

2012

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Repository Citation

Cao, Lan, "Informal Institutions and Property Rights" (2012). *Faculty Publications*. 1427.
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INFORMAL INSTITUTIONS AND PROPERTY RIGHTS

LAN CAO*

In recent years, the call for strong and clear property rights has grown in law and development circles. In the landmark book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*,¹ de Soto put forth the claim that “strong and clear” property rights, formalized rather than informal, are necessary for economic efficiency and for the protection of the poor, who occupy through squatting, for example, property that they do not own. De Soto believes that for capitalism to work in poor countries, as it does in the West, poor countries must establish a system in which individual property rights are protected and formally titled. A formal land title system empowers the poor by assuring them rights to property critical to economic self-sufficiency. De Soto and the Institute for Liberty and Democracy, which he founded, pushed for reforms to modernize Peru’s laws and regulations, transferring land titles to more than a million Peruvian families who had previously subsisted in an informal land system that gave them no rights over property they worked or occupied. “Until you have universal, well-protected, clear, and transferable private property rights, you cannot have a market economy in Peru, in the ghetto, or anywhere else. And you are going to have all the problems those places have,” de Soto remarked.² According to de Soto, unreported, unrecorded economic activity in the informal sector creates a titling void for the poor because they are deprived of access to a formal system that gives them legal ownership of their property. Without legal title, the poor struggle to get credit and engage in economic transactions. Because they lack legal ownership, legal remedies are also beyond their reach should land disputes arise. When the poor are trapped in the informal, extralegal sector, they are excluded from the formal, legal sector and from

* Professor of Law, William & Mary Law School. I thank Prof. Lynda Butler of William and Mary Law School and Vice Dean Weixing Shen of Tsinghua University Law School for inviting me to be a panelist at the 2011 Brigham-Kanner Property Rights Conference.

1. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2003).

2. Frank Pellegrini, *The Modern Hernando de Soto*, METRO CHI. REAL EST. MAG., Dec. 2006, at 43, available at <http://www.prairietitle.com/pdf/TitleTalk/TitleTalk1206.pdf>.

gaining access to the benefits of law and globalization—their assets, adding up to more than \$10 trillion USD worldwide, as estimated by de Soto, languish as dead capital.³

De Soto's efforts have been widely praised. Bill Clinton, for example, called him "The world's greatest living economist."⁴ Secretary General Kofi Annan of the United Nations said, "Hernando is absolutely right, that we need to rethink how we capture economic growth and development."⁵ But de Soto's ideas have also been critiqued by many scholars and activists. His property rights initiative has generated strong backlash from non-governmental organizations and social movements because they believe that his policy prescriptions may be inappropriate for the poorest of the poor. According to these scholars and activists, incorporating the poor conspicuously into the formal economy, without more, will simply enfold them into an onerous tax base that might be counterproductive for those living on the edge.⁶ Others charge that titling creates incentives for individual struggles to get titles and could erode the much-needed solidarity that the poor must forge to progress economically.⁷ Critics also charge that de Soto oversimplifies the informal economy and its property relations. For example, according to these critics, it is unclear how de Soto would want the legal system to be adjusted to accommodate other parallel systems and "the unsettling implications for mainstream property systems, are skirted, not confronted."⁸

De Soto's main point boils down to "converting informal property into private property through systematic titling"⁹ in order to ensure

3. DE SOTO, *supra* note 1, at 301–31.

4. Press Release, U.N.C. at Chapel Hill, Noted Economist de Soto to Discuss Property Rights as Solution to Global Poverty in Oct. 26 Address (Oct. 19, 2004), http://www.unc.edu/news/archives/oct04/fpg_desoto101904.html.

5. Press Release, Secretary-General Kofi Annan, Press Conference at International Labour Organization (Jul. 16, 2001), <http://www.un.org/News/Press/docs/2001/sgsm7892.doc.htm>.

6. Ben Cousins et al., *Will Formalising Property Rights Reduce Poverty in South Africa's 'Second Economy'? Questioning the Mythologies of Hernando de Soto*, PLAAS POL'Y BRIEF, Oct. 2005, at 1, available at <http://www.icarrd.org/en/proposals/Policy2018.pdf>; see also MIKE DAVIS, PLANET OF SLUMS 80 (2006) (arguing that formal titling may help some by incorporating them into the economic system, it is a double edged sword but for tenants who are unable to pay the taxes that follow titling).

