

REFLECTIONS ON THE DEVELOPMENT POLICY ENVIRONMENT FOR LAND AND PROPERTY RIGHTS, 1997–2003 (Draft)

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Introduction

This paper is provided as a background essay for the international workshop on Fundamental Rights in the Balance, to be held at IDS 16 -18 October. It reflects on key events, processes and publications emerging from donor - engagement and research on issues of land and property rights, and land reform, over a five to six year period from mid-1997 up to the present day. The idea is to provide some idea of the development policy context, for workshop participants who may be less aware of its bearing on thinking, policy and practice in development agencies' treatment of rights in land and property.

Inevitably, these reflections arise from where I sit in the UK Department for International Development (DFID), as well as where I've been, and those with whom I've worked with during the last five years. For most of it it's been my privilege, or perhaps my misfortune, have worked as a focal point and part time specialist adviser to DFID on land: rights and tenure, land reform and land policy as a whole.

A renewed focus on poverty; within that, a new focus on land rights

In UK, 1997 was an exciting time. The first Labour government in seventeen years, and the creation of DFID, with a radical Secretary of State, Clare Short, impacted rapidly on the British development "community", and the international impacts soon followed. DFID prepared and issued the first international development White Paper for many years. "Eliminating Poverty: a challenge for the 21st century" (DFID 1997). I was asked to provide a piece of background work reviewing the importance of land tenure and land reform for poverty eradication and sustainable development, and to assess the implications for Africa. This led to little more than a phrase in the White Paper, but to the recognition that land rights were mattered, and they came back on to the development policy agenda of the former colonial power.

A principle thrust of Britain's new development policy was to influence the behaviour of international development institutions as a whole, and galvanise a shared, coherent approach to the task of poverty eradication. The importance of secure land rights and fairer land distribution was subsequently clearly recognised in DFID's Strategy Paper on economic growth and poverty reduction. (The DFID promoted development targets subsequently became merged with those developed by the UN and became the Millennium Development Goals).

What followed from the White Paper were a number of interesting, related things. In 1998 I was asked by DFID to assist in taking forward policy work on land on a regular basis. We established an advisory group on land tenure and land rights, drawing in land rights advocacy from Oxfam and tenure researchers from IIED, both organisations with extensive networks on the ground in the developing world, especially in Africa. The work developed into a combined networking, research, advocacy and policy effort to promote a more coherent and people centred approach to land policies and reforms by developing countries and by international development agencies as a whole. A focus on land rights was fundamental to that endeavour. I shall say more later on about the work relating specifically to Africa.

Livelihoods and Rights-based approaches

In parallel with all this DFID developed the Sustainable Livelihoods Approach (Carney 1998) as a means of transforming an outdated approach based on boosting natural resources production for its own sake, focussing instead on people and their own strategies to survive and where possible prosper, changing the skills base and outlook of rural development professionals, and giving the poor a voice in policy making and project planning. This became an analytical framework and a practical approach to both rural and urban development, with far reaching influence in development agencies, and in the developing world

Rights figured in this, as part of the policies, institutions and processes, which influence people's livelihood strategies and their outcomes. Land and property were treated as natural and physical capital, key components of the asset base of the poor, but intimately bound up in many cases with social capital - the networks and relationships which enabled access to land, while also having a bearing on people's ability to access finance and basic services. The framework legitimised the importance of land and of land and property rights, and helped bring about a focus on the policy and institutional processes which enable - or disable, people' ability to claim their rights.

Also in parallel, DFID's then Social Development Department with its collaborators developed a Rights-based Approach, and published another target strategy paper on Human Rights. Land and property did not really figure as basic human rights, but shelter did, and the right to a livelihood, was a strong contender. Clearly, many of us felt, rights and Livelihoods had to be looked at together. At the end of the day, we were all looking for the same outcomes, however illuminating the conceptual framework, what mattered as what we did. A couple of important papers in 2000 and 2001 sought to clear the air, and link up the Rights-based and Livelihoods approaches (Norton and Moser 2001, Conway et al 2002)

In 2002, DFID drafted a consultation paper on land policy (subsequently issued as DFID 2002, Better Livelihoods for Poor People: the role of Land Policy) based on the work of the land advisory group. This is what we said about the relevance of a rights based approaches:

A rights-based approach to land

Rights are *claims that have been legitimised by social structures and norms*. Basic human rights are defined in international law and reflected in major international conventions. Rights include both civil and political rights, and economic, social and cultural rights, including those to shelter, health, education and livelihoods.

