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**Many thanks** for that generous introduction. It is a real pleasure to be here – I'm very grateful for your interest in my little paper about property rights. Thanks also to Mekonnen Firew for putting this together.

I'd like to start by placing the distributed paper in the context of a larger project about the relationship between legal and economic ideas about development. In the broadest terms, I'm interested in how ideas, particularly the ideas of experts, affect policy. Economic ideas – and legal ideas. In that context, I've been working on an intellectual history of the relationship between law and economic expertise in development policy-making.

In the development policy world, we know that economics is in the driver's seat, and that economic ideas matter. Take the question: what is an "economy?" If for thirty years everyone thinks an economy is an input/output cycle to be managed and then everyone thinks an economy is a market allocating resources to their most productive use through exchange in the shadow of a price system, lots has changed. Similarly if everyone thinks markets mostly work pretty well --- or if they think there is a market failure, information problem, public goods problem, around every corner. Different things will seem like problems, will seem like solutions, will seem worth doing, and so on.

What about legal ideas? Over the last 50-60 years, the visibility of legal ideas has waxed and waned. In every period, moreover, law has been secondary to economics – and the ideas economists have about law have superceded ideas from legal science itself. So what ideas do economists have about law?

It turns out lots of ideas about law are embedded in economic theories of development, if only implicitly. When economic theory is uncertain or plural, we often find economists also talking explicitly about law and institutions. [To legal ears, a lot of what they say can sound strange – as I suppose we lawyers must sound when we talk about economics. ]

Let us take two historical moments of economic self confidence:

First, the 1950s- 60s – the days of what Deepak Lal would later term "Dirigiste Dogma," when regimes of every political stripe opted for one or another form of import substitution industrialization.

And then, the 1990s – the period of neo-liberal orthodoxy.

In their heyday, neither focused much on law, although as each orthodoxy broke down, people talked about law a great deal.

But there WAS a lot of law in there all along.

For ISI, the implicit image of law was instrumental, making the state more effective. Law meant *public law*, legislative or executive supremacy, administrative decrees and administrative judging

For the neoliberal orthodoxy, law meant *private law*, instrumental to supporting the market and ensuring order.

In both cases, governance issues were central to the decline of the dogma or consensus

For ISI, it was the discovery of government failure – rent-seeking, and so on. It turned out an instrumental public law couldn't do all that was demanded of it.

For NEOLIB it was the failure of the market to constitute or govern itself – the ubiquity of market failure/public goods problems, etc.

*Better ideas about law might have made the difficulties easier to see in advance.*

Take ISI – legal scholars *already knew* there was a gap between law in books and action, *already knew* that adding a second regulation to compensate for problems in the first could compound bureaucracy but leave problems unaddressed.

Legal scholars already knew about the significance of private ordering and the importance of strategies by those who use the law, *already knew* that the informal, customary normative world was ubiquitous and important.

Lal famously asked why regulatory design was not driven by a subtle and careful second-best welfare economics analytic. For lots of reasons, doubtless, but among them the difficulty of translating welfare economics into legal reasoning. Legal scholars knew that already – were working on it vigorously at the time.

The chastening of NEOLIB has run parallel. Legal scholars already knew that statutes didn't make a market – and neither did rights.

They knew that institutions were mixed creatures of public and private law, that markets didn't stand alone, that institutional form mattered, and so on. Somehow these ideas didn't translate back to economic policy, which continued to overestimate the effectiveness of formal rights and best practice statutes in generating market activity

So I come to the question of “property rights and development” convinced that law is terribly significant for development policy.

But I am equally convinced that as we lose confidence in economic orthodoxies, we ought not to reassert them in legal terms.

**With that as background motive – let me say a few things about the paper itself.**

**What do economists think about law now?**

Often quite sensible things – about the centrality of legal entitlements to economic life, the significance of institutional arrangements, governance channels, etc.

The interesting thing is the persistence within the policy vernacular of ideas about what law is like and how it works which were prominent in neo-liberal policy --- but which seem no more plausible in legal science today than the simplified neo-liberal orthodoxy is in economic science.

