# The Mystery of Capital and the Construction of Social Reality

**Barry Smith, David M. Mark, and Isaac Ehrlich (Editors)**

Chicago, Illinois: Open Court, 2007 (512 pages)

When economist Hernando de Soto published *The Mystery of Capital* in 2000, its author made (on page 221) a single seemingly insubstantial reference to philosopher John Searle's *The Construction of Social Reality*, which had appeared in 1995. Nobody need have paid attention to this fleeting citation, particularly because the other philosophers referenced in support of de Soto's claims—Popper, Dennett, Foucault, Derrida—constitute quite a philosophical hodgepodge. It required a catalyst at the time who worked on various fields of applied ontology to bring the two approaches under one roof so that de Soto's practical development economics and Searle's theoretical work on intentionality and social ontology may fructify each other. The catalyst with this vision was Barry Smith, philosopher at the University of Buffalo and ontologist-at-large.

In April 2004, a two-day workshop was held close to Buffalo, New York, chaired by the three editors. This volume collects most of the talks given at the workshop, and some papers by other participants. The seventeen contributions come from philosophers, economists, geographers, political scientists, land planners, and jurists. Their widely different focuses preclude a review of every contribution. Therefore only those by de Soto and Searle will receive a more detailed discussion.

In his lecture, "What I Do, and How Philosophy Has Helped Me," de Soto restates his basic claim that the creation of appropriate legal institutions is the key for developing nations to benefit from market economies. In particular, moving from property to wealth requires a transition from informal, extralegal ownership to a formal, unified system of property rights that can be asserted, traded, and defended, and a transition from informal entrepreneurship to formal productive activity.

Without a doubt, de Soto's proposals are important and sound. Yet, there are some inconsistencies in his arguments. In his book, he goes to great lengths to emphasize that property law and other institutions are independent of culture. They can work everywhere, and in much the same way, because they are "not the inevitable result of people's ethnic or idiosyncratic traits but of their rational evaluation of the relative costs and benefits of entering the legal property system" (*Mystery of Capital*, 226). In this volume, he disputes the idea that in developing countries one can "get a formula from the United States and put it into place, as in the case of the Zurich traffic law transferred to Lima" (14). What now? Are laws about cadastres or company registration somehow more easily transferable wholesale regardless of local conditions than are laws of lesser social importance?

Another problem arises with a supposed problem of civil law, which de Soto locates in the possibility to change written codes (17). In his book, however, de Soto mentions how in the United States legislation had, in order to integrate the extralegal population, to remedy the perceived inadequacies of inherited English common law doctrines. What

now—superiority of common law or of its American adjustment through the parliamentary instead of the judiciary process? Might not civil law jurisdictions such as Switzerland, Norway, Japan, or the Netherlands (or, for that matter, Quebec and Louisiana) be actually better at protecting property rights and facilitating official commercial activity than are common law jurisdictions such as Nigeria, Pakistan, Jamaica, or Papua New Guinea? Would not a common-law system, which sees law as arising from social custom, very much depend on culture and therefore preclude easy portability? In reality, both legal traditions derive institutions of property law—possession, titles, mortgages, servitudes, and so forth—from Roman law. More specifically, Erik Stubkjær's contribution lays out in painstaking historical detail how, within the civil law system of Denmark, real property rights have come into being in response to social, religious, political, and ideological forces. Denmark had the same conditions in place—a uniform religion, a bureaucratic government, and a code-based law—that are supposed to impede economic development in South America. Changes in land holdings and a clean bureaucracy made the difference, not the formalization of titles. Andrew Frank adds that legal institutions are in place in all countries; the problem is rather that they are not used, often because they are too complex and not adapted to the specific needs of societies. So, is social embeddedness important after all?

