CHAPTER ONE

Law and Long-Term Economic Change

An Editorial Introduction

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"Legal origin": a global perspective

Property rights and contract enforcement lie at the heart of sustainable economic growth. During the past decade, our understanding of the historical evolution of various institutional mechanisms to cope with this issue has been greatly enhanced by the voluminous research under the broad category of new institutional economics. The research demonstrates that these mechanisms, whether informally organized through repeated interaction of economic agents or formally institutionalized in a state-backed legal system, were central to the securing of property rights and contract enforcement (see, for example, North, 1981; Acemoglu et al., 2001, 2005; and Greif, 2006).

The importance of formal law and legal institution to economic growth has long been noted. The unique features of legal formalism and rule of law embedded in Western law—as argued by Max Weber—have laid the foundation of Western capitalism (Trubek, 1972). The role of law in economic growth resurfaced in recent scholarship on economic growth as exemplified by the highly influential debates on law and finance (La Porta et al., 1998, 1999) and legal origins (Glaeser and Schleifer, 2002). Yet curiously, in this new law and growth literature, the old Weberian interest in legal traditions around the world had largely been forsaken for a much narrower focus on Western European legal regimes only, namely, common versus civil laws. The widely popular exercise of cross-country growth regressions—cross-country intended to cover most, if not all, the countries—reduces the

world legal regimes to the dummy variable of common versus civil law as casual variable to explain differential national growth rates. Even adding in the finer subdivisions of civil law regimes—that is, the Scandinavian, Germanic, French, and Spanish legal traditions—this literature could not make up for the neglect of other vastly important non-Western legal traditions, such as Hindu, Islamic, Confucian, and other systems that had been the focus of intellectual attention of scholars like Weber who, at his time, possessed neither the means to trot the globe nor the tools to run two or four million regressions.[1]

Can one justify the reduction of our global legal traditions to two European legal origins due to the spread of European colonialism? Not quite: the Western victory in the "legal" battle is far from over. Non-Western legal traditions continue to form the mainstream of the legal systems in a large part of the developing world today; the operation of Islamic law in many Middle Eastern countries is a case in point. Even for those that have nominally adopted Western legal regimes, indigenous legal traditions are still predominant often under the garb of Western legal lexicon. More important, there is other scholarship on the so-called order beyond or without law that emphasizes the importance of informal norms and rules as a means of supporting exchange and contract enforcement under conditions of economic agents' repeated interaction given a long-term horizon (Greif, 2006). Thus, by simplifying the whole world into two European legal regimes, we misspecify our model by attributing either too much credit or too much blame for the economic success and failures of the developing world in the non-West. While we give due credit and full recognition to the importance of measurement and quantification, the strict adherence to this methodology as sometimes pursed in the "New Economic History" of the 1960s and 1970s and the recent craze in development economics with econometrically identifiable "exogeneity" (or one-way causality) or randomized experiments could contribute to an overtly short-term and restrictive view of long-term economic change. More important, this short-term orientation led to the neglect of long-term evolutionary dynamics with multiple-feedback loops between culture and religion, on the one hand, and economic development, on the other—where institutions, including the legal system, serve as one of the key linking concepts.[2]

Interestingly, this current narrow focus is in sharp contrast to the older intellectual tradition on law and economic change as represented by scholars, such as Max Weber, who argued that the unique features of Western legal institutions, that is, legal formalism and the rule of law, laid the foundation of Western capitalism. Weber's intellectual interest in legal regimes was far more global than in the current "legal origin" literature,

and his writings included extensive discussions on Islamic, Hindu, Chinese and other non-Western legal traditions. The broad-sweeping Weberian thesis on non-Western legal tradition has long been hotly contested and often criticized as Eurocentric by revisionist scholarship of comparative law and area studies. While vastly improving our knowledge on non-Western legal traditions, much of this revisionist research did not directly engage the large and fundamental question of law and long-term economic growth as raised by Weber and others.[3]