Basic principles can be extracted from human rights thinking and applied to the wider business of development and institutional change. These principles include social inclusion, participation and the fulfilment of obligations (DFID 2000). Development agencies should be concerned not only with what rights people are entitled to, but also with whether or not people can effectively claim and defend their entitlements to basic resources and services. Although land is not regarded as a universal right, rights to shelter and to livelihoods frequently are. In countries dependent on agriculture and renewable natural resources, sustainable livelihoods will generally entail the security of land and natural resource rights. These may be reflected by legal or constitutional rights although, in practice, entitlements to land will often not be realised because of institutional failure and problems of competition, corruption or conflict. Moreover, people's entitlements under the law may frequently be deficient because policy and legislation are incomplete, based on a simplified understanding of a complex reality, or biased towards the needs of particular influential groups.

A rights based approach to land can involve a number of possible types of action:

- Reform of land policies and legislation to strengthen the rights of the poor, the landless, women or other marginalised groups.
- Promoting inclusive policy debates and consultation in relation to legislative drafting.
- Making legal provision to capture or formalise legitimate customary rights in formal law.
- Strengthening organisations that represent the poor or advocate for land rights on behalf the poor – community based organisations (CBOs) and NGO Land Alliances.
- Legal representation of the poor to enable them to claim their rights to land, shelter or natural resources.
- Land rights information and awareness campaigns.
- Instituting local arrangements for land administration and systems for resolving land disputes that are accessible and transparent to the poor.
- Training for those involved in service delivery, whether government land administrators or NGOs.
- Participatory natural resource management arrangements that enable access by the poor to vital livelihood resources.
- Representation of civil society groups and CBOs on land boards and land commissions.
- Involvement of civil society groups and community representatives in assessing and monitoring the impact of land and tenure reforms and the performance of land institutions.

DFID issued a second White Paper dealing with Globalisation as a force for equitable growth progress and poverty reduction (DFID 2000). This reflected the policy commitment to internationally recognised human rights, but did not address other fundamental rights including those to land and property. It has been remarked by DFID's Chief Economist, that in view of the negative impacts of globalisation registered in the last few years, the paper would be very different if written today. One issue is that of how far it is really worth strengthening property rights and institutions, or redistributing land to provide new agrarian opportunities for the poor, in the absence of reforming global trade policies in such a way as to ensure that the opportunities for property ownership, and the benefits that result are distributed fairly. (This issue was raised vigorously by Latin American government and civil society delegates at a World Bank consultation on land policy in the region, held in Mexico in 2002)

DFID's application of rights based approaches has been reviewed recently (for GTZ) by ODI (Piron 2003). This study found that although DFID is widely regarded as an agency which

adopts a rights based approach, it has not been systematically incorporated into DFID's programmes. A reorganisation of DFID's Policy Division has left the organisation without a team or focal point to carry forward the issues set out in an earlier Human Rights strategy paper. Further work remains to be done: to clarify the relationship between the MDGs and human rights; to assess the contribution that civil and political rights can make to progressive change, and the implications for developing partnerships; to identify how rights contribute to Poverty Reduction Strategies; and to continue engagement with International Finance Institutions, notably the World Bank, on rights issues.

The World Bank and received orthodoxy in land policy

When the DFID land advisory group and our developing country collaborators entered the international debate on land, it was dominated by a modernising push for formal land titling, and the old assumption that individual titles were necessary to relieve the poor of a Tragedy of the Commons, to enable them to access some vast imagined sources of collateral based or land -mortgage credit, and to kick start open markets in land and property - believed by some as a universal good. This view appeared to emanate from Washington DC, was actively espoused by colleagues in USAID, and was the *raison d'etre*, in practice of the World Bank's lending directed at creating technical capacity for land registration and titling and rolling it out where possible across rural Africa and the rest of the developing world.