In the area of public law and regulation, this often means the kind of positivism, formalism or instrumentalism associated with aspects of both ISI and NEOLIBERALISM ---- to have a statute or a bureaucracy is to have an outcome, that kind of thing.

In the area of private law, it is often a set of background ideas about what RIGHTS are like – particularly property rights.

The paper is an effort to bring these ideas to the surface and counterpose them to ideas about property one would learn as a legal professional.

My hope is that we will learn to link heterodox and institutionalist economic ideas with parallel traditions within law.

So, there is nothing fancy in the paper – and nothing new. I simply bring together some relatively well known legal ideas about property and rights, and contrast them with a series of oversimplifications that all too often find their way into contemporary policy discussion.

My focus is the idea that there is such a thing as STRONG AND CLEAR property rights and that having them is really important for economic development. Legal science suggests a number of reasons to be skeptical.

Note at the start:

I do not argue that it is never a good idea to render a given set of entitlements strong, or clear – if we could figure out what that means. It might be and it might not be.

Nor do I argue that entitlements are unimportant – quite the opposite. Law is absolutely central. It can be the language in which the political strategies and choices required for development policy can be debated and made. But it is a terrain for strategy, not a substitute.

In the paper I examine a series of specific ideas associated with the “strong and clear property rights” slogan – to give you a flavor, let me say a few words about three of them.

**I. A first troubling idea that one encounters in many policy discussions is this: you can *strengthen and clarify* property rights without becoming entangled in economic and social struggle.**

We know – although we sometimes forget --- that property rights always come with regulatory obligations, often meant to ensure the social productivity of assets [think of zoning or adverse possession and other “use it or lose it” rules) or to address social or political concerns [think taxes or regulation]. Messing with the property law system is bound to affect these things.

The aspiration behind focusing on strong and clear rights without this regulatory baggage of duties and regulations is often precisely to avoid entanglement with matters of politics or values. This is technical, legal, scientific – just for the purpose of getting the market/economy going.

The separation of rights from regulations runs parallel to the separation of efficiency from distribution or justice. And therein lies the rub. If economics has found it difficult to keep distribution out of efficiency, law has also found it difficult to do rights on their own.

And it turns out that in a deeper sense, property rights *themselves* are all about social struggle and economic choice.

In part this is simply a socio-historical observation. As such, it casts doubt on some popular nostrums from liberal political theory that sometimes find their way into policy argument

- that a market “precedes” political history (natural propensity to barter and truck...)
- that private law (property) “precedes” government
- that property has an “ideal” form – rather than expressing a particular distributional outcome

Across the West, property rights have taken many forms and provide a record of economic/political struggle. Economic actors use entitlements to dominate, and to consolidate their political and economic positions.

Economic change has repeatedly generated and exploited new kinds of property – just as it has extinguished all kinds of older rights – from feudal land rights to the welfare entitlements of the postwar era.

Along the way, some rights get treated as fundamental (even as “constitutional”), others are hedged, qualified, constrained

Law/legal rights are also the stakes and instruments for political/social/economic struggle  
Rights are entitlements to rents – people want them.  
Modes of economic life emerge through them

Moreover, different commercial interests have different views about rights. What is good for some may not be good for others --- some want clear rights, others something vague: for some strong entitlements are preferable, for others weak (new media)

As a result, property rights – their allocation and definition – are excellent instruments for industrial and development policy. They distribute access to resources, can affect -- even determine -- economic paths

BUT, “strong and clear” tells you almost nothing about *how*. Indeed, the search for a formula is the opposite of careful analysis or context specific strategy. A kind of retreat, a return of the neo-liberal fantasy that economies make themselves.

**A related idea is that property rights, in their ideal form, are important for distinguishing and defending the “private market” from public authority.** This idea might encourage us to think about arranging property rights not only as pre- or extra-political, but as a defense against the politicization of the economy.

