norway

legal empowerment – a way out of poverty

june 2006 – issue 1

editors:
Mona Elisabeth Brøther and
Jon-Andreas Solberg

NORWEGIAN MINISTRY
OF FOREIGN AFFAIRS

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The views expressed in this anthology are those of the authors and do not necessarily represent those of the Norwegian Ministry of Foreign Affairs.

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Dear reader

Formalisation of property rights is one way out of poverty, but not the only one, and it is not a "one-size-fits-all" solution. In January 2006, the High Level Commission on Legal Empowerment of the Poor held its first meeting. The Commission will produce and disseminate a comprehensive set of practical, adaptable tools that will assist policymakers in their reform efforts at the country level.

The Norwegian government has been a key player in setting up this commission. We now want to take this agenda further. This anthology you are holding contains articles which address the complexity in this agenda. Formalisation is titling, but it is more. Private property is important, but so are collective- and user rights. Historically, women have been marginalised. In several countries they still are being denied rights that you and I take for granted. This has to stop. In this publication you can read about how we can make land rights accessible, and why this is important. You can also read about how this agenda is seen through the lenses of the civil society community.

I hope you will find this anthology interesting, and that we together can make the world a little bit better.

Erik Solheim

Erik Solheim
Norwegian Minister of International Development

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The HLCLEP – and the way forward

Background:

Millions, if not billions of poor people are without security for their assets. They can be taken from them any day, by elites, whether political, economic or business-based. They are defenceless spectators. The poor are usually also without the possibility to use these assets to increase their own income – to get out of poverty.

Just as many poor people are dependent on land, on access to land, security for land, the possibility to cultivate their land, and the possibility to use their land as collateral. In most countries the issue of land rights is linked to injustice, to land shortage, to controversial

issues of land reform, to disputes over rights to land. Land is at the heart of poor people's ability to survive – and to get out of poverty. The HLCLEP has to address land-issues, but they are among the most difficult and controversial ones in almost all countries. It all has to be done with caution. We are talking about empowerment as a process, and the Commission must take a process-related approach in its work.

The Commission of Legal Empowerment of the Poor has a very important role to play.

The ideological basis – The principles

The basis for the work of the Commission should be the fundamental human rights of every person, every poor. In the Convention of Civil and Political Rights, Art 11 and 17:*"Everyone has the right to ownership, alone or together with others. 2. No-one should be deprived of their property randomly.* Respecting this right is also a precondition for the realization of other human rights that are key for the livelihood of people and their social and economic development. The principle of collective rights is in this way already anchored in international law and in our common human rights framework.

In any society there are relations of power, of distribution of resources, equal and unequal. *Rights are therefore linked to resources.* This is key. Empowerment can never happen just with formalization of rights on paper. There has to be a context in which rights are realized through resources, or where measures are taken to this effect. This implies access to resources and a fair distribution of resources. The Commission should make this clear at the outset, and outline how such empowerment-processes can be undertaken as pass the test of fulfilling the rights for all.

In terms of land, this implies that the Commission also has to deal with the injustice of not having access to land, of land shortage, not only the issue of legalizing of formalizing existing land rights.

In human rights there are two dimensions of human rights obligations ”obligations of conduct” and ”obligations of result”. Both are highly relevant to legal empowerment, to analyze the conduct that will deliver the result – the realization of rights of the individual. This is empowerment of the poor. In the area of land rights, this is even more important.

Definition of task: not formalization, but empowerment – Empowerment is the test.

The definition of the poor – the target group of the process:

The Commission needs to have a clear understanding of the word “poor”. ”The poor” must be differentiated as a term. One needs e.g. to differentiate between urban poor, rural poor, pastoralists, women, indigenous peoples, landless people etc. ”The poor” should in other words not be defined as the whole population of a low income country, but individuals that are poor, as a result of their own or their group’s status in society.

One must also avoid an understanding of poverty that a priori defines people operating in the informal sector as poor. Informality is not equivalent to exclusion and poverty. Many poor people may see benefits in remaining in informality unless formalization-processes really lead to empowerment.

The understanding of legal empowerment:

The Commission needs to make clear whether it understands legal empowerment more broadly, or the focus is on legalization of the assets of the poor. In my view the latter is far too simplistic, and does not cover empowerment as a process – and the complexity of power relations we are dealing with. The linkage between rights and resources implies that formalization of rights on paper does not in itself imply empowerment. The Commission has to define more clearly what legal empowerment and take a process-related approach.

Legal empowerment of the poor as I understand it implies that individuals must take part in a process where they can have more security, less vulnerability, protected livelihoods with more influence over their own situation, greater potential for increasing their income, and in that way reduce poverty.

The definition of property:

Rather than using the term property in the classical economic way, the Commission needs to define the term property in a way that includes informal rights, user rights, collective rights, and customary and traditional rights. In this way property must be given a different, and wider, meaning, than what we usually identify with the term. This is not least important with regard to land. From the first discussion and the first meeting of the Commission, it is quite clear that this seems to be the collective understanding. In that way the Commission will already have departed from the classical neo-liberalist view of individual property rights.

The importance of legal empowerment for the poor: The 5 Why's

Why do we have to make efforts of legal empowerment? In my view, there are 5 important reasons. Firstly, it is to provide security of livelihoods through security over assets, with legal protection of individual or collective rights. This is a very important part of the Commission's work. Secondly, it is important to increase income for the poor and reduce poverty through legalizing assets, using them as security or collateral for increased access to capital. Thirdly, if we want this Commission to succeed, we have to make customary rights, user rights and collective rights workable as legal instruments to empower the poor.

If we want to unleash the potential for entrepreneurship in the informal sector, we have to empower individuals, with or without the basis in rights to land. In this context, small and medium size enterprises play a vital role, and it is necessarily to legalise their assets and providing access to capital. Furthermore, strengthen state building processes and the rule of law are keys to empowering the poor. Conducting the public registration or formalisation of land and other assets are difficult in countries with weak states and in post-conflict countries. But it is nevertheless maybe even more important in these situations.

The tools of legal empowerment: The How's

Lessons learnt on tools of legal empowerment – successes and failures

In order to succeed, we have to analyze the multiple ways of developing legal systems and registering rights – and the multiple levels of rights, individual, family, collective, local community. In this process it is important that we can learn from the history, both successes and failures. It is necessary to have documentation about the historical experiences of legalisation, registration and formalisation of assets. We have cases in both East and Central Asia, and further on in Japan, the United Kingdom and continental Europe. The Scandinavian countries also went through these processes one time. We have to have the knowledge about these cases in the past to make good tools for the future. There are also current experiences of legalisation, registration, formalisation of assets and other methods of legal empowerment in a variety of national and cultural settings we have to draw our knowledge from. And as in post-conflict experiences, there are both successes and failures but all experience is valuable for the Commissions work.

Learning from the failures - The risks that need to be mitigated for processes of empowerment to succeed:

As past experiences have shown, formalisation processes don't always make it better for the target group. In my opinion we can identify at least four different types of risks. *First we have risks related to land-issues.* There is always a risk that a formalisation process empowers the rich instead of the poor when there is inequality in land distribution or lack of land reforms. Here, the risk of privatisation or commercial-

isation of land in traditional societies must be addressed. The risk of the poor smallholders selling their land piece by piece is obvious. The biggest empowerment-challenge here is to establish ground rules for land reforms and land policies ahead of registration processes, or combining land reform and legalisation processes.

Secondly, we have the *risks related to gender.* This is a very important issue, also because women traditionally have been the looser in many formalisation processes. There is a risk of empowering the men instead of poor women when there is inequality in ownership and rights to land and other assets. Legislation, or rights on paper, often has a male bias, and often will imply mail ownership. There is also the opposite, when new land laws and registration can give women the right to own land and to get land heritage, and where access to the formal legal system can grant them rights that they did not have before. Here our empowerment-challenge is to outline measures to turn legislative and legalisation processes in women's favour.

Thirdly, there are *risks related to indigenous peoples.* There is the risk of further marginalisation of indigenous peoples related to inequality issues, non-recognition of collective rights and exclusion from governmental processes. Or opposite, there is a possibility of using such processes to formalise collective right to assets, to land and to autonomous areas for indigenous peoples. The Commission's big empowerment-challenge here is to outline measure to turn these processes around, and recommend collective formalised rights of ownership for indigenous peoples to autonomous areas.

Last, we have *risks related to traditional and customary rights.* Here we find the risk of cultural impoverishment through the introduction of private ownership, undermining traditional and customary rights, or individualising collective rights. But we have also the possibility of using such processes to expand the legal term "property" to include all

such informal forms of rights to assets, user rights, and customary and traditional rights and give them formal recognition. The Commission's challenge is to recommend the legalisation of collective rights, user rights, and traditional and customary rights, and in that way secure stronger protection of land and living areas for the poor.

Learning from the successes – Identifying tools that work and can succeed in empowerment processes:

It is important that we can learn from the successes as well as from the failures, but we can't just copy these solutions. The Commission will have to deliver a toolbox with a variety of different tools and policy options, options that include practical advice for governments embarking on formalisation processes. We should be able to present a toolkit with a variety of approaches to legal empowerment which includes different ways in which poor people can be provided with security and protection of their assets, in this case land. Further, the toolkit will have to include different ways and means of registering rights to assets and to land, and the variety of ways of making it possible to use such assets as collateral. Finally, the Commission should include an outline of different ways and means of providing access to financial resources in its work and in the tool-kit.

The how's – depend on Conditions and Context

All such processes happen in a country and every country is unique in terms of its power-relations, cultural characteristics etc. The context of processes of legal empowerment in a country, the conditions, is decisive for the result. Whether it will lead to empowerment of the poor will largely depend on how one deals with this context. As I see

it, we can identify several different contexts that are important to bear in mind in a formalisation process.

First, we have the context in terms of power relations at the local, national and regional level. They may be linked to social context or the political economy. Such relations are decisive for how processes of legalising assets and addressing informality can be used and/or misused. There is also the context in terms of the governance situation. If there is a situation of bad governance, inefficient or corrupt system which is controlled by elites, or an institutional context with the lack of the rule of law, there is a high-risk environment. Fragile and/or dysfunctional states may imply misuse of such processes.

The cultural context may greatly influence the way such processes will turn out in a local context. There are a great variety of cultural traditions, and cultural variation with regard to customary rights, title deeds, collective rights, gender and inheritance, marital tradition will influence the process. The issue of culture and tradability of land may be controversial and complex. Migration and mobility between rural and urban areas also play into this. We have to consider the context in terms of demography, land availability and mobility. Densely populated countries may be affected differently from land-registration processes than what the case would be in other countries.

It is also important that we bear in mind the context in terms of post-conflict settings where ownership or rights to assets may be disputed and where the complexity of rights to assets may seriously affect any process of legal empowerment of the poor. Empowerment never comes with papers alone, but with resources, how they are distributed, and how they can be used and accessed. Good analysis of the context will give a sense of direction of what it takes to ensure that processes of legalizing assets will, in fact, lead to empowerment of the poor.

The test - ensuring empowerment of the poor; Applying the tools

It is my hope that the Commission on this basis will be able to say something about how empowerment processes in this area can succeed. And this is also where the Commission can break new ground. I hope we will be able to present new and practical approaches to legal empowerment of the poor that passes the test of human rights standards and really empower the poor. The Commission's report should threfore end up with:

- Presenting *in which context* such processes are most likely to succeed;
- Presenting how *risks can be avoided and mitigated;*
- Presenting the *different approaches* one could take to maximize poverty reduction and empowerment of the poor, building on *the successes* of processes of legal empowerment;
- Presenting how legal empowerment-processes can be *monitored* to ensure success over time. The *test* being related to agreed human rights standards and indicators of empowerment and poverty reduction (ref. MDGs).

This should be summarized as a set of policy options and a variety of ways to conduct such processes – for policy-makers, governments and development agencies – where one shows how the poor can benefit from legal empowerment-processes.

Whether the Commission will succeed in helping processes to empower the poor will be clear only after 10 – 20 years, which is the time it takes to implement such reforms. But in order to have the result in the future, it is important that we start now.

Hilde Frafjord Johnson *(b. 1963) obtained her PhD in Social Anthropology at the University of Oslo in 1991. Hilde F. Johnson was Minister of International Development of Norway between 2001 and 2005, and Minister of Human Rights and Development from 1997 to 2000, within the two administrations of Prime Minister Kjell Magne Bondevik. She is currently one of the members of the High Level Commission on Legal Empowerment of the Poor.*

Bård Anders Andreassen

Formalisation and poverty reduction: A human rights approach

Within legal studies, law and better legal protection of properties and assets for production is sometimes seen as having a radically transformative role. Law can help people use their resources and capabilities more effectively and efficiently, and help them move out of poverty, and achieve prosperity and welfare. There is, in fact much historical evidence to support this proposition: The modern welfare state is fundamentally a system of legally secured entitlements in complex legal webs for the protection of working conditions, social security for those in need of help, legally protected pensions for the aged, access to health facilities, etc.

Legal empowerment to secure property to means of production, or title deeds for access to land (as property or user rights) can help improve

people's opportunity to invest in production of marketable goods and hence, contribute to a long-term reduction or abolishment of poverty. Legal empowerment and formalisation is, however, hardly a shortcut to poverty reduction. Formalisation of access to property and other assets as a strategy for legal empowerment faces complex practical and conceptual challenges that need to be addressed. To be realistic, international efforts to improve the formal rights of property and assets as a method for poverty reduction need to reflect on the social, economic, legal and political conditions for legal empowerment.

