

# Land Reform in Developing Countries: Legal and Institutional Aspects

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## **Abstract**

Proposals for land reform in developing countries often pose two basic questions. First, should any land be capable of private ownership or should the state retain the legal ownership of all land, subject to specified rights of use and occupancy by those individual persons or groups of person to whom the state may grant such rights? Second, how can the state best identify the location, size and characteristics of every land parcel, whether publicly or privately owned, and the legal rights that affect it, as part of a national land information system?

The availability of powerful tools such as GPS, GIS and remote sensing may encourage a belief that problems of land reform are susceptible largely to technological solution. But technology, even when judiciously applied, is not enough. There must also be an appropriate legal framework, an adequate institutional infrastructure and sufficient financial support that will ensure both the viability and sustainability of the reform.

## **Land Ownership or Land Use**

“Property is theft,” protested the French philosopher Pierre-Joseph Proudhon in 1840. A half-century earlier the English agriculturalist Arthur Young declared, “The magic of property turns sand to gold.” This apparent contradiction is reflected in the modern world where some countries take for granted the right of an

individual person to own a parcel of land, while other countries insist that all their land belongs to the state.

Even in capitalist societies a distinction may be found between land ownership and land use. For example, in their early treaties with European settlers the aboriginal peoples of Canada regarded land not as a marketable commodity but as a resource to be shared. In their view, land “ownership” means land use, not an exclusive personal title to the soil. In Canada’s more than 2,500 reserves, where the federal Crown holds the legal title to the land on behalf of the Indian bands (or First Nations as they prefer to be called), an individual person cannot acquire outright private ownership. The highest form of available title is a Certificate of Possession which can, however, pass by inheritance (McEwen, 1992). The same unavailability of individual private ownership applies in those areas of Canada’s vast northern territories that are held collectively by Inuit and by Indian aboriginal nations under fee simple title. A similar situation exists in Alberta where the Métis hold their only Canadian land base, under a collective fee simple title (McEwen, 1995).

The individual ownership of surface rights to land normally includes all buildings, structures and other objects that are attached to the soil. In other words it comprises all those features that are classed as immovable property under a civil code system and as real property under common law. Zanzibar provides an interesting exception to this general rule, for its Land Tenure Act provides that economic trees, such as clove and coconut, can be owned separately from a right of ownership or occupancy of the land. Indeed, any one tree may have a large number of co-owners, each with an undivided interest, and it can pass by inheritance. It is possible that those co-owners own none of the land containing the tree, not even excepting the portion of the ground in which its roots are planted.

Equally noteworthy are those jurisdictions where a person may own a house or other building but not the land on which it sits. In such situations the state retains ownership of the land but grants a right of occupancy under specified conditions that usually include the purpose for which the land must be used, the duration of the right, and the rental or other fee that is payable. One effect of this arrangement is the creation of two registration systems, separately administered, one for buildings and the other for land. The notion of a unified registrable title is an alien concept. In Mongolia buildings are registered in the decentralised State Immovable Property Registry (SIPR) which is part of the Ministry of Justice. This is really a misnomer, for that institution does not register land, even though the Mongolian Civil Code includes land within its definition of immovable property. Nor does registration extend to buildings owned by the state; it applies only to private houses and apartment units. The *ger*, a portable, circular, tent-like dwelling favoured by nomadic herders, is regarded as movable property because it is not fixed to the soil. But in urban areas, particularly in the capital city of Ulaanbaatar where there may be as many as 80,000 *gers*, these residences have assumed a more permanent character and some of them are registered in the SIPR. Parcels of land

for individual use and occupancy are allocated by the local municipal authority, which issues a certificate to each successful applicant. Details of these certificates are registered with the decentralised Land Administration Authority of the Ministry for Nature and Environment. The Mongolian Land Law states that the possession for allocated land may be for an initial period of 60 years, with a one-time extension of not more than 40 years. The ostensible duration of 100 years prompts some government officials to assert that since it is really equivalent to ownership, land privatisation is unnecessary. In practice the initial period may be 15 years or even less, the actual term depending on the discretion of the land-allocating authority. Proposed amendments to the Land Law include allowing allocated land rights to be transferred to third parties by sale or gift and to permit the land to be mortgaged as security for a loan (UB Post, 2000). This proposal may be inspired, at least in part, by the official recognition that land rights are sold from time to time on the informal market, despite the present illegality of such transactions.

