



RESEARCH PAPER

**Sanctity of Property Rights and Title Enforcement: Philosophy
versus Realty perspective on Pakistan**

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ABSTRACT

This paper intends to analyze De Soto's idea of the mystery of capital in the context of Pakistan. History witnesses the fact that nations that respect property rights, "fought for property rights" thrived with economic growth, inclusive institutions and democratic regimes, juxtaposed to the nations where property rights were dealt prodigally. But the question arises why developing countries could not catch up developed nations even they are getting so much influential advice from DCs and fore founders of developed nations were very much clear about the importance of property system in the development process. Pakistan has a quite intricate structure of laws and regulations; however, the implementation of title enforcement and property rights is very poor. We recommend that the ambiguity in the property laws should be clarified as the first step towards secure property rights. We also recommend that loopholes in the enforcement and implementation of existing laws should be addressed with a strong political will

Introduction

"Given political stability and solidarity (asabiyah), for the rise of the nations, there must be: A firm of the establishment of private property rights and freedom of enterprise"

(Ibn Khaldun, Moqaddimah)

History witnesses the fact that nations that respect property rights, "fought for property rights" thrived with economic growth, inclusive institutions and democratic regimes, juxtaposed to the nations where property rights were dealt prodigally. Such nations destined to have extractive institutions, expropriation, economic deterioration, and absolutist/authoritative regimes. The world of the

millennium is volatile where economies are mercurial; this very fact has magnified the importance of property rights all the more. In today's globalized world tangible assets should be convertible and exchangeable at every instant of time and any hindrance in the sanctity, protection, and enforcement of property rights will impede growth.

De Soto's Mystery of Capital

It is the same argument Hernando de Soto (one of the most prominent modern ideologues addressing the issue of PRs) proposed in his book "Mystery of Capital" where he attributed property ownership system as major rationale "why capitalism triumphs in the West and fails everywhere else," he writes in his book;

"Property rights are just the tip of the iceberg, important is the other and biggest part of the iceberg, namely the whole of processes to convert possession (and labor) into capital (p.8)."

De Soto's case is based on three key arguments: first, for investment in housing and improvements in business people need secure legal tenure status. Secondly, access to credit and secure tenure status need the legalization of informal settlements and businesses, and third universal title ownership and enforceable rights are a way forward for the third world to prosper. De Soto urged that formal PRs are not a mere assignment of titles, records, or mapping. They are a mechanism to bring the poor into a social contract where their incorporation in the system can raise total productivity. He accentuated that titling alone (without relation with maps or registers) will not be sustainable over time. Hence titling must be tied to the whole system of the country so that it can further be used as collateral in the financial system and can be converted into live capital.

The mystery of Capital in Developing World

De Soto emphasized that poor in developing countries have assets but their possession of resources is in a defective form which makes their assets dead capital incapable of representing their property for capital generation.

"Every developing and transition country has some form of formal property system, however: a majority of the citizens don't have access to it. The law protects the elites under the 'bell jar'" (p. 156).

Lack of entitlements hinders the creation of surplus value from assets. About US \$ 9.3 trillion of dead capital in developing countries was found to be present by De Soto. Markets in DCs are representations of property rights where only papers are flowing back and forth on the other hand developing countries still trade in goods. Informal or extra-legal titling is very common in developing world and to legalize business or property is a striving task as de Soto observed that in Peru, to get a title to land involve 207 bureaucratic steps and a period of

approximately 21 years and 289 days to get legal authorization of a little sewing factory. In Egypt time to get authorization to build a house can take 17 years and run a legal bakery takes 548 days and for the same 24 to 50 years in Filipino. All this paper process to legalize creates hurdles in establishing private enterprises especially for poor. De Soto in an interview during his trip to the US said that developing economies also do have PR but they are not legal. After the legalization of titles, you get enormous data about ownership of assets. He said that only shortcuts to prosperity are a legal PR system otherwise it could take 300, 500 years to prosper.

Why Developing World is not Catching Up?