De Soto also appears disingenuous when referring to Hayek's distinction between two legal orders, *kosmos* and *taxis* (that he on page 16 mistakenly calls "praxis"). Hayek would have flatly rejected not de Soto's program but his justification, which is rooted in the new institutional economics: Formalized property systems reduce transaction costs (complemented by an emphasis on organizational arrangements, credible commitments, modes of governance, incentive structures, enforcement mechanisms, and so forth). This is not what Hayek's thought is made of, which has no place for cost-benefit decisions or organizational designs. One simply cannot teach governments how to introduce spontaneous rules. This will always lead to a constructed order, to *taxis* rather than *kosmos*. Stubkjær therefore places de Soto's theory closer to Douglass North's neo-institutionalism. This is also the perspective from which Isaac Ehrlich analyzes the contribution of investment in human capital to economic growth in the United States and from which Serguey Braguinsky does the same for Japan and Russia.

More important yet is the question of originality. Has this not been said before, for example by Eugen von Böhm-Bawerk, to whom Gloria Zúñiga refers in her paper? In his habilitation thesis of 1881, *Whether Legal Rights and Relationships Are Economic Goods*, Böhm-Bawerk disputes the claim that rights are different from the goods to which they give title: "A legal right or the legalized power of disposal over a thing is nothing more nor less than a necessary reinforcement supplied by a politically organized state of the physical power which is needed by the owner of a good as a condition of its economic utilization" (*Shorter Classics of Böhm-Bawerk*, 1962, 58f.). A thing does not become a good until it becomes someone's property. Outside a Robinson Crusoe economy, this requires the recognition and enforcement of the individual's right to control the thing.

Searle's paper, "Social Ontology and Political Power," restates the three main components of social reality: status functions ("X counts as Y in context C"), collective intentionality, and constitutive rules. It then extends them to political philosophy and shows why political power, though exercised from above, always comes from below, why it leaves individuals feeling powerless, and why it is based on a monopoly on armed violence. In politics, status functions involve deontic powers that provide reasons for action independent of desires. With this analysis, Searle goes beyond his previous work, but he does not solve its major weakness: that a naturalistic understanding of social reality may just be incompatible with his claim to realism. For Searle, X's are always part of physical reality. How then can weddings, debts, prices, or job promotions be real (rather than fictional) if they are not, like banknotes or passports, part of the physical world or reducible to it?

This is the topic of Barry Smith's paper. He proposes that some social objects are anchored in records and representations. This "realm of the quasi-abstract" is of course what de Soto's work is concerned with. Yet, despite his defense against the charge of Platonism, does Smith not add even more realms to Searle's "huge invisible ontology" of social reality? It seems a bloated realism at best, one that explains *obscurum per obscurius*, and that is committed more to Meinong than to Aristotle and Brentano.

It is surprising that one avenue has been totally neglected from which insights may be derived for an unequivocally realist understanding of the social world: sacramental theology. In the Catholic view, by proclaiming the trinitarian formula and pouring water over a person's head, a baptism is performed, which brings about an irrevocable ontological change. The same applies to communion, holy orders, and all other sacraments, which are, in Searle's terminology, performatives (involving words, signs, gestures, liturgical implements, and so forth) that create institutional facts. Bishops, priests, and sometimes laypersons, have deontic powers. Catholicism teaches that sacraments produce and effect grace not through the moral or religious efforts of the recipient, but rather through the objective accomplishment of the sacramental sign itself (*ex opere operato*). They differ from sacramentals (such as rosaries, holy water, or statues) the causal efficacy of which depends on the belief of the recipient (*ex opere operantis*). Most of Searle's examples would seem to fall under the latter category (and they all indeed involve physical objects), but what about weddings, constitutional amendments, or the opening of investment accounts? In all these cases, X cannot count as anything but Y, because the domain over which X and Y can range is defined by a law or other constitutive rule previously established (e.g., by the natural and by statute law, only persons of different sex can marry). By filling out a particular form and the clerk accepting it, one has opened an account. Would the analogy with sacraments not apply here?

—Wolfgang Grassl
*St. Norbert College, De Pere, Wisconsin*