7. DAVIS, *supra* note 6, at 80–81.

8. Cousins et al., *supra* note 6, at 2.

9. *Id.*

a system of strong and clear property rights.¹⁰ As observers have noted, de Soto's primary argument is that "clearly defined property rights generate what economists call positive externalities, or benefits shared by everyone."¹¹ This claim, however, has been incisively critiqued by Professor David Kennedy, who argued that "[t]he case for a straightforward link between 'clear and strong' property rights and robust growth or development in today's industrial societies is more ideological assertion than careful history."¹² According to Professor Kennedy, the developed economies of the modern West "have experienced periods of aggressive industrialization and economic growth with a wide range of different property regimes in place."¹³ De Soto's notion of clear and strong property rights rests on the mistaken assumption that "property rights' have an ideal form—capable of being clarified and strengthened—which can be disentangled from the warp and woof of social and economic struggle in a society."¹⁴

This paper will expand on one of the points Professor Kennedy espouses, specifically positioning property rights against a "complex system of forces" that include not just the "legal fabric" but also "the informal world of custom and business practice which transform the meaning of entitlements for different actors."¹⁵ Professor Kennedy stated that

[t]he focus on strong and clear rights . . . obscures the fact that no property law regime is composed solely of rights, however strong or clear. There are always also lots of reciprocal obligations, duties and legal privileges to injure. Property law is a complex system of forces pulling in contradictory directions. As such, it offers myriad opportunities for fine-tuning the relationship

10. De Soto is not the only one who has made this claim, although he has been most identified perhaps with this principle. Scholars in the field of New Institutional Economics have made similar arguments. The World Bank too asserts that secure and well-defined land rights are key to growth and development.

11. Robert J. Samuelson, *The Spirit of Capitalism*, FOREIGN AFF., Jan.–Feb. 2001, at 207, available at <http://www.foreignaffairs.com/articles/56674/robert-j-samuelson/the-spirit-of-capitalism>.

12. David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCT. ECON. & L. 1, 3 (2011), available at <http://www.bepress.com/acl/vol1/iss1/3>.

13. *Id.*

14. *Id.* at 8.

15. *Id.* at 6.

among economic and social interests in pursuit of a development strategy.¹⁶

In other words, an emphasis on strength and clarity “has tended to take the focus off the sorts of social, cultural, institutional and political transformations generally associated with ‘development.’”¹⁷ Indeed, simply making property rights strong and clear does not begin to address a host of thorny issues that implicate distributional considerations or rights and obligations that are associated with a country’s historical or cultural fabric. Thus, the call for strong and clear property rights cannot sidestep allocative determinations, whether those determinations are made as a matter of explicit public policy or implicit cultural norms.¹⁸

Because property is a “bundle of rights”¹⁹ which are themselves embedded in institutional regimes, it is important to place property rights against an institutional framework. In this respect, Douglas North’s observation that institutions are “rules of the game” or “humanly-devised constraints that shape human interaction”²⁰ is especially relevant. For North, constraints include both what are prohibited and what are permitted, providing the “incentive framework” that guides human behavior.²¹ And institutions can be formal or informal,²² consisting of both “formal written rules as well as

16. *Id.* at 4.

17. *Id.* at 29.

18. One reason the “strong and clear property rights” idea continues to seem innocent of any allocative public policy commitment is the lay notion that property rights concern the relationship between an individual and “his property.” Strengthening and clarifying that relationship does not seem to implicate anyone else. It seems merely to empower *him* to participate more effectively in the economy. For a legal professional, however, property is not about the relationship between persons and things. Rather it concerns the relationship between people with respect to a thing.

Id. at 26.

19. James Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711–820 (1996).

20. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

21. Indra de Soysa & Johannes Jütting, *Informal Institutions and Development: Think Local, Act Global?*, OECD DEV. CENTRE & DEV. ASSISTANCE COMMITTEE—NETWORK ON GOVERNANCE 3 (Dec. 11–12, 2006), <http://www.oecd.org/dataoecd/52/16/37790393.pdf>.