The World Bank played a dominant and overarching role in land policy in developing countries during the 2nd half of the 20th Century. Much of the Bank's lending has been through technical projects intended to modernise and strengthen systems of land administration to support the registration and titling of secure individual rights to land and property, as practised in the North. There was scant consideration of the wider policy context and the practical impacts on the rights of ordinary land users. Regional development banks, in Africa, Asia, the Americas and the Caribbean for the most part followed a broadly similar approach.

The Bank's policy was to promote formal land titling as a precondition for agricultural growth, "modern development" and to secure access to credit; abandonment of communal tenure systems in favour of freehold title and the sub-division of the commons, and the widespread promotion of land markets to bring about "efficiency enhancing land transfers" (World Bank 1974). This approach changed little until the end of the 20th century. The Bank also believed, however, and still does, in re-distributive land reforms to promote both equity and efficiency in agricultural development.

During the 1980s and into the 90s - the era of structural adjustment - the World Bank's zeal to promote individual property rights and land markets increased. Understandably these policies were widely criticised. People's rights to land and the impacts that these policies had on rights and livelihood opportunities did not enter the equation, since the objectives were to promote aggregate economic growth based on free market principles. Land was treated as a commodity like any other, and land markets were promoted on the assumption that the market mechanism would automatically allocate land to its most efficient, and therefore presumed best, use.

In relation to land distribution, while this was seen as desirable, the World Bank was determined to promote the land market as the mechanism - in line with the rolling back of the state and the promotion of the market as a supposed public good. The need for a

proactive strategy to combat entrenched structural inequalities in access to land and property and the role of the state in acquiring land, or targeting land for redistribution, and matching supply of land to social need were ignored. The immense distortions in land markets whereby all but those who already own substantial landed property or financial assets are unable to enter the land market, and land is often acquired by the wealthy primarily for speculation, future development but not social use, were not considered.

The twin emphasis on secure individual property rights and the role of the market in providing land access are widely regarded as pillars of neo-liberal economy policy. Many developing and transitional countries bought into these principles. Land titling programme, while clearly meeting the needs of some beneficiaries, risked undermining complex sets of established rights, and were dogged by gender inequalities, and problems of financial and institutional sustainability. Together with a "big bang" approach to decollectivisation and the creation of land market in Russia and Eastern Europe (executed by the Bank in close collaboration with USAID) titling programmes created land grabbing opportunities for predatory elites. Experiments with "market based" land reforms (a title which the Bank rejects in favour of "decentralised" or "community-led" land reforms) in Brazil, Columbia, the Philippines, and South Africa have been used by the state to undermine civil society campaigns for expropriation of illegally held and underutilised estates and to re-assert the primacy of established Property rights over and above the Fundamental rights of land users to livelihoods, security and shelter.

The World Bank's view was also received wisdom internalised in the minds of developing country officials and policy makers. But the realities of land rights on the ground frequently gave the lie to the theory, certainly in Africa, and elsewhere where land rights remain rooted in social relations, although also dispensed by the state. Empirical economic research has recognised that titling was not really working in Africa, the costs were high, and the expected benefits had not materialised, and where family farming prospered, it appeared to do so anyway, on a foundation of customary rights, secured by kinship and social contracts (Bruce and Migot Adholla 1993). By the time DFID engaged the Bank in debate on land policies and land rights in Africa, Bank staff were already admitting that policy was changing, and needed to change further. Although the Bank's lending practice however, remained unchanged, it is interesting to note that from the late 90s onwards, the Bank was unable to disburse proposed loans for land titling and administration in Africa. This was because of controversies on the ground, and the recognition by African nations of the complexity, legitimacy, and broad equity of customary rights, and of the importance of consulting widely on land policy and law before applying one-size-fits-all technical solutions, simply because they were on offer from international institutions.

