Legalising Land Rights, Yes But How? An Introduction

Otto, J.M.; Hoekema, A.J.; Otto J.M., Hoekema A.J.

1 Legalising Land Rights, Yes But How? An Introduction

Jan Michiel Otto & André Hoekema[1]

In the Face of Two Paradigms

In this volume of essays the authors reflect on legal means to improve the position of the many smallholders in the developing world who live and work on land that they do not officially own. From quite different perspectives they explore how to provide more tenure security through better land law. The authors recognise that for rural development an appropriate land law is necessary but not sufficient. They also realise that ideas about what precisely constitutes an appropriate land law have for too long been informed by two contradictory paradigms, namely the 'install full private property' paradigm and the 'leave customary law undisturbed' paradigm.

The essays in this volume demonstrate that the full private property approach, which has come to dominate international and domestic land policies over the last decades, has major drawbacks. It has often done little good for rural smallholders as it neglected existing land management and land use practices which were embedded in local circumstances. The main assumption on which it rests – legal institutions can protect the poor man's legal rights – has unfortunately proved to be a gross overestimation of state capacities for effective and just land governance.

On the other hand, the authors do not trust approaches which recommend 'leaving customary law undisturbed' either. Proponents of such approaches have tended to perceive rural communities as culturally distinct and tied to their land with collective landholding as the centrepiece of their arrangements. They favour rigorous legalisation of collective holding of land, by which the land is declared collective and inalienable. In the face of large-scale dispossession of local communities by state and corporate actors, this approach is often advocated as the only effective way to protect existing land rights.

A Leiden-Based Research Project Featuring 'Third Ways'

This book is the result of a Leiden-based research project on legalisation of land tenure. The project already resulted in a volume with studies from eight countries in Africa, Asia and Latin America entitled *Legalising Land Rights* (Ubink, Hoekema & Assies 2009).[2] Both volumes show a tremendous variation in local circumstances as well as in the nature and historical background of land policies and their relation to the development concepts and land laws prevailing in each of the countries under review.

This heterogeneity strongly suggests that policy-makers and scholars need to find out empirically under what circumstances particular kinds of legal innovation would be effective or not, both in terms of their responsiveness to needs and practices of the people involved as well as in terms of a legal instrument which enables agricultural growth without jeopardising legal protection of rural communities. This volume features a number of land law regimes that have taken practices of unregistered land tenure seriously and that have tried, where and when the need arose, to build new state law on this very basis, all by thoroughly participatory methods. We identified in these regimes a 'third way' of legalising land tenure, or rather a bundle of various 'third ways'. These 'third way' experiments not only build upon practices on the ground but also try to legally remedy deficiencies and fill some legal gaps. In doing so they fit in neither of the two paradigms we mentioned above.

A First Introduction to the Chapters

All five authors in this book try to draw practical lessons from their respective experiences with developing legal protection for the rural poor in case holding land 'informally' really turned out to be insecure. All agree that the number of such cases has been growing fast in recent times, and that therefore the need for formalising or legalising land rights has increased. And they ask: 'very well, but how?'

John Bruce explains that introducing full private individual property plus titling and sophisticated registration of land parcels and titles cannot be the 'silver bullet', as suggested by Hernando de Soto in 2000. Yet, he endorses De Soto's views to the extent that formalisation of land holdings under certain circumstances may benefit the poor directly. Bruce, looking back at about 50 years of attempts at legalising land rights in developing countries, shows how to adapt land laws better to local circumstances. Lorenzo Cotula comes to similar conclusions from a slightly different angle. He discusses the