This disconnect in these strands of literature leaves a large lacuna in our knowledge of institutions and economic growth, with serious intellectual and practical implications. The exclusively European focus leads to continued neglect of important non-Western legal traditions still prevailing in a large part of the developing world today. It leads to simplistic views that undermine our understanding of the complex and difficult process of mutual interaction and transplantation of different legal traditions and that grossly underestimate the importance of indigenous legal traditions even in those countries that have officially adopted Western legal regime and lexicon. Indeed, as pointed out by Gareth Austin's (2009) insightful critique, the highly influential Acemoglu et al. thesis (and to some extent the Engerman and Sokoloff hypothesis) has largely neglected the importance of indigenous non-European institutional endowments under Western colonialism. By "compressing history" and singling out the role of natural resource endowments and disease environments, these authors inadvertently exaggerated the predatory capacity of European settlers, as though the colonized territory had been an institutional vacuum where indigenous agents were simply passive recipients of an alien tradition. This compression of history, as Austin has pointed out, carried large implications for our understanding of the historical roots of poverty as well as of postcolonial developmental problems.[4]

The fourteen chapters included in this volume bring together the works of some of the most dynamic scholars in the fields of economic history, area studies, and comparative law to explore how legal regimes have evolved over time across major civilizations throughout Eurasia. Although diverse in discipline and at times with differing viewpoints, these chapters collectively explore some common major themes concerning the fundamental question of the nature and evolution of different legal regimes and their impact on long-term economic growth: How do different legal traditions originate and evolve? How are different legal institutions structured, and what is their connection with the state or organized religion? How arbitrary or rule-bound is the legal system in a comparative framework? How do different legal traditions define and impact property rights and ownership? How do courts functions, and

how are contracts enforced? And finally, is legal tradition relevant to the "Great Divergence" debate?

CULTURE, IDEOLOGY, AND LEGAL REGIMES: AN ANALYTIC FRAMEWORK

Part of our attempt to revive Weber's vision is in line with the "new institutional economics" paradigm, through our incorporation of institutions, such as legal systems, social-political structures, and the long-term evolution of broad cultural and religious values into the analysis. Increasingly with the role of the state or bottom-up institutional evolution identified as the "source" of new "rules of the game," questions on the ultimate or meta-causes of the sources of these rules and institutions cannot be avoided. The chapters in this volume show that there are important differences in the ways in which societies resolve their conflicts through their respective legal regimes and that these differences should be placed in the wider cultural or even religious background of the societies involved. The conclusion that we draw from the different chapters is that culture matters in that it defines to a large extent the range of ideas that are open to or at the disposal of a given society or civilization. Most (advanced) societies have at their disposal a very broad range of ideas originating in their respective religious and philosophical traditions. European society, for example, could draw on different Judeo-Christian, Greek, and Roman traditions (not to mention Celtic, Germanic, Slav, and other non-Mediterranean influences). Chinese society has Confucian, Daoist, and Buddhist traditions, which all developed different schools and conflicting interpretations of what the "tradition" was all about. And to some extent these traditions overlapped, and societies shared the same ideas and concepts (for example, Buddhism in India, China, and Japan; Greek and Jewish traditions in Islam and Christendom; and Roman legal traditions in Byzantium and Western Europe). What is important for understanding the genesis and development of institutions—including the legal system—is the ways in which these broad traditions impacted on the actual formation of rules. We argue here that the state, or sociopolitical power structures in general, acted as a kind of filter in selecting those ideas compatible with their interests, while suppressing alternative ones. So the first thing that matters is the range of ideas that is on offer—here the history of a specific culture comes in—but the second and perhaps

even more fundamental element in explaining institutional variation (and variety) is the selection mechanism or process that occurs at the sociopolitical level.