DFID's focus on land rights in Africa

In 1998, DFID's interest was focused on sub-Saharan Africa, because of the levels of poverty and vulnerability through out the region (which led DFID to prioritise Africa, alongside South Asia), and a groundswell of interest across the continent in reforming land policy and law, shared by governments and by emerging civil society advocacy networks and so-called "land alliances".

In the late 1990s, across sub-Saharan Africa, civil society groups and community-based organisations were demanding voices in national policy debates, and the commissions of enquiry preceding policy and legislative change, otherwise dominated by technocrats,

lawyers and highly susceptible to the direct influence of donors. Country by country, throughout the previous decade, the continent had begun to grapple seriously with the legacy of formal, colonial land law, and its contradictions with the changing but pervasive realities of customary rights. The other, equally persistent issue to address, in the south of the continent, was the post-colonial and post-apartheid persistence of race based inequality in land holding and access to assets.

The immediate task was to organise a workshop drawing together policy makers, practitioners, researchers and activists from across Africa, to debate issues charged and controversial at home, on neutral ground. This the British government provided - in the auspicious surroundings of the Sunningdale Civil Service College - not only for the former British colonies, but also drawing in practitioners from francophone and lusophone Africa. Here, the modernisers argued for modernisation, for secure formal property rights as a foundation for agricultural growth. Others argued for protection of customary rights and for formal recognition of a role for traditional leaders in land administration and management. Yet what was most striking was the breadth of the middle ground, the recognition that different points of view, and governments, civil society and donors had to meet, to work together, and enable the development of African solutions to what had become almost a pan-African problem - the need to establish viable, equitable institutional and legal frameworks that could safeguard the birthrights of Africans in land for future generations. Somehow government and law had to find ways to accommodate the myriad economic, political social and spiritual connections of Africa's people to the natural resource which remains the basis by which Africa can pull itself out of poverty.

The proceedings of the event (DFID 1999) led to a book (Toulmin and Quan 2000) which disseminated widely the event's papers, findings and debates, which continue to influence thinking and policy on land rights in Africa. Yet there was much more to learn and to do. The participants asked DFID to help them continue the process of debate and learning, and DFID tried - through a partially successful African wide experiment in land rights networking, which African practitioners christened LandNet Africa at a follow up workshop in Addis Ababa in January 2000 - and through our work at country level.

Francophone perspectives

An important stream of work, which continues to reveal the complexities and dynamics of land rights on the ground, especially in West Africa, but also elsewhere, is that of colleagues in IIED. In an outstanding, illuminating departure from continuing tradition DFID, for Britain, and the French government collaborated directly through the FBI (the Franco British Initiative - with Washington DC a mere part of its audience) on agriculture and land. The work drew on both francophone and anglophone intellectual traditions, and developed strong partnerships with African researchers, blending Anthropology, Law, Economics with Social, Political and Environmental science to generate insights on the practical realities and dynamics of land rights and land transactions for farmers, herders, women, men, chiefs, citizens, subjects, politicians and business people in West Africa - and how governments are struggling to catch up.

Recent World Bank thinking

A central feature of international debate on land and property rights in the early 21st Century has been the World Bank's process of consultation on Land Policy. This led to the production of a major Policy Research Report (Deininger 2003) and appears to represent a comprehensive landmark in changing World Bank thinking, not least in the Bank's capacity (with strong encouragement from the other donors and partner countries involved) to listen to voices other than its own.

The Bank's new document focuses on land and property rights primarily from an economic point of view, emphasising the importance of secure rights to economic growth. But it recognises the social values of land rights, their complexity on the ground, and that poorly designed interventions have over-ridden legitimate established rights. In addition rights do not necessarily have to be secured by formal land titling processes, but simpler, more accessible processes, based in local institutions can also be used. Collective or community rights have a place, and institutions for management of land rights have duty to protect the poor and vulnerable from abuse of their rights. The right of people to transact in land is seen as fundamental to the operation of land markets - and the empirical evidence throughout the world that people do and will transact interests in land, even where this is illegal, is undeniable - but groups and communities should also retain the right to restrict the alienation of radical rights to land outside the group. Rental markets are seen as infinitely more useful in enabling access to land than are sales markets, and the distortions in property markets which tend to exclude the poor are acknowledged. On land distribution, the report also acknowledges the fact that a variety of mechanisms are needed, and that the state can play a legitimate role in acquiring and re-distributing land, along side market mechanisms. But little space is devoted to the issue, and the document neatly sidesteps the global controversy about the promotion of market based approaches, in which the bank has become embroiled.