Resistance to land privatisation does not always rest solely on political ideology; it may be influenced by practical concerns. The Ukraine Land Code of 1992 ended the state monopoly of land and recognised three forms of ownership: state, collective and private. Yet the replacement of collective farms by private agricultural enterprises in which individual peasants hold land-share rights brings new problems. Although land rights can be lawfully sold, exchanged or used as collateral, selling a land share is complicated and expensive, nor can shares be merged to create a bigger holding. In fact, farm output has shrunk every year since 1991 (Economist, 1999). The breaking up of collective farms in the Russian Federation, upon the recommendation of perhaps over-zealous foreign advisers, contributed to the collapse of many farms and fostered sceptical attitudes towards the professed advantages of private ownership (Globe and Mail, 2000). Similar doubts arose in Moldova and Uzbekistan where many local experts believe that the unrestricted privatisation of rural land will lead inevitably to loss of agricultural production. Ideological objections may also include the view that the occupation and use of land is a form of stewardship from which all members of society, not just the occupant of the land parcel, should benefit. It could be argued, for example, that the private owner of an unimproved parcel should not reap the reward of its increased value caused by urban development, not by the owner's own efforts. In some cities of the People's Republic of China the owner who sells his or her privatised residential apartment must share any profit from the sale with the work unit from which the apartment was originally purchased (Economist 2000).

### **Land Law**

Laws relating to land in developing countries should reflect both customary practices and the will of the people as expressed in legislation that is interpreted and applied by the courts and enforced by the administering authority. Written

laws typically consist of relevant articles of the Constitution and the Civil Code (in civil law systems), supplemented by a number of acts, regulations and orders that deal with particular areas of land management and administration. As a precondition of providing funds for a land reform project under a loan agreement, the donor organisation often requires the recipient government to enact specified pieces of legislation, which might include laws governing land adjudication, land tribunal and land title registration. Unfortunately, the prompt passage of legislation in response to this requirement carries no assurance as to its suitability for the project's intended purpose.

The drafting of legislation involves more than the legal scrivener's art. New or amended laws must reflect government policy. But they must also be capable of implementation, a consideration that presupposes an adequate institutional infrastructure and a sufficiency of human and other resources to undertake the project. Not only must the project itself be viable, it must also be sustainable by the implementing agency, even if no additional outside funding is likely to be available to continue or complete the work. Where project funds come mainly from a loan that must be repaid, even over a long period of time and under generous terms, the borrower's ability to generate revenue to meet that repayment may be a factor in deciding whether or not to proceed with the project at all.

Changes of government may represent shifts in policy that render existing or proposed legislation inappropriate. In Canada the three provinces of New Brunswick, Nova Scotia and Prince Edward Island each passed a Land Titles Act in the 1970s. Except in New Brunswick, where the law was proclaimed only with respect to a pilot project in one county, the legislation has not been brought into force. In the two other provinces the laws lie in a legal limbo where they may eventually be repealed or simply omitted from a future consolidation of the statutes.

In the year 2000 Trinidad and Tobago, in compliance with the terms of a loan agreement, enacted three new laws: Land Adjudication Act, Land Tribunal Act and Registration of Titles to Land Act. At the time of writing none of these laws has been proclaimed in force. An earlier enactment, the Land Registration Act of 1981, never came into operation. It seems reasonable to predict that the new legislation will not take effect until the necessary institutional and financial resources are provided. Should the Registration of Titles to Land Act be proclaimed Trinidad and Tobago will have three different systems to record the ownership of, and the legal interests in, land. The two laws currently in force are the Real Property Ordinance, which is Torrens-type legislation introduced in 1895 but now little used, and the Registration of Deeds Act, dating from 1885, which is essentially a repository of documents that may or may not be evidence of title.

A comparative analysis of land legislation in other jurisdictions can assist a developing country in enacting its own laws. Yet the object should be to find solutions that are based solely on local needs and circumstances. The uncritical adoption of legislation that appears to operate satisfactorily under different

conditions elsewhere may lead to a Procrustean conformity that proves unworkable in the country of its reception.

