Social Ontology, Development Policy, and Modern Property Law: What Can They Learn from Each Other? [*]

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Abstract

The eminent development practitioner, Hernando de Soto, holds that a key to unlocking the growth potential of stagnating economies can be found in the social ontology of a philosopher, John Searle. De Soto argues that the primary barrier to development in most languishing countries is not a lack of physical assets, markets, entrepreneurship, or work ethic. Rather, it is the lack of a society-wide system of representations that will allow the assets held in them to serve as 'live' rather than 'dead' capital. Assets cannot be used to secure loans, contracts, utility hook-ups, and the like, because the societies have failed to establish uniform, clear, and integrated property rights systems on which parties engaged in economic transactions can rely. The problem is not that property rights do not exist; rather, it is that there is more than one system of property rights – and accordingly of claims – applicable to many assets. The result is that the assets cannot be used to realize their full value. In Searle's terms, the societies have failed to establish a system of uniform representations in which people accept that specific actors are enabled to exercise specified powers over property.

De Soto's proffers a straightforward solution. Governments in economically stagnant societies should create integrated property systems. They can do this largely by recording the arrangements that already have been developed in the informal sectors of their economies and incorporating them into their formal legal systems. De Soto's primary evidence in arguing that this strategy will be successful is the experience of the developed countries, and particularly the United States, in creating unified property systems during the the 19th century. During the last half of the century, for example, the U.S. federal and state governments gradually incorporated the informally established property claims of squatters and other kinds of resource interlopers into their formal property systems, after which their economies took off.

The purpose of this paper is not to assess De Soto's causal argument with regard to U.S. history, nor to assess his analogy of 21st century developing countries to the 19th century U.S. 'wild west.' Rather, it seeks to bring De Soto's prescriptions and Searle's analysis into a conversation with contemporary American property law. To do so, it focuses on four features of property law.

First, the paper briefly describes the complex structure of modern American property interests, which are more variable and broadly distributed through

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space and time than the concept of 'ownership' may be seen to imply. An owner never holds all of the legal interests in 'his' or 'her' property. Rather, the resource is typically subject to many kinds public and private rights, such as easements, servitudes, and rights to be free of public and private nuisances, as well as frequently divided rights to possess, manage, and derive income. Thus, property rights in any given asset are often quite fragmented, and can be parceled out among various owners and rebundled by them in a multitude of ways. Viewed together, property interests often look more like webs of interests than like unilaterally held rights. Moreover, many of the interests are only partially defined, and are subject to sometimes surprising elaborations over time. This means at the very least that ontological descriptions of property law must allow for a considerable amount of uncertainty, and quite possibly that they will have to incorporate certain discursive or hermeneutic elements to accurately describe property rights systems of developed countries.

Second, despite its great flexibility and variability, modern American property law does not in practice facilitate or incorporate all of the arrangements that rights holders attempt to evolve in the course structuring their relationships. Rather, it limits the available forms of property rights to a set number of categories, and often forces putatively new interests into preexisting forms. The reasons for this limitation (now called the 'numerus clausus' limit as it is in civil law systems) are complex, but they are thought by most commentators to involve judgments by the legal system that allowing too much variability in property will inhibit the efficient allocation of resources. Thus, a likely practical challenge for De Soto will be to develop methods of ascertaining which informal property arrangements in developing countries should be incorporated into official property systems, and which ones not.

Third, at a higher level of abstraction, far from simply absorbing conflicting property systems, the American property system has in fact made difficult and questionable normative choices about which systems to respect and which to reject. The first and still festering choice was simply to override Native American property systems in favor of European ones. On the one hand, neither Searle nor de Soto seems to have a way of explaining this process, nor of clarifying how such choices should be made. On the other, Native American claims to property continue to exert considerable normative power within the U.S. legal system, and have not been entirely resolved to this day. It would be most helpful if ontological analysis could help to comprehend these normative processes, but it is not clear whether they can.

Finally, definitions of property rights in national legal systems are increasingly subject to powerful transnational influences. Two rather different developments exemplify this process. The first is the growth of 'regulatory expropriations' law through international trade treaties. The North American Free Trade Act, for example, provides that no country may "expropriate an investment of an investor" from another country, or "take a measure tantamount to . . . expropriation," unless it meets a number of conditions, including the payment of just compensation. This provision recently resulted in Mexico having to pay a U.S. corporation $16.7 million plus interest after a

Mexican state extended protected area status to a site on which the corporation had planned to build a hazardous waste landfill. The standard for defining the expropriated property interest was not Mexican law, but rather a general one of reasonable expectations developed by the NAFTA tribunal. The ironic result is that, at least in some cases, the property rights of a foreign investor will be greater than those of a domestic one, and that in any event they will not be defined solely in reference to national law.

The second emerging transnational influence on property rights operates largely outside the realm of government, and is exerted by transnational civil society organizations seeking to set global standards for proper business behavior. The Forest Stewardship Council (FSC), for example, sets global standards for forestry. These include protections for communities, indigenous groups, workers, and biodiversity, among other things. Thus, while national law may allow a corporation to apply certain chemicals in managing its forests, the FSC may prohibit their use. Although the FSC standards generally are not mandated by state governments, they may be effectively mandatory as a result of pressure exerted on forestry operations through global product chains. Over time, it seems likely that such standards will be at least partially absorbed into domestic legal systems and into cultural definitions of property rights. Thus in examining the deontic structure of property rights, it will probably be necessary to consider such transnational extra-legal normative forces as well.

The paper concludes by pondering the relationship of ontological analysis to the above features of modern property systems. It argues on the one hand that the Searle and De Soto perspectives on property may be sufficiently flexible to comprehend them. Moreover, they offer the benefit of opening formal property systems to understanding the importance of both extra-governmental property systems and clear representations of all property interests. On the other hand, it seems likely that ontological conceptions of property will have to be extended considerably to come to grips with several features of real-word property rights: (1) the inherent limitations of property representations due to the partial indeterminacy of the rights they signify; (2) the need to provide for continual social learning and concomitant changes in property rights to adapt to changing circumstances; (3) the need to account for the role of normative argument in determining (a) what the specific contents of specific property rights will be in any given case, and (b) which property interests ought to be to respected and which not; and (4) the fact that there may inevitably be multiple, often conflicting collectivities to whom different, partially inconsistent representations will be credible, regardless of efforts by governments to achieve clear and uniform representations.