22. *Id.* at 2; see also Hans-Joachim Lauth, *Informal Institutions and Democracy*, 7 DEMOCRATIZATION 21 (Winter 2000); Guillermo O’Donnell, *Another Institutionalization: Latin America and Elsewhere* 10 (Kellogg Inst. for Int’l Stud., Working Paper No. 222, 1996),

typically unwritten codes of conduct and regularized behavior that underlie and supplement formal rules.”²³ The former are enforced by formal entities such as courts, judges, police, and other officials, whereas the latter are “largely self-enforcing through mechanisms of obligation, such as in patron-client relationships or clan networks, or simply because following the rules is in the best interests of individuals who may find themselves in a ‘Nash equilibrium’ where everyone is better off from cooperation.”²⁴ Although “all informal institutions (rules governing behavior outside official channels) should not be confused with culture,”²⁵ there is nevertheless “a close association between . . . the ‘constitutive’ and ‘regulatory’ effects of culture and informal institutions.”²⁶ Informal institutions then are reflected in and encompass a cultural regime. Thus, culture is part of the institutional regime that North discusses. In other words, the constitutive dimensions of informal institutions

relate to aspects of culture that shape economic behavior by guiding relative valuation, categorizations and understandings of economic processes and outcomes, which are passed on through the generations of parents, schools, peers. The regulatory effects refer to the way in which the values and beliefs of a society are manifested through social norms and attitudes in ways that regulate behavior: promises must be kept, contracts must be honored.²⁷

As de Soysa and Jütting observed, Nobel Prize winner Elinor Ostrom calls such informal rules “rules in force” to reflect the notion that although they are generally not codified they are deemed legitimate

available at <http://kellogg.nd.edu/publications/workingpapers/WPS/222.pdf>. One way of distinguishing an informal from formal institution is by reference to the state-societal dichotomy. “Formal institution” refers to state bodies such as courts, legislatures and bureaucracies or state-enforced rules such as constitutions, laws, regulations, court decisions. “Informal institution” refers to “civic, religious, kinship, and other ‘societal’ rules and organizations.” Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda* 8 (Kellogg Inst. for Int’l Stud. Working Paper No. 307, 2003), *available at* <http://kellogg.nd.edu/publications/workingpapers/WPS/307.pdf>. However, this approach fails to take into account informal rules within state institutions or official rules within non-state organizations (rules of religious orders or political parties). Helmke & Levitsky, *supra*, at 8.

23. De Soysa & Jütting, *supra* note 21, at 3.

24. De Soysa & Jütting, *supra* note 21, at 3.

25. *Id.* at 2.

26. *Id.*

27. *Id.* (emphasis omitted).

and hence “rules in operation.”²⁸ They are, in other words, “socially sanctioned norms of behavior (attitudes, customs, taboos, conventions, and traditions).”²⁹ By contrast, formal rules and constraints that are part of formal institutions are “constitutions, laws, property rights, charters, bylaws, statute[s] and common law, and regulations.”³⁰

Property rights are embedded in an existing institutional regime, which includes formal institutions as well as informal institutions such as culture. Thus, property rights are themselves a reflection of formal institutions as well as informal institutions. Law and development objectives such as the call for “strong and clear” property rights—without more—seemingly address only one component of the overall framework—formal institutions—while ignoring the other equally important component—informal institutions, such as culture. Rights, including property rights, are embedded in a cultural regime. Certainly property can be an instrumental component for development strategy, but simply asserting that having clear property rights is a baseline sidesteps other important considerations. Such considerations include, for example, who will be entitled to have property rights, what kind of property rights will be protected—even if the rights, however defined, are defined clearly and strongly. In other words, just because a property right is clear doesn’t answer at all the question of who can be a right holder or what kinds of rights will be entitled to legal protection. To understand all these other issues requires understanding the relationship between the formal and informal institutions, between property rights and the background cultural norms that animate those rights.

The purpose of this paper is to examine precisely this relationship. The presence or absence of property rights must be examined against the backdrop of culture. “Property rights are not the be all and end all of progress but a simple reflection of the larger culture.”³¹ As I discuss in the section below, it is important, especially in law and development, to realize that formal institutions such as property rights are affected by informal institutions.³² Law and development

28. De Soysa & Jütting, *supra* note 21, at 3.

29. *Id.* at 3.

30. *Id.* at 5.

