

LAND TITLING AND URBAN DEVELOPMENT IN DEVELOPING COUNTRIES: THE CHALLENGE OF HERNANDO DE SOTO'S *THE MYSTERY OF CAPITAL*

ROBERT HOME ¹

Abstract

Hernando de Soto's global best-seller, *The Mystery of Capital*, has transformed the previously obscure topic of land titling into an apparent cure for the world's ills. His achievement has been to focus attention on the relationship between sustainable capitalist economic development and the need of the Third World poor for secure land tenure. He challenges lawyers (and other professionals concerned with land management) to recognize the centrality of land to issues of social justice and development. The article links de Soto's call for integrated property systems with current cross-disciplinary academic discourses on urban law and development and postcolonialism. Specific themes (illustrated with country examples) are cadastral reform (Southern Africa), adverse possession (Israel/Palestine) and *usucapio* (Brazil), the relationship of customary and individual land tenure (Botswana), and land assembly and infrastructure provision for urban development (land readjustment in Japan and India).

Keywords De Soto, land titling, urban development, indigenous land rights, adverse possession, *usucapio*, land readjustment

Introduction

The Istanbul City Summit Declaration (Habitat II 1996) committed the international development community to a human settlements policy that emphasized access to land, systems for transferring land rights, and protection from forced eviction. The policy has been summarized by the leading development land law specialist, Professor Patrick McAuslan:

'government at all levels and civil society must be involved in working with the disadvantaged and the poor, removing obstacles to their obtaining land, and developing innovative mechanisms, instruments and institutions to help them obtain access to land and security of tenure via the market. Governments must also desist from actions that penalize such persons and lessen their opportunities to obtain and hold onto land.' (McAuslan 2002: 26)

The Habitat II agenda focusses upon the fast-growing urban areas of the developing world. It is estimated that by the year 2025 80 per cent of the world's urban population will live in developing countries, many of them under conditions of extreme poverty and tenure insecurity, and about half of the world's population (three billion people) now live in urban areas. Various books, especially of collected papers, on the legal aspects of urban poverty have followed Habitat II (notably Fernandes and Varley 1998; Durand-Lasserve and Royston 2002; Payne 2002). The boundaries between urban and rural are being eroded, and a 'changing conceptual landscape' is emerging which recognizes the importance of the 'peri-urban' as an intermediate zone between urban and rural. Peri-urban areas are places of risk and opportunity, characterized by institutional fragmentation, mixed land uses, opportunities for multiple livelihoods, fragmented land holdings, fragmented social structure, and rapid change (Adell 1999; Brook and Davila 2000).

The World Bank, USAID and other agencies were already committed to a framework of secure, transparent and enforceable property rights, perceived as a critical precondition for investment, economic growth and poverty alleviation (Deininger and Binswanger 1999; USAID 2002). The linkages between land titling and urban or peri-urban development in the Third World remained, however, a largely closed discourse within communities of development policy-makers and academics until the dramatic response to Hernando de Soto's book, *The Mystery of Capital* (De Soto 2000). The Peruvian economist's previous book, *The Other Path* (De Soto 1989), attacking the oppressive effect upon the poor of exclusionary laws and regulations devised in the colonial era, was a best-seller, but overtaken by *The Mystery of Capital*. De Soto himself is

¹ MA, PhD, DipTP, MRTPI, Reader in Land Management and Director of Research, Anglia Law School, Anglia Polytechnic University, Chelmsford, UK

sought after as a lecturer and a consultant to heads of state, and has been proposed for the Nobel Economics Prize, while his ideas are discussed as potential solutions to world poverty and social unrest in such periodicals as *The Economist* and *Forbes Magazine*.

De Soto addressed poverty in the developing world and ex-Communist countries by re-imagining the nature of property under capitalism. He argues that property only becomes useful capital when it is recognized by a formal legal system, and that without such a system the property held by the world's poor is merely so much 'dead capital'. For him six 'property effects' have been the key to the success of Western capitalism, in his words: 'Fixing the Economic Potential of Assets', 'Integrating Dispersed Information into One System' (a particular focus of this article), 'Making People Accountable', 'Making Assets Fungible' (ie capable of being divided, combined or mobilized to suit any transaction), 'Networking People' and 'Protecting Transactions' through the rule of law (Chapter 3).

Deploying some vivid images to reinforce his message, de Soto sees, for example, the poor without formal property rights as locked in the 'grubby basement of the pre-capitalist world' (p.55). Releasing the potential of 'dead' property capital he compares with nuclear fission: 'similar to the process that Einstein taught us whereby a single brick can be made to release a huge amount of energy in the form of an atomic explosion.' (p.37). Formal property systems he compares to 'a bridge, if you will, so well anchored in people's own extralegal arrangements that they will gladly walk across it to enter this new, all-encompassing social contract' (p.182). He approaches extralegal property title through an image of the barking dogs that he encountered walking through the rice fields of Bali – dogs who 'may have been ignorant of formal law, but ... were positive about which assets their masters controlled' (pp.170-71). In his lectures he has likened the poor to a lake, and the makers of land policy and property systems to the engineers whose skills may transform that placid lake's potential energy into hydro-electricity.

De Soto is not without his critics: academics have found his methodology and supporting research suspect, and disputed his basic argument (eg Bourbeau 2001; Fernandes 2002). He treats the poor as an undifferentiated mass, and evades some difficult issues, such as land ownership inequities and indigenous land rights. Nevertheless, he has raised awareness of land management, and especially land titling, as key issues in the reviving law and development movement (McAuslan 2001), and has thrown down a challenge to land lawyers and legal education to re-address the land issue in development.