strong pressures on unregistered land tenure arrangements caused by large-scale buying of big tracts of land by both foreign governments and multinational enterprises. Cotula shows that local smallholders although resorting to national and international law, often lose their land. How to go from here, is explained by Liz Alden Wily. She discusses the 'learning by doing' approach she used in Tanzania. In a truly bottom-up fashion she gathered local people and government officials together in a common effort to design a legal regime that provides land and resource (forest) management rights. Paul van der Molen, cadastral registration expert, also contributes to our search for the way ahead. He looks at the problem of how to reorganise public records for registration of kinds of land rights outside the full private property ambit, like land rights granted to communities as such, and also specific use rights of individuals such as the 'secondary rights' of women and pastoralists. Finally, André Hoekema raises the question: 'If not private property, then what?'. He discusses experiences with two new land laws through which land management and land use rights are granted to communities (Mozambique and Tanzania) and one new land law securing the position of individuals (Ethiopia). Based on the strong and the weak points of these three recent laws, he provides a checklist which could be useful for any legalisation effort.

The Changing Picture: Why Smallholders Urgently Need Legal Protection

Until recently[3] many law and development experts hoped that creating *legal certainty* would do away with the problem of unregistered, 'lawless' landholdings of many rural smallholders. By establishing legal certainty, it was hoped, they could speed up rural development all over the world. Individual full property or freehold rights, titles and strong forms of public registration would bring about this legal certainty, create land markets and offer farmers the opportunity to invest and contribute to rural economic growth.

Meanwhile, counter-movements of community organisations, NGOs, academics and some politicians have maintained that such unregistered landholdings do not necessarily constitute an impediment to rural development. Their advocacy has made much sense, especially when such holdings have been well protected and managed by local communities who practice local types of law[4] and authority called customary law, *adat*, indigenous law, or people's law. Such tenure arrangements are often called 'communal'. They may provide a fair amount of tenure security and offer holders locally effective rights to use land as they see fit, to

reap the fruits of investments, to engage in some kinds of land transactions and to keep the land in the family. Many such smallholders without official legal position may expect that 'a person's right to land will be recognized by others and protected in case of specific challenges' (as the FAO 2002: 18 defines tenure security).[5]

With all due respect to these communities and their potential, the last few decades have witnessed new economic and social developments which have undermined such local land tenure arrangements at a quicker pace than before. In many areas, and particularly in isolated places, people now face both internal as well as external challenges previously unheard of. As for the internal threats it suffices to refer to the interrelated processes which have changed rural community life almost everywhere: individualisation, marketisation, population growth, migration, state formation, mass communication and transportation, education, women's emancipation, democratisation, and juridification. All of this has contributed to intra-community tenure insecurity and conflicts about land.

The external threats stem largely from business interests and state intervention. Rural areas are now increasingly incorporated in national and global economies and smallholders are pressured to make place for large-scale agribusiness, whether for food, timber, or biofuel production. Moreover their local tenure arrangements have often been affected by government efforts to replace them with new laws that should foster rural development. These included invasive agricultural policies, imposing heavy duties on peasants. Many of these government efforts have not been successful. However, under such conditions communal tenure arrangements have often lost their stability and cohesive character. Moreover, where communal land tenure arrangements are not recognised or are not functioning (any more), smallholders often cultivate land that is formally classified as state land. Often they lack official titles or other means of protection against the usurpation of their plots for large-scale agriculture, irrigation, mining business and infrastructural works. They run the risk of being branded as squatters on their own land, or at least regarded as people who can easily be evicted without an adequate compensation for the loss of 'their' land. In view of these external threats, there is indeed an urgent need to legally empower these smallholders so that they do not just rely on continued protection by unregistered customary arrangements, even if their communities still seem resilient.

Two Types of Land Tenure Legalisation, and of Legislation

To grasp the full spectrum of legalisation of unregistered land tenure arrangements, we should, to begin with, distinguish two types, i.e. the *communal* type, and the i*ndividual* (or family-based) type. The communal type refers to community-based arrangements in which the (usually unregistered) right to manage and control the land – and often the right to rent out the land to outsiders – rests in the hands of a collectivity, a corporate actor, represented by for instance a village head, a chief or another community leader. Rights to use and exploit the land, sometimes also the right to bequeath, are in the hands of individuals and/or families.[6] Such community-based land tenure arrangements regularly lack official recognition.[7]

But not everywhere customary law functions in such ways, and not all customary law embodies communal land tenure arrangements.