***The problem here is at once practical and analytical.***

*In practice*, defining and enforcing private rights is everywhere a matter of public authority. Moreover, the history of every Western legal tradition is one of struggle over the line between public and private and over the *plausibility of their legal distinction*.

*Analytically*, it turns out to be far more difficult than you might think to work your way through the rule system, distinguishing entitlements which “support” and “distort” the market, or even distinguishing “property” from “sovereignty” --- just as it is difficult to keep “property” and “contract” from slipping back and forth into one another. Indeed, it is a fundamental legal reasoning skill to take something which looks like one and make it look like the other.

- II. The second troubling idea is most closely associated with the notion that property rights should be STRONG. The idea is that property is not about the relations among people – it is about each person’s relationship to things. As a result, strong property rights simply strengthen each person’s relationship to assets, empowering him or her to participate more effectively in the economy.**

***It turns out, however, that “strength” is relational, relative – a matter of allocation and distribution.***

Rights are all reciprocal, correlative – for every right there is a duty. They are distributional – regulating relations between people with respect to resources. Again – great for economic strategy, terrific tool for allocation, but “strong entitlements” doesn’t say *how*.

And of course, property is, in fact, a “bundle of rights” which can be sliced up in lots of ways. It can be turned into contract, embedded in corporate law, turned back into property.

Thinking like a lawyer today does mean thinking across these boundaries, redefining entitlements to transform relationships among people with respect to assets.

A crucial piece of the puzzle – often underappreciated – is the *privilege to injure*, to use your rights in such a way as to diminish the value of mine. You can set up a bakery right next to mine and put me out of business, build walls which ruin my view or generate smoke which undercuts my property value.

Handling these issues is not just a matter for subsequent regulation, it is part of allocating rights in the first place. Does property “mean” an entitlement to be free from smoke or an entitlement to make smoke?

How to decide?

Settling these issues will distribute between parties in the economy. It makes sense to do so in a way which is guided by development policy objectives.

Here we can see how difficult it is to translate the economic distinction between efficiency and distribution into legal terms. There would be no price system absent a legal capacity to own, bargain and contract. How you set up such a system – the details, including who can do what to whom with impunity – will establish the capacity and respective powers of economic actors. This will influence what happens next, entrenching some powers at the expense of others and influencing the direction of an economy’s development.

**A related idea, also common in policy discussions, is that even if setting up a property regime is all about distribution and allocation, how you do it doesn’t matter --- subsequent rearrangement will take care of it. So long as everyone’s rights are strong and clear.**

This is often associated with COASE – although he clearly recognized, given the ubiquity of transaction costs, that his hypothetical demonstration that entitlements would be rearranged towards the pareto efficient allocation was just that – a hypothetical.

There is a deeper issue – you can’t have a market in entitlements in the first place without figuring out what property means and when contracts will be enforceable. Before entitlements can be re-arranged, you need a set of entitlements to those entitlements.

In this sense, rights are not “before” or “outside” efficiency. They are “inside” the problem – we need to think about questions like: do we want large firms or small ones, concentrated or dispersed ownership.....etc. The allocation of rights will set the economy on one, rather than another, path. The difference may well be crucial for economic development.

Moreover, sorting this out is a complicated question of institutional/legal design. What you do about remedies and procedures is as important as how you set up the rights/privileges. Indeed, many aspects of the legal system come into play – how are the parties organized? It can’t be done by proclamation – nor does it happen at once. Much will depend on how economic actors respond.

There is a robust tradition within legal science about this --- the law and economics tradition – which starts where Coase left off, with transaction costs. The tradition would have lots to offer us in the development field.

Interestingly, there has been relatively little attention, even there, to the relationship between setting entitlements and GROWTH or development. They tend to focus on efficiency (by reducing  $t$ =costs, etc) and ethical considerations (weaker bargaining parties).

The focus on efficiency takes our eyes off the social/cultural/institutional/political changes intrinsic to development, and underestimates the usefulness of legal arrangements for sparking productive disequilibria and inefficiencies

At the same time, their focus on justice foregrounds compensatory justice (righting “wrongs”) rather than distribution for growth/development. So there is a lot to be done.