'The Mystery of Legal Failure: Why Property Law Does Not Work Outside the West'

This is the title of Chapter 6 of *The Mystery of Capital*, in which de Soto accuses lawyers of adhering to traditional processes, defending the *status quo* and sabotaging the expansion of capitalism: 'their knee-jerk reaction to extralegal behaviour and to large-scale change is generally hostile' (p.210). He calls for reform-minded lawyers to organize themselves and influence political decision-making, and the concept of a pro-poor urban law is in itself a challenge to how lawyers are educated. While he has little to say about British or Commonwealth law, one section of his book (within his chapter on the United States) is entitled: 'Leaving behind Antiquated British Law'. British land and property law has been seen as difficult and complex, the preserve of specialists: in the rather bleak words of one specialist, taking 'a lifetime to master and when mastered is but lean, wasteful and barren learning' (a reformer in 1919, quoted in Simpson 1976: 24). The de Soto thesis would require property lawyers to look beyond their own construction of professional knowledge, and academic/professional networks have begun to emerge, such as the International Research Group on Law and Urban Space (IRGLUS), as part of a general widening of legal studies into theory, policy and cross-disciplinary approaches (Mansell, Meteyard et al. 1999). Much of the research on urbanization and the Third World poor has been undertaken by other disciplines, social scientists rather than lawyers, hence the title of McAuslan's latest book on the role of law in urban land reform, *Bringing the law back in* (McAuslan 2003). The practice of land management includes not only lawyers, but other professions (such as valuers, planners, architects, land surveyors, archaeologists and ecologists) who may also have stakes in the reform of land law.

Postcolonialism and globalization theory has provided new perspectives for the law and development movement, and socio-legal studies on the Third World. Legal systems have been among the most enduring

institutions of colonialism: the 'authoritarian and transformative character of law in the utilitarian rendition was perfectly suited to colonial rule' (Fitzpatrick 1992). Colonial law functioned as an instrument of control and an arena of inter-community struggle, and engendered a social process of legalization and professionalization through which such struggles were mediated (Darian-Smith and Fitzpatrick 1999). Colonialism demanded state control of territory, achieved through an array of legal instruments, and pre-existing legal structures were overlaid by received law from the colonial power, creating for postcolonial nations a situation of legal pluralism, with conflicting sources of legitimacy, and unpredictable or contradictory outcomes (McAuslan 2000). Alongside the rising importance of land management functions in postcolonial states, academic work in postcolonial law and geography is now re-appraising the role of differentiated territorial jurisdictions in regulating social relationships (Blomley, Delaney et al. 2001). Colonialism excluded and marginalized unwanted social groups (Sibley 1995; Jacobs 1996), and in the postcolonial era indigenous groups, formerly dispossessed from their communal and ancestral lands, are increasingly pursuing legal challenges and human rights law to re-assert their claims (Stephenson and Ratnapala 1993; Brody 2001). Postcolonial theory has provided a platform for these 'subaltern' groups, subjects occupying a position so marginal, and whose voice is so fragmented in relation to a dominant culture and language, that they are potentially forever silenced and spoken for by that dominant culture (Spivak 1994; Otto 1999). De Soto's claim that the voices of the poor (or their barking dogs) be heard, and their extralegal property systems understood through a democratization of land law, reinforces the argument of postcolonial and subaltern theorists for filling the gaps and silences in dominant narratives. Recent transnational research, contributing to the World Development Report and World Bank policy, has explored community-based participatory processes in poverty reduction through recording the experiences of the poor themselves (Narayan and Petesch 2002).

De Soto's own position on colonialism and postcolonialism is ambivalent. As he says:

'I love being from the Third World because it represents such a marvelous challenge – that of making a transition to a market-based capitalist system that respects people's desires and beliefs' (p.242).

Such a belief in market capitalism does not much question the role of capitalism and globalization in perpetuating colonial power structures, and how the rule of law and land titling can protect inequitable land distribution in colonial settler societies (the civil unrest in Zimbabwe, for example, revealing the corrosive effects of delaying land reform). He does not address some difficult aspects of land and property, such as the farm-size efficiency debate or reform of land ownership. But the recognition of the importance of land issues and land titling reform will require lawyers to 'think outside the box' of traditional jurisprudence and to incorporate pro-poor approaches. This article now suggests four areas, crossing professions and academic disciplines, where such change might occur: cadastral reform, the law of adverse possession, the scope of customary/tribal/communal land rights in pluralist systems, and land assembly for urban development. It draws upon current research undertaken for the Department of International Development (managed by the author) on land titling and low-income peri-urban households in Africa and the Caribbean (with country case studies of Botswana, Trinidad and Zambia), to be published by Cavendish (Home and Lim 2004).

Integrating property systems: cadastral reform and the future of Torrens

If, as de Soto argues, integrated property systems are the key to capitalist economic development, then cadastral systems will need to change. In another of his striking images, he sees capitalism in the colonial and postcolonial world functioning within a bell jar, sealed off from the rest of society:

'Inside the bell jar are elites who hold property using codified law borrowed from the West. Outside the bell jar, where most people live, property is used and protected by all sorts of extralegal arrangements firmly rooted in informal consensus dispersed through large areas... The bell jar makes capitalism a private club, open only to a privileged few, and enrages the billions standing outside looking in... This capitalist apartheid will inevitably continue until we all come to terms with the critical flaw in many countries' legal and political systems that prevents the majority from entering the formal property system' (De Soto 2000: pp.66-80 and 164).