The promotion and protection of human rights represent, when effectively conducted legal empowerment of any human being, affluent or non-affluent. Human rights are moral as well as legal entitlement that anyone can legitimately claim. One of these rights is the right to property. A human rights approach to formalisation, however, is a comprehensive normative and legal framework – it assumes that fundamental human rights are – or should be – interrelated and interdependent. Although some rights may be more important to prioritise in particular situations, and priorities may and should be made in terms of which rights should have most resources in a particular situation, they are in principle equally important and valuable. A human rights approach to formalisation and empowerment through protection of property rights therefore requires that this set of rights is seen in context of other human rights and the underlying human rights principles. One of these principles is the concern for equality, proposing that everyone is born free and equal in dignity and rights, cf. Article 1 of the Universal Declaration of Human Rights form 1948. Another is the principles of non-discrimination, stating that there should be respect and observance of human rights and fundamental freedoms for all, without distinction as to race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status (cf. Article 2 of the International Covenant on Economic, Social and Cultural Rights, adopted as of May 2006 by 154 states).

The importance of seeing human rights as interrelated can be demonstrated by a couple of illustrations: An effective use of property rights, for instance land rights, will depend on fairly well functioning and non-corrupt system of governance that secure a formal and non-partisan management of registration and gazetting of formal documents. It also relies on a non-partisan and independent judiciary capable of resolving land disputes or other conflicts that may arise, and access to resources for anyone to have one's property and assets *effectively legally* guaranteed. Access to a legal system is commonly quite expensive, and may demand extensive systems and large recourse allocations for legal aid.

But the legal system is not at all the only arena for protecting and promoting rights and legal entitlements. Very often people's rights and entitlements are promoted by organisations or institutions mandated to defend the interests and rights of their members. By exercising public influence, interest organisations such as peasants association or trade unions promote rights through public awareness, institutional negotiations or other forms of public influence and resource allocation. Organisations more easily than individual citizens have access to resources needed to take a matter to court on behalf of an individual member or group of members. Legal empowerment of poor people therefore requires that the right to organise and associate, and rights of petition, access to receive and impart information and freedom of expression are being respected.

In summary, formalisation of property rights and legal empowerment of the poor rests on political, institutional and legal conditions that make formalisation realistic and potentially effective. A human rights approach to the formalisation agenda requires that property rights must be seen in this broader and interrelated human rights framework.

The Right to Property

There are different conceptions of property rights and different interpretation of its meaning. The conception of property, and its legal and social definition and construction influences our conception of its possibility for making a constructive contribution to poverty reduction. Different categories of poor people, e.g. urban, rural, women, indigenous people, pastoralists, etc, may have quite different approaches to the need for securing user or property rights. A key point is that *de facto* rights requires resources for the utilisation of *de jure* rights, for instance in terms of know-how resources, access to financial credits, resources for maintenance or property, etc.

A key aspect of property rights is to protect the right from interference from public authorities. In the case of property rights to land, property normally entitles a person to prevent others from entering his or her land. The right to property in human rights law, however, can be restricted under certain conditions, and a critical concern is the scope and margins for public authority to legally regulate and restricts the exercise of this right. Limitation is usually justified by reference to the interest of the public good, for instance by introducing land reform. The general provision of human rights law is that any interference in property rights must be taken in the public interest and it must be provided for by law. Deprivation of property should not be arbitrary and entitles the holder of the property to some form of compensation. The standard of compensation, however, is not very explicitly defined by human rights law.

The conception of property varies considerably between societies and communities. Usually viewed as a private right, the right to property may also be exercised collectively. This is the norm in pastoral societies (where the issue usually is about access to land and user rights rather than property rights). For poor rural people access to land and a secure tenure to utilise land is the main preoccupation, not indi-

vidual ownership. A human rights approach to formalisation should acknowledge the variation in conceptions of property, and reflect on how it is embedded in different cultures and social practices and traditions.

Positive aspects

It is a positive but not at all new issue to address legal empowerment of the poor by addressing access to land, distribution of land, and land rights. Land reform and access to land has been a rallying issue for liberation movements over the decades since the 1950s. For the urban poor the issues are different and require further empirical analysis. From modern Western history, at least the Scandinavian experience, we know that the development of the welfare state to a very large extent was a development embedded in law. Social protection and security have been regulated by legislation enforced by legal systems, and not left to shifting political trends, authorities and institutions.

It is a basic tenet of modern human rights that they are incorporated or transformed into national legislation. Human rights operate through domestic law. However, there is also a "margin of appreciation" inherent in human rights law, which give due recognition to local and national conditions and institutions. There are therefore some degree of flexibility in using human rights norms as legal standards for public policies and reforms.

The relationship between formalisation and human rights

The right to property is an important human right. Historically it was one of the "natural rights" in John Locke's philosophical scheme justifying fundamental rights of the individual, an important precedent indeed of the modern human rights doctrine. The right to property is often a precondition for the free exercise of other human rights, for instance the protection of economic rights such as the right to adequate food by an individual's or household's self-provision. The right to work and an adequate income may be conditioned on the right to property. Hence, the right to property is enshrined in all key human rights instruments. Below is a brief sample of important legal references in human rights law:

The International Covenant on Civil and Political Rights
Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The African Charter on Human and People's Rights
Article 14

States that the right to property shall be ensured. It shall only be "encroached upon" if there is a public need, or required by a concern for the public interests, and prescribed by law.

The African Convention on Human Rights, 1969
Article 21

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just Nompensation, for reason of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and other form of exploitation of man by man shall be prohibited by law.

   According to Protocol 1 of the European Convention on human rights and fundamental freedoms, Aricle1

   Everyone has the right to the "Peaceful enjoyment of ones possession… not be deprived of possession".

Rights-based development and formalisation

A human rights approach to formalisation of property rights views these rights as integrated, interdependent and indivisible with other human rights. A development model that builds on human rights, the so called human rights based approach to development, reflects this interdependency and at the same time provides standards for the goal of development (what development ought to be about) and how development planning and programming should be carried out.

A human rights approach to development (HRBAD) stipulates that the goal of development is to promote, protect and fulfil human rights. A HRBAD suggests that international human rights provide institutional guarantees that enable people to make choices that makes it possible for them to live a life they have reason to value (using Amartya Sen's terminology of capabilities and choice). Planning and

development interventions must be done in ways that are conducive to human rights standards. It is primarily the obligation of states to promote and protect human rights. There is though an international human rights discourse on the human rights responsibilities of non-state commercial and non-commercial actors. This discourse also addresses the issue of international duties to assist poor countries and provide development support and cooperation.

A HRBAD is concerned with development as process and as outcome. In human rights theory this is referred to as state obligation of conduct (or process) and obligations of result (or outcome). Human rights advancement as a process should nurture and respect all human rights, and at least, as a minimum, uphold the *do no harm principle*. At a more advanced level all concerned rights should be upheld, focusing particularly on the right to participate, right to access to information, and rights protecting political pluralism and opposition etc. It also requires that anyone should exercise his or her rights in a way that respect the rights and freedoms of others, cf. article 29 of the Universal Declaration of Human Rights. In anyone's exercise of one's property rights, this is an important concern. We may ask for instance whether the right to buy and own land in a free market is in conflict with poor people's ability to keep on to one's land, for instance in times of bad cropping and hunger.

Rights, in other words are interrelated, and must be legally guaranteed by non-corrupt systems of rule of law. It is imperative that to have a right also implies to be in a position to claim one's rights: To claim one's right, however, is contingent on resources, a functioning legal order, a political dispensation that respect and secures people's rights, as well as other well structured public and private institutions. Institutional structures at different levels, in particular appropriate state institutions, are critical for any state authority's capacity to ensure a legal order that guarantees people's personal security and integrity.

Summing up a human rights approach to development rests on the principles of equality and non-discrimination. Access to the legal system is usually expensive, bureaucratic and demand knowledge (and often relationships!) that hamper justice and fairness in access to justice and in justice as outcome. Legal empowerment of the poor through the advancement of property and other related rights requires critical examination of how formalisation strategies may have social, gender or other biases and inequalities in resource distribution and utilisation.

Issues for further studies and discussion

1. Is the formalisation discourse situated in a rights-based model?

A rights-based model for international development requires that the process and the outcome is conducive to human rights standards, oversight and participation. It also requires that international standards are respected and monitored. However, until the present monitoring bodies have not paid as much attention to the right to property as to most other human rights. In spite of this, the formalisation discourse should examine the work of international human rights bodies, including the work of the UN appointed Independent Expert of the Right to Property in order to identify more concretely the interpretation and operationalisation of property rights as human rights.

A human rights model requires

- respect for different types of property and user rights. The fulfilment of human rights for poor people, for instance the rights to food, and to work and income, are not sui generis interlinked with property rights, but closely related (and perhaps depends on, for all practical purpose) user rights;
- that formalisation of property rights should be complemented by social and economic policies for legal justice and social redistribution. The right to property gives ample room for accumulation of property (with winners and losers): Accumulation of property leads to social inequality and inequity and to demands for redistributive policies, for instance through the taxation system. The formalisation framework therefore requires political will and political reforms that are able to manage and accommodate demands for social justice and redistribution;
- a rule of law system that works in fairness, and that facilitates legal reform, anti-corruption efforts, and efforts to strengthen access of the poor to the legal system.

2. Has the debate been too focused on "formalisation" and too little on informal or structural distributive mechanisms, institutions and other factors, including social and economic power relations?

In societies or states where governance institutions are closely nit with political and economic interests and with little public accountability, legal empowerment has little chance of succeeding. Historically, access to resources for acquisition of property (contacts and nepotic relationships, access to credit institutions etc) have been the prerogative and privilege of those already in position of resources and influence.

In paternalistic societies, women will systematically loose out and poor people will generally have difficulty in retaining the rights good that they have obtained, such as different forms of property and related assets. An important issue is how to avoid legal *disempowerment* of the poor in bad times (in famine situations, under poor harvesting etc) granted that they have improved their property conditions in "good times".

3. The enhancement of rights of poor people is to a large extent a matter of collective action and responsibility

Protection of rights often takes place in on-legal channels and institutions. Rights, including human rights are often promoted and protected through non-governmental development or humanitarian organisations. The rights and interests of poor people are to varying degrees promoted and protected by peasant associations, small-farmer or trade unions. For poor people the legal channel is a rights-protecting institution with significant and serious limitations due to lack of accessibility and high costs. We may ask whether the formalisation agenda includes a concern for well functioning freedom of assembly and the right to organise as means of promoting and defending the rights of the poor.

4. Institutional conditions for formalisation and legalisation

A widespread problem in countries and societies with large populations living in poverty is weak institutionalisation, low trust in public authorities, and a high threshold for people's access to public institutions, including the legal system. This represents significant obstacles to an effective formalisation agenda. A progressive formalisation agenda also acknowledges that many societies with large poverty challenges have political systems where traditional, and patrimonial institutions live side by side with "modern" institutions of democratic representation. Such systems of parallel structures of authority make it imperative to define and resolve how conflicts over property rights shall be settled.

Formalisation, institutionalisation and legalisation of interest and access to goods including property in many societies lead to the cementing of social inequality and injustice with deep historical roots. In fact, empowering the poor in many societal situations implies reforming or transforming existing legal systems (as happened with the freedoms struggles in Kenya, Rhodesia or South Africa). In other words, the formalisation agenda has to carefully reflect the diversity of social formations in which it is being promoted with due attention to the potential and likely social distributive outcomes of the agenda.

Dr. Bård A. Andreassen *is Associate Professor and Director of Research at the Norwegian Center for Human Rights, University of Oslo. He has been coordinator and co-editor of several issues of the research and documentation publication Human Rights in Development (Kluwer) and has published on human rights and development issues, human rights and non-state actors, as well as on governance, democratic change and ethno-politics in African contexts. He is co-editing (with Stephen P. Marks) the anthology Development as a Human Rights. Legal, Political and Economic Dimensions. FXB Center for Health and Human Rights/Harvard University Press, forthcoming Summer 2006.*

Jennifer Franco – Transnational Institute (TNI)

Making Land Rights Accessible:

Potentials and Challenges of a Human Rights Approach to Land Issues

"States and the international system have not been capable of defeating poverty and hunger in the world. We reiterate our call to our governments, to the FAO, to the other institutions of the UN system, and to the other actors who will be present in the ICARRD, and on our societies, to decisively commit themselves to carrying out a New Agrarian Reform based on Food Sovereignty, Territory, Dignity of the Peoples, and which guarantees us, as peasants, family farmers, indigenous peoples, communities of artisanal fisherfolk, pastoralists, landless peoples, rural workers, afro-descendents, unemployed workers, Dalit communities and other rural communities, the effective access and control over the natural and productive resources that we need to truly realize our human rights."

Excerpt from the Final Declaration of the "Land, Territory and Dignity" Forum, a civil society parallel meeting to the ICARRD, 6-10 March 2006, Porto Alegre, Brazil, convened by the International Planning Committee (IPC) for Food Sovereignty, a global network that includes Via Campesina and the Foodfirst Information and Action Network (FIAN) among others.

I. Introduction

For organizations and movements of the landless rural poor, land has a multi-dimensional character – land and their connection to it has economic, social, political, cultural, and environmental meaning and importance.[1] In their view, the multi-dimensional significance of land for people can only be taken seriously through the lens of a "human rights" approach. For them, a human rights approach to land is one that *starts* from the recognition of *especially* the most vulnerable humans – that is, the "peasants, family farmers, indigenous peoples, communities of artisanal fisherfolk, pastoralists, landless peoples, rural workers, afro-descendents, unemployed workers, Dalit and other rural communities" whose representatives are speaking in the above quote -- as "rights-holders" with respect to land.