31. Samuelson, *supra* note 11, at 211.

32. Since the effectiveness of formal rules, such as penal codes, the rule of law and democratic governance, depend on informal institutions, such as norms and

has historically focused only on formal institutions and thus it should not be any surprise that “not everyone finds strong effects from formal institutions, such as the rule of law to development outcomes.”³³ In other words, law and development as a field has been characterized by failures which scholars and practitioners within the field themselves bemoan and acknowledge. An almost exclusive emphasis on formal institutions, I argue, has resulted in the field’s systematic exclusion of culture from its lens. Yet,

changing formal (macro- and micro-level) institutions that might be compatible with particular structural forms might yet not fit very well with informal institutions given underlying cultural factors that remain resistant to change, factors that have a more proximate bearing on the outcomes we are interested in, such as corruption, education, governance, or questions of gender equality.³⁴

So assuming that law and development efforts wish to establish property rights in order to attract foreign investment, ensuring that they are strong and clear does not address the important question of the cultural framework in which the newly established property rights are to operate. One needs to turn to background cultural norms to more fully examine the issue. Thus, “the question of institutions and development may depend greatly on how informal institutions moderate formal ones as they affect outcomes.”³⁵ It is important to understand whether or not property rights introduced by law and development projects are in sync with local culture or not. This issue would seem to be as important as whether or not these rights are “strong and clear.” More discussion on this issue will follow in the section below.

attitudes and existing levels of social capital, or the patterns of interaction that individuals assume in any shared activity, understanding where informal institutions come from and how they change is crucial to understanding how the interaction between formal and informal institutions can be harnessed to effect desirable policy goals.

De Soysa & Jütting, *supra* note 21, at 5.

33. *Id.*

34. *Id.*

35. *Id.* at 5.

I. FORMAL INSTITUTIONS AND INFORMAL INSTITUTIONS:
PROPERTY AND CULTURE

The development of a law of property is certainly important for a law and development agenda. But “[b]efore ‘property rights’ can be strong or weak, they must be allocated.”³⁶ And how they are allocated by law in the formal rule of law regime will depend on political considerations and informal institutions such as culture.³⁷ Property rights “are embedded in a larger complex of legal rules, institutions and procedures which alter the meaning of entitlements, and in a dense fabric of social expectations and informal arrangements which affect the meaning and usefulness of entitlements.”³⁸ The question that law and development is preoccupied with—introducing property rights—is itself dependent on how informal institutions modify formal ones.³⁹

Numerous studies have reinforced what Douglass North termed “rules of the game” and the extent to which behavioral guides could be found in informal constraints. These studies generated calls, from scholars such as Guillermo O’Donnell, for greater attention to informal institutions and to “the actual rules that are being followed.”⁴⁰ The phrase “informal institutions” has had varied uses.⁴¹ There is disagreement as to whether informal institutions should be distinguished from culture.⁴² But for the purpose of this paper, I adopt a broad understanding of the phrase so that it can purposefully encompass culture. Informal institutions can be understood as a set of informal, socially shared rules and norms that structure social

36. Kennedy, *supra* note 12, at 10.

37. *Id.*

38. *Id.*

39. North observed that actors respond to a mix of “formal and informal constraints.” NORTH, *supra* note 20, at 67.

40. O’Donnell, *supra* note 22, at 10 n.2. For example, an emerging body of research suggests that informal rules do in fact influence formal institutional outcomes in a variety of settings. In some African and Latin American countries, patrimonialist norms of unregulated executive control over state institutions have resulted in executive power assertions over legislative and judicial branches in ways unanticipated by the constitution. Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55 (Jan. 1994).

41. The phrase “informal institution” may refer to aspects of traditional culture, personal networks, clientelism, corruption, clan and mafia organizations, civil society, and a wide variety of norms. Helmke & Levitsky, *supra* note 22, at 7–8.

42. *Id.* at 10.

interaction by shaping and constraining actors' behavior.⁴³ Indeed, in the context of developing countries especially, where the rule of law is weak and informal rules may be relatively strong,⁴⁴ it is important to understand how culture affects, modifies or tempers the establishment of rights, such as property rights. This is especially important because once established and allocated, "it is not always easy to remake entitlement regimes. The existence of settled expectations about the meaning and significance of legal entitlements can also slow both economic and political change. . . . [T]hose with entitlements from round one will often be able to exercise political, economic or legal influence in round two, making it more difficult to begin again."⁴⁵ Professor Kennedy was referring more specifically to those "[l]arge economic actors in every economy [who] seek to use their entitlements to consolidate their political and economic position."⁴⁶ But the same can be said of actors who rely on and leverage existing informal institutions—cultural norms, for example—to resist reallocations of resources through the recognition of new property rights or the reconfiguration of entitlements.

