

Property Rights for Disaster Recovery

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Abstract

Natural and man-made disasters are a regular part of the human experience on the planet, though in this particular era certain natural disasters (e.g. flooding, wildfires, excessive heat) seem to be more frequent and intense. An often overlooked issue in disaster management and recovery is the property rights regime that underlies human settlement. Whether land is privately, publicly, commonly, tribally, formally, or informally claimed (or 'owned' in some other way) makes a tremendous difference in the ability of individuals, NGOs, and governments to manage disaster recovery.

This contribution examines the current global debate over the right to property in the context of an ever increasing urban population. In particular, claims for increased Western-style private property as a vehicle for increased social stability and increased wealth are scrutinized in the context of their compatibility with sustainable disaster recovery. Research suggests that it is the institutions that support and legitimate property that appear more important than the actual form of property rights itself. The outcome of this examination suggests policy directions for property's form and civic and public sector action to achieve a form compatible with disaster recovery.

Keywords

Property, Private Property; Informal Settlements; Hernando De Soto

Introduction

The twenty-first century began with several notable trends, a few of which are particularly relevant to this contribution. One set had to do with land use.

It appeared to many that we have entered a period of increasing ecological fragility. The popular media and scientific literature are replete with stories and investigations of, for example, melting ice caps in the polar regions, receding glaciers, deforestation, increasing forest fires, desertification, water supply disruption, previously unrecorded heat levels, extended drought, unstable weather systems (see for example Fountain 2022, UNEP 2022, Yaffa 2022). A consequence of these changes are the potential for and reality of a broad range of natural disasters, such as rising sea levels, floods, wildfires, earthquakes, tsunamis, volcanos (among others).

Coterminous with ecological fragility is the trend of urbanization. Sometime in the early part of this century human settlement became, for the first time in recorded history, more urban than rural. While this has long been the case in the developed world, we are now a planet of cities and city dwellers. In and of itself this need not be a problem. But what is a problem is that much of the urbanization that is occurring is in the developing world and is designated as ‘informal’. Informal settlement means that dwellers from rural and minor urban areas migrate to a major city where they settle without a secure sense of place, on spaces that often do not have adequate (if any) physical or social infrastructure, and which may actually be dangerous (e.g. unstable hillsides). The places are often labeled slums (Davis 2006, Bansal 2022).

A second trend is institutional and legal. Of concern here is the renewed focus on property rights (von Benda-Beckmann et al. 2006). Largely spurred on by informal urbanization, and the tenuous situation of most informal settlers, an argument emerged for the necessity to formalize informal settlers and settlements through the formulation and granting of private property rights. This argument was most prominently advanced through the work of Hernando De Soto (2000). De Soto contended that if and when settlers were granted secure private property rights both their sense of social security and their opportunity for economic development and advancement would be improved.

This contribution explores the history and current status of the argument for the granting of private property rights. In so doing it poses the question of whether such an institutional solution is the only or even the best way to address natural (and human-made) disasters, and what place there is for other approaches.

Private Property in Historical Perspective

The disasters that get our attention – the ones that we ‘care about’ – are generally the ones that occur in the context of human settlements. And human settlement means that decisions have been made (historically or consciously, culturally or legally) to allot uses of land with certain privileges and restrictions. We refer to these privileges and restrictions as property rights. And they confer upon the ‘owner’ (controller) of the rights the ability to do things – to use the land, such as building upon it or putting it into production, to transfer it, through market transactions such as sale or lease, to gift it through for example inheritance. Rarely, though, are these rights unlimited. Often, especially in modern times, they are subject to privileges and restrictions put forth by society through government, such as through urban zoning regulations. Throughout history, human have allocated access to land in a wide variety of ways globally. Land can be

tribal, common, customary, aristocratic, state (public), patriarchal, matriarchal, and often a mix of these all at the same time. Often these property systems arose to address different ecological conditions, and always varying historical and cultural circumstances. And all of these property systems ‘worked’, and all were, at the same time, problematic.