The key issue now is how far the Bank will be able to put its new thinking into practice.

The mysteries of capitalism

Recent work by a Peruvian property rights "guru", Hernando de Soto, widely espoused, to the point of evangelism, in the USA, has now given new impetus to old debates about land titling, this time in a primarily urban, rather than agrarian context. His basic thesis is that secure property ownership has been the foundation upon which capitalism has flourished in the West (or is it the North?) and must be extended to the poor in the developing world if it too is to prosper.

In his influential book, *The mystery of Capital: why capitalism triumphs in the West and fails everywhere else* (2000), de Soto argues that the law must recognise the land claims and settlements of the poor through land titling. These property rights provide a solution to the problems of poverty and the process of capital accumulation in poor countries. Title, by allowing property to be mortgaged, will "unlock the hidden capital assets of the poor".

De Soto has successfully drawn attention to the need to recognise the property rights of the poor, as a route to social and economic inclusion, and this has assisted in raising the profile of land and property rights issues on the international development agenda. De Soto advocates establishing more accessible user systems for the poor to register their rights to land and property, whether rural or urban. This view is broadly in line with that of DFID's land advisory group, and few would deny the importance of opening up the institutions

which administer land and property to make them more accessible to the poor. However, his argument that there is a direct causal relationship between formal land titles and economic development is not new, and remains fraught with problems. The main issue is how to extend formally legitimate property rights to the mass of ordinary people in developing countries. This requires the political will, technical expertise, vision and resources for medium / longer term programmes to re-model institutions and professions which have developed in such a way as to serve primarily their own interests and those of elites who can successfully navigate or buy their way in, while excluding the poor.

The dominant thrust of the US based arguments to promote de Soto are basically about betting on the strong, on the assumption that opening up opportunities for enterprise by a few will benefit all, without explicitly building social protection into the equation. Formal property ownership may not be appropriate for all, indeed, until such time as property institutions become genuinely transparent, accessible and equitable in their operations, the costs of formal property ownership, as well as the debt burdens that are created when property is mortgaged, are not appropriate for the poor. Nevertheless the rights and claims of the poor must have equal status, before the law, with those of the rich and powerful. In this regard it will be important to improve secure access to land and housing through a range of appropriate, and secure forms of tenure, and to invest in judicial and quasi-judicial processes which can enable the poor to protect their rights against seizure and abuse, and to resolve disputes. These issues tend to be neglected by the proponents of de Soto's thesis who see Property rights as a simple solution to the multiple problems of poverty, development.

Other issues

There are many other issues which could have been explored in this essay, but for the present there is not enough time and space. These might include:

- the new PRSP (Poverty Reduction Strategy Paper / Process) orthodoxy applied by the donor community, and now internalised in many poor countries, and the question of how rights fit in;
- the absence of any reference to land rights in official anti poverty strategies throughout the whole of Asia;
- the failures of processes such as WSSD and NEPAD in Africa to internalise land and property rights issues;
- the continued importance, but relative incoherence in UN institutions such as FAO and HABITAT in promoting and providing technical support to realise fundamental rights to land , livelihoods and shelter
- The opportunities (and threats) posed by radical social movements for land rights, and the uneasy co-existence of neo-liberal economic policies and land reforms in Brazil and South Africa
- The continuing challenge of re-modelling land and property institutions, the and eliminating the pervasive risks of corruption
- The perennial challenges of collective and communal rights, the so-called "tragedy of the commons" and in that context, the tragic failures of development policy to protect our common estates

Lessons learnt

Let me turn instead to some lessons that have been learnt (although not necessarily institutionalised) over the last five years. These are by no means exhaustive:

