

The pressing need for land law reform

Insecurity of land tenure is a central cause of poverty. Secure property rights ensure sustainable land resource use and improve business climate and investment opportunities. Certain groups are systematically disenfranchised through lack of access to property. Among these are women, who own only around ten percent of the world's property. Equally, indigenous people around the world tend to suffer from weak property rights not adequately recognised by law. Not to forget the one third of the world's poor who are living in slums without legal protection of their assets.

Land, as a key asset, has attracted large-scale corrupt practice, both by private individuals, political elites, as well as government officials through state capture. This has led to a situation in many parts of the world where there is a large inequity of land distribution, which in turn continues to impact political stability and economic growth. There is reluctance to acknowledge that in many countries the state itself – pursuing not just public purposes but the private purposes of the powerful – is the primary threat to land tenure security (John W. Bruce: *Land law reform*, World Bank Publication 2006).

Relationship between rule of law and the rights to land

Weak rule of law situations in many countries reduce security of land tenure. Illegal transfers may cause legitimate owners or occupiers to lose their rights. Informal transfers and informal ownership are not protected by law, and the protection offered by customary tenures may be weakened

through external pressures, and may not be extended to newcomers. Those who capture the state may use land registration systems to reinforce their claims to land, even when the land has been acquired through land grabbing. Marginalised groups may have the evidence of their land rights suppressed by officials. Weak rule of law leads to disputes. It provides opportunities for the powerful to claim the land of others, including the state. The poor may not be able to defend their rights against unfair competition and may lose their livelihoods.

There is a very close interrelationship between weak rule of law, and also more specifically, corruption in the judiciary and insecure land rights. The Global Corruption Report 2007 concludes that a corrupt judiciary, located in one of the

major pillars for rule of law, inhibits access to justice and redress for human rights violations. The legal system/judiciary was identified as the most corrupt sector and the third most common recipient of bribes. Quite a significant proportion of all cases in court are land-related, especially in post-conflict and least developed countries.

Example of problematic practices: gender discrimination

Less than ten percent of the world's property and less than two percent of the registered land rights in the developing world are held by women, which has implications for human rights, conflict, and sustainability. Millions of women around the world suffer abuses of their equal rights to own, inherit, and manage their land. In many countries, formal statutory law operates in conjunction with customary law and cultural norms and practices based on patriarchal attitudes which make it difficult to enforce women's legal rights



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Less than two percent of the registered land rights in the developing world are held by women.

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to land as wives and daughters. Individualistic statutory law favouring the male household head and customary practices and hierarchies combine into a mix that is harmful for women.

In some instances, statutory law has erased customary practices favouring widows or women in general. The staggering number of HIV/AIDS affected (especially in Africa) is resulting in millions more women becoming widows at a younger age, often being excluded from inheriting the husbands' land and evicted from their land and shelter. However, legal reform alone does not improve the precarious property rights situation of women if there are no enforcement mechanisms, if social norms are not gender responsive and if legal assistance and support services are not affordable or accessible for women.

Example of problematic practices: misuse of eminent domain

Corrupt governments can use the inherent power of the state to seize private and common property and thus confiscate assets of the poor in the name of the public good. Laws and practices with regard to the abuse of eminent domain practices differ widely but principally show three sources of this type of legal disempowerment:

1. process of acquisition, wherein, for example, compensation remains unpaid especially for unregistered private land, customary land and common property rights,
2. the basis for compensation payment, which routinely fails to take into account real costs to the loss of land, and
3. manipulation through purposeful or poorly specified definition, of what constitutes 'public purpose'.

There should be a strict focus on using eminent domain as an ultima ratio in providing essential public services (W. Zimmermann, *Effective and transparent management of public land*, FAO/FIG conference 2008). The

The driving forces for land law reform

MDGs and Social policy	The international commitment to achieve the Millennium Development Goals, the Voluntary Guidelines on the "Right to Food" (FAO) and national poverty reduction strategies by improved pro-poor land law design, formalising informality in land, regularisation and distribution of state land, legal provision for implementing the action plan ICARRD 2006
Human rights approach	Respecting basic human rights by developing gender responsive land laws, anti-eviction law and regulations, legislating eminent domain and resettlement, recognising customary tenure rights
Protection of natural resources	Improving legal coherence between land legislation and land use/ environmental legislation (IUCN, <i>Land use law for sustainable development 2007</i>), integrating legal and land-related elements of the conventions of biological diversity and climate change
A functioning and rule-based land market	Exchange of property and assets to a level of transparency and accountability, legal provision for making land and lease markets work for all, including essential instruments for transactions; rights-based framework for transnational large-scale land acquisition
Governance approach	Interaction between land policy reform and land law reform, coherence between anti-corruption convention/law and land law, basic right to appeal in cases of land acquisition/ land registration/ land disposal, the basic right to access land information, legal empowerment of local institutions and people, rights-advocacy by civil society

primary remedy against wrongful or unjust loss of property is a just policy and legal framework of land acquisition and resettlement; it can include innovative approaches, such as offering partnerships to the poor in developing assets created from investment in infrastructure and services.