In the late 1600s, English philosopher John Locke began a multi-century discussion arguing for the widespread privatization of land (Locke 1988[1689]). Private property (on the whole) does certain things quite well – it returns to users the effort of the investment of their labor; it provides owners with a sense of security, investment, and equity; it is an asset against which they can borrow for the purpose of improvement or for other economic activity; it can lead to ‘pride of ownership’, which with residential property can mean care and upkeep, gardens, etc. Locke’s argument has resonated through the centuries (though his caution that it works well when there is “at least . . . enough [land], and as good, left in common for others” (para. 27 of Second Treatise) seems to be less present in the minds of many). Locke’s ideas had great influence on the founders of the United States and their Declaration of Independence from England in 1776. Locke’s ideas on property also influenced Jean-Jacques Rousseau who in turn influenced the activists in the French revolution of 1789 (Rousseau 1994[1754]). And Locke’s ideas informed Adam Smith and his treatise for the emergence of market economics, which itself argued for the need for clearly articulated and defensible property rights (Smith 1937[1776]) (these matters are discussed in more detail in Jacobs 2013).

From the 16th century through the mid 20th century European powers colonized Africa, North and South America, Asia and Southeast Asia. Wherever they went Europeans encountered alternate property systems which they choose to ignore or obliterate, replacing indigenous property systems with western property systems that enabled extensive resource harvesting and exploitation (see, for example, Cronon 1983 for a discussion of the property system conflicts that occurred between European settlers and indigenous peoples in northeastern North America in the early European settlement era).

The end of the second world war began a multi-decade period of de-colonization, as the European powers pulled back from their ownership and control of foreign countries. But this period also gave birth to a new focus on property rights. Under the guise of promoting economic development through efficiency in agriculture, western advisors urged reform of property systems towards the western model of private property. The overall argument was that private property would lead to higher yields, which could become production surpluses, which would facilitate exports, which would bring in foreign capital, which would yield funds for investment in social and physical infrastructure. A compelling story.

In this period, western countries counseled developing countries in Africa, Latin America, Asia, and South Asia to undertake considerable revision to their traditional property rights regimes, primarily in agriculture, though in all natural resource sectors (forestry, grazing, mining). Bilateral international aid agencies such as the United States Agency for International Development (USAID), Great Britain’s Department for International Development (DfID), Germany’s Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), and multi-lateral international aid agencies such as the United Nations Food and Agriculture Organization (FAO)

all largely offered similar counsel (many of these and related international aid agencies have had subsequent name changes). While the activity of the bilaterals and multilaterals continued on through the decades of the twentieth century, the prominence of a global discourse on property rights faded for a period in the latter decades of the 20th century.

Private Property Advocacy in the 21st Century

The birth of the twenty-first century brought with it a renewed focus on property rights, especially private property rights.

A major reason for this reemergence was the work of Hernando De Soto (2000), and the impact of his ideas. De Soto shifted the global property rights conversation from rural to urban areas by focusing on informal settlement in the developing world. Like many others, he pondered how to regularize these settlements, as the conditions for residents and their environs were problematic. In essence he asked: 'how can the poverty of informal residents and their need for a comprehensive and effective program of economic development be addressed?'

De Soto's answer was a simple and compelling one. According to him, the poor needed to acquire rights in property, specifically formal title for the land they occupied. If they did, he reasoned, such acquisition would give them spatial security (they wouldn't worry about displacement), and they would have an asset which could use for investment (in their place of living) and borrowing for other economic activities.

De Soto's ideas proved wildly popular with (neo)conservative political leaders in the west including U.S. Presidents George H. W. Bush and Bill Clinton, and French President Emmanuel Macron. For a period in the first decade of the twenty-first century De Soto was a regular invitee to the World Economic Forum (Davos) where he mixed with economic, political, and cultural 'influencers' (to use a contemporary term).

However, De Soto's ideas have also been subject to deep criticism, even hostility, from scholars and activists (for an early example, see Gilbert 2002). Some activists see him as an apologist for the right, providing justification for actually making the poor poorer. Where informal settlement upgrading has occurred and has involved the granting of formal titles, it is not clear that it has actually benefitted the poor in the way De Soto suggested it should. Instead it appears that it is often the middle classes who acquire the titles, and the poor are themselves displaced from their settlements into new settlements. Are they any better off? Many say no. Often these new settlements can be less centrally located, and require more complex (and expensive) transport between home and work (for a lauded review of decades of slum upgrading efforts in sub-Saharan Africa see Gulyani and Bassett 2007).

