official decision makers fuel a good bit of the debate over the meaning of the rule of law and over the conformity of particular legal regimes to it.<sup>58</sup>

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<sup>58</sup> See for instance Dicey (1915); Fuller (1969, pp. 86-91); Hart (1961, pp. 119-120, 195-207); Raz (1979, pp. 206-209).

In even the most rule-of-law oriented regime, there will be instances of state-sanctioned discretion that seem to be strongly in tension with protection of property rights. The United States, for example, countenances the use of official discretion to order the destruction of property without compensation when it is deemed to be necessary to public safety in times of emergency. A public official can destroy property to create a firebreak or can order animals killed to prevent the spread of disease without the need to offer compensation to the property owner whose investment is sacrificed to the public good.<sup>59</sup> Administrative agencies can render decisions on licenses that dramatically reduce the value of the license or that take licenses away from holders who have invested substantially in them without compensating the injured party (Cass 1982, p.2). Property owners and developers have complained that officials have required them to provide cash payments for new schools, for roads, for water and sewer improvements, for affordable housing projects, to support a council for older citizens, to fund the local park department, or to defray costs of general services.<sup>60</sup> In each case, the assertion by the owner is that some perfectly reasonable use of their property is held hostage to exactions that unreasonably burden the property.

Real property is especially vulnerable to such discretionary exactions. Whether reasonable or not, the quid pro quo for use of the property takes advantage of the property's immobility. Because the owner cannot remove the property to another jurisdiction, local regulators can – subject only to the limits of political possibility – impose conditions up to the value of the improvement. This is, in effect, the mirror image of the holdout problem that justifies forced takings by the state (Epstein 1985). Various forces, such as the effects of repeat play between developers and regulators and competition among jurisdictions for the investments that secure property rights induce,

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<sup>59</sup> See for instance Keeton, Dobbs, Keeton and Owen (1984, p. 146); Christie (1999).

<sup>60</sup> See for instance Maryls Duran, 'Growing Pains: As Rural Areas Expand, Schools Feel the Crunch', Denver Rocky Mountain News, Nov. 28, 1999, p. 48A; Miguel Navrot, 'Developer Questions City Action', Albuquerque Journal, Sep. 30, 2000, p. 1; Mia Taylor, 'Builders Often Face Questionable Requests', Patriot Ledger, Sep. 25, 1999, p. 1; Mark Vosburgh and Christopher Quinn, 'Developer Says Withholding Building Permits Is Extortion', Plain Dealer, Jan. 22, 2002, p. B2; Lesley Wright and Anne Ryman, 'Scottsdale May Force Builder, Schools Talks', Arizona Republic, Aug. 6, 2002, p. 1B.

may constrain the exercise of official discretion.<sup>61</sup> But in almost any regime with captive property (property subject to a single regulating authority) and costly monitoring of official behavior, there will be at least some residual discretion. It seems, then, that the existence of discretion, even discretion that can visit substantial harm on property rights owners, is not clear evidence of a regime departing from the rule of law.

Indeed, some discretion may be necessary to support the rule of law. Economic analysis of legal rules suggests that there is an optimal degree of precision that is consistent with social welfare, a degree less than total precision (Diver 1983; Ehrlich and Posner 1974). The point is not simply that precision is costly to achieve. Too much precision also can generate such complex rules that there will be costs to rule application that exceed any gains from the increased precision. Some degree of discretion in rule application, thus, will be welfare-enhancing.

The same conclusion must be true in respect of the rule of law. One requisite of the rule of law is predictability in the application of rules based on the rules themselves. Efforts to eliminate all discretion doubtless would produce a body of rules so complex and cumbersome as to make the application of rules less predictable, not more so. In fact, overly complex rules may generate more effective discretion than simpler rules overtly conferring a degree of discretion on rule enforcers. The goal for rule of law purposes, hence, is not to eliminate discretion but to find a level of discretion that is consistent with predictability and constraint.

In evaluating the experience in Zimbabwe, however, the finer points of this debate need not detain us. The discretion conferred on Mugabe by the Presidential Powers (Temporary Measures) law was virtually unlimited both in the subjects on which Mugabe could legislate and in the nature of the legislation he could enact.<sup>62</sup> And Mugabe used that discretion not to effect a land reform program that would apply neutrally to those who are similarly situated, instead tilting for and against favored and disfavored groups. Wherever the line lies between permitted discretion cabined by law, on the one hand, and discretion so broad as to erode a sense of legitimate governance

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<sup>61</sup> Repeat play might moderate or exacerbate regulators' incentives to impose exactions. Competition among jurisdictions should work strictly to moderate those incentives, but just how such competition works is a subject of some dispute. See for instance Buchanan and Goetz (1972); Tiebout (1956).