The point: even the initial allocation requires social, political and economic judgment – needs to be done in the shadow of a development strategy. You can’t just strengthen the rights and hope for the best.

**III. The third troubling idea is associated with the notion that property rights should be CLEAR. The idea seems to be that however one allocates entitlements, clarity – achieved through formalization – is good for everybody.**

***It turns out, however, that distribution is as much a factor in the “clarity” of rights as in their “strength” – both are relative. In this sense, it is not at all clear what “clear” property rights means.***

We must always ask clear *for whom?* Clear *in what institutional arrangements?*

Between rules and standards, it is common to think “rules” are clearer. But standards can be “clear” – reasonable, fair use ...

And rules may not be clear – they must also be applied, after all.

Between formal and informal law, it is common to think formal arrangements will be clearer. But informal norms and expectations can often be “clear,” just as official law can seem hopelessly opaque.

Moreover, “clarity” is not always good – many economic ventures prefer vagueness to unleash new businesses. Vagueness about other people’s rights – about their own.

The real issue is distribution of knowledge about entitlements – clear “to whom”. Clarity is also a relative thing.

And is also embedded in a larger legal world of institutions and procedures. Clear to the judge? The bank manager? The wife’s family? And so on.

Entitlement clarity does not automatically bring institutions into being – it might or it might not --- but it is always embedded in institutions, is a function of institutions.

Clarity is, in this sense, an interaction between modes of formulation, modes of social understanding, and modes of official interpretation. It is a relative, dynamic and interactive matter.

This makes formalization – or deformalization or reformation – a terrific lever for development policy, right at the boundary between official and unofficial patterns of behavior.

It is not an automatic on/off switch for anything. Clarifying rights MAY, for example, open credit markets – but may not. The one thing it will most certainly do is transfer power to whichever professionals are empowered to manage the new forms.

***A great deal has been said about the GENERAL virtues of “formalization” for economic development.***

We should note, of course, that formalization is not always the same as clarity.

Nor does formalization equate with “strong” entitlements --- that will depend on institutional arrangements, the strategies of affected social and economic actors and much else.

Nevertheless, there are lots of reasons for thinking formalization *in general* would be helpful – would make for a more orderly and comprehensive legal system, more precise and predictable dispute resolution

The difficulty is that formalization also turns out to be about distribution – the allocation of authority and discretion.



Moreover, formalization is notoriously quixotic in its effects: does it slow things down (red tape) or speed them up?

(And is “slow,” as my grandmother would always ask, a good thing or a bad thing?)

Here we remember Polanyi’s famous response to Weber’s observation that the industrial revolution had happened first in a legal system which was anything but formal --- for Polanyi, the mud law threw in the gears was what made the dramatic social transformation politically and culturally “sustainable,” as we would say today.

Indeed, if we think strategically, attuned to the iterative and interactive dimensions of formal rules, many alternatives to legal formalization will also sometimes be very useful.

Legal pluralism, for example --- the absence of a single unified legal order -- can sometimes be a good thing – opening space for various productive ventures

Informal entitlements can themselves be productive .... Think again about the UCC’s constant injunction to look to the customs of the commercial world.

## **Conclusion**

Nothing that I have said so far is particularly new or even controversial. Of course there is no legal *recipe* for development, whether “strong entitlements” or “clear property rights” or “formalization” across the legal order.

The question I am left with is how these remain powerful suggestions in policy debate --- at least as default rules of thumb.

How ought we to understand their persistence?

I think there are a couple of things going on. The first is simply the appeal of a recipe, particularly an institutional recipe, in periods like ours, when economic analytics so often seem unable to generate a clear policy direction.

If development economics has become too complex, conflicted, cumbersome to guide our strategic thinking – perhaps law has something simpler to offer. There is something wishful in this, the wish precisely to avoid becoming enmeshed in complex strategic questions of political economy.

The trouble is that legal recipes don’t substitute for strategy. Sometimes they can get in the way. As applied, moreover, they will *become* a strategy – will have effects, will help set the economy on one development path rather than another.