For him cadastral reform will allow the lifting of the bell jar, releasing the entrepreneurial energies of the world's poor, and that process involves not only lawyers but the lands and survey agencies of national

governments. When de Soto talks of the vested interests resisting change, he identifies two groups: the lawyers and the 'technicians' (those who manage the cadastre for the state).

The colonial state claimed that most basic resource, land, where not (or apparently not) in active use, and then transferred it through grant, sale or lease to new settlers. State survey departments mapped the territory, and lands departments allocated the leases and title deeds to private or corporate owners, overriding indigenous land rights in the process. The 'jewel in the crown' of Commonwealth lands and survey was the Torrens system of state-guaranteed property registration, with origins in North German towns of the Hanseatic League. The legislation introduced by Torrens for South Australia in the 1850s was transferred to much of Australasia, North America, the Middle East and Africa (Hogg 1905; Thom 1912; Shick 1978; Whalan 1982). It largely superseded deeds registries, and provided records of property, proprietorship and encumbrances, incorporating six main features of security, simplicity, accuracy, expedition, cheapness and suitability (Larsson 1991; Kain and Baigent 1992). The spread of 'scientific' cadastral survey from the dominions to the colonies and protectorates of Africa, Asia and the Middle East was supported by textbooks on land registration, notably Dowson and Sheppard's, invited by the Conference of Commonwealth Surveyors in the 1930s, funded by the Colonial Office and subsequently revised (Dowson and Sheppard 1956). With the 'winds of changes' and decolonization in the 1960s further textbooks followed (Dale 1976; Simpson 1976; Dale and McLaughlin 1988; Dale and McLaughlin 2000), maintaining the globalizing impetus of the concept, and the International Federation of Surveyors (FIG) has responded to the Habitat agenda with the Bathurst declaration of the importance of land administration systems (Bathurst 1999).

Expanding the Torrens system in the developing countries under conditions of postcolonial legal pluralism is neither simple nor cheap, and their governments may lack the resources, institutional capacity and perhaps political will. The procedures of land management by the state are time-consuming and demanding, and require specialist staff to undertake field surveys, check cadastral survey plans, prepare legal documentation, keep and update records, manage property, and enforce the law. De Soto asserts that 'titling projects tend to degenerate into identification systems for physical stock' (De Soto 2000: 209-17). With such complex processes, involving large land areas and populations, it is not surprising that cadastral coverage and land information systems in Third World situations are weak, especially for informal settlement areas. A review of cadastral systems in developing countries (Fourie and Fluck 1999) found that up to 90 percent of the parcels had no documentary evidence of title, with only 1 per cent of sub-Saharan Africa covered by any kind of cadastral survey. Improved hardware and software for processing geo-spatial data could potentially change the situation through a spatial data infrastructure (SDI) integrating global satellite positioning systems (GPS), remote-sensed digital photogrammetry, geographical information systems (GIS), and on-line conveyancing. In practice, however, most cadastral records remain paper-based, and the process of digitizing and converting them is specialist and time-consuming. Numerous costly initiatives during the last decade in developing countries to modernise land information have produced disappointing results, questioned by both the potential beneficiaries and the cadastral specialists.

Thus postcolonial governments have been forced to recognise the limits upon what state-directed land management can achieve. Recent innovatory approaches, in which the post-apartheid Southern Africa region, combining as it does First World capacities with Third World problems, has been a pioneer, have attempted to combine effective records with local community control, bringing land registration to the people on the ground (Christensen and Hojgaard 1997 for Namibia; Durand-Lasserve and Royston 2002, Part 3). Such approaches are contributing to the growing recognition of common property (or common pool) resource knowledge, albeit threatened by the processes of globalization with devaluation and even extinction, what de Sousa Santos calls 'epistemicide' (Shivji 1998; Santos 2002). As de Soto puts it:

'It is up to the government to find out what these extralegal arrangements are and then find ways to integrate them into the formal property system. But they will not be able to do that by hiring lawyers in high-rise offices in Delhi, Jakarta or Moscow to draft new laws. They will have to go out into the streets and roads, and listen to the barking dogs' (p.189).

Such a participatory approach, listening not only to the dogs but to the people and to community-based organizations and urban social movements, would indeed be radical, requiring a rethinking of professional roles, stake-holder relationships, accessible dispute resolution methods and record-holding processes.

Unfortunately, if centralized land titling programmes are seen as too expensive, such a participatory approach is unlikely to be less so, and credit agencies and land registries have remained reluctant to recognize intermediate or unofficial forms of land title. The next three sections explore some approaches to pro-poor urban land law which respond to the realities of occupation and use on the ground: adverse possession, customary tenure and urban land re-adjustment.

‘Not squatters but settlers’: the law of adverse possession or *usucapio*

There is a paradox contained in de Soto’s argument. He supports the connection between the legalization of property and the creation of capital by citing the historical example of the United States, and in his Chapter 5 celebrates the reluctant acceptance by the US government of squatters, drawing upon the concept at the heart of customary land tenure, that land is a precious resource and should be kept in productive use. Yet once land rights have been recognized by the state, it will presumably defend them against any further squatting attempts: registered title should be indefeasible. In other words, land-grabbing is justified, but once and once only. The potential conflict between the holder of land title and the actual user and occupier of that land is one that makes legal minds uneasy. One of the achievements of *The Mystery of Capital* has been, therefore, to focus attention upon a sometimes neglected area of land law, adverse possession, which was an important component of colonial settlement in North and South America.