<sup>62</sup> Presidential Powers (Temporary Measures) Act, Zimbabwe, Chapter 10:20.

under law, on the other, that line places the authority conferred on Mugabe outside the bounds of the rule of law.

### **Changing personnel**

As with the other issues that draw Zimbabwe's actions into question, the change in the identity of the judges who interpret the law must be seen as something that violates the rule of law because of its particulars, not because any change – even any change aimed at altering the law – is illegitimate. The rule of law requirement of principled predictability means that the identity of the individuals who interpret the law should not matter. The legal rules themselves should have sufficient specificity and sufficient binding force to allow prediction of their application without knowledge of the particular individual who will interpret the rules (Cass 2001, pp. 16-18; Dorf 1995). If that is not so, not only will the system lack principled predictability, it also will lack the legitimacy that comes with adherence to external authority (Cass 2001, pp. 18-19; Schauer 1991). If those who interpret and apply the law have sufficient discretionary authority that their identity is critical to the outcome, it can hardly be said that the laws rule, even if it can be said that the nominal rulers – the political officials holding primary positions of power and authority in government – do not.

This much is fairly common ground, a basis for agreement among those who favor relatively expansive modes of judicial interpretation and those who favor relatively constrained modes, for those who believe that the laws can and do provide determinate structure for judicial decisions and for skeptics on those matter (Dorf 1995; Dworkin 1986; Easterbrook 1991; Scalia 1989; Singer 1984). What is debated quite vigorously is how much the laws actually do constrain and how much freedom judges actually enjoy over the disposition of issues that come before them. It is a debate about how much judges matter, and to some degree which judges matter.

In the United States, this debate has been quite visible in the public domain recently. It may be especially important in the United States, not only because so many matters come before courts, but also because courts exercise somewhat broader powers in America than in most other nations (Posner 1996). A subcommittee of the United States Senate has held several hearings on the extent to which ideology does and should matter in the work of judges and in the selection of judges. The focus of those hearings,

as of most debates on these issues, was on judges on the nation's highest appellate courts. These courts decide a tiny fraction of the judicial cases filed in America and address legal issues that are least governed by fully articulated external authority. Plainly, for these courts more than the general run of 'ordinary' courts, the identity of judges matters, as the greater openness of governing law increases the influence of all manner of other considerations that doubtless vary across individuals (Cass 2001, pp. 62-71, 84-97). The officials in the executive branch will care who these judges are, and so, too, will members of the opposition party. Each will endeavor to appoint individuals who will tilt toward preferred outcomes on important, contested matters.

On its face, this endeavor looks to be a direct contradiction to the rule of law requirement that the legal authority, rather than the law interpreter, should govern. So, what makes the endeavor to select judges sympathetic to particular views consistent with the rule of law? What, in other words, makes the United States in this respect unlike Zimbabwe?

First, as with the concentration of discretionary power over legislation under the Presidential Powers law, the selection of judges in Zimbabwe looks to be much more subject to the will of a single individual than is the case in the United States. In the United States, the President appoints members of the federal government's judiciary, but he can do so only if he is able to secure agreement from the United States Senate, agreement that has been famously lacking in numerous instances. The credible threat of rejection colors the nomination and appointment process. In Zimbabwe, the President selects judges and is only required to consult with a judicial service commission, not to secure its approval.<sup>63</sup> If the commission disapproves, the President informs parliament, but there is no provision for parliamentary disapproval of the selection.<sup>64</sup>

Beyond the confirmation of individual judges, in the U.S. the Congress prescribes the number of judges authorized for the various federal courts. Although presidents have from time to time proposed changes to the number of judges – most notably President Franklin Roosevelt's plan to add members to the Supreme Court in order to facilitate its acceptance of key aspects of his program (Leuchtenberg 1966) –

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<sup>63</sup> Constitution of Zimbabwe, § 84 (1).

<sup>64</sup> Constitution of Zimbabwe, § 84 (2).

politically inspired changes rarely are adopted. Roosevelt's plan, for example, was not enacted.

In Zimbabwe, the number of judges, even of the Supreme Court, is subject to fairly easy manipulation. The President can designate the number of judges he 'deems necessary' to sit on the Supreme Court.<sup>65</sup> And if the Chief Justice decides that more are needed (not a defined term in the constitution) on a temporary basis (also not defined), he can appoint additional judges to the Supreme Court for a term of his choosing.<sup>66</sup> In combination, the President and a Chief Justice sympathetic to him can have a powerful impact on the size and shape of Zimbabwe's highest court.