In addition, some scholars argue that De Soto's investigative methods and his data do not actually 'prove' what he says they do. Attempts to independently verify his study results have not yielded the conclusions he offers forth.

But in most ways, these critiques are and have been immaterial. De Soto's ideas appealed to

powerful individuals in the public and private sectors. And it was this appeal that in a very real way validated his arguments.

What We Know About Property

People have always developed rules whereby they allotted rights to property. These rules took many forms, and were shaped to the ecological and historical circumstances that human communities found themselves within. And just as there have been many forms of property there has been long-standing and on-going conflict over the best form for property.

As the global environmental movement was emerging in the late 1960s population biologist Garrett Hardin ignited a debate about property with his article *The Tragedy of the Commons* (1968). To some, he seemed to suggest that for efficient and effective natural resource management – and especially those resources which were ‘commons’ (air, oceans, etc.) – it was necessary to extend the institution of private property. As such, he fit into the centuries long argument by Locke, Rousseau, and Smith, and pre-dated the argument by De Soto.

But the Nobel prize winning political economist Ostrom was among the most prominent to take up Hardin’s argument and to suggest he was wrong, or that he at least over simplified what was, in reality, a complex situation (Ostrom 1990, Cole and Ostrom 2012). She pointed out that ‘the commons’ could be owned in a variety of ways and that many of these ownership modes could be quite successful – for the owners and for the resource. She and others pointed out that property has always been and continues to exist in a myriad of forms; one scholar has denoted its current status as ‘polyrational’ (Davy 2016).

How does this impact the form of property for disaster recovery? In many ways the research literature is quite clear about several things. Property (often referred to as land tenure) is a crucial component of disaster management and recovery, and yet an often under considered and under valued component (Brown and Crawford 2006, Caron et al. 2014, Mitchell 2011, Register and Escaleras 2007 are among many who make this point). A significant reason why property is important is that when there is a lack of property records those impacted by disasters (most often among the poor and those living informally) suffer disproportionately in the recovery process (see for example, Kalin 2005, Kenny et al. 2006, Mitchell 2011). So in instances of disasters, especially in developing countries with large informal settlements and a lack of property records, the disaster recovery process can often result in significant displacement among prior residents and subsequent land grabbing.

However, privatization of land a la De Soto’s proposal is not necessarily the only or the best solution to this situation. Privatization itself presents significant challenges and problems. Heller’s scholarship (1998, 2010, 2013) presents an extended examination of the challenges and problems of *over* privatization of property. Using examples from the former Soviet Union, among others, he shows what can happen when there is pendulum swing towards private rights without enough concern for the community context within which these rights exist. My own experience working on land and property issues in Albania in the 1990s under the auspices of the U.S. Agency for International Development affirmed this observation. I saw first hand how

privatization (after a multi-decade period of forced social ownership) led owners to have concern only for their apartment units but not the hallways or other common areas in a multi-unit building, or only for the precise legal definition of the space around their building which led to neglect and deterioration of yards which were now ‘a no man’s land’. Heller’s analysis about the dangers of over privatization of property has been challenged, but this challenge is largely ideological rather than empirical in nature (Epstein 2011) .

Reale and Handmer (2011) are one among many who point out that in the context of disaster management it is not just or even primarily the form of property that ends up mattering. Rather, it is how property is embedded within a set of strong institutions that then allow a property form to function as it is theorized to function. What are these institutions? Reale and Handmer (2011) identify a) a strong and enforceable legal system, b) an up-to-date and functional land records system, and c) a governmental system with legitimacy and authority. Unfortunately, it is precisely these institutions which are often lacking in developing countries. So other forms of property – tribal, common, customary, aristocratic, state (public), patriarchal, matriarchal, etc. – are often no more or only marginally more effective in disaster management and recovery than private property. In this vein, Raschky (2008) found that countries with stronger, more well developed, and socially respected institutions had fewer victims and lower economic losses from natural disasters.

Conclusion

So what is the best form of property for disaster management and recovery? Property systems can take many forms. All are both functional and dysfunctional; there is no ‘perfect’ solution, only a solution that works in the moment, for a time, and within an ecological, economic, and social context. And as that context changes, it is likely, even desirable, that the form of and for property changes.

What we know about property is that it always been a socially contestable and malleable entity.