De Soto’s case study of the integration of property systems in the United States identifies the Pre-emption Act (1841) as ‘the legal breakthrough’: it allowed squatters (or ‘pioneers’) who had settled on public lands before they could be surveyed and auctioned by the government, to stake a claim to 160 acres (65 hectares), and after about 14 months of residence to purchase it from the government for a preferential rate. The later Homestead Act (1862), passed during the Civil War with a political objective of preventing the spread of slavery westward, developed the approach, allowing anyone to file for a quarter-section of free land (160 acres) and achieve title after five years if they had built a house on it, dug a well, broken or ploughed 10 acres, fenced a specified amount, and actually lived there. Such a liberal approach to squatting was made possible because the United States government had acquired vast tracts of territory from the native Americans and European competing colonial powers (Spain and France), but its land management capabilities could not keep pace with the westward movement of its people. Homesteading was condoned and encouraged by the state as a cheaper alternative to direct military force against the native Americans (Allen 1991).

Land-grabbing by colonial states and settlers took place also in the vast territories of South America. There Spanish and Portuguese colonialism drew upon the Roman or civil law tradition, under which adverse possession was known by the Latin term *usucapio* (taking by use, in Miller 1875, entry on *usucapio*), and became an accepted alternative to land grants by royal charter or the state. Postcolonial Cuba under Castro allowed the use of *usucapio* by peasant farmers against the absentee plantation owners, and more recently *usucapio* was incorporated in the 1988 reform of the Brazilian Constitution, which supplemented existing provisions by endorsing a right to claim private urban landholdings up to the (rather small) maximum of 250 sq.m. after only five years of peaceful possession (Fernandes and Rolnik 1998; Imperato 2002). This new constitutional right could potentially regularize title to half of the *favelas* or illegal settlements where millions of poor Brazilians live, and citizen’s guides to exercising *usucapio* rights are popular, running into several editions and reprintings (Nunes 2002 [in Portuguese]). In South Africa, however, where Dutch colonists imported the civil law tradition, it was deployed in the service of *apartheid*, creating new and profitable private property rights for the (mainly white) rich, while using property law in the public sphere to exclude the (mainly black) poor from obtaining secure property rights. ‘In view of the strict divide between the public and private spheres it was possible to keep these two areas apart’ (Van Der Walt 1995: 187):

By contrast with the settler societies and rapidly-growing cities of North and South America, adverse possession in British and Commonwealth land law has long suffered under judicial disapproval. There was once a concept in common law of the ‘one-night house’ (if you can build a house between sunset and sunrise, with a roof in place or a functioning fire-place, then the land-owner cannot expel you), but it largely disappeared with the enclosures and tighter policing of property rights in the 19th century, and with the 1947

nationalization of development rights in land by the British town and country planning acts and subsequent stricter planning controls (Everton 1971; Ward 2002). A recent wide-ranging reform of the system of land registration in England and Wales has further restricted the scope of adverse possession, especially against registered title. The reformers asserted (although with little supporting evidence) that it had become 'very common', and cited examples of Torrens land registration systems in Australia and Canada, which had abolished adverse possession outright, or severely restricted its application (Law Commission and HM Land Registry 2001: para.2.70).

In the settler societies created by British colonialism the Torrens system guaranteed settlers' land rights through the state, but largely disregarded those of the indigenous population, who might be banished to live on special reservations. Judicial support of adverse possession would favour the subaltern 'other', the original occupiers against the new settlers, or the actual occupiers against absentee title-holders, so it is unsurprising that long time limits (thirty years) were commonly set for a claim of adverse possession. Thus white settlers were encouraged and supported by their state in their land-grabbing, while the indigenous and imported non-white peoples (whether slaves, indentured labour or other economic migrants) were discouraged from such actions. In a recent example, the manipulation of adverse possession law to transfer land from one ethnic/religious group to another, in Israel/Palestine since 1948, has been well documented (Kedar 1998 [in Hebrew]; Kedar 2001). In the postcolonial era the concept of adverse possession is implicitly being revived in recent measures to regularize informal settlements, following the Habitat commitment to secure tenure for the poor. In postcolonial Trinidad, only a few miles from former Spanish jurisdictions which followed the civil law tradition, concepts of *usucapio* or United States pre-emption were seen as having little relevance, and those ex-slaves and former indentured labourers who settled upon abandoned private estates or upon state land until recently were still officially regarded as squatters, even though in some cases they had occupied the land for decades (in some cases apparently since the abolition of slavery in 1838!). The creation of a Land Settlement Agency under the State Land (Regularization of Tenure) Act 1998 reflects government policy to give greater recognition to squatter rights, and has introduced a form of intermediate title, the 'certificate of comfort', giving the holder a personal right that he will not be removed from his house plot unless deemed necessary for him to relocate and an alternative plot is available. While such reforms are welcome, it would seem that the rapidly urbanizing New Commonwealth still has to reclaim the concept of adverse possession, and might learn particularly from South American and South African postcolonial experience.