In many cases, it is undoubtedly true that cultural norms such as clan or ethnic solidarity or community-based trust facilitate economic transactions by solving various coordination problems and thus reduce transaction costs.⁴⁷ But certain cultural norms can also have a negative impact. Many "studies highlight phenomena—such as clientelism, corruption, patrimonialism, and clan politics—that undermine the performance of markets, states, democratic regimes,

43. NORTH, *supra* note 20, at 3–4 n.9.

44. De Soysa & Jütting, *supra* note 21, at 8 ("People in both rich and poor countries rely on informal institutions to varying degrees to facilitate transactions, but these institutions are relatively more important in poor countries and small, traditional communities where formal institutions are less developed and the reach of formal law and state power relatively weak.").

45. Kennedy, *supra* note 12, at 11–12.

46. *Id.*

What is clear is that the arrangement of entitlements is not only the result of political and social struggle, it also provides the stakes and instruments for that struggle. The allocation of entitlements in each round establishes actors with interests and procedures from their pursuit which have an impact on the evolution of the society in successive rounds of political and economic development. As a result, a regime of entitlements helps structure the next round of social struggle.

Id.

47. Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POLITICAL SCI. REV. 1095 (1986); Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale*, 44 WM & MARY L. REV. 1521 (2003); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999).

and other formal institutions,”⁴⁸ the very institutions that law and development work to establish.

Take the example of family law. Assume that private property rights that meet the criteria called for—“strong and clear”—are established in a given society. Whether the formal institution of such property rights grants entitlements to the family, to the head of the household, or to women and men, it is highly likely that this formal arrangement will be heavily affected by the cultural framework of that society.⁴⁹ This cultural framework transcends the standard paradigm that has conventionally presented the issue as a “choice between private property rights and state control, . . . [or] a choice between public and private ownership”⁵⁰ and rather, reflects “a dense network of entitlements reflecting specific social histories of allocative struggle.”⁵¹

There will be, in other words, the pull and tug, between formal and informal institutions. Cultural norms may interact with formal institutions in four ways—complementary, accommodating, competing and substituting.⁵² In some instances, cultural norms may coexist with and are complementary to or accommodate effective formal institutions.⁵³ Or they may converge with or operate in lieu of state law.⁵⁴ But often, in developing countries where law and development projects operate, competing cultural norms create incentives and exert pressure on actors in ways that may be incompatible with the objectives of law and development. For example, civil servants in Ghana’s public administration believe they would lose their social standing in the community if they adhered to administrative rules rather than kinship norms that obligated them to provide jobs to family and clan members.⁵⁵ In the past, the introduction of

48. Helmke & Levitsky, *supra* note 22, at 11.

49. For example, when implementing land reform, “ought title to be given to the ‘head of the household,’ to ‘the family,’ to the ‘matriarch,’ or to the community in common?” Kennedy, *supra* note 12, at 47.

50. *Id.* at 16.

51. *Id.*

52. Helmke & Levitsky, *supra* note 22, at 12.

53. *Id.* at 12–13.

54. For examples, see *id.* at 14–16 (“[C]omplementary and accommodating informal institutions exist in stable institutional settings, which are generally found in advanced industrialized countries . . . and substitutive and competing informal institutions exist in context of formal institutional weakness and instability, which are more likely found in developing and post-communist countries.”).

55. See, e.g., *id.* at 12–13.

European legal systems to the colonies created “multiple systems of legal obligation.”⁵⁶ Because local and European systems each “embodied different principles and procedures,”⁵⁷ adherence to one often meant violating the other. Thus, it is not sufficient to issue a single-bullet prescription without fully understanding how a prescription to alter formal institutions will affect or be affected by existing informal institutions.