This understanding of the right to land (and other productive resources) differs fundamentally from what can be called a "(private) property

1 For the parallel forum's final declaration in full, see www.icarrd.org/en/news_down/IPC_en.pdf. According to the Foodfirst Information and Action Network (FIAN), the Food and Agriculture Organization (FAO) considers the following categories of people as landless and thus "are likely to face difficulties in ensuring their livelihood: (i) agricultural labour households with little or no land; (ii) non-agricultural households in rural areas, with little or no land, whose members are negaged in various activities such as fishing, making crafts for the local market, or providing services; (iii) other rural households of pastoralists, nomads, peasants practicing shifting cultivation, hunters and gatherers, and people with similar livelihoods" (FIAN, The Right to Food: A Resource Manual for NGOs, 2004: 14).

rights" approach to land, which starts from a much narrower, unpeopled and uni-dimensional understanding of land as a commodity or financial instrument, and then assigns rights according to who can go to the market and buy land. Yet the idea of land as a human right is today being invoked, whether explicitly or implicitly, by a wide range of people in a variety of structural, institutional and cultural locations and settings across the globe. This includes – but is not limited to -- the rural poor, who are increasingly invoking it to claim rights previously denied them (whether collective or individual, customary or statutory, user/stewardship or ownership rights).

Land is important to different people for different reasons. As a result, land rights in reality tend to be a highly contested matter, with no consensus on the underlying question of who ought to be given priority in the authoritative determination of land rights. Instead, as land reform scholar Saturnino Borras Jr. explains, "[p]roperty rights involve dynamic power relations between contending groups of people that are not reflected in national official statistics". [2] On the stage of dynamic power relations, it is, in the end, the strategic interaction of the competing "claim-making" efforts – each framed by a distinctive set of values, beliefs and meanings -- that will determine who has land rights in reality. Success depends on how well-organized and well-framed the effort is. For those concerned about ensuring the land rights of the rural poor, it is vitally important then to be clear about what is meant by a specifically human right to land.

2 Borras, S. (2006). "Redistributive land reform in 'public' (forest) lands? Lessons from the Philipines and their implications for land reform theory and practice" in Progress in Development Studies, 6 (2): 126.

II. A Human Rights Approach to Land

A human rights approach to land is one that is anchored firmly in the human rights tradition. The most basic elements of this "human rights tradition" may be summarised as the following: (i) people are viewed as rights-holders, rather than mere "beneficiaries" (ii) states are viewed as duty-bearers with the obligation to respect, protect and fulfil people's human rights, rather than "service providers" and (iii) governments should be held accountable when they fail to meet this obligation and rights are violated.[3] With respect to state obligations, the UN Committee on Economic, Social and Cultural Rights has elaborated a further set of criteria that spells out more particularly what this entails. [4] Accordingly, the nature of States parties obligations means:

- The obligation to guarantee that all rights will be exercised without discrimination;
- The obligation to take deliberate, concrete and targeted steps towards the full realization of ESC-rights within a reasonably short time by all appropriate means, including particularly the adoption of legislative measures;
- The obligation to move as expeditiously and effectively as possible towards the full realization of ESCR and not take any deliberately retrogressive measures;
- The obligation to use the maximum of available resources in the State Party and in the community of Status;

3 This view of the "human rights tradition" draws from a presentation made by Dr. Wenche Barth Eide, associate professor at the Institute for Nutrition Research at the University of Oslo, and the co-Director of the International Project on the Right to Food in Development ("From Food Security to the Right to Food", presentation prepared for a symposium on "The Rights Based Approach to Food" held last March 20, 2006 at the Wageningen International Conference Centre, Wageningen University.

4 See "The nature of States parties obligations" (Art.2, par.1): 14/12/90; and "CESCR General Comment 3" (General Comments).

- The obligation to prioritize in State action the most vulnerable groups; and
- The obligation to guarantee a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.

It bears pointing out that this delineation of the nature of States parties obligations clearly reveals a built-in bias in favour of the poor, such that one may say that the human rights tradition intrinsically means a pro-poor approach. But then what does such an approach mean with respect to land specifically? The answer, unfortunately, is not obvious. This is because there is no explicit human right to land in international human rights law, and consequently the obligations related to access to land have not yet been fully determined. As a result, there is not yet an authoritative consensus at the international level on what a human right to land would actually mean in practice.

According to Sofia Monsalve of the Foodfirst Information and Action Network (FIAN) International Secretariat, in thinking about land rights, a distinction must be made between two very different groups of rights: "One group are the property rights, i.e. the rights protecting the interests of the owners, mainly landowners. The other group are the rights to property, i.e. the right to have land for those who have not got land, who do not have enough land or whose ownership of land is not recognized. The right to property has a controversial status in the international law on human rights and the relationship between the right to property and other social rights is regarded as an area of

conflict which limits the latter."[5] While the more progressive "right to property" was established in international human rights law in Article 17 of the Universal Declaration of Human Rights (UDHR), it was not codified in the subsequent (legally binding) international conventions on economic, social and cultural rights and on civil and political rights. This was because of the underlying controversy and a lack of consensus at the time and during the deliberations over the conventions.

However, as Monsalve goes on to explain, "Even though there is no human right to land, the right to land of rural communities is implied in other human rights recognized in international covenants, such as the right to property, the right to self-determination, the right of ethnic minorities to enjoy and develop their own culture, as well as the right to an adequate standard of living." [6] There are indeed an increasing number of relevant international legal instruments, mainly on the human right to food, which lend support to the idea of a human right to land specifically and other productive resources, and that emphasise vulnerable people as the main rights-holders (see table below). [7]

5 Monsalve, "Justiciability of Economic, Social and Cultural Rights: Progresses, State of the Debate" in Right to Food Journal, No.2, December 2003. Heidelberg: FIAN: 1.

6 Monsalve, "Justiciability …": 4.

7 In fact, as Monsalve notes further, "It has become clear that the right to property, the right to self-determination and the right of ethnic minorities to their own cultural life, safeguard first and foremost the land rights of those who already own land. Only the right to an adequate standard of living, whether as such or in combination with the other rights mentioned above, provides a legal basis for claiming the right to land of those without land" (Ibid.).

Article 11 of the ICESCR (1966/76)	"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."
General Comment 12 of the Committee on ESC Rights (1999)	"26. The [national] strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries of rights in land (including forests)."
Voluntary Guidelines on the Right to Food adopted by the Council of the FAO (2004)	"Guideline 8B Land 8.10 States should take measures to promote and protect the security of land tenure, especially with respect to women, and poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit. As appropriate, States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women. Such mechanisms should also promote conservation and sustainable use of land. Special consideration should be given to the situation of indigenous communities."

Still, the matter is not so easily resolved. As important as these various international legal instruments are – and there should be no doubt that they are important, the idea of a human right to land (which

prioritizes the landless rural poor) remains contested in one arena where it counts the most -- that is, literally, on the ground (e.g., in specific landholdings claimed by contending groups or individuals). International law is one thing, but as one land reform scholar warns, "real property rights are inevitably local; right means what the claimant can make it mean, with or without the state's help".[8] More concretely, despite the existence of redistributive land laws in numerous countries, landlords, backed up by their own private armies, a network of sympathetic local public officials, and sometimes even their own self-declared "law", may still invoke their "right" over specific pieces of land (and may even expect national governments to defend or protect their claims), over and against even the legally sanctioned rightful aspirations of rural poor claimants.

Take the case of the Philippines, which has had a relatively progressive land law in place since 1988 called the Comprehensive Agrarian Reform Law that has led to the redistribution of an unexpectedly impressive amount of farmland to several million rural poor households over the past nearly 20 years. Most of this land redistribution occurred during the 1992-2000 period for several reasons that have been discussed extensively elsewhere.[9] Briefly, the rise of what is known as the "bibingka strategy in land reform", a strategy that emphasised strategic interactions between well-placed reformists within the state and well-organised movements of landless rural poor land rights claimants, contributed to greatly boosting the redistributive potentials of the 1988 law and its related implementation program.[10]

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8 Herring, R. (2002). "State property rights in nature (with special reference to India)" in F. Richards (ed.) Land, Property and the Environment. Institute for Contemporary Studies: 288.

9 See especially Borras, S. (1999), but also more recently Borras and Franco (2006, forthcoming).

10 See Borras, S. (2004). Rethinking Redistributive Land Reform: Struggles for Land and Power in the Philippines. Doctoral dissertation. The Hague: Institute of Social Studies.

But although gains in real land redistribution have been made in relation to struggles around the 1988 law, it bears remembering that the successes were usually very hard-won.

One underlying source of institutional discontinuity and significant legal tension has been (and remains) the co-existence of two contending bases of legal interpretation, the 1950 Civil Code on the one hand, and the 1987 Constitution and 1988 Agrarian Reform Law on the other. The 1950 Civil Code takes evidence of title (e.g. absolute deed of sale, tax records, etc.) as the legal basis of ownership, whereas the 1988 Agrarian Reform Law takes personal cultivatorship as the legal basis for land ownership. And while the 1987 Constitution defines property in terms of its social function, there is no such concept of land under the Civil Code. These legal considerations have been found to be important factors in the land reform implementation process. In particular, the continued existence of the Civil Code has provided landlords a possible and ostensibly "legitimate" way out of the government's own land reform program.[11]

Meanwhile, another recent development in the Philippines that is relevant to discussion of the extremely unsettled nature of the idea of the

11 Rural poor claimants seeking land reform are obliged to mobilize the Comprehensive Agrarian Reform Law administratively through the Department of Agrarian Reform (DAR) or the quasi-judicial DAR Adjudication Board structure. But forum-shopping landowners often try to activate the more conservative Civil Code by mobilizing the trial courts to defend their claim to property threatened with redistribution and to harass peasant claimants, wither by filing dubious criminal charges aimed at weakening their resolve and eating away at scarce financial resources, or by launching a kind of legal blitz intended to confound and overwhelm. In mobilizing the regular courts, landowners have a better chance of influencing the outcomes of legal proceedings, since judges are often landowners themselves (and thus more sympathetic to a fellow landowner than an "upstart" tenant or farmworker) or they are part of the extensive elite patronage networks that play a role in judicial appointments to begin with.

right to land in practice is the Land Administration and Management Program (LAMP). The LAMP is a World Bank funded, 25-year land titling programme, the stated aim of which is to generate individual private titles in some 5 million hectares of land to about 2 million individual title holders. It was pilot tested in the Philippine province of Leyte from 2002 to 2004, and became a full-scale programme last year. According to one close observer, "…the programme is not placed within a land reform framework, and so the main basis for the land titles being generated is the existing formal claims by any persons – rich or poor, landed or landless, actually cultivating the land or not".[12] Preliminary investigation in fact casts serious doubt on the LAMP's potential to connect with the landless rural poor and enhance their effective control over land, since in the pilot area it clearly did not. [13]

What these experiences from the rural Philippines suggest is that a purportedly "rights based" approach to land that does not explicitly opt *for* the landless and near-landless rural poor, can just as easily end up working *against* them. This is a critically important insight that ought to be heeded in countries like the Philippines, where the majority of the poor are *rural* poor and effective control over productive resources,

12 Borras, 2006: 137.

13 According to Borras, "In the pilot municipality visited for the study, official LAMP records show that *majority* of those that have put forward claims were: (i) middle and upper class families, (ii) not living in the villages where the claimed lands are located but in distant town and city centres, (iii) most of whom are not working the land, and (iv) many of whom have multiple land claims. The programme implementers have not required the 'residency' of the land claimants because this would 'complicate and slow down' the implementation process. Yet, the official claimants regularly paid the municipal land tax (*amelyar*) – which is one of the formal bases for property rights claims, though in practice, seems to be the main basis. In the same pilot sites, tenant-farmers and farmworkers who have been cultivating the lands being claimed by others were not even part of the LAMP project in any way" (2006: 137-138, emphasis in the original).

especially land, is crucial to the rural poor's capacity to construct a rural livelihood and overcome poverty. For this reason, linking the discussion of land rights with the human rights tradition can be seen as a much-needed step forward. If our starting point is the search for a land policy that is truly *pro-poor*, and it is framed unambiguously in these terms, then a human rights approach is a powerful tool – precisely because it *does* take sides: it is not pro-elite.

With these considerations in mind, then, what might a human right to land look like from the rights-holders' perspective (e.g., landless and near-landless rural poor people)? For advocates, the human right to land encompasses two, interrelated dimensions. First, from a political-economic livelihood perspective, it refers to the "actual and effective control over the land resource – meaning, the power to control the nature, pace, extent and direction of surplus production and extraction from the land and the disposition of such surplus".[14] Second, from a social-environmental cultural perspective, this right also involves land that is understood as territory where people live and reproduce their communities and "cosmologies" (or shared understandings of the origins and evolution of the universe and their place in it).