The future of customary tenure

Integrating plural property rights into one system, as advocated by de Soto, may facilitate the spread of global capitalism, and has become an aim of many nation states, encouraged by donor agencies, but the process is not without its risks and contestations. The local property systems which de Soto calls 'extra-legal' are usually communal or tribal, managed by different communities and organizations as private, autonomous systems, usually serving a homogeneous social group, and supported by oral traditions and communal sanctions. Such systems may seem foreign to, and competing against, the laws of the nation-state, and the process of integrating them into 'one formal representational system' may devalue their complexities and reduce them to 'subaltern' status. They often maintain precolonial societies characterized as 'indigenous', 'aboriginal', 'native', or 'chthonic' (in harmony with the earth: Glenn 2000: chapter 3), which have recently re-asserted their place in a more diverse and pluralist configuration of land rights (Brody 2001; Weyrauch 2001; Home 2002). Extra-legal, communal property forms, which de Soto sees being replaced or absorbed into formal property systems, may provide a form of social security for the poor, old and disabled, and the process of integration and codification has its practical difficulties and costs. Property systems may or may not be in a process of natural evolution 'towards a greater concentration of rights in the individual and a corresponding loss of control by the community as a whole' (as claimed in Simpson 1976: 225), but that process often devalues secondary, derived or delegated rights, concentrates ownership and creates landlessness. De Soto is promoting formal property systems at a time when the dominance of individualised land tenure in policy prescriptions by donor agencies is increasingly acknowledged as having negative consequences for the poor. Identification with land can be a vital component in retaining cultural identity, and the with-holding of communal land from state land-titling may be seen as a means of preserving family cohesion and continuity (Crichlow 1994; Farran 2002). Sub-

Saharan postcolonial Africa shows the strength and resilience of communal or extralegal social contracts under pressures of population growth, environmental change and oppressive land policies (Platteau 1996; Toulmin and Quan 2000; Manji 2001; Ndengu 2001), and tribal or customary land tenure has retained an important welfare function, and has functioned as a reservoir of cheap, unserved land in peri-urban areas, notably in South Africa under apartheid (Fourie 1994; Hindson and McCarthy 1994; Barry 2000).

Research from Botswana, a country neighbouring to South Africa (Ng'ong'ola 1992; Molebatsi 1994; Habana 2000; Home 2001), has explored the tensions between tribal land tenure and the postcolonial nation-state. Peri-urban tribal land, at the boundary with the Gaborone capital territory, provided for those seeking cheap housing land without the tough anti-squatting measures applied by government within the city boundaries. A loophole in the dual structure of land tenure created opportunities for speculative private land developers: the contrast between the high prices and slow delivery of public sector serviced land within the municipal area, and the availability of cheap peri-urban land nearby, poorly managed by the tribal land boards (described as 'dogs without teeth', a sorry contrast with de Soto's barking dogs). A government commission, comprised mostly of lawyers, recommended a zero-tolerance policy towards this 'eating up of agricultural land by towns and villages': 'We have to be ruthless. If people have acquired land illegally they have to suffer the consequences' (Kgabo Commission 1991, pp. vi and 72). Demolition of unauthorised structures was undertaken with the supposed authority of Presidential Decree, but was rejected in the courts as lacking due process, and now the government is struggling towards a policy which accepts the right of the poor to secure tenure, and tries to make the tribal land boards system effective in a situation for which it was not designed.

New methods of land assembly for urban development.

If integrated property systems are to facilitate wealth creation among the urban poor of the Third World, then they will need to be linked to effective processes for urban development and infrastructure provision. To accommodate future population growth in the Third World, an estimated 125 million hectares of land (or about 10 percent of the potential crop land of developing countries) will need to be converted to urban uses over the next few decades (Crosson and Anderson 1992). Urban development has traditionally been a partnership between the state and the private developer through the mechanism of town planning, a professional area in which Britain, partly because of its colonial experience, claimed for a century a particular expertise through the garden city and new towns movement (Home 1997; Ward 2000). In recent years Third World urban growth has, however, outstripped the capacity of governments to plan and service it (Devas and Rakodi 1993). The legal powers may exist for large-scale compulsory land acquisition to clear slums and plan orderly urban development (Kitay 1985), but such programmes are increasingly abandoned in favour of *in-situ* upgrading that acknowledges occupiers' tenure rights. In Trinidad, for example, the judiciary refused to uphold the East Port of Spain compulsory purchase order in 1973, which sought to clear a long-established area of informal housing, thus acknowledging the rights of the poor to stay on their land (Home 1993). The increasing formalisation of land tenure that de Soto advocates will force governments to co-operate with land-owners in the difficult task of assembling and organizing land for urban development and infrastructure, and in sharing the financial benefits (the so-called betterment value or unearned increment).

The land readjustment technique addresses these issues, and in some countries is well known and regularly used (notably in parts of northern Europe and Asia), but remains largely overlooked in the English-derived legal traditions. The technique assembles and re-parcels land, recovers infrastructure costs and redistributes the financial benefits (betterment) between land-owners and the development agency. Its procedures involve designating an area of land, preparing a master plan, replotting and measuring land areas, estimating the total market price of all saleable plots, estimating the infrastructure and project costs, selling the so-called cost equalization plots (which are to pay for the development), and reallocating the balance of plots back to the original owners at their increased development value. Land readjustment in peri-urban areas facilitates *in-situ* upgrading, forces development authorities to negotiate with plot-occupiers, rather than sweeping them away for redevelopment, and shares the development gain between the stake-holders.