Land law reform needs a fresh approach

There are a number of driving forces for land law reform activities. During the last decade, we have experienced broad trends towards market liberalisation and demand for stronger private property rights in land, especially in countries in transition. Decentralisation holds out the promise not just of more effective implementation of national programmes but also of legal regimes that better accommodate diversity and respond to local needs. Beyond these two driving forces, additional fundamental principles and issues for land law reform are receiving greater attention at international and national level (see Table).

Land Law must evolve organically to suit the context in which it is to be

applied and should not be perceived as the instrument through which a minority imposes its power. Legal aspects of property systems must grow from land practices on the ground and incorporate customary interactions and networks.

Conventional conceptions of property rights focus on static definitions of property rights, usually as defined in statutory law. However, in practice there is co-existence and interaction between multiple legal orders such as state, customary, religious, and local laws, all of which provide bases for claiming property rights. These fundamental aspects of property rights as a bundle of rights are now recognised and can be enforced in some countries.

There must be a degree of coherence to laws based on fundamental rules and social norms, or those laws will not be respected. If de jure property rights do not correspond with de facto property practices and customs, the subsequent legal misalignment will undermine rather than strengthen the system (*Making the Law Work for Everyone 2008, Report of the Commission on Legal Empowerment of the Poor*, Chapter 2).

A fully functioning and legally binding system of land rights is composed of four building blocks:

- a system of laws and rules that defines the bundle of rights and obligations between people (and the state) and land reflecting the multiplicity and diversity of land tenure systems;
- a system of governance;
- a functioning rule-based market for exchange of assets;
- an instrument of social policy.

Each of these components can be dysfunctional and operating against the poor if rules are not pro-poor and inclusive and laws not enforced. These rules develop in a manner that entrenches the power relations between and among individuals and social groups. The quality of the land law determines how the following questions are addressed: Who benefits from the current legal and policy framework for land? How does this framework interact with customary (and informal) institutions? What are the incentive structures for diverse stakeholders, and what constraints do they face? Who influences the way in which decisions about land are made? How are decisions enforced? What recourse and access rights do the less powerful members of society have?

A few lessons

1. Development of innovative pro-poor land tools. There has been an over-emphasis in many programmes and regulatory frameworks of the delivery of individual land titles through formal land registration. This has meant that few countries have been able to go to scale on the delivery of land documents. Also, and more importantly, this has left little room or resources for innovation on how to deliver security of tenure at scale to the poor. The Global Land Tool Network partners' work (www.glt.net) is one of the few focused on this area.

In countries with social inequity and poverty, a sustainable land agenda and land law reform needs to focus more on normative and land governance issues, such as the management of conflict over land and the issue of fair access to land, rather than just on the creation of an efficient land administration system. Innovative new pro-poor land tools are currently being developed and tested such as

1. the Islamic land tenure reform (UN Habitat 2005);
2. the Social Tenure Domain Model;
3. post disaster and post conflict tools;
4. mechanism for gendering land tools and
5. regularisation of informal settlements.

2. Customary rights in sub-Saharan Africa. Recognition of customary tenure enjoyed permissive existence in most states throughout the last century and provided the basis for some of the entitlement that has taken place, albeit in converted forms. What is new today is the opportunity to register customary rights 'as is', without necessary conversion or loss of customary incidents (such as if and how the property may be sold or in whom the property is vested). Even without registration possibilities, the current reform movement appears to enhance customary security, long overdue (Liz Alden Wily, *Formalising the informal: A review of decentralising land administration in Africa*, 2005).

The 1997 Land Law of Mozambique, for example, is considered to be innovative in no small part because of the unusual degree of rigorous investigation, consultation and public deliberation that went into it. Customary rights that are not registered (more than 90 %) are most explicitly protected in Uganda, Tanzania and Mozambique and, in a different manner, in Ghana (UNDP 2006: *Land rights reform and governance in Africa*).