What does this understanding of the human right to land imply for duty-bearers (e.g., what are the obligations of governments)? For advocates of the human right to land, state obligations in this regard were established by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and later reinforced by the special rapporteur. As Monsalve has more recently stated, "State Parties to ICESCR are obligated to *respect, protect and fulfil access to land*, given that this forms part of the basic content of the right to food and is particularly important for peasants, indigenous peoples, fisherfolks, pastoralists, and people living in rural areas and who have no

14 Borras, 2006: 125.

alternative options for earning a living. *The Special Rapporteur on the Right to Food has already adopted this interpretation and considers it to be clear that governments should respect, protect and fulfil access to land*".[15]

It is important to note that the *obligation to fulfil* means *effecting the transfer of power to control* land resources from landed elites to landless and land-poor people precisely through redistributive land reform. The significance of truly *redistributive* land reform from this perspective cannot be overstated. As Borras puts it, "[r]edistributive reform is achieved only when there is actual net transfer of (power for) effective control over the land resource to landless and land-poor … regardless of whether it is in private or public lands, or whether it involves a formal change in the right to alienate or not, ie, full ownership or 'stewardship'/lease, or whether it is through individual or collective/community formal rights".[16] Against this backdrop, we now turn the discussion to the next question of how such a transfer might occur and how the human right to land, although not yet fully established in international law, might still be achieved on the ground. Again, the answer is not obvious.

III. Making Poor People's Land Rights Accessible

The "real world" of course is teeming with struggles – played out on the ground, in courtrooms, in legislatures, etc – between competing interpretations of the meaning and purpose of the right to land, and over the outcomes of official land law/policy making and implementation. This is because, simply put, no law or policy -- especially one that aims to redistribute power -- seamlessly or flawlessly arises and then

15 Monsalve Suarez, Sofia (2006). "Access to land and productive resources: Towards a systematic interpretation of the FAO Voluntary Guidelines on the Right to Food – Summary", *FIAN Report R 1*. Heidelberg: FIAN: 2.
16 Borras, 2006: 125.

goes on to "self-implement" effortlessly in a power vacuum, no matter how hard some might wish. This observation is certainly not new, but perhaps it bears repeating today amidst growing interest in land rights and the "legal empowerment of the poor".

Indeed fifty years ago, the economist J.K. Galbraith remarked that discussions of land reform tended to "proceed as though this reform were something that a government proclaims on any fine morning – that it gives land to the tenants as it might give pensions to old soldiers." That was half a century ago, but the point is still relevant. Today, land reform remains the "revolutionary step" that Galbraith (and others) knew it then to be; one that "passes power, property, and status from one group in the community to another …."[17] For those concerned about guaranteeing poor people's land rights, what immediately follows is a two-stage political problem. The first stage of the problem involves establishing the legal right and can be summed up using Galbraith words: "The world is composed of many different kinds of people, but those who own land are not so different …. that they will meet and happily vote themselves out of its possession." The second stage involves ensuring effective access to that legal right.

In societies marked by skewed land distributions, fully redistributive land reform laws and policies may be the exception to begin with. But where they do emerge, even partially redistributive land laws and policies must then still be implemented within an overall inequitable balance of power between those who have (landed elites) and those who have not (landless and near-landless rural poor). Land reform laws and policies often end up as incomplete interventions that have become altered and been improvised in the course of implementation over time. This is because they are implemented by real people located at different

17 Cited in Peter Dorner, *Latin American Land Reforms in Theory and Practice*, University of Wisconsin Press, 1992.

levels of a polity, who are themselves: (i) embedded in power relations and differentially endowed with power resources and (ii) bearers of contending cultural and institutional frames of reference.

But contrary to what one might expect, the outcomes of this process have not always been lack of redistribution, as the case of the Philippines, among others, suggests. The underlying issue is under what conditions can the human right to land be realised?

I was recently involved in a research project sponsored by the Institute of Development Studies (IDS) in Brighton, England and funded by the British Department for International Development (DfID), which attempted to address this issue of rural poor people's effective access to legal land rights, by taking stock of the obstacles but then trying to identify social-political factors that may contribute to overcoming those obstacles. The central questions of the research were: How do rural poor people experience and use state law? When do rural poor people use state law? When do rural poor people succeed in making state law a progressive force for social change? In particular, when do they succeed in making it work for them in claiming land rights?

The Philippines is a good place to explore these questions because unlike in the past, many rural poor Filipinos since the 1990s have actually been trying to use state law to claim land rights. But in spite of the availability of a much heftier set of specialised legal resources than ever before, claiming legal land rights for them remains extremely difficult, for a combination of reasons that have to do with both the nature of Philippine state law and the nature of landlords' anti-reform resistance. In the Philippines, historically, landlord resistance to land reform has tended to take both legalist and extra-legal forms. In recent years, this situation seemingly bolstered the position of pro-market scholars, who cited difficult legal problems in calling internationally for the replacement of the current state-led redistributive land reform

by the so-called "market-assisted land reform" (MALR) model. The suggestion has been met with strong opposition by civil society groups working on land reform issues.

Against this backdrop, a team of local researchers and I conducted extensive field work in two regions of the Philippines (Bondoc Peninsula and Davao del Norte), using a combination of data gathering methods. We surveyed and coded some six thousand court records at different levels of the judicial and quasi-judicial system (municipal and regional). We also conducted key informant interviews with numerous individuals in both regions, including officials from the Department of Agrarian Reform, the regular trial courts, the police, and the local government, as well as numerous non-governmental activists and peasant movement leaders. In addition, we conducted lengthy, in-depth focus group discussions with various kinds of village-level civil society organisations in forty-two villages (twenty-one per region). Finally, we studied the political-legal strategies of several rural poor people's organisations that were involved in land conflict cases in varying types of crop/farm system: (i) a modern export banana plantations in Davao del Norte (ii) a private coconut hacienda in Bondoc Peninsula and (iii) a "privatised" coconut hacienda (e.g., on public land) also in Bondoc Peninsula.

The cases and our findings are discussed extensively in a working paper published in 2005 by the IDS. [18] The key findings regarding political-legal strategies and when they work for the rural poor may be summarised as the following:

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18 See Franco, J., 2005, "Making Land Rights Accessible: Social Movements and Legal Innovation in the Philippines." IDS Working Paper Series, no.244 (June 2005), Brighton, England: Institute of Development Studies (IDS) (for PDF version, see www.ids.ac.uk/ids/bookshop/wp/wp244.pdf).

First, national constitutional-juridical changes in the Philippines in the 1980s created unprecedented opportunities for landless rural poor Filipinos to claim ownership rights on land they tilled as tenants and farm workers even in the most politically contentious landholdings. Specifically, these changes were embodied in the 1987 Constitution and the 1988 Comprehensive Agrarian Reform Law (CARL) and Comprehensive Agrarian Reform Program (CARP).

Second, related institutional reforms expanded landless rural poor people's access to that part of the state most directly responsible for implementing new land reform legislation -- namely, the Department of Agrarian Reform (DAR). But other "institutional access routes" (e.g., the regular trial courts) remained closed or immune to social change pressures. This finding is significant for what it implied in terms of political-legal strategy.

After the 1987-1988 changes, there were now two contending legal frameworks on land: namely, the 1950s Civil Code (which takes evidence of title – e.g., absolute deed of sale, tax records, etc. -- as the legal basis for land ownership) and the 1988 CARL/CARP (which takes personal cultivatorship as the legal basis for land ownership). Rural poor claimants seeking land reform are obliged to mobilise state law administratively, through the DAR or quasi-judicial DAR Adjudication Board (DARAB) structure. But forum-shopping landowners often try to activate the more conservative Civil Code by mobilising the trail courts to defend their claim to property threatened with redistribution and to harass peasant claimants, either by filing dubious criminal charges aimed at weakening their resolve and eating away at scarce resources, or by launching a kind of legal blitz intended to confound and overwhelm. In mobilising the regular courts, landowners have a better chance of influencing the outcomes of legal proceedings, since judges are often landowners themselves or they are part of the elite patronage networks that play a role in judicial appointments to begin with.

Third, whether or not rural poor rights-holders in hostile political situations took steps to claim their land rights depended on their having access to a support structure for political-legal mobilisation – specifically, a *"rights-advocacy organisation" with the political resources and interpretative capacity* to help prospective rural poor claimants to maximise the political-legal possibilities using the new law. Underlying this particular capacity is not a "naïve belief in the rule of law—akin to Scheingold's 'myth of rights'", but rather a determined understanding of how state law can be used *strategically* by social movements of the rural poor and their rights-advocate allies in society.[19]

But trying and succeeding are two different things. And so the fourth and final point is that whether or not they actually made any gains depended on their adopting what I call a "proactive, integrated political-legal strategy". This means a strategy that is capable of: (i) activating a pro-poor interpretation of the law, (ii) exploiting the independent initiatives of state reformists, and (iii) resisting the legal and extra-legal efforts of anti-reform elites within the state and society. Central to such a strategy is a recognition of the fundamental value and necessity of the autonomous mobilisation of social pressure from below by the rural poor in order to "work the system" to make it work for (rather than against) them.

19 For this distinction, see Garth, B.G. & Sarat, A., 1998, 'Studying How Law Matters: An Introduction' in Garth and Sarat, eds., *How Does Law Matter?*, Northwestern University Press and the American Bar Foundation: 7-8.

IV. Conclusion

In summary, even in what can be seen as relatively more advantageous political settings (e.g., where there is a "good" law, highly mobilised social movement actors, active state reformists, and constructive state-society interactions), the implementation of redistributive land laws (or making legal land rights accessible to the landless rural poor) has proven to be complicated, messy and extremely difficult. In the Philippines, this is partly because of the existence of contending legal frameworks (1950s civil code versus 1980s agrarian reform code), and partly because of strong anti-reform elite resistance. It is important to emphasise that elite resistance to land rights claim making by the rural poor often takes the form of both legal (or "legalist") and extra-legal resistance. This has clearly had dire consequences for the whole range of human rights of rural poor claimants and potential claimants -- not only their economic and social rights, but also their civil and political rights as well.

And yet in spite of the formidable obstacles and hostile social-political conditions, our research confirms that many disadvantaged and vulnerable rural poor people still choose to take action as rights-holders, usually by banding together to press their claims. By no means are their efforts to do so always or automatically successful; indeed, many of those who dare to petition for land rights through the government land reform program are at risk for getting stuck for long periods of time in an "in-between" stage (prior to actual land transfer), where they become even more vulnerable to summary dispossession, livelihood deprivation, criminalisation, and physical harm by landlords.[20] However, the Philippine case also suggests that under certain

20 See Lanfer, Anne (2007). *The Philippine Land Reforms and their Impact on Rural Households.*Bachelorarbeit. Institut fur Ernährungswirtschaft und Verbrauchslehre, Agrar- und Ernährungswissenschaftliche Fakultät, Christian-Albrechts-Universität zu Kiel.

conditions, disadvantaged rural poor people have a better chance of succeeding in making gains toward gaining effective access to their land rights if they can use a proactive and integrated political-legal strategy.

More generally, this study suggests that a human rights approach to land issues has great potential precisely *because* it is anchored in an *unambiguously pro-poor* perspective. But for those interested in fully realising a human rights approach to land, the challenges are many. The first challenge remains putting it on the official agenda of governments. This in itself is a Herculean task because at the moment the level of advocacy is still relatively low, engaged as it is in debates on the Voluntary Guidelines on the Right to Food and not yet on the right to land (see Monsalve 2006 and the Preamble of the ICARRD 2006 Final Declaration). And then, once a pro-poor human rights approach to land does make it onto the agendas of governments, the next challenge has to do with actual implementation, as shown by the Philippine case.

All of these tasks are very difficult, but they are certainly not impossible to achieve. In the end, much will depend on the efforts and strategies of the rural poor and their movements, and their rights-advocacy allies in civil society and in government. Those interested in contributing to the eradication of rural poverty and rural poor people's political empowerment, at least in the Philippines, but perhaps elsewhere too, would do well to support these kinds of proactive, integrated initiatives – that is those that confront, rather than back away from, the formidable political-legal obstacles to redistributive land reform. This may well mean putting more public resources into supporting a more determined and sustained kind of integrated state intervention in favor of specific well-organised landless rural poor social movement groups, around their rightful land rights claims.

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Shahra Razavi, UNRISD

Agrarian Change, Gender and Land Rights

This article divides into three sections. It begins with some brief remarks about the role of politics and ideas in changing land policy perspectives towards gender: from a position of non-recognition of the issue to one where gender inequalities are being increasingly acknowledged as worthy of attention. It then turns to some of the difficult policy issues that currently confront us. Here I raise some questions about liberalization policies vis-à-vis land; especially whether "land markets" can be a vehicle for poor women's inclusion. In the last section, the article turns to the current endorsement of "customary systems" and "local level" land management by a wide range of policy actors, and I ask what the implications of this may be for the gender equality agenda.

Politics and Ideas

It is no secret that historically even the more successful and comprehensive land reforms like those in Taiwan and South Korea paid little attention to the issue of gender justice. Admittedly, these reforms took place at a time when the gender question was still dormant and when women's organizations lacked their current visibility and voice.

Compared to this rather gloomy scenario, recent developments appear promising – for a start, gender inequalities in access to resources, including land, are being increasingly recognized by policy-makers as a problem that needs to be addressed. There are also increasing instances where women's rights advocates, and more sporadically rural women themselves as a constituency, are mobilizing to make claims to land.

I would argue that two developments have fed into this recent shift.

First, the transition from authoritarian rule in many parts of Latin America and Africa, have given women's rights agendas greater force and legitimacy. This helped bring women's rights into the process of constitution writing and the stipulation of legal codes in many countries – Brazil and South Africa are good examples of this.