The increasingly loud call in law and development for clear and strong property rights, through formal titling programs, for example, has had mixed results in Cape Town, South Africa. Clear and strong property rights were instituted for households occupying vacant land owned by a parastatal company in the manner exhorted by de Soto. A housing project was implemented and individual ownership was granted. Title was registered in the name of only one member of each household, resulting, not surprisingly, not only in “a decrease in security of tenure,” but also “reduced security for women and members of the extended family.”⁵⁸

Similar examples abound. In the Ekuthuleni region in South Africa, residents of a rural community consisting of 224 households, mostly headed by elderly women, live on state-registered land. These residents, many of whom receive welfare, wish to formally acquire title to the land and hold it in collective ownership primarily for two reasons. The first is because the group wishes to retain “group control . . . to prevent strangers from coming in and causing conflicts,” and the second is because members “cannot afford the costs of maintaining individual title.”⁵⁹ However, a system that focuses only on establishing strong and clear property rights misses the fact that informal institutions such as cultural norms may in fact compete with formal property norms. The property rights system, for example, requires that certain conditions must be met before rights over property can be registered: “an individual rights holder must be identified; the exclusive rights of this rights holder must be precisely described; and the boundaries of land parcels must be accurately depicted through beaconing and geo-referencing.”⁶⁰ But in

56. *Id.* at 14.

57. *Id.*

58. Cousins et al., *supra* note 6, at 3.

59. *Id.*

60. *Id.*

this particular region, property ownership is rarely exclusively individual and is often shared by family members.

This is a concept that is clearly in competition with South African property law. Even a family trust does not fully capture the cultural dynamics that animate the informal norms of the region. “There are many nuanced layers of rights in Ekuthuleni (of access, use, transactions and decision-making) and it would be extremely difficult to precisely describe these in title deeds.”⁶¹ Indeed, it may very well be that formal titling and strong and clear property rights do not benefit the poorest of the poor.⁶² Informality means flexibility and flexibility may benefit the most vulnerable⁶³ because, for example, boundaries are ever adaptable to reflect social needs or household emergencies. Informality and flexibility may be important, as transactions involving land and housing in the informal sector in Cape Town are socially embedded and social relations are an important component of land tenure,⁶⁴ reflecting the layered and relative nature of rights and duties. Thus, there may be a “fundamental incompatibility between property rights in community-based systems and the requirements of formal property. Formalization of property rights is therefore not neutral with respect to existing rights; it does and will transform and alter both the nature of the rights and the social relations and identities that underlie them.”⁶⁵ Studies concerning land use in rural South Africa show that “rights to land and natural resources

61. *Id.*

62. Some have suggested that clear and strong property rights through formalization does not necessarily yield the benefits claimed. For example, it has not been the case in rural South Africa that formal property rights promote lending to the poor. Banks still do not lend to the poor because of the high risk of default, the low value of their assets and the high transaction costs. Indeed, “formalization could expose the poor to the risk of homelessness: If banks could be persuaded to lend to the poor with their assets as collateral, foreclosure of loans would result in repossession.” *Id.* at 4. The poor who need to borrow may do so instead from micro-finance institutions or other informal sources.

63. In many instances, homeowners were “not interested in a formal sale because their incomes were too low to move up the housing ladder, and most viewed their homes as a family asset rather than as ‘capital.’” *Id.* Moreover, a study of township property showed that there was a weak secondary market for houses. Hence, emphasizing title deeds here is inappropriate, given the “real constraints of affordability and the limited availability of housing stock.” *Id.*

64. “Property systems are embedded in many institutional arrangements, not only in registers. Registers are thus only one component of the formal system, and it is the system *as a whole* that makes property ‘visible’, manageable and exchangeable in the eyes of public and private investors and service providers.” *Id.* at 3.

65. *Id.*

are socially and culturally embedded, and nested within social and political units operating at different scales.”

The South Africa example suggests that formalization and low-cost mechanisms for titling may be appropriate, from a law and development perspective “only for those already on the way out of poverty.”⁶⁶ In addition, clear and strong property rights may not be appropriate because cultural norms embedded in pre-existing informal institutions are not complementary to formalization. Some have suggested in response that the formal system should be more cognizant and supportive of the informal sector and its cultural norms, which “have widespread legitimacy” rather than replace the latter with the former.⁶⁷ Approaches based on Western property regimes ignore this cultural context and “can lead to distortions that impact negatively on the poor”⁶⁸ “The entire legal and social complex around which notions of formal and informal property are constituted needs to be interrogated.”⁶⁹

In other circumstances and contexts, however, it may be the case that after examining the informal property system and the cultural institutions that support it, law and development may indeed conclude that the norms of the informal system are at odds with the legitimate objectives of the law and development project and should instead be challenged. What are the objectives of law and development, one would then ask. Development viewed exclusively in terms of economic growth is passé and in recent years, development has been viewed more broadly. American governmental officials at the top echelon, such as Secretary of State Hillary Clinton, increasingly understand that “development, democracy, and human rights can and must be mutually reinforcing.”⁷⁰ Indeed it is now generally accepted in many circles that there is a positive linkage between development and human rights⁷¹ and that development should be

66. *Id.* at 5.