The differential trans-national take-up of land readjustment as a tool of urban development reveals the different legal traditions of land management. Its origin is claimed for Frankfurt-am-Main, where rapid urban growth was creating a housing land shortage because of fragmented land parcels, and the *Lex Adickes* 1902 (sponsored by Mayor Adickes) allowed regroupment by petition of land-owners, with up to 40 per cent of the land area expropriatable without compensation. It was extensively used for post-war German reconstruction, and is still a well-recognized procedure in areas of fragmented land-holdings. From Germany the technique was introduced into Japan in 1919 (where land consolidation already existed for rural areas), and was applied to reconstruction after the Tokyo earthquake of 1923, and also to post-War reconstruction of a third of Japan's urban areas, although in recent years it has been opposed by land-owners as violating their constitutional property rights (Siman 1990; Sorensen 2000).

Land readjustment, however, was not deployed in the United Kingdom for various reasons, not least the different legal tradition. Property inheritance by primogeniture, and the enclosure of agricultural holdings, generally avoided the land fragmentation found in Germany and Japan. Compulsory purchase and compensation provisions had been devised during the railway construction of the 19th century, and other legislation empowered the local authority or the developer: to undertake infrastructure works and recover the costs. Private developers in Britain, accustomed to assembling the land and providing infrastructure, were disinclined to share their betterment gains with the local authority, and the attempt to nationalize development value in 1947 was short-lived. While the British government is currently reforming its compulsory purchase law and procedures, land readjustment, with no roots in the British legal tradition, has not attracted support from the reformers (Lichfield 2002). British-derived town planning legislation in the colonies generally overlooked land readjustment, but with some exceptions. It was successfully introduced into Mandate Palestine in 1921, where Ottoman land law had similar provisions, and, incorporated into the 1965 Israel Planning and Building Law, is now widely used to facilitate urban development in that densely populated country (Goadby and Doukhan 1935: chapter 4; Alterman 1990). Another importation was into the Bombay presidency with the 1915 Bombay Town Planning Act (Mirams 1919-20).

With global pressures for conversion of land for urban development, land readjustment would seem to offer potential in certain situations: peri-urban areas lacking planning or infrastructure, urban regeneration sites where land assembly may be difficult, so-called 'antiquated subdivisions' (where higher densities are sought), environmental protection zones (eg coastal areas), and after disasters (earthquakes, fires, wars) with displaced populations and confused ownerships. It offers real benefits of orderly development, sharing the costs of public land and infrastructure, economies of scale for large projects, and discourages land speculation (Archer 1999).

Conclusion

The attention given by the policy-making and academic communities to the arguments in *The Mystery of Capital* has raised the profile of land titling in urban development law. Academic lawyers such as Patrick McAuslan and Edesio Fernandes, and researchers from other disciplines such as de Sousa Santos, Geoffrey Payne and Ann Varley, have added a more scholarly dimension to de Soto's arguments with new and valuable work in the area, much of it trans-national studies drawing upon innovative practice in countries such as Brazil and South Africa. The central thesis of de Soto, the link between land title and capitalist economic development, may be questionable as a policy prescription, not least because of its social and economic costs, large investment in technology, and diversion of resources from other poverty alleviation measures (such as provision of the basic infrastructures of water, electricity, roads and drains). Land titling may reinforce land ownership inequalities, and add to the insecurity, indebtedness and landlessness of the poor. Nevertheless, de Soto has contributed to a re-appraisal of the importance of land as a basic resource whose management is crucial for sustainable development and social justice. The challenge of providing secure tenure for the poor in a rapidly urbanizing world is one to which lawyers may have been slow to respond, but the legal academy is now beginning to explore the differing legal traditions, particularly in postcolonial and pluralist societies, as they relate to the problems of urban and peri-urban development, and the potential for a transnational exchange of approaches and legal instruments. Such exchanges and diffusions have been a recognized feature of colonialism and globalization, illustrated by examples such as the Torrens state-guaranteed land registration system, the British garden city and town planning movement

and the German/Japanese land readjustment method. Current work is bringing the experience of postcolonial Brazil and South Africa into a global discourse, and international networks such as IRGLUS and FIG are contributing perspectives from other land-related professions and disciplines. Country-based case studies such as *usucapio* in the *favelas* of Brazil, tribal land transformations in the peri-urban areas of Botswana, and Israeli land readjustment can enrich the development of a pro-poor land law which engages with global issues of sustainable urban development and social justice.