The second explanation may be an idea about where *to start*. Sure, we think, it will all get very complex in the details, but it can't hurt and it might help to focus on the basics – rule of law, clear entitlements, strong courts....

There is something to that. But it turns out to be strategy all the way down. The basic entitlements must also be configured --- indeed, it may be *most* important to think strategically at the start when economic interests and directions may still be more open.

Ultimately, I think the persistence of one-size-fits-all legal recipes --- in an era which has rejected one-size-fits-all economic recipes ---- has more to do with ideology than strategy.

We need to remember that the vernacular of development policy --- the way we *argue* about what to do --- is not primarily scientific or analytical. It remains a vulgate, a collection of arguments, only loosely tied to economic (or legal) models. It is more open ended than it seems, is capable of being instrumenalised in lots of ways, and is tethered to various conventional ideological tropes – favoring a big state or a small state, regulation or market, and so on.

A lot of what is going on in discussions of “strong property rights” is like what goes on in discussions of “market failures” – you have a loose framework for justifying specific policies in terms of a general model which is not nearly robust enough to tell you to do this or that. If you think there are lots of market failures, you're a liberal or progressive. If not, not.

“Market failure” is something you *say* when you want to regulate.

Clear strong property entitlements is like that as well. It is something you say when you *don't* want to regulate.

In the paper, I use land reform policy to briefly illustrate this thought. We know that any land reform program requires myriad decisions about details. Each is, potentially, an opportunity for strategy --- a lever for development policy.

Moreover, we know that land reform has a history, and has everywhere been undertaken repeatedly. There have been winners and losers – whose gains or losses will be transformed by the strategic details of a new land reform project.

After all, a typical LDC might have experienced waves of land reform which

- Consolidated land tenure to empower settlers over indigenous people, or collectives over the landed peasantry
- De-concentrated land to empower entrepreneurial farming and eliminate a land holding elite obstructing modernization
- Then titled urban or exurban squatters to bring informal habits of use into the formal economy

And probably many others. Technically, each will have presented all kinds of choices.

We might think that each choice could be assessed for its developmental impact. This turns out to be very difficult – and is anyway not what the actors involved will care most about. For them, it is about opportunity, gains and losses. In the absence of a robust analytic to assess strategic consequences it is useful to have a general orientation to help figure out what one is *for*

A left-right orientation might be one way to bundle these choices ideologically, and land reforms have often fought out in these terms.

Large scale reforms, taking private land, taking without compensation, giving to the least well off, to hold communally --- these might be part of a family of choices linked by their ideological affinity more than their contribution to a common economic strategy.

To assess a land reform program, we would only need to ask “how far it goes” toward this family of choices. Does it go too far, not far enough, just right. “Too far” is a way of characterizing a whole range of choices favorable to one’s ideological opponents. Looking back, we might also interpret land reform programs in light of the institutional and political pressures brought to bear for and against them.

The beauty of an idea like “strong and clear property rights” is that it does the same work without the left/right baggage. It seems more technical, and somewhat axiomatic or obvious. Sure there are lots of choices, but taken as a whole, does this program “do enough” to ensure that property entitlements are clear and robust?

That is quite a different question from an assessment of its economic consequences. Indeed, the whole point of a recipe is not to have to go there – to have a different benchmark for progress.

If strong and clear rights are axiomatically linked to development, efficiency, growth, and so on, our deliverable is formalization, codification, judicial empowerment, and so.

This is how law can come to substitute for development strategy. (The same might be said, moreover, about “human rights” as a development strategy)

If we can get past these recipes, however, law has a great deal to offer – tools for development policy, a map of strategic alternatives, a terrain for engaging in the political choices which come with development policy. The odd thing is that in development economics, no one is an orthodox neo-liberal any more. The orthodoxy has been chastened. Social, institutional and political factors have been endogenized. Just not in law. There, the dream of a self-creating market and a mode of policy which did not require political choice remains.

Thank you, I look forward to the discussion.