A few examples serve to illustrate how this might work in practice. In an illuminating essay, Bettine Birge (2003) has documented the changing legal and institutional position of women between the Song and the Ming (and in fact the Qing) dynasties. She demonstrates that under the Song the position of women was relatively strong, because there was a certain degree of ideological plurality, and common law and actual government practices often protected the rights of women—as heiresses to property when they were widowed, for example. Already under the Song, the Daoxue reform movement insisted on reforming the family system to make it more consistent with Confucian ideas, but it was the Mongol conquest, and the need for the Mongols to stabilize their regime, that lead to an official acceptance and formal institutionalization of these (neo-)Confucian ideas in the new regime. This tendency for the state to identify itself more strongly with Confucian ideas continued with the ascendancy of Ming imperial power, ultimately leading to a certain narrowing of the ideological and institutional focus, driven by the desires of the state to impose law and order, which not only undermined the independence of women (as Birge, 2006, demonstrates) but had consequences for much broader processes of institutional change.

We can take a comparable example from European history. As was the case with Song China, medieval Western Europe could draw on a very broad range of ideas and traditions for shaping its institutions. One dimension of this plurality concerns the degree of hierarchy that was considered right and whether the king was subject to the law. According to Roman public law, as formalized in the Justinian code, the emperor alone had power to make statutes and to interpret them; he was therefore not subject to them (although others had argued that "it was worthy of the emperor to profess himself to be bound by statutes"; Johnstone, 1997). At the family level, a similar degree of hierarchy was maintained in Roman law; the father was the single ruler of the household. In medieval Europe these traditions were simply in direct conflict with societal practices, and were therefore ignored (in spite of the rediscovery of Roman law in the eleventh century). As part of the European legal revolution of the eleventh and twelfth centuries, as described by Harold Berman, Western Europe developed new traditions and subjected the kings to the rule of the law and limited the authority of the father to canon law (Berman, 1983). The canon law, for example, developed the doctrine that marriage should be based on consensus, thereby seriously limiting the power of the head of the household

over this crucial decision (De Moor and Van Zanden, 2010). At the same time, this power structure, characterized by "constraints on power," gave rise to the private law tradition of "a reliance on adjudication of disputes" (Haley, in Chapter 2 of this volume).

However, the gradual strengthening of the position of monarchs in the late medieval and early modern periods created a demand for an ideological repositioning of the king. Social philosophers such as Bodin began to use the concepts and ideas of Roman law to develop "absolutist" ideas about the role and power of the king, who was now, again, placed above the law. At the same time, the Reformation and the Counter-Reformation resulted in a revision of family law in a more authoritarian direction. In the early modern period, the two traditions—inspired by "authoritarian" Roman law and "democratic" medieval law—were an important source of dynamic change of the institutional and sociopolitical development of the region. This again demonstrates that the selection process was driven by political or societal interests—but at the same time, countertraditions continued to exist that drew on alternative cultural and religious ideas.

We can demonstrate our analytical paradigm through a simple three-layer framework, where the first layer—cultural traditions or values (note the plural forms here)—were filtered or selected through the second layer—the social and political structures—to translate into the third layer—the institutional rules, such as the legal regimes. We want to emphasize that, in this highly simplified scheme, as much as culture matters or rules it does not operate in a deterministic one-way street—far from it. Our examples and the chapters in this volume show that institutional practices may feed back into the range of ideas available in a given society. Institutional development—and economic growth—may give rise to the growth of new practices and concepts that enrich the first layer of the scheme. At the same time, the selection process that occurs at the middle or second level could also result in certain traditions becoming obsolete, or in ideas losing their practical relevance or appeal in a given environment, and sometimes leading to a kind of petrifaction of the ideological framework of societies or civilizations. Conversely, the importing of new ideas—via trade, missionaries, or diplomats—will often enrich the range of ideas available but will also challenge prevailing sociopolitical structures.

Below we turn to a chapter-by-chapter introduction of how this mechanism has operated over time across Eurasia. Although the order of the chapters in this volume follows an East-West geographic direction, the following discussion is arranged by themes.