This brings us to the individual type of unregistered land tenure arrangements. Such individual rights may concern communal land, privately-owned land, or, as is very often the case in the developing world, land which has formally been declared to be state land. Such *de facto* ways of individually using and exploiting state land are often not recognised nor legally protected. In some places such individual land use practices are reminiscent of age-old customary practices, whereas elsewhere such individual tenure can be a recent phenomenon, for instance resulting from large-scale land invasions, allocations to private companies or public use, or other drastic state measures.

As a consequence of these two existing types of land tenure, the efforts of countries who have engaged in experiments to define, title and record customary rights and give these legal status,[8] reflect two corresponding types of legalisation. The first focuses on the group or community level, and the second on the individual or family level, according to the specific context. In the first case, groups and communities are the potential subjects of rights and in the second case individuals. This distinction runs through all the present-day efforts of legalising land tenure.

In both types of arrangements the search is for ways to provide real tenure security for the smallholders. In the communal type of legalisation, the legislator first has to dress up the nature and competences of a management and regulatory local agency out of the contours of locally existing entities like a 'village', a 'community', a 'tribe'. Next, given the role of this entity, rules of use, heritance, transactions etc, must be recognised and defined.[9] Thus, issuing of new land law at the same time calls for the creation of new, or amendment of existing, management authority over land. This state-imposed change of locally

existing institutions of land management authority may give the legalisation an ambiguous character: on the one hand there is recognition and state-sanctioned legal support for local authorities (often for the first time ever), on the other hand local institutions are regularly changed to such a degree that – if the changes are implemented at all – these institutions change into something that might be far away from the original. This in its turn may cause certain problems of legitimacy and effectiveness in the actual functioning of the new regime.

In the individual type of legalisation, the legislator primarily defines the nature, scope and conditions of the use rights as well as the ways of registering and public recording of these rights. Regarding the land management authorities, often no more seems to be needed than some changes to already existing state land management agencies and/or decentralised public entities.

Capturing both types of land tenure legalisation in our study, our proposed definition of land tenure legalisation would be as follows: 'a process whereby possession (including use) and management of a tract of land are incorporated into a national legal system – either directly, or indirectly through recognition of community-based rights and authorities – whereby the rights and obligations of the individuals and entities concerned are defined.'

Land Tenure Legislation in Context

Both paradigms mentioned in the first section, namely 'install full private property' and 'leave customary law undisturbed' have put their marks on more than a century of designing, implementing and evaluating land policies and land laws in Asia, Africa and Latin America. Much can be learnt about this history on a country by country basis from our previous study mentioned above (Ubink, Hoekema & Assies 2009). In the country chapters of that study we can also see how a third paradigm, which we might summarise as 'state and party for the people's development', came to dominate land policies and laws in countries as diverse as China, Ethiopia, Mexico, or Indonesia, during certain periods. In the remainder of this introduction, we will roughly sketch this historical *Werdegang* of land tenure policies and law, from the colonial era until today. The overview will pay some attention to trends in foreign aid. For, land policies in most developing countries have been informed not only by domestic considerations but also by international and transnational assistance. This book is mainly based on the experience of the authors of this book as partners in such projects.

Prior to this historical overview, we will first look at some recurring themes concerning the broader context of land tenure legalisation. First

we will briefly look at the importance of some 'governance' issues, next at 'land policies', and finally at some underlying ideologies and theories aiming at economic and social development. Thus we try to provide a context which should help to understand the background of land tenure legalisation, especially how the long struggle between 'legal centralists' and 'legal localists' has evolved over time and seems now to be leading into 'third ways'.