The attention paid to rights-based approaches at the global level has also played a part in prompting activists to draw attention to the constraints that women face in accessing land. Women lawyers, coming together through regional and sub-regional groupings, have become particularly influential as advocates demanding legal reform. There are many examples of such groupings: Women and Law in Development in Africa (WILDAF) has been advocating for legal reform on a wide range of issues including women's rights to land, and similarly Women and Law in Southern Africa (WLSA).

These activists are oriented towards the international conventions and instruments (such as CEDAW) and a rights perspective; with a generally positive stance towards the role of the state and statutory law as mechanisms for delivering rights to women (I will argue that this is a narrow perspective).

The other overlapping stream of activism within which women's land rights has emerged as an issue is at the level of social movements, NGOs and Land Alliances. While the importance of building coalitions between gender advocates and other "progressive" forces is often emphasized as a "good thing", forging such alliances is not always so easy.

As Carmen Diana Deere (2003) shows, it took more than a decade of activism for women's rights to be strongly articulated by rural social movements in Brazil. It was not until the exclusion of women began to have "real practical consequences for the consolidation of the agrarian reform settlements (the *assentamentos*) that women's land rights became an issue within the main social movement leading the agrarian reform, the MST and for the state".

Second, the above-mentioned political openings have been matched by academic research on gender and the household, which has produced interesting changes in the realm of ideas; some of these have found their way into policy circles. The intrahousehold arena has come under increasing scrutiny over the past couple of decades, initially by feminists from diverse disciplinary backgrounds, and of late by neo-classically inclined micro economists, some of whom are associated with policy organizations such as the World Bank and International Food Policy Research Institute (IFPRI).

This literature has drawn attention to the unequal distribution of resources and power within households, along gender lines, as well

as women's greater attachment to the welfare of children (evident in women's spending priorities). There are some interesting shifts in policy that seem to reflect the findings of intrahousehold research: anti-poverty programmes, whether in the form of micro-credit or cash transfers to poor households increasingly target women on the grounds that they will spend the resources under their control in ways that enhance family and child welfare.

Another strand of thinking uses neoclassical micro economic analytical tools to argue that the structure of male and female incentives in farm households (in sub-Saharan Africa) leads to "allocative inefficiencies" and a muted agricultural supply response. One important resource constraint to which they draw attention is women's inadequate access to land—attributed to patriarchal land tenure institutions. Other studies have given support to the view that women's access to, and ownership of, land plays an important role in household decision-making and in the allocation of resources to children's welfare and education.

While there are some concerns about the ways in which gender research is being translated into policy—the instrumental ways in which women are being used for policy purposes, sometimes with little regard for their own welfare—what the above suggests is a degree of selective up-take of "feminist" ideas within the policy domain. This has facilitated the absorption of "the gender asset gap" into various policy documents – the World Bank's 2003 policy statement on land being a very good example.

Land markets as gendered institutions

Global policy guidelines vis-à-vis agriculture, and with respect to land more specifically, have undergone important shifts in recent years. While compared to the early 1980s in recent years "a more nuanced and empirically foregrounded approach" (Whitehead and Tsikata 2003) has taken hold, the importance of land markets and individual tenure as the essential ingredients for agricultural productivity and growth continue to be underlined.

How likely is this to coincide with global policy commitments to gender equality and women's land claims? In other words, how likely are women to emerge as winners in the market-based land reform model and in land market transactions more broadly?

As was noted above, domestic institutions – families and households – are now increasingly seen as embodying gender divisions and inequalities. That social and gender hierarchies have similar effects within market institutions is less well recognized, especially within mainstream economic analysis.

Although the empirical evidence is far from comprehensive, a judicious reading of the existing evidence, most of this case study material, would point to the severe limitations of land markets as a channel for women's inclusion. It is of course important not to homogenize women as a social group; there are always groups of women, for example urban women in formal employment or women in peri-urban areas who grow food for urban markets, who may have accumulated enough resources to purchase land in their own name with full property rights. But for the vast majority of women smallholders, market mechanisms are not likely to provide a channel for inclusion.

For sub-Saharan Africa Lastarria-Cornhiel's (1997) examination of the continent-wide evidence for the effects of land privatization points

to women as the largest group who have had little to gain from the trend toward privatized land tenure systems. In fact the transformation of African tenure systems have tended to further constrain women's already tenuous access to land while other groups (community leaders and male household heads) have been able to strengthen theirs. While previously a number of persons and community groups held different rights to a piece of land, with privatization most of those rights are brought together and claimed by one person. In this process women have tended to lose out.

Have women fared any better in so-called market-friendly land reform programmes? The South African land reform programme, which attempted to meld a strong commitment to the goal of social justice (and gender equality) enshrined in the new democratic constitution, with the principles of market-led land reform, does not provide the basis for optimism. Research highlights the severe constraints imposed by the "willing-buyer willing-seller" framework. The programme has been criticized for being "demand-driven" by many critics. The main concern has been the state's inability, within the market-friendly straightjacket, to acquire and redistribute productive land proactively and on a sufficiently large scale. By March 2005, less than 3.5 per cent of the area designated as "commercial farmland" had been redistributed (poor quality land).

More to the point, a strictly demand-driven programme also conflicts with the policy aim of reaching women, because it overlooks the ways that power relations and divisions within communities structure how "demand" is expressed, and by whom (Walker 2003). It commits the state to responding to applications from already constituted groups, in which it is likely that women's role will be a dependent one. The pressure on government to exit as soon as land has been transferred further limits its effectiveness as a development agent.

So markets do not operate in gender-neutral ways, as in the ideal market of neo-classical textbooks. And the evidence that we have seems to suggest that gender advocates should have serious reservations about land markets as a mechanism for women to acquire land.

Why then have women's rights advocates in some countries, Tanzania and Uganda for example, fought for the rights of women to be able to inherit, purchase and own land in their own name while rejecting the customary forms of land tenure which they claim have strongly discriminated against women?

In Tanzania, for example, the Gender Land Task Force (GLTF) entered into alliance with the National Land Forum in 1998 to ensure that both gender and other equality concerns in the Land Bills were addressed and to establish a stronger coalition (Manji 1998; Tsikata 2003). This grand coalition, however, soon had to face the fact that there were serious differences within it. There were many divisive issues, but the most relevant for the present discussion were the disagreements with respect to liberalization policies and the risks entailed by land markets. The other issue that divided the coalition centred on discriminatory customary law rules, how they should be reformed and what powers should be vested in state and village level land management institutions.

Some women's rights advocates were critical of the liberalization agenda, given the highly adverse implications of private property regimes for resource-constrained women. Others, however, did not share this dim view of land markets. In fact, some of the most influential gender advocacy groups supported the liberalization of land markets and land titling as opportunities for women to purchase land on an individual basis. Evidence from women's advocacy groups in other countries of the region suggests that Tanzania may not be an exception.

The argument that the class composition of the dominant women's groups limits their capacity to engage with an issue which concerns poor rural women most, and also creating a conflict of interest because they stand to benefit from liberalization in ways that rural women could not, though persuasive at a certain level, is not ultimately convincing (see Tsikata 2003).

An adequate probing of this question would have to take into account the discontents with how "customary practices" are being used and how this is contributing to advocacy groups' embrace of liberalization.

Yet while women's rights advocates are rightly concerned about the ways in which "traditionalist" discourses and "customary" practices are frequently used to deprive women of equal rights, it is unfortunate if discontent with "customary" tenure leads to the oversimplified conclusion that land markets are a gender-neutral terrain and a channel through which women are likely to substantiate their access to land. Much of the evidence that we have provides little support for such expectations.

Land is not a "magic bullet"

Some women's rights advocates rightly point out that liberalization of land, whatever its risks and merits, is already underway and hence women should seek to gain a place in the emerging markets (like men). While this may indeed be the case, the more critical question is how – under what conditions – are women likely to access land in a liberalizing context? While having an enabling legal framework is no doubt important, it is far from sufficient. How can women access the necessary resources, the infrastructure, and the marketing channels necessary for a viable farming enterprise? How are the institutional biases in marketing channels, government extension services, credit

provision going to be tackled so that women can be more equitably included?

These questions are often left out in women's rights advocacy around land, while the legal requirements for land ownership tend to assume in my view an unduly hegemonic role ("advocacy driven by lawyers"). To address these critical issues of institutional bias in markets and state services as well as power inequalities a broader analytical and policy framework is required – one that is not so narrowly fixated on law and legal regimes. In other words, we need to move beyond the view that sees land as the "magic bullet" and to focus on the interlinkages between land and other resources. For this we need a developmental framework rather than a narrowly legal framework.

A critical point that emerges from the literature is the ways in which women's constrained access to non-land resources (credit, extension services, labour markets) contributes to their precarious economic situation. While in some areas of sub-Saharan Africa marked by severe land scarcity, an inability to access land constitutes a constraint on women's farming; in other areas, women smallholders experience other constraints – inadequate access to labour and to credit. As Ann Whitehead has shown, although women farm much less land than do men, this is not always because women are prevented from accessing land; it is also because they lack capital to hire labour, purchase inputs and access marketing channels.

It is also important not to isolate land from other sources of livelihoods, especially off-farm employment opportunities which are increasingly a component of rural people's livelihoods and a healthy and vibrant rural economy. The orthodox macroeconomic policy package which seems to be contributing to very low rates of economic growth and an inability to generate sufficient employment is one major constraint and one that is producing particularly adverse conditions for women.

So we need to worry about non-land issues and widen the scope to include developmental concerns more broadly within which an agrarian transition is possible.

There is also a tendency within the gender literature to pose land and employment in binary opposition: are employment opportunities more important for women or access to and ownership of land? Posing the issue in such terms tends to miss out on the critical inter-linkages between the two, and the ways in which many women and men need to complement land-based incomes/outputs with income from off-farm sources in order to secure viable livelihoods.

The "re-turn" to "the local"

In this penultimate section of the article, I want to focus on the turn to local level land management institutions and so-called "customary" practices, which are all part of the drive for "decentralization". What are its implications for women?

In a "state of the art" paper that Ann Whitehead and Dzodzi Tsikata prepared for UNRISD in 2003, they documented how received wisdom within the World Bank's Land Policy Division has been swinging away from position they held in the 1980s which was to see the absence of private property rights in land as a barrier to agricultural growth and to give full support to privatisation, titling and registration of land; the current position, as we see in the 2003 policy statement on land, is in favour of "building on customary tenures and existing institutions" (even though individual land titling still routinely appears in policy documents advising borrowing governments on the need for further liberalization.)

Interestingly, we see a similar endorsement of "the local" by policy

advocacy organizations such as OXFAM and IIED, which are in many ways opposed to the policies of liberalization advocated by the IFIs. For these advocates too however subsidiarity and devolution are key objectives in land reform policy. Given the history of political abuse and processes of land alienation and "land grabbing" facilitated by national political elites, they claim that it is best that decisions on land management and control be taken at the lowest levels possible, "closer to home" in the words of the Shivji Commission in Tanzania. "The local" is thus seen as a site of resistance against the state and against international capital. This approach fits their general support for participation, building of local capacities, and local-level democracy.

In general, women's rights advocates in many countries do not see "customary" law and "local level" institutions in the same positive light. While there is ample evidence of women using social relations and local level land management fora for making strong claims to land, the weight of evidence suggests that economic changes have resulted in women's diminished access to land. Competition over shrinking resources seems to have intensified the patriarchal tendencies of the lineage system, even though conditions differ across contexts and generalizations are difficult to make. In Tanzania, for example, women were reported to be generally unhappy with the local administration bodies "for reasons of corruption, under-representation of women and bias against them arising from prejudices and ideologies which cast them as less reliable protectors of clan land than men" (Rwebangira et al. no date cited in Tsikata 2003: 172).

This is not to suggest that "customary" practices are bad for women, and statutory systems woman-friendly. Commentators refer to the practice of "forum shopping"—referring to the overlaps between formal legal systems and so-called customary ones, and the fact that individuals are using different courts and other dispute-settlement fora and using arguments grounded in either "customary" or "modernist" principles,

whichever is to their advantage. Outcomes depend not only on the different quotients of economic and political power that different parties are bringing to the fore, but also the kinds of structures that are being put in place, how change is being managed, and ultimately the role of the state as a major actor promoting change.

There is very little discussion, however, by the policy making organizations advocating "local level" land management as to how the proposed local level systems might work in practice, including their capacity to deliver more equitable, especially gender-equitable, resource allocation. It is not at all clear that these local level institutions are more socially just than the "big remote centralized state".

What kind of political dynamics then are being unleashed by the return to "the customary", and the revival of "traditional" authorities? These institutions could have highly *dis*-empowering implications for rural women and their claims on resources. As Whitehead and Tsikata conclude, the main problem is that women have too little political voice at all the decision-making levels that are implied by the land question: not only within formal law and central government, but also within local level management systems and indeed within civil society itself.

States are clearly not neutral in designing and implementing social and economic policies, but they are not self-evidently patriarchal either. Unlike institutions like the family and "community", states may be more permeable to women's interests in contexts of strong social conservatism (Hassim and Razavi 2006). This may offer openings for women's movements to extend the reach of social programmes in ways that address women's interests. What is needed is greater democratisation of the state, rather than a flight into "the customary".

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By the ForUM ad-hoc group represented by
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Rocking the power balance when formalising land rights: Some reflections from Norwegian NGOs

Introduction

A majority of the world's poor people are rural and struggling to find subsistence from the land. This is an ever growing challenge when a quarter of the 1.1 billion poor people is landless or lack recognition of land rights. The poor and marginalised are diverse groups with different concerns, be it pastoralists from the Horn of Africa, women struggling with disfavouring inheritance practises or landless people in Brazil being denied their constitutional rights to land. The complexities of realities of the poor are enormous.