3. Code pastoral and user agreements. In Mauritania, the tribes and with them the tribal system of managing natural resource tenure have been abolished. All natural resources are owned by the state. There is a widening gap between legislation and legal reality. The state asserts ownership over sylvo-pastoral lands, but is unable to enforce this against the traditional use rights enjoyed by the local population, who use these areas as pasture for their livestock, for gathering wood and for hunting.

The new Code Pastoral Mauritania (2000) may prove a pivotal piece of legislation because it provides a legal umbrella for user associations and user agreements. Establishing user asso-

There is a need to regularise informal settlements, for example those of native Indian populations.

Photo: Iain



ciations is thus an important part of a policy aimed at state disengagement, decentralisation and democratisation and at reinforcing individual responsibility. Similar local co-management or user agreements have been successfully concluded in eight West-African partner countries supported by GTZ (K.P. Kirsch-Jung et al, 2008: *Local use agreements: Contributing to decentralisation and democratisation*, Rural 21).

4. A system of charters and joined action. While the Universal Declaration of Human Rights states in Article 17 that “Everyone has the right to own property alone as well as in association with others”, and that such rights “shall nor be arbitrarily deprived”, international law does not dictate the content of property rights and the objects to which they apply. It is a critical issue that compared to law use and environmental laws, land law has little coverage of directly binding international norms and conventions (IUCN 2006, *Compendium of Land Use Laws for Sustainable Development*). A system of multilateral charters and multilaterally supported land governance reform is therefore urgently required to set minimum standards for land and natural resource tenure, checks and

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balances in governance, post conflict and natural disaster land management. International and bilateral organisations, civil society and research organisations dealing with the land sector have established a number of promising operational coalitions for joint actions. Good ongoing actions are:

- the initiative for the development of “Voluntary Guidelines on Responsible Governance of Tenure of Land and other Natural Resources” chaired by FAO and supported by the German Government (BMZ/GTZ) (see also article on pp 38–40)
- the World Bank initiative for developing a “General Framework for assessing Land Governance”, including the development of a comprehensive set of cross-country indicators (World Bank / FIG: *Land Governance in support of the Mil-*



Photo: Zimmermann

lennium Goals, Conference March 2009, Washington D.C.)

- the Transparency International / FAO partnership for including land questions into the Global Barometer surveys (TI, *Global Corruption Barometer 2008 including land questions*, forthcoming).

Zusammenfassung

Die Landrechtsreform muss Möglichkeiten eröffnen, um das Landmanagement zu verbessern, zur Armutsminderung beizutragen, die Gleichberechtigung zu fördern und Rahmenbedingungen für eine nachhaltige Landnutzung zu schaffen. Grundbesitzsysteme brauchen einen effizienten sowie einen sozialen Unterbau, und die Anerkennung der sozialpolitischen Seite erfordert einen verstärkten Fokus auf die Folgen der Landrechtsreform für Arme. Die Notwendigkeit einer Landrechtsreform bei gewohnheitsrechtlichem Landbesitz und die Anerkennung lokaler Co-Management-Modelle erfordern neue Sichtweisen. Durch Reformen sollte dem Machtmissbrauch

durch den Staat oder einflussreiche Einzelpersonen der Boden entzogen werden. Die Herausforderung für eine solide Landrechtsreform liegt in der Verknüpfung dieses Prozesses mit einer wissenschaftlich fundierten Politik, einer breiten Einbindung der Bevölkerung und verbesserter Koordination durch die internationale Gemeinschaft.

Resumen

La reforma de la ley agraria debe encontrar modos de contribuir a una mayor gobernabilidad de la tierra, reducir la pobreza severa, promover la equidad de género y crear condiciones para el uso sostenible de los recursos de la tierra. Los sistemas de tenencia de la tierra son eficientes y cuentan con una base social.

A su vez, el reconocimiento de la parte de política social requiere un enfoque más claro del impacto que podría tener la reforma agraria sobre los pobres. Con respecto a la reforma agraria, se hace necesario centrar la atención en los requerimientos de los propietarios agrícolas bajo el régimen de tenencia tradicional combinados con el reconocimiento de los modelos locales de cogestión. Deben instituirse reformas que limiten el abuso del poder por parte del Estado o de individuos influyentes. El desafío de un sólido proceso de reforma agraria consiste en vincular dicho proceso con la formulación de políticas fundamentadas en la investigación, una amplia consulta popular y una mejor coordinación por parte de la comunidad internacional.