Swinging Pendulums of Governance

Since the World Bank's 1992 report on good governance and development, the concept of governance – and especially 'good' governance – has taken centre stage in development policy, both internationally and domestically. The concept refers to the role of the state in development processes, and covers aspects of politics, administration, law, and state-society relations. All of these aspects are manifest in land policies in developing countries, both in past and present. In the late colonial era, European and domestic businesses were able to extract much profit from their control of land and agricultural labour. When after World War II most developing countries gained their independence, colonial governance was succeeded by national regimes who tried to build the nation and promote development by exercising strong, centralist and authoritarian leadership. Employing such top-down approaches governments initiated ambitious programmes for unification of land law, land registration, as well as 'land reform' inspired by socialist models.

Over the years this style of governance has caused much resistance, and led to demands for political participation, economic freedom, democratic decentralisation, human rights and rule of law. Around the globe, recent decades have seen the emergence of strong business communities, decreasing distributive capacities of the state, and a rise of civil society organisations representing weakened social groups. Since the demise of the Soviet Union international and national development policies are clearly focused on market efficiency rather than social justice. This is to some extent an ideology by default, born out of the recognition that 'big government' and 'legal centralism' of the 1960s and 1970s have not been able to deliver.

Whatever the position is on the broad spectrum between the poles of centralisation and decentralisation, policies cannot be carried out without a sound public administration, an effective civil service. Also the realisation of Hernando de Soto's ambitious plans would fully depend on the administrative capacities needed to run an efficient land administration. Similarly, a proper rule of law environment is key to the success of any land policy.

Land Policies and Land Tenure Law in a Broad Sense

There is still one other important matter which deserves mentioning. This book speaks mainly about the legalisation of unregistered land tenure. We might seem to suggest that this is the single most important and effective recipe for strengthening the position of rural smallholders. It is not. Rather, it is one of a dozen or so interrelated policy options concerning land management. Here, we cannot do more than touch upon some of them briefly. They include the definition and allocation of the various rights to land. Measuring and mapping land raises another set of issues. Then there is the issue of land use planning, which calls for balancing many different interests, and its implementation by land use licensing. Here intersectoral relations are key: besides balancing the needs and demands of agriculture, forestry, environmental protection, industry, mining, energy, housing, and public works, to mention just a few, coordination with other spatial planning and environmental management policies is necessary. Land acquisition policies for public and private interests, enabling state agencies and corporate actors to acquire land without a painstaking process of expropriation is also an important issue.

Then there is the issue of land reform, in the sense of redistribution of land to the needy. There are many different models of land reform. In the 1960s the popular model consisted of seizing land from large private landowners on the basis of certain land ceilings (maximum) for redistribution to landless labourers, tenants, or smallholders, who would form cooperative societies. Today, there is more interest in the privatisation of state land. Some experts and donors now promote the allocation of much smaller plots as a feasible way to support the rural poor (Prosterman 2009). Recent studies show trends of large-scale dispossession of smallholders throughout Asia (Li 2009). In as far as urban areas are unable to employ and absorb them, solutions require changes in access to land in rural areas.

The resolution of land conflicts has also become a major policy concern in itself in most developing countries. Different types of conflicts (within families, between communities, between communities and the state, between communities and enterprises) are often difficult to solve, and have the potential to develop into larger conflicts threatening stability and security. Whatever land rights are allocated, other factors are as crucial for small farmers to benefit from their land, including water, seeds, fertiliser, agricultural extension, access to markets, market information, transport, and fiscal incentives. This calls for integrated agricultural support policies and infrastructure. Obviously, the scope of this book does not permit us to further elaborate on this, nor to go deeper into land policy issues concerning the urban poor.

Underlying all of these related elements of land policy and law, two more ideological questions stand out: who controls the land, and how is land actually perceived? Often the issue of who actually owns and controls the land in a country – the state, private individuals, or collective entities – is highly contested. And if the answer is 'the state', then which national or subnational agency (or agencies) is mandated to issue rights and licences concerning land? This question of land control matters as much for agricultural land as for urban land, peri-urban land, forest land, or marginal land, and often has severe consequences.