But the question arises why developing countries couldn't catch up developed nations even they are getting so much influential advice from DCs and fore founders of developed nations were very much clear about the importance of property system in the development process. Just have look at the thought process of the Founding Generation of the American nation; it pays tremendous concerns over property rights in the declaration of independence (the most celebrated draft in the constitutional history of the world after Magna Carta that advocates civil liberties). The crowning glory of the draft is civil liberty and property rights.

As In *The Farmer Refuted* (1775), Hamilton stated clearly that PRs are "sacred rights of mankind." He insisted that "the established rules of morality and justice apply to nations as well as to individuals; that the former, as well as the latter, are bound to keep their promises, to fulfill their engagements, to respect the rights of property which others have acquired under contracts with them." This very principle lays the basis for "all distinct ideas of right or wrong, justice or injustice concerning society and government." And without PRs there could "be no such thing as rights" and "no such thing as property or liberty." Without it, "[a]ll the boasted advantages of a constitution of Government" would "vanish in the air," and everything would "float on the variable and vague opinions of the governing party of whomsoever composed." He postulated that a just government is bound to observe natural rights doctrine specifically PR and sanctity of contracts. Along with others from the founding generation, he also held the government responsible for securing PRs and if the government fails to maintain PRs security it was a major failure.

Despite such clear and sophisticated history of PRs ideology developing countries have not been able to follow the path of institutional reforms. Williamson's Washington Consensus was the most outstanding growth paradigm of 1980 and 1990 which failed due to the very fact of ignoring the institutional structure of the developing countries. It was a ten-point agenda followed by the Washington-based Bretton Woods Institutions and the Treasury Department in the 1980s. The focus of the agenda was to ensure growth, maintain and control inflation, ensure income equality, and adjusting the balance of payment problem.

These reforms were followed enthusiastically by many economies but failed to bring the desired change. After large scale failure of first-generation reforms; second-generation reforms were introduced with a major focus on governance issues but again ended up creating no positive differences. Professor Dani Rodrik and a recent WB report "(The-World-Bank, 2005) - Economic Growth in the 1990s: Learning from a Decade of Reform"- criticized Washington Consensus heavily calling them overambitious for trying to achieve a whole host of MDGs. Chief criticism on Washington's consensus was to ignore the importance of reforming institutions which are a key determinant of long-run development. Although second-generation reforms tried to incorporate institutional reforms but applying similar institutional blueprints was their primary mistake. On explaining a new strategy for growth Rodrik emphasized the presence of a broad array of institutional functions to acquire long-run development.

De Soto comes up with an almost similar explanation for foreign policy failure in this regard again making his point of the sanctity of PR a key point of concern. De Soto takes the stand that foreign policy is mistaken in the sense that it failed to realize where the challenges are. According to him, the developed world has just started to realize the real issues. A general misconception on part of developed countries' policy advice is to mix culture with prosperity. He argued that the US needs to realize that they too were a poor country with the same culture years back and now have grown as Spain was once. Moreover, it is also propagated that the poor don't want to globalize but they do that's why they are constantly migrating towards DCs. Point is that they are not allowed to enter and globalize due to the legal infrastructure of their economies. Instead of looking into differences, similarities need to be addressed in third world economies. What all of the poor worlds have in common are weak legal apparatus and underdeveloped PRs system and this is the key instrument to keep DCs ahead of the third world. He emphasized that talking about machines and technology is easy to convey as a cause for prosperity but to convince people about invisible things like laws and institutions which is very hazy stuff is a sturdy job. He pointed out macro policies and macro perspective overemphasis in the wrong direction, all of the policies like education, health, infrastructure, liberalization everything has been tried but failed. The only thing which has not been given a chance so far is property rights which must be tried to change the fate of the masses in the third world.

Development is a foreign policy issue in the US simply because they are already developed. Only a minority of People with investment in MNCs are interested in development debate with whom we have to deal with. As the first world has the privilege of having greater resource control and a greater impact on policy matters, the developing world needs to pay attention to what is happening in DCs. He said, "So when the First World blinks, the rest of us blink as well, and even harder". He said that issues are local, we should not be depressed about the careless attitude of the west towards us.