- Strengthening rights through policy consultation and debate, legislation, and implementation cannot really be tackled as a straightforward, linear process. A number of countries have tried to meet the challenges in reforming land policies in this way, with mixed results. Uganda, Tanzania, South Africa and Malawi all sought to bring about comprehensive reforms beginning with systematic enquiry and policy debate (with varying degrees of stakeholder consultation and popular participation) followed in turn by development of policy statements, drafting and passage of legislation, and an implementation process. While a rush to legislation, without clear policy in place does not help (demonstrated by Uganda), there is a need to tackle pressing legal reforms quickly, even if this means using provisional legislation. How to implement, including financial and institutional implications of legal changes need to be considered from the beginning. New institutions for delivery need to be built carefully based on existing capacity and should not be stipulated by legislation. Sweeping legal reforms to protect rights, however progressive and well-intentioned, can have perverse effects, leaving an administrative vacuum exploited by the strong.
- Policy needs to address questions of urban and rural land and property rights together, although specific legislative instruments may well be appropriate. In many cases the main body of law and institutions in place cover the whole range of land and property rights.
- Migration is a critical survival and development strategy, households and kin groups maintain footholds in town and country, in many cases across the globe. Property rights and the institutions which allocate them need to present clear levels of security, not necessarily absolute, but also to secure opportunities and to facilitate entry and exit, in both urban and rural areas. Rental is here to stay
- There are real practical and financial limits to the extent to which it is possible to record, register, survey, and map and determine comprehensive sets of specific property rights. To seek to do so is a very long term and very expensive process, and the costs are likely to far exceed the benefits. Policies and laws which seek to fix property rights in this way will not in fact protect them, because of the lengthy delays, during which rights are rendered insecure, and the fact that the procedures involved are susceptible to capture by the strong, while often inaccessible to the weak.
- Policy and law have the clear option of protecting established legitimate rights, (instead of reinventing them through new centralised procedures), and devolving responsibility for regulation to the local level. In doing so processes procedures and institutions, to allow negotiation of claims and resolution of disputes and conflict amongst rights claimants are more important than procedures to fix substantive property rights. Judicial, quasi-judicial and customary systems for negotiation and dispute resolution need more investment than conventional land administration, and the cost benefits in social terms, will be higher.
- The protection and extension of land and property rights cannot be separated from other areas of development (housing, urban planning, service delivery, agrarian development, , education and training, business support and trade reform) to generate social and economic opportunity whereby people can realise the benefits of secure rights by improving livelihoods. Although secure land and property rights are an immense

advantage to all who hold them, their creation is not in itself a magic bullet propelling countries along a development pathway.

- There are enduring issues about the role of collective groups, in delivering and enshrining rights to land and property. In order to act quickly, as well as to maintain and develop social capital, the state must deal with groups. In almost all contemporary cases where land distribution, restitution and resettlement, tenure security, informal settlement upgrading and community based natural resource management are starting to work, groups play a critical role. These may be “communities” defined by combinations of social, kinship and geographical relations and / or formally constituted associations, cooperatives or trusts. They need not be collectivist or communist in the sense of collective rights and responsibilities overriding those of individuals, households or sub-groups, but groups are in many cases the starting points for securing existing rights or delivering new ones. Questions of internal leadership, democracy, group management, rules and sanctions, as well as their interfaces with government institutions, although fraught with mundane local difficulties, must be addressed.
- In a modern market economy, marked by the tendencies of globalisation and regional integration, and in which vertically integrated commercial enterprise is a major engine for growth and employment, not everybody can own and occupy land, except perhaps for housing. If economic development is to be democratic, and its benefits widely spread, issues of land rights start to shift into questions of property rights or shares in corporate bodies capable of managing diversified enterprises, distributing social gain and maintaining the social environmental public goods of the land resource. If the global market economy is to become more equitable, and if land reform is to proceed far at all, it is likely that property rights will need to develop along these lines.

Conclusion

In conclusion, this essay can only ask "where next ?" for the international development community in promoting rights to land and to own property for the poor and "with what mechanisms and through what channels ?" Following the workshop, the answers to these questions are likely to be vastly richer and informed by debate amongst the jurists, advocates and researchers from the developing world. This will contribute to revision of this paper, and consideration of how best it can be used

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