This paper is a joint effort by Norwegian NGOs [21] advocating for a nuanced view of power-relations when addressing reforms and developing policy to promote *asset security*. We believe that a central part of securing access to land rights, which is our theme, is about pro-poor agrarian reforms and recognizing *security of tenure*. A concern that has been expressed by civil society, be it NGO groups or the Academia, is that formalising land rights alone cannot bring all marginalised groups out of poverty. In fact, a "one-solution-fits-all-approach" might even be to the detriment of marginalised groups, be it nomadic groups, women, landless or indigenous peoples.

Norwegian civil society has been strongly involved in debating pros and cons of the *formalisation* agenda for poverty reduction. Not all countries of the world have the possibility of such an open public debate. But, we have noticed that there is a danger of compartmentalising the formalisation discussion into so-called technical or policy forums. This can undermine the importance of working with land rights with an integral and holistic focus. This means that access to land cannot be analysed without taking into consideration the different actors involved and their different bargaining power.

This paper starts by briefly identifying the importance of land rights on the international agenda on poverty reduction. The main focus of the paper is on concrete cases that shows how unequal power relations affecting formalisation processes of land rights. Throughout the paper we address the newly established High Level Commission on Legal Empowerment of the Poor (hereafter the *Commission*). The Commission is one of the recipients of this anthology, and we want to utilize this opportunity by providing constructive recommendations to their work.

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21 The Norwegian Church Aid, The Norwegian Development Fund, Norwegian People's Aid, Rainforest Foundation Norway, FIAN Norway (FoodFirst Information and Action Network). We cooperate under the umbrella of the Norwegian Forum for Environment and Development.

Land rights on the international agenda on poverty reduction

A significant feature of food insecurity and poverty relates to unequal access to resources and rights. It is increasingly clear that economic growth alone will not reduce poverty and inequality, therefore formalising land rights is not always the answer. Rather, as we continue to argue, the bottom line is secure access to productive resources for the poor and vulnerable.

The importance of access to land for poor people is identified by all the member states of the UN Food and Agriculture Organisation (FAO). The aim of the newly adopted "Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security" is to guarantee all people the availability of food or **means for its procurement** (FAO 2004, 1st paragraph, emphasis made by authors)[22]. Similarly, the *UN Special Rapporteur* on the right to food, Mr. Jean Ziegler, affirms that "access to land and agrarian reform must form a key part of the right to food" given that "access to land is often fundamental for ensuring access to food and to a livelihood, and therefore freedom hunger" (Ziegler 2002: paragraphs 30 and 24).

States have further discussed the importance of access to land for poverty reduction during the recently held International Conference on Agrarian Reform and Rural Development (ICCARD)[23] conference hosted by FAO and the Brazilian government in March 2006. In the conference's final declaration the Member States:

22 See also Suáerez (2006) for a systematic interpretation of these FAO Voluntary Guidelines

23 www.icarrd.org

> " [R]ecognize that food insecurity, hunger and rural poverty often result from the imbalances in the present process of development, which hinder wider access to land, water and other natural resources, and other livelihood assets, in a sustainable manner. We reaffirm that wider, secure and sustainable access to land, water and other natural resources related to rural people's livelihoods, especially, inter alia, women, indigenous, marginalized and vulnerable groups, is essential to hunger and poverty eradication, contributes to sustainable development and should therefore be an inherent part of national policies. We recognize that laws should be designed and revised to ensure that rural women are accorded full and equal rights to land and other resources, including through the right to inheritance, and administrative reforms and other necessary measures should be undertaken to give women the same right as men to credit, capital, labour rights, legal identification documents, appropriate technologies and access to markets and information" (FAO 2006, paragraphs 5-7).

Key elements of what agrarian reform should entail are found in the statement made by the conference "Land, Territory and Dignity" held parallel to ICARRD.[24] Here representatives of organisations worldwide came together to "defend our land, our territory, and our dignity" (Land, Territory and Dignity 2006).

When implementers; or actors in position and power, don't take into consideration redistribution of land and excludes women from acquiring titles, the reform process will fail if the intention is to reduce rural poverty and gendered poverty. "[T]here is considerable

24 The document is available at www.foodsovereignty.org or www.icarrd.org/en/news_down/IPC_en.pdf

consensus that privatisation of land will affect women negatively" (Ikdahl et. al 2005: 57-58). Registration has often served to re-distribute asset towards the wealthier and better-informed and those with power vis-à-vis other social groups or within a group (landowners versus subsistence farmers; men versus women). Research on land has tended to focus on the technical issues concerning land tenure systems, while much less attention has been paid to the process through which those systems are designed and operates within a context of policy and bundles of power structures (Cotula et al 2003). Civil society organisations in many countries are calling for political will to conduct agrarian reforms and to secure access to productive resources for the poor. La Via Campesina, Land Research Action Network and FIAN International (FoodFirst Information and Action Network) have since 1999 conducted a *Global Campaign for Agrarian Reform*. The fundamental task of the campaign is to assist the already existing national peasant movements struggling for agrarian reform in their own countries and to strengthen them internationally. The Agrarian Reform Campaign pursues three main objectives in order to lend international support to local and national movements for agrarian reform: 1) Supporting peasants' movements on the local level; 2) promoting international exchange and 3) lobbying for agrarian reforms with international institutions.

Formalisation may reproduce inequalities

Land rights are under pressure. While in some countries in Sub-Saharan Africa land is scare, in most countries throughout Africa and Latin America land is unequally shared (Toulmin 2006). Unequal land ownership structures are one of the main causes behind the inequitable distribution of rural income and wealth. This situation fuels potential conflicts over access to land. Because redistribution is by definition taking something away from someone and giving it to

someone else, national governments and international agencies have tried to avoid this scenario, which they see as too problematic and too costly, by developing market-based transfers of land, where willing sellers and willing buyers can both gain. A pilot project took place in Northeast Brazil[25].

The Brazilian case illustrates what is a problem in many developing countries with highly unequal land ownership patterns and where landless people occupy and cultivate land that originally is owned by big landowners and/or companies[26]. An elite group of landowners occupy most of the fertile land and often do not fully utilise the resources available. There is, at the same time, a large and steadily growing mass of landless and unemployed class of rural labourers living in abject poverty (de Janvry and Sadoulet 1998). Brazil's constitution allows for the expropriation of large land holdings that either does not fulfil a social function or are considered unproductive. However, occupations and claims of land by landless have generally not resulted in redistribution of land because of political patronage[27], lack political will and budgetary constraints[28]. And, when landless peasants have won their legal rights to land, post-reforms policy has too often been

25 The North eastern region contains the single largest concentration of rural poverty in South America and more than 60% of all Brazilian poor, and 69% of the country's rural poor, inhabit this chronically drought-prone region (PNAD 1999; World Bank 2001).

26 According to agricultural census, approximately 44% of the country's arable land, both public and private, is legally unproductive, 80%, which is in the hands of large estates (de Janvry & Sadoulet 1998).

27 The northeastern states, where land is particularly skewed, dominant feudalistic land pattern still exists (in particular in the areas where cultivation of cash crops like sugarcane takes place) and powerful landowners still exists (Groppo 1996; de Andrade 2003; Medeiros 2002).

28 For several decades, the federal Brazilian government sponsored a system described as "perverse compensation" in which it taxed the agricultural sector unfairly while at the same time providing direct subsides to large landowners.

poor or non-existing. In this way, agrarian reform has absorbed vast amount of economical and administrative capital and yet has had a minimal impact on patterns of land and income distribution (FAO 1999; Medeiros 2002).

Because of the growing need for land for redistributive purposes in the late 1990s, the Brazilian government sought a complementary alternative to traditional redistributive and "state-led" land reform. As a result a "marked-based" approach to land reform was introduced with the overarching goal of reducing poverty. In addition, the aim was to make the entire process quick, cost effective and productive while at the same time avoiding post-reform conflicts (Borras 2003). This new model is based on World Bank policy and facilitates a voluntary transfer of land from a willing seller to a willing buyer. Empirical studies from Brazil tells us that the programme have had very limited effect – if any, and that middle class farmers has gained on the marked-based approach essentially because it was blind to both politics and to power relations on the land, and because the market simply not work pro-poor (Sauer 2003).

In January 2006 the Institute of Social Studies (ISS) organised an international conference on *Land, Poverty, Social Justice and Development*[29] where there was almost an unanimous rejection that market-based land reforms have an impact on poverty reduction. The general conclusion to be drawn from this conference was that marked-based land reform in general has failed *if the aim was to reduce rural poverty*.

Despite this vast criticism of market-led land reforms, these models are today the most promoted models for redistribution of land by international agencies as the World Bank in collaboration with national governments (e.g. in Brazil, South Africa, Guatemala, the Philippines

29 www.iss.nl

and Colombia). Many researchers and civil society organisations see obvious similarities between marked-based approach to land rights and the reforms to promote asset security advocated by the Commission. That is why we call attention to carefully look into the literature based on the experiences of these reforms[30].

We are aware that pro-poor redistributive attempts at land reform in the world do not provide clear-cut trends, and some will argue that the results are generally poor. However, this does not indicate that redistributive state-led land reforms are by definition a flaw, rather the literature concludes that reforms have laced political will and post-reform support. This failure is also tied to a number of other factors as national and international agricultural policy, unfair marked access both regarding access to local and international markets and so on. Land is essential, but it is an inadequate asset if the land is of bad quality, if you lack access to technical assistance, irrigation, education, markets and other inputs. According to Borras (2006), sustainable and diversified livelihoods need access to five types of capital assets; financial, human, natural, cultural and social. The challenge for poverty reduction is how rural poor people can gain effective access and control over these assets.

In the Brazilian case formalisation of land rights has served to segment unequal ownership patterns mainly because the beneficiaries were not poor subsistence farmers (they could not get access to credit) and because land (and recourses) that could have been used for redistributive land reforms favouring the poor and landless were allocated for a marked-based implementation. The conclusion to be drawn from this case is that marked-led land reforms can marginalise poor people even further. Another

30 See Borras (2003; 2006) and papers distributed at the ISS conference: www.iss.org/, on the Conference on Land, Poverty, Social Justice and Development.

conclusion to be drawn is that the marked-based approach reflects how one tries to "depoliticise" access to land.

Women's rights – intra familiar power relations

80% of the world's poor are women. Virtually everywhere land tenure systems discriminate heavily against women, with negative consequences for the entire society. Women are the primary cultivators of land. Yet often they have less recourse than men to legal recognition and protection, as well as lower access to public knowledge and information, and less decision-making power. This is due to different factors like existing discriminatory laws, customs, ineffective institutions, ignorance and negative attitude towards equality and the human rights of women. For women, the problem is intertwined in both conventional laws and customary laws that keep them out of the land ownership equation.

Although women are the main producers of food through subsistence farming in Kenya, and women provide the majority of labour in cash crop farming, only five percent of registered landowners in Kenya are women. A complex combination of legal, economic, social and cultural factors affects the rights of Kenyan women to own, use or manage property. This is due to existing discriminatory laws, customs, ineffective institutions, ignorance and negative attitude towards equality and the human rights of women (Kipyegon 2004).

The case of Kenya shows that currently the land tenure system provides for the registration of family land or land owned by a group of people. The title deeds for the former are given in the name of the head of the family, who is the man. In the latter, the representatives' in-group ownership of land are usually male. Land therefore is

transferred from one male to the next – from great grandfather to father to son to grandson to great grandson. Land tenure policies do not only continue to restrict women's access to and ownership of land but also to other factors of agricultural production such as technology, credit, capital, subsidies and inputs. These are always directed to the male landowner, who have the title deed and can acquire loans and other financial support.

For women, the problem of lack of land rights is intertwined in both the conventional laws and customary laws that keep them out of the land ownership equation. At the family and community levels, women are at the periphery of land matters. They are hardly ever represented in village courts of elders or any other decision-making bodies on any levels.

Some of the gender violence that takes place in Kenya is directly linked to property and livelihood. In many cases, women have been abused by their husbands, or have been denied access of use of family property. Currently, Kenyan women find it almost hopeless to pursue remedies for property rights violations. Traditional leaders and government authorities often ignore women's property claims and sometimes compound the problems even further. On many occasions single women and widows are compelled by their circumstances to move into informal settlements in urban centres – with all the complications that this lifestyle raises - if they are to find shelter at all (ibid.).

The description from Kenya portrays the reality of many women depending on land for surviving. We appreciate the focus the Commission can put on these realities and in finding solutions and developing policies that can be of crucial importance for women's livelihoods, security and access to land rights. However what we are particularly concerned with is how the Commission will deal with intra-familiar power relations, and in avoiding developing policies that actually segments inequalities.