Property Rights Situational Analysis of Pakistan

Pakistan is endowed with a diverse landscape from vast irrigated Indus valley to deserts, from mountains to green fertile pastures, and from rivers to the sea, Pakistan is rich in natural beauty and resources. A diverse set of productive opportunities are also available to the residents of a highly populated country. Rural productivity critically depends upon the combined access to land and water resources. The densely-settled Indus Basin Irrigation System (IBIS) is crucial for the agriculture of the country and for the export potential of the country to be realized fully. 47 % of the land area of IBIS is situated in Pakistan and rest is shared by India, China, and Afghanistan. The population of the country is dispersed both in the arid and non-arid mountainous areas. We observe a very high concentration of land rights in the irrigated areas of Pakistan with almost 50% of the households residing in the rural areas to be either landless or near-landless. The political and social instability of the country is highly dependent upon the high poverty ratio that is triggered by the landlessness of the households. Insecure land tenure, coupled with poor water policy and management, has led to increasing degradation of land. Enactment of a comprehensive legal framework for establishing more equitable access to the property and more transparent land administration could, many analysts believe, contribute to both political and economic development objectives (USAID Country Profile, 2018).

Being a struggling developing economy; the situation in Pakistan is no different from what is happening in the third world. Illegal possessions and injustice with legal owners of lands, property, and plots are a familiar phenomenon. Misappropriation of legal titling in property dealing offices, Disputes over title-to or forcible dispossession of immovable property are a repeated story of every day. Different Qabza-groups, grabbers, or land mafia forcibly take possession of properties entitled to others by force. Instances of legal owners wasting time and money to seek justice are numerous. Getting justice is next to impossible and if someone is lucky enough to come up with favorable court orders, chances of implementation of court orders are very bleak because the forces and institutions(police) commanding implementation are notorious to usurp their rights as a common practice. Hence expecting enforcement of legal orders is just a dream which hardly comes true.

Real estate business profitability and shortage of houses have added up to the momentum of property scams and frauds where imposters exploit needy people and grab huge amounts of money in the name of builders and real estate investors. Disputes over property depreciate its value for real owners but appreciate for Qabza mafias and grabbers. Because influential groups or individuals purchase disputed property at low prices and sell at higher rates after getting its Qabza from encroachers. The entire administrative infrastructure including courts, police, and district offices are involved in corruption where rightful owners are deprived of their property. Investing in real estate in Pakistan

has become the riskiest one because of the fear prevailing in society due to frequent scams and frauds in this business. The cases of payment for houses never built, people running away with money, bogus companies all are recurrent features of the real estate business of Pakistani society.

Property disputes may take many forms: for example, Land and owner dispute: some time land grabbers illegally occupy other's property and legal owners are unable to vacate their property from encroachers. Homeowner and tenant dispute where renting out a property becomes trouble. Tenant refuses to vacate the valuable property and the owner is left with no option other than filing a case for eviction of tenant leading to consuming a substantial period for legal judgment and approval. Same is in case of Shop owner and tenant dispute; tenant refuses to increase rent and to vacate the shop.

Another familiar type of dispute is Family dispute: where on family member living and using inherited property denies other legal heirs who are away to get the benefit of the ancestral property. Selling a property to multiple hands is another very common fraud. Officials at different development authorities are no less than any magician, they can buy you any plot you want, can sell the same plot to several persons at one point of time: of course, money is what matters only. You can know about the real owners only when you have enough money to bribe the officials. Overseas Pakistanis are another vulnerable group with heavy investments in real estate. They face tremendous trouble in getting their property vacated from unauthorized occupiers including relatives, grabbers, and Qabza-mafias. Illegal Dispossession Act was promulgated in 2005 to restrain these encroachment activities against lawful owners of immovable properties. The law gave provision of filing a case in the court of sessions for the speedy remedy of grievances against grabbers and Qabza mafias.

Politicians, ministers, industrialists, and big businessmen are the real beneficiaries of this diluted state of the title security situation. The most destructive tool at their hand is the power to redirect policy in their favor with which they are confident to invest heavily and flew away after looting money. We see much such big fish around us and the misery is they are even ruling us with the power and money grabbed from us.