References

- Adell, G. (1999). Theories and Models of the Peri-Urban Interface: A changing conceptual landscape, Development Planning Unit, University College London.
- Allen, D. W. (1991). "Homesteading and Property Rights; or 'How the West was Really Won'." Journal of Law and Economics **34**: 1-23.
- Alterman, R. (1990). "Developer Obligations for Public Services in Israel: Law and Social Policy in a Comparative Perspective." Journal of Land Use & Environmental Law **5**(2).
- Archer, R. W. (1999). The potential of land pooling/readjustment to provide land for low-cost housing in developing countries. Making Common Ground. G. K. Payne. London, Intermediate Development Publications.
- Barry, M. (2000). Evaluating cadastral systems in periods of uncertainty: A study of Cape Town's Xhosa-speaking communities, Faculty of Engineering, University of Natal (Durban).
- Bathurst (1999). Bathurst Declaration on Land Administration for Sustainable Development. FIG/UN Workshop on Land Tenure and Cadastral Infrastructure, Bathurst, <http://www.fig.net/figtree/figun/sessions/session1/bathurstdec.pdf>.
- Blomley, N., D. Delaney, et al. (2001). The Legal Geographies Reader. Oxford, Blackwell.
- Bourbeau, H. (2001). "Property wrongs: How weak ideas gain strong appeal in the world of development economics." Foreign Policy: 78-9.
- Brody, H. (2001). The Other Side of Eden: Hunter-gatherers, Farmers and the Shaping of the World. London, Faber and Faber.
- Brook, R. and J. Davila, Eds. (2000). The Peri-Urban Interface: A tale of two cities. London, Development Planning Unit.
- Christensen, S. F. and P. D. Hojgaard (1997). Innovative Land Surveying and Land Registration in Namibia. London, Development Planning Unit Working Paper No.93, University College.
- Crichlow, M. A. (1994). "An alternative approach to family land tenure in the Anglophone Caribbean: the case of St. Lucia." New West Indian Guide **68**(1 & 2): 77-99.
- Crosson, P. and J. R. Anderson (1992). Resource and Global Food Prospects. Washington, D.C., World Bank Technical Paper 134.
- Dale, P. F. (1976). Cadastral Surveys within the Commonwealth. London, HMSO.
- Dale, P. F. and J. McLaughlin (2000). Land Administration. Oxford, University Press.

- Dale, P. F. and J. D. McLaughlin (1988). Land Information Management: An introduction with special reference to cadastral problems in Third World countries. Oxford.
- Darian-Smith, E. and P. Fitzpatrick, Eds. (1999). Laws of the Postcolonial. Ann Arbor, University of Michigan Press.
- De Soto, H. (1989). The Other Path: The Invisible Revolution in the Third World. New York, Harper & Row.
- De Soto, H. (2000). The mystery of capital., Basic Books.
- Deininger, K. and H. Binswanger (1999). "The evolution of the World Bank's land policy: Principles, experience, and future challenges." World Bank Research Observer. **14**(2): 247-76.
- Devas, N. and C. Rakodi, Eds. (1993). Managing fast growing cities. Harlow, Longman.
- Dowson, E. and V. L. O. Sheppard (1956). Land Registration, Her Majesty's Stationery Office (HMSO).
- Durand-Lasserve, A. and L. Royston (2002). Holding their ground: Secure land tenure for the urban poor in India, Brazil and South Africa. London, Earthscan.
- Everton, A. R. (1971). "Built in a Night." Conveyancer **35** (NS): 249.
- Farran, S. (2002). "Learning from students in the South Pacific: Names, customary land tenure and student perceptions." Journal of Commonwealth Law and Legal Education **1**(2): 89-100.
- Fernandes, E. (2002). "The Influence of de Soto's The Mystery of Capital." Land Lines: Newsletter of the Lincoln Institute of Land Policy **14**(1): 5-8.
- Fernandes, E. and R. Rolnik (1998). Law and Urban Change in Brazil. Illegal Cities. E. Fernandes and A. Varley. London, Zed Books: 140-56.
- Fernandes, E. and A. Varley, Eds. (1998). Illegal cities: law and urban change in developing countries, Zed.
- Fitzpatrick, P. (1992). The mythology of modern law. London, Routledge.
- Fourie, C. (1994). A New Approach to the Zulu Land Tenure System: An Historical Anthropological Explanation of the Development of an Informal Settlement., Rhodes University, Grahamstown, South Africa.
- Fourie, C. and O. Fluck, N. (1999). Cadastre and Land Information Systems for Decision-Makers in the Developing World. Joint UN-FIG Conference on Land Tenure and Cadastral Infrastructures for Sustainable Development, Bathurst, Australia.
- Glenn, H. P. (2000). Legal Traditions of the World: Sustainable Diversity in Law. Oxford, University Press.
- Goadby, F. M. and M. J. Doukhan (1935). The Land Law of Palestine. Jerusalem, Palestine Government (reprinted 1998 by Gaunt, Holmes Beach, Florida).
- Habana, G. (2000). Field owners or squatters?: Practical issues of land title and peri-urban settlement in Botswana, MSc, School of Surveying, University of East London.

