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INTERNATIONAL BOOK ESSAY

Understanding Legal Convergence: Economic Theories and Alternatives

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YUN-CHIEN CHANG, *Property Law: Comparative, Empirical, and Economic Analyses* (Cambridge University Press, 2023)
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Yun-chien Chang's *Property Law* is a quantified survey of property laws across the globe—the first of its kind. Chang's database took many years to compile and code and is, without a doubt, one of the more significant empirical contributions to the fields of private law and comparative law in recent years. It opens up an enormous range of comparative and theoretical inquiries that previously could only be pursued in highly abstract or piecemeal forms. On that basis alone, the book deserves robust praise and widespread reference.

When it comes to theoretical arguments about sociolegal causality and normative evaluation, Chang positions himself firmly within a very specific kind of microeconomics-oriented private law theory and, therefore, is vulnerable to all the controversy that has traditionally surrounded that school of thought. Taking a somewhat stylized view of property and contract relations as rational bargaining between self-interested parties, this school generally seeks to minimize the transaction costs and information costs involved in such bargains—and when that is impossible, seeks to mimic the outcomes of zero-transaction cost bargaining (Merrill and Smith 2000; Kaplow and Shavell 1996). It has long been criticized for taking an overly simplistic view of socioeconomic behavior (Alexander 2011; Zhang 2020) and often responds by arguing that its models are more empirically robust than those of its detractors (Chang and Smith 2012).

Chang's book operates quite comfortably within this latter strand of argument. Fortunately, it represents the school in its best form, careful and precise enough that any potential disagreement can be productive and mutually beneficial. All in all, this is an extraordinary achievement that solidifies Chang's position as one of the most resourceful and thoughtful comparative private law scholars of his generation.

Empirical Tests of Global Legal Convergence

The empirical core of the book is a database of 156 jurisdictions, covering most forms of regional, cultural, political, and economic diversity. For each jurisdiction, Chang codes its formal property law across 279 binary legal variables and then uses machine learning methods to cluster these laws according to their substantive similarities and differences. This allows him to produce a rigorous categorization of legal families and also trace their divergences and convergences. He finds, for example, that the Common Law versus Civil Law distinction that has dominated academic debate over the decades is not the most salient categorical divide in property law—that distinction instead belongs to French versus non-French influenced jurisdictions.

The book then seeks to move beyond these basic descriptive contributions into normative and causal territory. For eleven higher-level legal issues—ranging from the scope and form of the *numerus clausus* that determines which kinds of property rights are legally allowable, to the strength of exclusion rights that determine one's rights against all forms of potential trespass—Chang provides what he considers to be the optimally efficient legal regime, and then examines to what extent that legal regime is realized in these jurisdictions.

In the majority of cases, he finds significant global convergence onto the central pillars of the optimal regime: for example, nearly all jurisdictions follow some form of *numerus clausus*, in that they only allow property forms that have been explicitly recognized in written law, and nearly all protect property against physical trespass via some kind of *in rem* exclusion right, which imposes strict liability against intentional invaders of a property's physical boundaries. The implied message is clear: the economic stakes are so high in these contexts that few countries are either idiosyncratic or foolish enough to do otherwise. For less important issues, there is, not surprisingly, more global divergence, and there Chang takes a more prescriptive, rather than explanatory, tone.

Textual Convergence, Causation, and Economic Impacts

As stated above, no one can downplay the great significance of Chang's data collection efforts. Being able to have the property laws of 156 jurisdictions coded within a single database allows for previously unthinkable economies of scale when engaging in comparative analysis. Regardless of one's methodological affinity for this kind of large-scale cross-country legal comparison, the database will offer enormous utility, either as a reference tool or as a starting point for deeper qualitative analysis. The creation of these kinds of databases is always cause for celebration, and their creators always deserve widespread applause.

The more difficult question is, of course, how the database can be fruitfully utilized. There has been enormous methodological controversy in virtually every social scientific field over this issue, and property law will not prove to be an exception. The most basic and obvious limitation of a database like Chang's is that it only looks at the law on the books, and cannot provide any thicker portrait of how those laws function in socioeconomic life. This means that any analysis of convergence and divergence based on the database is necessarily just an analysis of *legislative* patterns rather than true socioeconomic convergence or divergence.

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Therefore, any underlying causal mechanism must necessarily operate through the subjective perceptions and positions of lawmaking elites.

Textual convergence on, say, the issue of *numerus clausus* can only imply that most lawmaking elites across the globe subjectively agree that there should be a *numerus clausus*. In other words, any potential causal connection between economic efficiency and legal convergence is really a potential causal connection between economic efficiency, the perceptions of elites on economic efficiency, and the eventual legal convergence as a result. There must always be a layer of political and intellectual analysis between economics and the law.