On intellectual PRs De Soto says "You can hum a tune in the United States, a little jingle for the radio, and you can create a property right on it in such a way that every time it's played on the radio or played on TV you get a remuneration against it. But the reason you get remuneration against it is that there's a property right that can be enforced. In Latin America when we hum a nice little song, there's no property right on that song and anybody can go down the street whistling it and not paying you for it." In Pakistan area of Intellectual property rights suffers the same melancholy. Common types of IP rights include patents, copyrights, industrial design rights, trademarks, trade dress, and in some jurisdictions trade secrets. The obliviousness of our society towards this aspect puts serious questions

on our intellectual backwardness. Not only at an individual level, but a violation of IPR is also very common where pirated software is used on a large scale without any hesitation by large business and public organizations. There seems to be no respect or enforceability of IPRs in our society and they are violated heavily. We see Pakistani markets flooded with look-alike products and consumers are cheated by illegal copyright logos. Multinational companies and Consumer Protection Council of Helpline Trust are working to create awareness in this regard but efforts so far have been missing the target. Not only consumers are cheated but foreign investment is also severely discouraged by flagrant IPR violations.

Although laws on property rights in Pakistan are very well-phrased, intricate, and flowery but hidden in these convoluted laws are the numerous loopholes and catches that lead the whole system back to square one. For example, The Constitution of Pakistan (Article 23), gives its citizens "the right to acquire, hold and dispose of the property in any part of Pakistan and it does not differentiate between men and women". The next article (24), states "the protection of property rights and clarifies that no person shall be compulsorily deprived of his property save per law". We also find detailed laws on women's property rights like "Dissolution of Muslim Marriages Act, 1939", "Married Women's Property Act, 1874", "Muslim Family Laws Ordinance, 1961" and "Muslim Personal Law Shariat Application Act, 1962". But when it comes to practice we stand nowhere in terms of enforcement of these flamboyant laws.

But as De Soto pointed out that it's not having titles and laws which matter it's the enforcement of laws and hidden conversion process of dead capital into live capital that matters. And this is the area where we fail in a major way. We do have a formal property system and a very sophisticated legal apparatus; people from every corner of the country have entitlements to their properties but the litigation process is either very slow or is defective. For example, for the past decade, almost 18000 cases of consumer banking are pending among which housing has a substantial portion due to sluggish litigation process¹. In India, Pakistan, and Bangladesh, the only urban property is accepted as collateral and rural property paper are not considered credible, only HBL (Habib Bank Limited) accepted rural property papers but then discontinued the practice due to the non-credibility of the documentary proofs. The banking sector of Pakistan is run on a monopolistic competition basis and is one of the thriving businesses; it has the highest spread and stands with the top five countries of the world in this aspect. Bank of Barclays and bank of Scotland started their business in Pakistan because of high spread as per their statements. It is still progressive but its potential is immensely undermined due to lack of credible collateral to secure credit. Pakistan's rural land is more than 60% of the total land but it fails to be used as collateral even having all documentary proofs hence making it dead capital in De Soto's terms.

In addition to day to day observation of PRs violations in Pakistan, we also have scientific evidence on the precarious status of legal and institutional infrastructure. IPRI(International property right index) is a sub-component of the Index of Economic Freedom. The index measures the extent to which PRs are protected by country laws and their enforcement by the government. The index ranks countries on a scale from scores 0 to 100. Higher scores point towards a good condition of PRs in the country. Expropriation of private property rights, independence, and corruption by the judiciary and contract enforcement ability of individuals is also assessed by the index. The Global Property Guide puts significant weight on PRs security to determine residential investment desirability. International Property Rights Index (IPRI) was developed under the supervision of De Soto. He on explaining its score importance proved that PRs and Economic development of countries are strongly associated.