- Habitat II (1996). Declaration on Cities and Other Human Settlements in the New Millennium. Istanbul, United Nations.
- Hindson, D. and J. McCarthy, Eds. (1994). Here To Stay: Informal Settlements in KwaZulu-Natal. Daldridge, South Africa, Indicator Press.
- Hogg, J. E. (1905). The Australian Torrens System. London, W.Clowes.
- Home, R. K. (1993). "Transferring British planning law to the colonies: The Case of the 1938 Trinidad Town and Regional Planning Ordinance." Third World Planning Review **15**(4): 397-410.
- Home, R. K. (1997). Of Planting and Planning: The making of British colonial cities. London, Spon.
- Home, R. K. (2001). 'Eating farmland, growing houses': Peri-urban settlements and customary land tenure in Botswana, Southern Africa. Dialog **69**: 30-35.
- Home, R. K. (2002). "Negotiating security of tenure for peri-urban settlement: Traveller-gypsies and the planning system in the United Kingdom." Habitat International **26**(3): 335-46.
- Home, R. K. and H. Lim, Eds. (2004). Land Titling in Africa and the Caribbean. London, Cavendish Publishing.
- Imparato, E. (2002). Security of Tenure in Sao Paulo. Holding Their Ground. A. Durand-Lasserve and L. Royston. London, Earthscan: 127-137.
- Jacobs, J. M. (1996). Edge of empire: Postcolonialism and the city. London, Routledge.
- Kain, R. J. P. and E. Baigent (1992). The Cadastral Map in the Service of the State: A History of Property Mapping. Chicago:, University of Chicago Press.
- Kedar, S. (1998). "Majority Time, Minority Time: Land, Nationality and the Law of Adverse Possession in Israel." Iunei Mishpat **21**(3): 665-746.
- Kedar, S. (2001). "The legal transformation of ethnic geography: Israeli law and the Palestinian landholder 1948-1967." International Law and Politics Quarterly **33**: 923-1000.
- Kitay, M. G. (1985). Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector. Boston, Lincoln Institute of Land Policy.
- Larsson, G. (1991). Land Registration and Cadastral Systems. New York, Longman.
- Law Commission and HM Land Registry (2001). Land registration for the 21st century: A Conveyancing Revolution. London, Law Com no.271.
- Lichfield, N. (2002). "Land assembly in the urban renaissance." Town & Country Planning: 10-13.
- Manji, A. (2001). "Land reform in the shadow of the state: the implementation of new land laws in Sub-Saharan Africa." Third World Quarterly **22**(3): 327-42.
- Mansell, W., B. Meteyard, et al. (1999). A Critical Introduction to Law. London, Cavendish.
- McAuslan, P. (2000). Only the Name of the Country Changes: The Diaspora of 'European' Land Law in Commonwealth Africa. Evolving land rights, policy and tenure in Africa. C. Toulmin and J. Quan, IIED & NRI.

- McAuslan, P. (2001). "Path Dependency, Law and Development." Journal of Commonwealth Law and Legal Education **1**(1): 51-68.
- McAuslan, P. (2002). Tenure and the law: the legality of illegality and the illegality of legality. Land, Rights and Innovation. G. Payne. London, ITDG Publishing: 23-38.
- McAuslan, P. (2003). Bringing the Law Back In: Essays in Land, Law and Development. Aldershot, Ashgate.
- Miller, W. (1875). A Dictionary of Greek and Roman Antiquities. London, John Murray.
- Mirams, A. E. (1919-20). "Town planning in Bombay under the Bombay Town Planning Act, 1915." Journal of Town Planning Institute **VI**: 43-62.
- Molebatsi, O. C. (1994). Towards Understanding Policy-Practice Disjunction in Urban Planning: The Case of Kanye, Botswana. Town & Country Planning, Newcastle.
- Narayan, D. and P. Petesch (2002). Voices of the Poor: From Many Lands. New York, Published for the World Bank, Oxford University Press.
- Ndengu, M. (2001). Land Reform in Kenya, PhD, School of Surveying, University of East London.
- Ng'ong'ola, C. (1992). "Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of tribal land tenure." Journal of African Law **36**(2): 140-167.
- Nunes, R. (2002). do Usucapiao. Rio, Editora Forense.
- Otto, D. (1999). Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference. Laws of the Postcolonial. P. Fitzpatrick and E. Darian-Smith. Ann Arbor, University of Michigan Press: 145-180.
- Payne, G., Ed. (2002). Land, Rights and Innovation: Improving Tenure Security for the Urban Poor. London, ITDG.
- Platteau, J.-P. (1996). "The evolutionary theory of land rights as applied to Sub-Saharan Africa: A critical assessment." Development and Change **27**(1): 29-85.
- Santos, B. d. S. (2002). Towards a New Legal Common Sense. London, Butterworth.
- Shick, B. C. (1978). Torrens in the United States. Lexington, Mass., Lexington Books.
- Shivji, L. G. (1998). Not Yet Democracy: Reforming Land Tenure in Tanzania. London, IIED.
- Sibley, D. (1995). Geographies of Exclusion: Society and Difference in the West. London, Routledge.
- Siman, B. B. (1990). "Transferring and Legitimising Planning Tools: German Planning and Japanese Land Readjustment in the Late 19th Century." Planning History **12**(1): 21-25.
- Simpson, J. R. (1976). Land Law and Registration. Cambridge.
- Sorensen, A. (2000). "Conflict, Consensus or Consent: Implications of Japanese Land Readjustment Practice for Developing Countries." Habitat International **24**(1): 51-73.

Spivak, G. C. (1994). Can the subaltern speak? Colonial Discourse and Postcolonial Theory. P. Williams and L. Chrisman. New York, Columbia University Press.

Stephenson, M. A. and S. Ratnapala (1993). Mabo: A judicial revolution. Brisbane, University of Queensland Press.

Thom, D. J. (1912). The Canadian Torrens System. Calgary, Burroughs.

Toulmin, C. and J. Quan, Eds. (2000). Evolving land rights, policy and tenure in Africa. London, IIED and NRI.

USAID (2002). Promoting Effective Property Rights Systems for Sustainable Development. Washington,DC, US Agency for International Development.

Van Der Walt, A. J. (1995). "Tradition on trial: a critical analysis of the civil-law tradition in South African property law." South African Journal of Human Rights **11**: 169-206.

Ward, C. (2002). Cotters and Squatters: Housing's Hidden History. Nottingham, Five Leaves Publications.

Ward, S. V. (2000). Re-examining the international diffusion of planning. Urban Planning in a Changing World. R. Freestone, London. **Spon**: 40-60.

Weyrauch, W. O., Ed. (2001). Gypsy Law: Romani Legal Traditions and Culture. London, University of California Press.

Whalan, D. J. (1982). The Torrens system in Australia. Sydney, Law Book Co.

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