Peru provides an example of well-intentioned legislation that created a land titles registration system which, despite its successful introduction, falls short of assuring the certainty of title which that system is expected to offer. Registration of title normally implies that, subject to specified overriding interests, all legal transactions affecting the registered parcel, such as a sale or a mortgage, must themselves be registered to have legal validity. Unfortunately, this is not a requirement with respect to titles registered in the Urban Property Registry (RPU). Under current Peruvian law the holder of the registered title to a parcel may transfer or encumber the parcel without any requirement to register the transfer or encumbrance. Since the registration of legal transactions affecting registered title is a voluntary act, it can be readily appreciated that unless there is a legal obligation to register all such transactions subsequent to initial registration the registry itself will lose its integrity. In the course of time the recorded information will become incomplete and unreliable, thus destroying the very purpose for which the registry was originally created. The Peruvian officials who administer the RPU are not unaware of this problem, which is due in part to the unwillingness of transacting parties to pay the required registration fees.

### **Institutions**

The implementation of a land reform project in a developing country assumes the availability of a local institution that has sufficient capability and resources either to perform the work itself or to support a separate project team. Where two or more local institutions have responsibility for implementing the project it is essential to identify their respective roles and duties. Failure to settle this issue may lead to ministerial turf wars and lack of interdepartmental co-operation.

No less important is the need to harmonise the project with other similar projects that are being undertaken. In Peru two separate organisations, each supported by a different donor, are engaged in issuing land titles. The Commission for the Formalisation of Informal Property (COFOPRI) deals mainly with the problem of urban squatters, while the Special Project for Rural Land Titling and Cadastre (PETT) has a somewhat similar function in the rural areas. Both organisations would benefit from their adoption of common standards and procedures relating, for example, to air photography, map scales and the verification process needed to justify the issuance of individual titles.

Wherever possible, the local institution should keep members of the public informed of the purpose and progress of the project. This is particularly desirable in projects involving cadastral survey and land registration, which some landowners may see as nothing more than the prelude to increased taxation. The process of land adjudication will be facilitated if its object is explained in terms that are easy to understand, by means of public meetings, radio and television

broadcasts, and print media. An imaginative approach in Zanzibar produced an excellent video in 1995 entitled “A New System of Land Registration,” performed enthusiastically by local amateur actors, the script of which was also adapted for radio. In 1996 a cadastral project in Moldova engaged a public relations consultant to present a weekly radio broadcast that discussed the work and invited questions and comments from the public.

The implementing institution should also keep local professional associations informed of the project and its possible implications for their members. Proposed changes from a deeds-recording system to a land titles system, for example, may create fear among notaries that the replacement of arcane, prolix deeds of conveyance by simple certificates of title will result in their loss of income. Such concerns can be allayed by showing notaries how the new system can benefit their work and by pointing out that prudent purchasers and mortgagees should still seek legal services to determine the possible existence of overriding interests and other unregistered encumbrances before entering into transactions.

Because of their laws protecting state secrets some governments restrict the availability of vital information, even when it is required for a project from which their nation will benefit. Topographic maps at a scale larger than, say, 1:500 000 may be unavailable except to a few designated institutions and the co-ordinate values of geodetic survey control points may be inaccessible. A pilot cadastral project undertaken in western Ukraine in 1993-96 was obliged to use false co-ordinates despite the equal participation in the project of the very government agency that generates national geodetic co-ordinate information. Overcoming problems of this nature may require a prior commitment by the local authorities that they will release maps and survey data essential to the project.

In countries where land was neither privatised nor taxed the expression “cadastral survey” signified a land inventory that recorded land characteristics including, for example, the fertility, humus content and pollution of the soil, the type of vegetation cover and the actual or potential land use. The move toward private land ownership, on which a rent or tax is levied, compels the need for a legal and a fiscal cadastre as well. It is important to identify these three cadastral components and to assign their administration to the appropriate institution. The Cadastral Mapping and Survey Law of Mongolia, which came into force on 1<sup>st</sup> January 2000 but is not yet in operation, contains provisions relating to all three types of cadastre, without clearly distinguishing each one, and might suggest that they should all be the responsibility of a single institution.