The score of Pakistan in the PR index is 30 showing the abysmal state of PRs. The situation looks very precarious if we analyze index rank in comparative terms. We are placed with far backward economies of Nepal, Philippines, Mongolia, Cambodia, Kazakhstan, and Armenia on this index. Scrutinizing geographically our neighbor and age fellow India is far superior by securing a rank of 50. Even economies of Bhutan and Georgia are performing better than us. Index score puts a question on the sanctity of PRs and the consequent dismal development performance of Pakistan. Given Pakistan's history, however, the preparation and administration of an effective framework would require substantial and sustained leadership on the part of both federal and provincial governments. Achieving commitment to drafting such land-reform legislation will require considerable political will. While it might be a challenge to create the right mix of political and economic incentives that will compel political and business elites to sponsor and pass legislation that privileges other socio-economic and class interests over their own, political leaders at the federal and provincial levels will need to work creatively and proactively to establish such incentives.

Reforms are required to link statutory law with local customary law, ensuring that women have rights to property as established in law, and the establishment of a land registration system that incorporates the current tax revenue-based system of records with standardized documents and registries could increase tenure security and reduce land-based conflicts. Reforms could also address urban land issues, currently cited by Pakistani firms as one of the barriers to investment. As government ownership of land in urban areas and informality in the urban land-tenure sector are significant, a more proactive role for local development authorities to address housing and industrial land is both necessary and appears feasible. There also seems to be a need for more effective governance of urban areas to allocate land for low-income housing and prevent illegal land seizures and squatting. Cities and municipalities still must clarify and understand the balance of power between the federal and provincial government as they operationalize the 18th amendment to the Constitution, but weak and politicized

municipal governments cannot maintain peace and security in ethnically and religiously diverse and densely populated areas

Land Record Management System: A Wave of Hope

It's high time for Pakistan to take serious and well thought out policy initiatives for improving the legal framework and enforcement of PRs because after a long tussle and frequent episodes of civil-military power takeovers we are finally hoping for continuity and completion of tenure of a fourth democratic government. Pakistan has already leaped forward by introducing a land record information management system(LRIMS) in Punjab and KPK. All of the land records in Punjab have been computerized. System design aimed at putting all the information on an intranet and putting only the read-only output on the internet for public access. It will increase the online availability of all data. The transparent and corruption-free system will increase the level of tenure security of land-right holders. Biometric data entry and land records service delivery will facilitate land transfer within 50 minutes and issuance of "Fard" within 30 minutes.

Nevertheless, LRIMS has created hopes for improvement of the land record system of Pakistan but its framework needed to be stretched out to the whole country. Reforms in administrative and legal apparatus including the judiciary, rural and urban development authorities, government official procedures, bureaucratic structure, financial market regulations, and overhauling of macro policies at large with a firm commitment of political will are required to make PRs and title enforcement system works the way it works for West.

Way Forward

The paper revolves around the theory of dead capital proposed by De Soto. We try to develop an understanding of the question that why the developing countries are lagging in the area of property rights and title enforcement despite getting very intricate advice from the developed world. The developing countries like Pakistan are failing and lagging in the formulation and enforcement of property rights in a major way. The steps towards securing and establishing proper property rights can be summarized as follows;

(i) It is very important to define property rights properly first and ambiguity on "who owns what" should be completely elucidated. The example of badly defined property rights is the notorious "Patwari" system of Pakistan. However, the introduction of LRIMS has created hopes that the vicious power structure of these land record officers in maintaining records of the property will become weak in the country.

(ii) Since insecure property rights may disincentives investment in asset accumulation in the future, a credible commitment on property rights needs to be entailed i.e that property cannot be expropriated, either by the state or another private party. This condition needs the security of the asset ownership holder in the sense that neither government nor any other person or authority should have a right to confiscate assets from the rightful owner of that asset.

(iii) The right can be leveraged, if possible, for capital. For example, the owner of the asset can use the said asset as collateral to finance further capital accumulation or investment, such as buying a house and then taking a mortgage against it to finance investment in another venture. For this to happen, the property rights need to widely accept i.e. something which can only emerge if the prior two points are implemented, but this will also need a robust infrastructure to support contractual arrangements that would allow this to be possible(Wani, 2019).

The great thing about good property rights is that you can trade assets and they should end up being utilized more efficiently. Henceforth, the dead capital may only be converted into live capital if a well thought out framework with a political will is executed in Pakistan by the authorities to secure property rights and title enforcement.

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