Forced eviction of poor requesting land titling

As organisations working for a better livelihood for the poor, we support groups struggling to obtain formalised rights to the land they live off. Securing land titles and legal protection of their rights is of importance, especially for societies threatened by forced evictions. FIAN and other human rights organisations[31] have documented several cases where states have evicted poor people without providing due compensations. In many instances, the evicted poor have no paper to legitimate their land rights and are therefore in a more difficult position to negotiate with the state. For such cases, land titles can give those threatened by eviction a better bargaining power towards the state. In other cases, poor are evicted by local landlords or multinational companies, without the state protecting their rights. The below case from India illustrates the latter:

After more than a decade of tilling the land, 154 dalit families in the village Ambedkar Nagar, in Udham Singh Nagar, Uttarranchal, India, wanted to formalise their land rights. They contacted the local administration, resulting in the visit of two commissioners. These commissioners confirmed that the families were the rightful owners of the land[32]. Why were the families requesting this land titling? Their land was neighbouring the land of a local and powerful landlord. The dalit families wanted the land officially registered in order to protect them from land grabbing. Yet, the outcome of the titling process was the opposite. As a result of the commissioners' visit, the landlord, with the assistance of the local police and the local firemen, brutally evicted the families off land

31 I.e. COHRE (www.cohre.org) and HIC (www.hic-net.org), partner organisations of UN-Habitat.

32 For more information about the case see FIAN (2005).

and burned down their houses. The landlord for more than a decade thereafter occupied the land.

This happened in 1993 and the families have since then tried to get their land back. They have appealed all the way through the Indian court system, with all verdicts favouring their claims. Still very little has happened, due to the intricate relations between the landlord and the local administration. FIAN has supported the dalit families in their claims and have communicated this to the local, state and national governments. In 2005 there was finally a break through in the case, five years after the verdict of the Indian Supreme Court. The land is now expropriated from the landlord. Yet, the case is not resolved. The land is now under the ownership of the state of Uttarranchal, and has not yet been transferred back to the rightful families.

This illustrates that land titling is more than a technical registration process. The Commission therefore must duly take into account the need of legal protection by local, state and national institutions to poor acquiring land titles. These institutions are often more concerned with the rights of landed elites or other more powerful actors than with legal protection of the marginalised and vulnerable. The Commission should aim at developing policy that can strengthen local and national institutional capacities as implementers; to address the role of local power holders and investigate conflict resolution mechanisms related to land claims.

Violence when claiming land rights

According to Ikdahl et al (2005) more powerful people are able to use their knowledge and influence to receive larger and better holdings than others. The below case from the Philippines is one of many such examples. The Philippines have a progressive agrarian reform law called the Comprehensive Agrarian Reform Program (CARP) of 1988[33]. Yet, hunger is rampant in the Philippines.

In Bondoc Peninsula vast farmland is in the hands of a few landlord families. Most of the inhabitants here work as share croppers under a rigid 60% - 40% crop-sharing scheme in favour of the landlords. San Vicente is a village located in San Narciso, one of the municipalities of Bondoc Peninsula. The vast portions of the land here are owned or tightly controlled by the Uy family, to which the late former mayor of San Narciso, Juanito Uy belonged. Until 1996, his political influence enabled him to exclude the land from the CARP. In the mid 1996 several Uy tenants began petitioning for land distribution. These initiatives were met by systematic harassment from the armed men working for the Uy family and The New People's Army (NPA). The tenants were personally threatened, their houses burned, and harvests forcibly confiscated. Four local peasant leaders in San Vicente have been reportedly murdered since 1998. Due to the unbearable harassment and credible death threats, some families have fled their homes; others are forcibly evicted or denied access to their fields by the armed goons.

In the past, the organised tenants have called the attention of the government to protect them (Franco and Borras 2005). However, no concrete governmental action has yet been taken and the implementation of the agrarian reform is moving excruciatingly slow,

33 Franco and Borras, eds (2005) provide indebt information about agrarian reform in the Philippines.

and the government is using legal technicalities to block the tenants' attempts to include the land into the CARP.

Not only the tenants, but also those working for the implementation of CARP are endangered. On the evening of 24 April 2006 Enrico Cabanit was brutally killed by two masked men in Panabo City. He was the Secretary General of Pambansang Ugnayan ng mga Nagsasariling Lokal na Organisasyon sa Kanayunan (UNORKA, National Coordination of Autonomous Local Rural People's Organizations) and board member of FIAN Philippines. The assassination of Enrico Cabanit is not an isolated case. Just a week before, another UNORKA leader was gunned down by masked assassins in Negros Oriental; two additional peasant leaders were also gunned down in the month of April 2006. These men were all brutally murdered most likely for demanding land to be redistributed to landless peasants.

The struggle for land in the Philippines shows how contested land rights issues are. In order for policies to make a positive difference to the poor, political will is needed for its progressive implementation. Policy designing processes must therefore address power struggles which will arise during the implementation.

Particular challenges for indigenous people

A large proportion of the world's poor have access to land and natural resources because they belong to a community or an ethnic group, who manages a territory or land identified as belonging to the group through customary rights or collective rights. Natural resources are managed through complex systems of ownership and multiple, often flexible, mechanisms for granting rights of access. Most of these systems have in common that land itself is non-alienable it belongs to the group, whereas individuals, families or sub-groups may have

more or less exclusive, temporary user rights to parts of the territory/land. Many of these systems also have in common that they lack legal recognition, and that the national legal framework is incompatible with the system.

We believe that formalising land rights and indigenous people and communities raise some particular concerns. Many indigenous people state that their greatest problem is that they are not being recognized by the state: they are suppressed, denied and ignored. A majority of indigenous peoples live primarily outside the cash economy and are vulnerable because the state only has an economic approach to land that in many ways oppose indigenous paradigms of land (Crawhall 2006)[34]. We are concerned that the Commission promote this approach.

When the Norwegian Church Aid asked one of its partners in South Africa, the Indigenous Peoples of Africa Co-ordinating Committee (IPACC)[35], to write a paper on *Indigenous People in Africa* with reflections on how the Commission could be pro-poor through formalising the legal status of indigenous people we received this list of answers:

- New land tenure legislation should secure collective tenure of indigenous peoples over environmentally vulnerable territories. Legislation should take into account existing indigenous land management based on transhumance, and have as measurable targets the sustaining of both cultural and biological diversity;
- Indigenous peoples should receive national identification cards and birth certificates at the cost of the state;

34 Forthcoming from Norwegian Church Aid's *Understanding the Issue* series.
35 http://www.ipacc.org.za/

- All African countries should have UN-approved census-taking which allows people to freely identify their ethnicity and language group; the census-takers should be informed by the ethnic knowledge of indigenous peoples themselves;
- Indigenous peoples should receive support to map their traditional land and natural resource territories as a negotiating tool for future land management – there should be a clear manner in which different forms of ownership and usage rights can be compared to each other as well as *sui generis* solutions found that allow for a continuation of indigenous ecology;
- Certification of skills held uniquely or mostly by indigenous peoples should be recognised by national governments without reference to literacy and scholastic achievement;
- The hunting rights of indigenous peoples should be legalised and permitted by the state, these may be restricted to the use of traditional hunting weapons to help conserve wildlife;
- National legislation should be adjusted to protect the collective intellectual property rights of indigenous and local African peoples, with an emphasis on free, prior and informed consent, plus fair benefit and profit-sharing in the exploitation of knowledge systems;
- Freedom of movements across national borders should be facilitated for nomadic peoples (ibid: 40).

According to this, legal empowerment has more to do with being recognized and respected than formalising rights to land. The recommendations put forward from the consultancy is that:

"The Commission should therefore base their work on how to recognise and secure the territories and traditions related to indigenous land right by promoting and respecting the crucial importance of environmental, cultural and biological diversity. The Commission should also use their mandate to increase awareness of the challenges indigenous people face regarding land rights, and promote greater preservation and protection of their values, culture and traditions".[36]

Pastoralists and diminishing land access

An example of a marginalised group, are the pastoralists that are dependent on trans-boundary travel to access pastures in various African countries. One example to follow, describes some of the challenges of the Afar people.

The Afar region of the Afar people covers 270,000 sq km (on-fifth of the entire country) – and some 1.2 million people live in this lowland region bordering Djibouti and Eritrea. The Afar people have survived for centuries by adapting and perfecting a lifestyle of pastoralism. This is now under threat. The pastoral lowlands of the Afar are often faced with stresses such as draught, violent conflict and policies poorly suited to the particular conditions of the region. Consequently the pastoralists remain as one of the most impoverished people in Ethiopia. Loss of grazing land, water sites and increased population has disrupted the traditional Afar economy (Motzfeldt 2004).

Afar Pastoralist Development Association (APDA), is a partner organisation of the Development Fund that is based in the Afar

36 Written correspondence between Therese Vangstad/Norwegian Church Aid and Dr. N. Crawhall (IPACC), January 2006.

region of Ethiopia. Their concern and work focuses on water supply, animal health, market development, gender based development, and participation for the Afars in political processes.

The challenges are many, among others – access to land. To move herds and people to better grazing is especially important during the dry season. Their livelihood in fact, depends upon finding good grazing for their animals. But access to such areas is diminishing. And why is this?

Cultivated land from smallholder farmers moving down from the highland is occupying traditional grazing land. Other land is taken by government or private enterprises to develop. Especially oasis' are target for development. A concern raised by APDA, is about the construction of a dam using water from the Awash river. This will flood and also make possible irrigation schemes, but not for the benefit of the Afar people. According to APDA, it will put an end to an Afar local date plantation, as well as diminishing grazing land. This is a small scale local plantation where Afar families have in average one date palm each. Dates are an important commodity that is a safeguard, when other cattle products fail. APDA is immensely concerned of the effects of the private big sugar-cane plantation using the irrigation scheme planned. Strong interests are overriding traditional land use rights and mobility patterns of the Afar's.

The federal Constitution in Ethiopia from 1975 establishes in article 40 the right of pastoralists to 'free land for grazing and cultivation as well as the right not to be displaced from their own lands' (Markakis 2004). Still, user rights over grazing land between ethnic groups are difficult to solve in practise.

The descentralisation process of the government is also having an impact on the pastoralists. Earlier planning and decisions were taken

at regional level. This meant in reality that traditional Afar institutions (council of elders) could work without much interference (ibid). Since this is now changing, with decentralisation, the new context is that there is a need for political dialogue between the different levels of leadership. Is it possible to integrate the public administration and the indigenous administrative system, including local governance and by-law systems? What can the role of the traditional systems be in a new decentralised Ethiopia? Is there a space for the Afar's to be involved on at their own premises and conditions? Will these new local governments be able to stay transparent and accountable to the Afar's?

APDA are now involved in training programmes to enhance participation of their people. One example is 'voters' education programme'. They have to be able to be a voice in order to protect their rights (pastoralists rights are recognised in various international laws[37]). Now, pastoralists lack political leverage at national and regional levels to influence policy in their favour. Politicians see pastoralists as constituting a minority vote because they are numerically low and occupying marginal land of relatively little economic potential.

Maybe is there a distance to go. It might have to start with alphabetisation programmes. Only then, can they become a strong actor that can be a counterforce and show that there are other lifestyles than sedentary farming. Pastoralists must change from being voiceless and ignored to become a powerful group. And then, maybe, can they challenge development processes allowing flooding of their grazing lands. Political involvement and training for government interaction is important. Traditional systems must be taken into account into modern governance. This will hopefully lead to a power shift that can help securing pastoralists their traditional access rights.

37 See i.e. Ask (2006) about pastoralists' right to food.

Conclusion

We embrace the global concern identifying the importance of security of land tenure for the rural poor. As organisations working for a better livelihood of the poor, we have witnessed several groups struggling to obtain formalised rights to the land they depend on. Securing land titles and legal protection of their rights are of great importance for many people struggling for the realisation of their human right to food. But as the cases in this paper have illustrated, land titling is not an isolated exercise. Formalising rights takes place in a political setting, where the different actors have different bargaining power. The marginalised and vulnerable often have no power. In order to legally empower them- their voices must be heard when designing policies affecting their lives. This paper has given some ideas of the topics that should be included when addressing legal empowerment. Many of the rural poor are landless, and they might be further marginalised in formalisation processes if redistribution of land is not thoroughly addressed.

With the cases we have tried to draw the attention to some of the actors that must be included when initiating formalisation processes. Women's rights must be duly taken into consideration, also, formalisation processes should assess their empowerment through the implementation of both existing traditional and modern laws. Indigenous peoples, including pastoralists, are struggling in many societies for their right to self-determination. We therefore advocate for the importance to establish working-groups that specifically address these issues. One challenge for the Commission will be to actively seek information on civil society organisations and networks, especially in the South, so that different opinions, perspectives and experiences can be shared[38].

38 Regional consultations are one of the few outreach opportunities the Commission have to hear the concerns and comments from poor people, and can be one important opportunity, and the inclusiveness of these consultations will be vital to the work of the Commission both with regard to process and outcome.

In our view, the crucial task of formalisation processes is that it must rock the power balance – **in favour of empowering the poor**. The question is also: *Who wants registration to take place and for which reasons?* Land titling may on the one-hand provide more security. On the other-hand, it may be seen as a threat to more powerful actors. As illustrated by the case from India, getting land titles can endanger poor people if their legal rights are not protected. Policies and tools should, in fact, be *biased in favour of poor people* (sensitivity to registration fees, languages used and gender perspective).

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Hans Sevatdal and Helge Onsrud

Formalisation of Property Rights in NORWAY - practical answers to a complex reality

Introduction

Most countries in the World have established legal, technical and administrative infrastructures for the purpose of securing ownership and other rights in real property; individual rights as well as various forms of rights held in common. Without having made a complete survey, we believe that one will find policies, land laws, institutions and property registers meant to facilitate private, individual and common ownership[39] to land in most developing countries as well - particularly so for urban areas,

39 Or other secured and tradable rights to property, such as leasehold

where customary land tenure plays a smaller role. In many cases the problem is not the absence of laws and registers, but that the poor majority is denied access to the related services. That has certainly to do with poor design of laws, but also with unnecessary bureaucratic, cumbersome, expensive and often corrupted practises. Public officers, notaries, lawyers and surveyors are protecting their privileges, frequently holding on to standards and procedures which make it totally impossible for a poor urban dweller to have his or her property registered or mortgaged. This is very clearly described by Hernando de Soto in his books and, as an example, further uncovered in detail through the recently completed diagnosis study[40] of the land sector in Tanzania.