67. *Id.*

68. *Id.*

69. *Id.*

70. Hillary Rodham Clinton, Sec’y of State, Remarks to the Center for Global Development, Washington D.C. (Jan. 6, 2010), *available at* <http://www.state.gov/secretary/rm/2010/01/134838.htm>. (“So those who care about making human rights a reality know that development is an integral part of that agenda.”).

71. Ana Palacio, *The Way Forward: Human Rights and the World Bank*, in WORLD BANK DEVELOPMENT OUTREACH 35 (Oct. 2006), <http://web.worldbank.org/WBSITE/EXTERNAL>

understood within a broader framework of political and social institutions that promote basic rights.⁷² This broad view of development has been endorsed by scholars as well. Amartya Sen, the noted Nobel laureate in economics, has argued eloquently in favor of a holistic vision for development.⁷³ For Sen, development means freedom and maximizing well-being, taken broadly to mean maximizing capabilities—to participate freely in the political process, to satisfy hunger, to have access to social networks and connections, reliable information sources and structures.⁷⁴ The anthropologist Arjun Appadurai calls

/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html. Indeed, more and more, it is understood that development is intertwined with broader objectives such as human rights promotion. “The world now accepts that sustainable development is impossible without human rights. What has been missing is the recognition that the advancement of an interconnected set of human rights is impossible *without development*.” INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (IBRD), DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK 2 (1998), available at http://www.fao.org/righttofood/KC/downloads/vl/docs/HR%20and%20development_the%20role%20of%20the%20WB.pdf. See also Gernot Brodnig, *The World Bank and Human Rights: Mission Impossible?* 9 (Carr Ctr. for Human Rights Policy, Working Paper T-01-05), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf> (arguing in favor of integrating human rights objectives with the objectives of the World Bank because “development represents a bundle of interlocking concepts of very broad environmental, socioeconomic, legal and institutional implications, including the protection and promotion of human rights.”). Research has also shown that countries with substantial political and civil rights violations are also characterized by lower levels of economic growth. ROBERT BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY (1997); Robert Barro, *Economic Growth in a Cross Section of Countries*, 106 Q. J. ECON. 407. Studies have also shown a strong empirical link between civil liberties and performance of government projects. Jonathan Isham et al., *Civil Liberties, Democracy and the Performance of Government Projects*, 11 WORLD BANK ECON. REV. 219 (1997).

72. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) [hereinafter SEN, DEVELOPMENT AS FREEDOM].

73. *Id.* See also AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (1992).

74. To quote Sen directly, there are five distinct types of freedom:

These include (1) *political freedoms*, (2) *economic facilities*, (3) *social opportunities*, (4) *transparency guarantees* and (5) *protective security*. Each of these distinct types of rights and opportunities helps to advance the general capability of a person. They may also serve to complement each other. Public policy to foster human capabilities and substantive freedoms in general can work through the promotion of these distinct but interrelated instrumental freedoms In the view of “development as freedom,” the instrumental freedoms link with each other and with the ends of enhancement of human freedom in general.

While development analysis must, on the one hand, be concerned with objectives and aims that make these instrumental freedoms consequentially important, it must also take note of the empirical linkages that tie the distinct types of freedom together, strengthening their joint importance.

SEN, DEVELOPMENT AS FREEDOM, *supra* note 72, at 10.

this capacity “voice.” For Appadurai, alleviating poverty means working to strengthen the capacity of the poor to exercise their voice,⁷⁵ not only because this capacity is tied to democratic principles of inclusion and participation but also because “[i]t is the only way in which the poor might find locally plausible ways to alter . . . the terms of recognition in any particular cultural regime.”⁷⁶

Thus, a cultural regime that subverts the legitimate property rights of the poor or the marginalized in any given community must be examined and evaluated. Notably, efforts to reform inheritance and land rights concerning women in sub-Saharan Africa have been subverted by informal institutions and traditional cultural norms that have the effect of systematically constricting the rights and voice of African women. For many in sub-Saharan Africa, issues such as marriage, divorce, burial, and inheritance rights continue to be governed by customary law.⁷⁷ As noted, “[a]lthough conceptually distinct from culture, customary law is a legal expression of cultural norms and values.”⁷⁸ Many African states have retained a legal structure wherein the customary law of inheritance, which generally excludes women as potential heirs, and statutory law operate simultaneously.⁷⁹ Driven by traditional notions of culture and gender relationships, customary law has excluded women from property ownership and inheritance.⁸⁰ A woman’s relationship to land has traditionally been defined through her relationship to her father or