Without effective opposition, the President of Zimbabwe can select judges who are most likely to be cooperative on the matters of greatest immediate interest to him, and with the added ability to set the judges' terms of office can also replace them later to secure desired outcomes on other matters. If he needs additional judges to secure a majority that bypasses the entire sitting Supreme Court bench, he can add the requisite number. That is what occurred in the land reform saga: the selection of enough cooperative judges to secure a particular result in a particular case of importance to the nation's chief executive. This is not the overlay of politics on a judicial decision process that is otherwise insulated from politics. It is not the subjection of judicial selection to the pull and tug of competing political forces. Instead, it is the substitution of concentrated political power for judicial independence.

Second, perhaps in response to the pressure that can be brought to bear by the President, the process of judging in Zimbabwe does not at the end of the day look so well insulated from political influence as in the United States. Notwithstanding the very public criticisms of the U.S. appellate courts for decisions characterized as overly political, U.S. courts, including appellate courts, behave in a manner highly predictable from the governing law. Courts show precious little influence of politics. And U.S. courts, including those thought to be most subject to ideological influence, are amazingly often in accord regardless of the political background of the deciding

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<sup>65</sup> Constitution of Zimbabwe, § 80 (2)(b).

<sup>66</sup> Constitution of Zimbabwe, § 80 (3).

judges.<sup>67</sup> Efforts to influence selection of judges to courts that operate strongly under the rule of law necessarily look less threatening than efforts to select judges whose behavior post-selection is far more apt to reflect the views of the selecting authority.

There are, of course, contrary assertions about the roles of politics and political pressure on the U.S. judiciary. Some scholars view the U.S. judiciary as quite affected by political considerations (Revesz 1997). Episodes such as the change in law during the new deal era of the 1930s and 1940s, when the U.S. Supreme Court first struck down economic regulation and then in short order upheld similar legislation, are explained as responses to political pressure, specifically in this case to the Roosevelt court-packing plan. The change of a single vote, shifting a 5-4 majority against legislation's constitutionality to a 5-4 majority in favor, could be a simple response to political pressure.<sup>68</sup> But it also could be the product of a single justice thinking more about a difficult, closely contested issue, to the influence of additional conversations, to the impact of seeing additional fact patterns – to any of the myriad nonpolitical factors that can affect decisions where legal texts are relatively open. Doubtless, considerations external to the narrowest view of legal texts influence some decisions even in the most law-bound systems. But a fair view of the legal system in the United States, as in other Western democracies, still must conclude that there is quite strong insulation of judging from politics and precious little evidence of any direct influence from political officials. This stands in marked contrast to the situation in Zimbabwe.

In sum, the reason that the steps taken in Zimbabwe to undermine property rights and to alter legal rules violate rule of law values is not that there is a generic conflict with the type of action – with efforts to change legal rules, to redistribute property, to provide discretion to official decision makers, or to appoint judges congenial to the executive. The steps taken violate rule of law values because each oversteps the bounds within which such conduct may be said to permit reasonable

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<sup>67</sup> See Cass (2001); Ronald A. Cass (September 2002), The DC Circuit: Considering Balance on the Nation's Second-Highest Court, statement to Subcommittee on Administrative Oversight and the Courts of Senate Committee on the Judiciary.

<sup>68</sup> Although President Roosevelt complained about the wrongness of a 5-4 decision invalidating legislation, some of the critical decisions prior to the court-packing plan were 9-0 against the legislation while others were 8-1 in favor. Much attention afterward focused on a single 5-4 decision upholding a key piece of New Deal legislation.

certainty about the law and to permit legal rules to operate free of undue control by current rulers.

### *Conclusion*

Governance systems that limit official discretion to impair property rights, that have institutions and rules that provide clear definition to property rights and that provide predictable and consistent applications of those rights, will accord with the rule of law and generally will also advance social welfare. Some systems will depart quite evidently from this pattern, to the detriment of those societies, allowing too ready changes in law at the discretion of too few officials, too unconstrained by law. But differences between the good and the bad will not be drawn along simple, discrete lines. The systems most consistent with the rule of law will not be able effectively to bar all changes in the law or to eliminate official discretion. Instead, those systems will limit the avenues for change and the ambit of discretion in ways that make property more secure and impositions on it more predictable without reference to the identity of the individual official enforcing the law or the individual property owners subject to it. Those will be the legal analogues of Tolstoy's happy families.



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