Whatever opinion people have about the social and economic effects of formalising property rights, it should be agreed that it is a matter of unacceptable injustice to deny the majority of a country's population access to these public services, services which currently are available for the rich elite only. It can not be excluded that formalisation under certain circumstances could have negative effects for women and other vulnerable groups, but we believe that *bureaucracy and corruption* never should be tolerated being the reasons to hinder or slow down formalisation. We believe countries will have to follow two strategies simultaneously; removing red tape *and* implementing instruments protecting vulnerable groups.

For the millions of urban squatters throughout the developing countries, the basic issue is security from eviction; being able to go to sleep without fearing that the house will be bulldozed by the authorities or the landowner the next day, or that a stronger fellow squatter will force you out. However, in respect to reducing poverty, formalisation

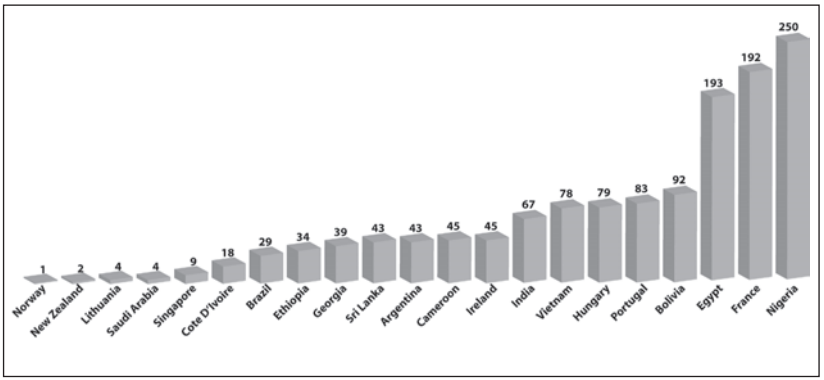
40 Funded by the Government of Norway and executed by the Institute of Liberty and Democracy, Peru.

of property rights will largely work indirectly by facilitating economic growth in general. By definition formalisation expects that the "clients" already have some assets to formalise. Hence those "clients" are seldom the landless poor, but rather people we in Norway would name ordinary 'smallholders'.

Standards and procedures for formalisation (i.e for registration) of property rights in countries with developed economies and well functioning land markets show quite a lot of variation, externally between countries, but also internally for different types of land. Much could be simplified if countries were willing and able to pick the best elements of exiting practises across the table. For countries with less resources the answer to the question "what are the minimum that works", should be of crucial importance.

The annual World Bank 'Doing Business' report name Norway as one of the countries providing best and cheapest registration services to clients in the land market. No developing country could implement a blueprint of the Norwegian land administration system. We sympathise a lot with the view of de Soto that to make formal laws and procedures work for the poor, developing countries have to identify and learn from practises in *their own informal sector.* However, there are characteristics of the Norwegian system that could inspire and provide food for thought. Below we attempt to describe some key elements of the Norwegian land administration system, however briefly and in a popular form.

Pilot results: time to transfer title



Word Bank Doing Business Report, 2004[41]

Allowing a range of land rights for registration

All land in Norway is registered - somehow. For urban, agricultural and productive forest land, comprising roughly 30% of total area, most land are held in some sort of freehold. The other 70%; forests, mountains, bogs and lakes etc., show a wide variety of tenure forms, held by local communities, governmental authorities, private groups including companies and by foundations as well as individuals. About 10% of the registered plots are leasehold, particularly used for secondary holiday homes, but also for primary housing in cases where landlords want annual revenues rather than a one-time payment. Leasehold has played an important role in providing building land to low income

41 The figure given for Norway for 2004 was relevant for some small court offices only. During 2005-2007 the operation of the Land Register will be centralised to a single office, and the standard registration procedure will take 4 days due to the volume of documents.

groups who could not afford paying the full price in a single payment. Speaking of leased land for building purposes, the Government has traditionally prioritised protected the lessee, by strictly regulating the right of landlord to increase the fee, and by giving the lessee the right to buy the land after 30 years, and thereafter to claim that right every 10 years.[42] In terms of right to sell and right to mortgage, a lessee will enjoy almost the same benefits as one with a freehold parcel.

Land lease for a period of more than 10 years and for the erection of a building requires a survey and cadastral registration, as for a freehold parcels. However, for leasehold the parties can optionally ask for a so called "point-parcel", meaning that the parcel is geographically localised by a single point only. Normally a house would define the point. No exact boundaries are established, but the lease contract would typically state that the lessee has the right to use an area of "about 0.1 hectar" surrounding the house. For holiday homes in forest and mountain areas the landlord could maintain the grassing right for his cattle and the logging right. It should be noted that there are no indications that parties in the land market, potential buyers and lenders, are much concerned about the absence of precisely defined boundaries, however leasehold in general has over the last decade or so gradually become less popular.

One could imagine that a corresponding solution of fuzzy boundaries could work for individually owned houses situated on land in common ownership, thus avoiding expensive surveys. Indeed the Norwegian legislating opens for that solution, which is however not frequently used; A number of individual family houses can be organised as condominiums[43], meaning that each party owns his house and as well

42 Ref 2005 revision of the Law on the leasing of land for housing and holiday homes

43 In accordance with the Law on condominiums, not only flats but separate houses as well can be established as condominiums

a share in the common land under and between the houses. That can be supported by a unique use right to a smaller plot for each house, if so decided.

Correspondingly the legislation on co-operative housing facilitates a similar solution. The difference between condominiums and housing units belonging to a housing co-operative is merely the way ownership to the land is organised and registered. For condominiums the owners of the houses would have a defined share to the common land. For a co-operative, the housing association would formally own the land, but membership in the association would be limited to those residing on the land. In terms of right to sell and right to mortgage the market does not distinguish much between condominiums and units in co-operatives, except that members of an association have a pre-emption right to buy, but at the best price offered in an open market.

Significant forest and mountain areas are in common ownership, organised as farm commons, parish commons and state commons. Farm commons could encompass ownership and use rights for a large or small number of farms in a certain location, and if they wish an elected board would manage the common, however limited by law. Selling a part of the common would, for example, require the consent of all owners.

Parish commons are legally registered in the name of the common being a juridical person. An elected board will supervise the management of the common, and the board is obliged by law to maintain an internal list of those (farms) enjoying rights to the common. The board will distribute use rights among the right holders or otherwise manage the common as an enterprise and distribute related revenues to rights holders. In the latter case it is not done in cash, but rather in subsidised prices of building materials and firewood.

State commons are registered in the name of a state agency. Users rights would locally be managed by a board, elected by the municipal council. As for parish commons the board shall maintain an internal register of right holders, and is empowered to distribute seasonal and other rights use rights among the right holders. It could also issue fishing and hunting licenses to the public, if that is relevant for the particular state common.

Finally it could be mentioned that in rural areas the concept of full individual ownership to all rights in a given parcel (freehold) is not that old. We still find many examples of a previously prevailing concept of overlapping use rights, meaning that at a particular location one farm could 'own' the timber right, another the development right and so on, whilst the pasture and hunting rights is commonly shared between many farms. Traditionally farmers were very consistent concerning ownership and rights to land, but did not put much emphasise on the concept of 'total' ownership to land: what counted was the rights to exploit natural resources. This diversity was reflected in our earlier registers. However, gradually formal registration has concentrated on freehold and leasehold only. It could well be argued that open up to a system where different use rights over the same area could be registered, *as separate tradable properties*, would be of benefit to owners and rightholders as well as to the economy at large.

Accepting simple transaction procedures

Contrary to most other European countries, the Nordic countries[44] do not require the involvement of notaries in land transaction. As for Norway in about 80% of the transactions the seller would engage a real estate agent to market the property, to set up the transfer document and to organise the money transfer. Transfer deeds can however be prepared by the parties themselves, witnessed by two trusted persons. That is indeed done for about 16%[45] of the cases, especially for transfers within the family. In case the object is a family dwelling, the spouse would have to co-sign the deed before registration. Mortgage deeds are almost always written by the lender, and also require the signature of the spouse if their common house is used for collateral.

In both cases the parties are obliged to use standard forms. A typical transfer deed would be no more two pages and take only minutes to fill in, provided that the required information is at hand – and that is not very much. Data requirements are limited to the identification of the property by the unique number, the name and address of the parties, the signature of the witnesses and the spouse, and the paid price to calculate the stamp duty. Additional clauses could be attached, but a deed for an average villa or apartment could be as simple as described above.

The subsequent registration of documents at the Land Registry takes 4 days, no more no less.

It could be argued that notaries ensure better control of the identity of the parties and of the legality of the documents and their content. Experiences, not only from the Nordic countries, demonstrate however that the land market could function perfectly without notaries involved.

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44 Except Finland, which has a sort of notary involved

45 In 4% a lawyer would be engaged

Transactions take more time and cost more money[46] in countries with a notarial system. Simple, standard forms help significantly to keep registration time and costs low. The fee to register a sales deed in Norway is currently about 300 USD, corresponding to 2-3 days average net salary. In fact the costs to the State of providing the service is far less, about 25 USD per document, equal to 2 -3 hours average net salary. To facilitate rapid services, it is important that the Registry applies relevant risk management, and pays compensation if any party has an economic loss due to mistakes at the registry. In Norway about one million documents are registered annually; about half of them related to mortgaging. The total amount of compensation has not exceeded 1 million euro in any single year, which is less than 0,5% of the amount paid in fees.

It should be noted that transaction in already registered properties can be completed without a cadastre certificate verifying parcel boundaries, and only in very rare cases a party to the transaction would ask for a fresh survey.

Applying flexible surveying and mapping standards

In 2005 the Parliament adopted a new law on the cadastre, for the first time introducing private licensed surveyors and related competence standards. Hitherto municipal employees have executed cadastral surveys, without any specific requirements to professional skills. Indeed in smaller[47] municipalities the work is often done by non-surveyors, and will continue that way for many years until a private profession

46 World Bank Doing Business Report, 2004

47 There are 432 municipalities in Norway, half of them with less than 5000 inhabitants

is fully developed. The inherited problems are not so much related to the quality of geodetic measurements, but to the hitherto absence of competent advice to landowners on legal matters that should be clarified for new parcels, such as utility rights, common fences etc. Norway is thus coming closer to the long European tradition of precise cadastral surveying and mapping, but simultaneously implementing standards that are more expensive to the users.

Poorer countries could perhaps be more inspired by the cadastral survey system applied in rural Norway until 1980. Until then local lay men set out and demarcated boundaries of new parcels - without any geodetic measurements – and accompanied with rough sketches and verbal descriptions of the boundaries only. Still the majority of rural properties have no better description. It is hard to find evidence that the quality, in terms of accuracy of cadastral surveys and maps, impact significantly on property values or transaction costs. Complete and up to date maps, not necessarily very precise maps in geodetic terms, are certainly beneficial to public and private land planning and development. The land market however seems to work quite well without applying very high survey standards. It seems largely satisfactory when boundaries are agreed between neighbours in the field.

Satellite positioning systems being continuously improved, accurate positioning is technically becoming simple and cheaper, however still too expensive to remove a significant barrier to formalisation of property rights in developing countries. Photomaps, which are now much cheaper to produce than before, offer a good solution to roughly locate plots and boundaries without bringing expensive surveying instruments to the field. Otherwise surveying and mapping frequently represent the biggest costs in large-scale adjudication projects, as well as to parties seeking to register their property individually.

Resolving land disputes outside the regular courts

Norway experiences more land disputes than most other countries in Europe, outside those countries in Europe restoring private ownership after the collapse of the socialist economies. To balance that, a special land court outside the regular courts, established in 1859 to deal primarily with land reallocation and consolidation, gradually has developed into a specialised 'land court' dealing with boundary disputes and other disputes over land rights. The 'land consolidation court' [48] demonstrates an efficient dispute resolving mechanism; the judge is a specially trained land surveyor - in court meetings accompanied by two laymen, and the court itself possesses the technical expertise needed to investigate and resolve the case, including making the cadastral survey. Parties should normally not need to employ a lawyer to help with the case, thus keeping resolution costs low. Negotiations between the parties, and mediation on the part of the court, play a very important role in the proceedings. With some justification one may say that this institution constitute a professional arena for negotiating.

Many countries would benefit from having a mechanism outside the regular courts to deal with land disputes. It is probably economically sound to allow a certain amount of court cases rather than making huge up-front investments in surveying and mapping.

48 In addition to making traditional land consolidation, this special court is authorised to settle almost all types of disputes over rights to land.

Helge Onsrud *is recently appointed director to the Centre of Property Rights and Development, which is a new unit within the Norwegian Mapping and Cadastre Authority. He has a Master in Land Surveying and related law. Over the last decade he has been working with land related projects in many countries outside Norway, especially in the Balkan region.*

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“Yes, the rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse and the powerful manipulate laws to retain power and accumulate wealth.

Kofi Annan, Secretary General of the United Nations, address to 2004 General Assembly

Our resolve, and the aspirations of all those who are struggling to convert the assets they hold into valuable properties, must not be left in doubt.

Benjamin William Mkapa
Former President of the United Republic of Tanzania”

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