Private property as promoted by De Soto and others is intended to address issues of intense urban poverty and a lack of economic development in informal settlements. It has that potential. In theory private property could help to deal with a range of issues and problems that arise in disaster recovery when claims to property are muddled – problems such as displacement and land grabbing. But private property can also contribute to and create its own set of problems, such as securing the rights of women and children when the overriding social structure is one that expects property to be held and managed by a male head of household, or excluding whole classes of people based on race, religion, etc.

Private property has a long and admirable theoretical history, dating at least to the work of Locke, Rousseau and Smith in modern times. It has been promoted in the latter part of the twentieth century through the work of Coase (1960) and others. Yet it is also a form of property that has long been subject to intense scrutiny and debate. Beginning within a century of the American Revolution and Adam Smith’s landmark text in 1776, critiques emerged among a range of scholars and activists who were concerned with what and who were privileged by the social and

legal institution of private property (see the discussion in Jacobs 2018, 2022). And these critiques continued to the present day, including an examination of whether a classical and robust set of rights in private property is the best configuration for long term environmental sustainability (among many exploring this issue see for example Stone 1972, Steinberg 1995, Freyfogle 2003, Jacobs 2022).

Are there alternatives to De Soto's concept of private property? Yes. There are both more social forms of private property (ones that recognizes and incorporates the needs of the community, the future, and the environment, while also being fundamentally private in form), and alternate forms of property (see for example the contributions in Geisler and Daneker 2000. Many of these alternate forms seek to explicitly address the critiques and shortcomings of classical private property.

Alternative forms of property compatible with disaster recovery can be developed and implemented. But several matters precede this step. First – a broader and overall set of purposes for this alternate form property must be articulated (disaster management being one of several purposes, but only one of several, which property must address). For example Pellissery and Lødemel (2020) use the frame of promoting social citizenship to examine a proper form for property 'beyond the [global] north'. So, property's purpose – security, stability, social cohesion, economic mobility, economic development, democratic citizenship, . . . – needs to be clarified. Second – property's development and implementation is directly tied to the state of supporting institutions: the legal system, the administrative and policy system, and the land records system. Any property system has to fit with these supporting institutions. If it does not, no matter the 'elegance' of its design, it will fail.

So there is no one form of property that is correct for disaster management and recovery. But I believe several design components of such a property system are elemental. A property system should promote democratic citizenship: it should promote and legitimate the rights of the individual as an individual and as a member of a community. In particular, a property system should: be designed that clearly denotes who has what (a clear and legitimate land records system); it should promote property access across race, tribe, gender, and religion; it should articulate both individual and social rights and responsibilities in property 'ownership'; it should allow for and promote as appropriate public and private initiatives to reconfigure property boundaries' (land consolidation), both post disaster and into the future; it should provide for the relatively easy transfer (through sale, lease, inheritance) of property rights; and it must acknowledge the right of the public to manage (regulate) and expropriate (physically take) property for legitimate public purposes. There are of course additional elements; these are offered forth as a building block.

Disaster management and recovery can be facilitated or inhibited by the property system in place. If there is a functional property system for disasters, it is place specific. There is no 'one size fits all' model to offer forth because property systems reflect many things. History, culture, the bioregional ecology, and law are among the factors that have been noted here, and there are others (religion, the economy, etc.).

What is known is that property matters. In the wake of natural disasters decisions have to be made about who can and should have access to land and for what purpose, and under what conditions. Often these decisions involve the public sector. But the way property is held pre disaster, and the strength and legitimacy of the legal, administrative, and land record systems, become what is significant for how the public sector can act.

The global challenge – in all countries of the world – is to generate a substantive discussion about the social and legal institution of property. But this is hard to do. What exists today is largely an evolutionary development. At a certain point in time property was designed to fit existing circumstances. Almost without exception those circumstances no longer exist, yet old forms of property has changed incrementally pushed along by history, culture etc. Absent an emergency, it is almost impossible to get focus on an institution that many (citizens, policy makers) find amorphous. Perhaps the best that can be done is to be prepared to use the (unfortunate) instance of a disaster to come forth with proposals for redesign. Until then, what is important is to work on the legitimacy and functionality of the legal, administrative, and land records systems so that when redesign can occur it has the possibility of succeeding.

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