75. See also Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in CULTURE AND PUBLIC ACTION 63, 66 (Vijayendra Rao & Michael Walton eds., 2004). Using Hirschman’s framework laid out in his groundbreaking book, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970), Appadurai argued that it is especially important in law and development to focus on increasing the capacity of the poor to have their voice heard. Exit is not an option for the world’s poor and loyalty is not clear-cut, leaving voice as the only viable and potentially powerful tool to alleviate poverty.

76. Appadurai, *supra* note 75, at 63, 66.

77. Johanna Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 425, 430 (2010).

78. *Id.* at 430; Thandabantu Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously*, 13 THIRD WORLD LEGAL STUD. 49, 53 (1994) (“Sometimes termed customary law, indigenous law is the system of norms which governs the lives of millions of African people, particularly (but not exclusively) in the rural areas.”).

79. Bond, *supra* note 77, at 430, 434.

80. Abby Morrow Richardson, *Women’s Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, 11 HUM. RTS. BR. 19, 19 (2004).

husband.⁸¹ While married, a woman gains access to use of the land, however, following the death of a husband, the woman no longer holds any rights in the land.⁸² The practice of “property-grabbing” has recently developed, wherein following the death of a father or husband, family members and elites repossess the male’s property often leaving widows and orphans homeless and destitute.⁸³

Where statute has been at odds with customary law, the latter has generally prevailed when the underlying issue involves gender relations. The Supreme Court of Zimbabwe, for example, refused to interfere with tribal customary law when the tribe of the deceased man refused to appoint his eldest daughter as heir to the estate because the man is also survived by a son. The Court rejected the daughter’s allegation that tribal law constituted a prima facie violation of the Zimbabwean Constitution’s guarantee of equality for women, holding instead that the Constitution exempts customary law.⁸⁴

In these instances, it would be appropriate for law and development to call for the enforcement of property rights for women even if such enforcement conflicts with existing cultural norms. Clear and strong property rights that are available to men should be equally available to women. However, for these rights to be meaningful on the ground and not just on the books, culture might need to be engaged more robustly and even challenged. Therefore, the case for strong and clear property rights cannot occur only at the statutory level. Given “the persistence of traditions and cultural norms that give preference to men,”⁸⁵ and that seek to preserve “religion and culture as spheres of despotism,”⁸⁶ experts in this area have suggested “‘massive awareness campaigns’ at both the national and local levels.”⁸⁷ Yet, unless cultural norms are confronted and altered, through deliberate education campaigns⁸⁸ “[t]hese statutory changes generally have no practical effect on the great majority of the population.”⁸⁹

81. *Id.*

82. *Id.*

83. *Id.*

84. Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1431 (2003).

85. Valerie A. Dormady, *Status of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1998*, 33 INT’L LAW. 637, 641 (Summer 1999).

86. Sunder, *supra* note 84, at 1434.

87. Dormady, *supra* note 85, at 640.

88. Richardson, *supra* note 80, at 22.

89. *Id.* at 19.

CONCLUSION

Strong and clear property rights have always been an objective of law and development but the call for such rights has markedly increased with the popularity of de Soto's titling program and the publication of *Mystery of Capital*. I have argued in this paper that clear and strong property rights can only be part of a complex development picture because clarity and strength obscure and sidestep certain other considerations—specifically how formal as well as informal institutions influence or modify a property rights regime. Moreover, I have argued in support of greater scholarly attention to informal institutional norms, such as culture, especially for a discipline such as law and development for several reasons. This is because law and development has been marred by failures and disillusionment. Indeed, for years scholars and practitioners in the field have bemoaned its decline and flaws.⁹⁰ It is time to shake up the field and adopt a different approach towards achieving development objectives by going beyond the call for the establishment of clear and formal rights. Indeed, precisely because law and development has had an almost exclusive focus on formal institutions, it is all the more important that the latter approach be supplemented by a systematic examination of informal institutions and their impact on formal rights.

90. John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993); David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).