Before the establishment of a national land information system (NLIS) can be contemplated it is necessary to decide what form the system is to take and how it will be administered. The existing cadastral framework can provide a useful base for an NLIS, but in areas that have no such framework the system may have to be constructed from the available survey data, cartography and topographic information. One administrative possibility is the creation of a single agency which stores, maintains and disseminates various types of land information. An Alberta

example of this kind is the Spatial Data Warehouse, sponsored by government and private industry, that maintains, updates, manages and markets provincial cadastral, topographic and related digital data. Another possibility is the creation or designation of an agency whose primary function is to co-ordinate the activities of the existing organisations that collect data, without requiring them to lose control over that information. In selecting the administrative mechanism the emphasis should be on ensuring that land information is accessible to all legitimate users on a timely basis.

### **Technology**

It is tempting to be dazzled by the almost overwhelming array of technology that is available to assist in the realisation of land reform projects. The selection of a technological application for a project must consider several factors: equipment costs, availability of trained operators, maintenance questions and overall suitability. The mere computerisation of land records, for example, may be insufficient unless the underlying problems of the system are rectified. It may be reactionary, even heretical, to argue for the retention of a manual system that satisfies local users. Yet an outside observer may discover in a developing country a manual system that works well in practice even though it is not supposed to work in theory.

A possible combination of various types of technology may be advisable. In a large, lightly-populated country like Mongolia, where one-third of its people live in the capital city, it would be wasteful and inefficient to contemplate large-scale, conventional line mapping for all areas, including those that are remote and virtually uninhabited. Urban areas lend themselves to softcopy orthophoto imagery from which scalable information is obtainable in digital format. Croplands and pastures could be mapped by satellite imagery to a positional accuracy of between 10 and 30 metres, which should be sufficient for most land management purposes.

The Global Positioning System (GPS) offers a technique that has revolutionised surveying practice, though its application to cadastral surveys has yet to be fully exploited in some countries. In Trinidad and Tobago the State Land (Regularisation of Tenure) Act, 1998 protects existing squatters on public land from ejection and facilitates their acquisition of leasehold titles. Since the first step includes issuing each squatter with a Certificate of Comfort, some simple but reasonably accurate method of locating the occupied parcel is required. In the absence of recent air photography or large-scale maps of the squatter areas, the administering authority on the Island of Trinidad is considering using GPS to identify the location of the parcels, many of which are scattered. Until recently, single-point GPS positioning could be expected to yield about 100-metre accuracy. The termination of Selective Availability (under which satellite clock and orbit information contained an intentional error) by the United States Department of Defense in May 2000 now improves the accuracy of single-point positioning to

about 30 metres, which might be adequate for many cadastral requirements. Much greater accuracy can be obtained by using the differential method in which a second GPS receiver at a station of known position maintains observations throughout the survey.

Surveys of urban areas, where high land values may demand greater precision of measurement, can be efficiently undertaken with the aid of electronic instruments such as the Total Station, which records both angles and distances. This type of equipment may be too costly to justify its use in rural areas. In some countries local land managers still measure the boundaries of allocated agricultural parcels crudely but sufficiently accurately by rolling a graduated perambulator wheel or by walking the two legs of a hinged rod that open to a fixed distance apart of, say, two metres.

## **Conclusion**

Although technology can contribute importantly to the solution of land reform problems its application may be of limited effect unless the necessary legislation and institutional infrastructure are in place. The initial steps towards the implementation of a land registration project, for example, often include air photography, ground control and cadastral mapping. All three activities are relatively straightforward operations because they do not usually require new laws to carry them out. Nor need members of the public be directly affected by this work; indeed they may remain unaware that it is being undertaken. But once the project completes its cadastral base maps it moves into the murkier area of individual property rights in which legislation for land adjudication and the registration of titles has a considerable social and economic impact. Not everyone would accept W.S. Gilbert's contention that "The law is the true embodiment of everything that's excellent." It is easier to agree with Alexander Pope that "Whate'er is best administer'd is best." But appropriate laws and institutions will always be crucial to the success of land reform.

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