Once we confront this layer of political and intellectual perception head-on, then it becomes very clear that there are serious alternative accounts of causality and normativity that Chang's book does not address. Elites certainly respond to concerns of economic efficiency, but they also respond to ideological groupthink, international power dynamics, global perceptions of prestige, and raw coercive force. At least some of these forces—such as the emergence of pan-European intellectual consensuses concerning property law during the eighteenth and nineteenth centuries, followed by their global transplanting via European imperialism—seem plausible enough as an explanation for Chang's empirical findings that they perhaps should have been discussed more explicitly in the book (Goldbach 2019; Daniels et al. 2011; Spamann 2009). The real story might, for example, be one of colonization, material or intellectual, rather than a natural and purely functional convergence around economically efficient laws.

Chang's rejoinder might be that it would be simply too large a coincidence if intellectual and political imperialism just so happened to produce, more or less, the same kind of legal consensus that pure economic rationality would. But this leads us to reexamine what Chang means by economic efficiency.

As noted above, Chang has clearly and expertly positioned himself within a Coasean school of law and microeconomics that makes very specific assumptions about human behavior, information costs, and how the law should interact with those factors (see, for example, Parisi 2005; Samuels 1974; Coase 1960). Assuming basic utility maximization by rational actors, this school generally argues that the goal of private law is transaction and information cost reduction. This argument runs on both empirical and normative levels: not only should law seek to reduce these costs, but it already does in most jurisdictions (Merrill and Smith 2000).

Chang's account of efficiency has all the conventional strengths and weaknesses of that school: on the one hand, it flows clearly from a few basic assumptions about human behavior and social structure. Self-interested rationality is a much cleaner and easily identifiable model of behavior than those that take psychological, cultural, or ideological elements into serious consideration. On the other hand, those assumptions themselves are demonstrably limited in their real-world applicability—psychology, culture, and ideology do not cease to matter just because they are messy or harder to quantify (Zhang 2016)—even if everyone buys into the highly contestable normative belief that economic efficiency should be the ultimate goal of legal institutions.

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From Efficiency Assumptions to Real-World Applicability

In Chang's specific case, nearly all of his assessments derive from an assumed socioeconomic context in which individuals are sufficiently self-interestedly rational. Information costs fall into just the right bandwidth (neither too high to render market transactions implausible nor too low to render certain kinds of property law altogether unnecessary), and the functional implementation of formal institutions is robust enough that the law on the books does not become unrecognizably twisted out-of-shape in actual socioeconomic life. That assumption may well apply to many, even most, Western countries of sufficient size, but it is of very dubious utility when applied to any number of non-Western countries, especially developing ones, where state-society relations and the fundamental structure of social interaction are very different. Surely, the idea that the same models of economic behavior, information costs, and institutional implementation can apply to China, Japan, Brazil, Russia, France, South Africa, *and* the United States, has to be empirically defended rather than simply theoretically assumed.

What this suggests, then, is that the statement "commonly shared legal features are commonly shared because they are economically optimal everywhere" may rest upon unrealistically strong assumptions. That said, the statement "commonly shared legal features are commonly shared because *lawmaking elites believe* they are economically optimal everywhere" is very possibly still true. The latter could well be true even if the former were dead wrong.

Chang's information cost-centric theoretical paradigm is, to a large extent, a crystallization of mainstream economic thought stretching back to at least the mid-twentieth century. That mainstream, which pursues market-based efficiency and therefore favors strong private property rights, has been extraordinarily influential among political elites across the globe (Williamson 2009). This is partially due to the intellectual and institutional legacy of European imperialism, partially due to American soft power, and partially because political elites almost everywhere have derived ever-increasing material profits from economic globalization, and therefore have strong interests in buying into its institutional paradigms. None of these historical trends necessarily produced legal institutions that maximized economic efficiency on the ground in any specific country in the global South. Nonetheless, by the 1970s and 1980s, they may well have produced a legislative consensus across much of the globe in favor of adopting privatized property regimes built upon strong rights to exclude (de Soto 2002).

New Directions

Ultimately, Chang's application of information cost economics to legal convergence and divergence is not necessarily *wrong*, but more work needs to be done before it can persuasively function either as an account of historical causation or as a normative framework. There are powerful alternative possibilities in both dimensions the book does not adequately consider.

It is perhaps unreasonable to ask that a book, which already accomplishes so much, do even more on both theoretical and empirical fronts, but its immense range and depth will unavoidably whet the reader's appetite for further debate of this nature. Chang's book massively enhances the empirical reach of comparative private law. In

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doing so, however, it unleashes broader questions of historical causation and normative evaluation that even a book of this magnitude can only take highly tentative steps toward answering. The curse of any work of true intellectual significance is, perhaps, that it will almost always leave its audience asking for more. Even so, for serious scholars, it is always better to have suffered the curse than to have dodged it altogether. Along those lines, Chang should be heartily applauded for producing this book.

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