Finally there is the question of whether land is perceived primarily as a commodity, an economic asset to be traded in an open, dynamic land market, or as the indispensable socio-economic foundation of communities and their livelihoods. In the first case, land assets should be legally fixed in order to – following De Soto's views – be transformed from dead to living capital, to allow land holders to capture rising land values and to use their possessions as collateral to gain access to credit.

For others, however, land tenure systems incorporate an extensive set of social relations from which people take their identity and that serve their needs for securing their livelihood. Through the inherent practice of reciprocity people are encouraged to see their individual interests in the light of the needs of others and the community as such.[10] The latter view emphasizes livelihood security and local food production.

Economic and Social Policy Theory: Efficiency versus Social Justice?

Much of the international debate on land governance today is conducted by development economists, as part of their general concern with economic development. Their work shows more attention for land as a marketable commodity than as a secure livelihood.[11] The focus on community-based local economies, as was once promoted by politicians like Gandhi and economists like E.F. Schumacher, the author of *Small is beautiful*, seems at first glance no longer fashionable among development economists these days. Yet, a closer look at De Soto's work reveals a strong focus on the actual importance of 'local contracts' and 'extra-legal relations'. Taking that seriously, requires development economics to focus on actual costs and benefits of farmers in their local contexts, bringing psychological, social, cultural and political considerations as much into the picture as rational choice calculations.

Today's development economics are heavily indebted to the work of Douglas North (1990) who forged the neo-institutional turn, underlin-

ing the fact that economic behaviour such as selling or renting out a plot of land (or deciding not to do so), – like any other behaviour – is influenced by 'transaction costs' – the costs of participating in a market. These costs, in their turn, are influenced by 'institutions', i.e. prevailing norms, rules, rule-applying organisations, and their practices. Jean Ensminger (1997: 191), who wrote an article in a book honouring North, concludes that in the field of how to organise land rights, there is a 'need for formal institutions to build upon informal institutions'. This actually calls for an alternative reading of neo-institutional economy, to the end that local communal regimes will be adapted rather than replaced.

In this vein economists could do more systematic research concerning the extent to which communal tenure arrangements provide smallholders with guarantees against losing their land, their means of survival and other serious risks. Introducing market-oriented private property has often led to uprooting such communal regimes and the social security that goes with it. In many regions, people have strongly resisted this, and not come forward to obtain private property titles for fear of losing this kind of social protection. Platteau (1996) gives a vivid description of these fears and problems. In an alternative reading of neo-institutional economics the concept of transaction costs might be expanded considerably. It should acknowledge the fact that in a great number of communities around the globe people's economic behaviour is influenced by their relations with other community members, by their sense of tenure security, by their ideas of justice, fairness, and social welfare. In these communities it is not the theoretically isolated, economically self-interested person who is the main player in economic transactions and market behaviour but the social person, in his social and cultural surroundings, with all of its trust, distrust, solidarity, or the lack of it. This would help policy-makers to decide when and where it may be wise to go for private property arrangements and when and where they could do better by looking for ways to support, recognise and legalise a communal land tenure regime, or parts thereof.

Colonial Era: an Earlier and More Ambitious Leiden-Based Research Project

To understand today's land law regimes in Asia and Africa, one needs to look at their histories. From the early twentieth century onwards colonial powers were divided regarding the best way to govern a colony, either by direct rule or indirect rule. In terms of land tenure and land law policies in the colonies this was reflected in two widely different approaches, namely 'legal centralism' or 'legal localism', to which we will

refer in short as a 'centralist' as opposed to a 'localist' approach. The centralist approach of colonial governments was quite popular with the French, for example in West Africa. They believed that European law had qualities superior to local indigenous law, assuming a natural evolution from customary forms of tenure to full private property, from status to contract. Customary arrangements were seen by such colonial regimes as backward and not offering opportunities for creative investment and development.[12]

However, other colonial governments, like the British, were taking local customary law and traditional authorities more seriously, and many colonial administrators opposed its replacement by Western concepts of freehold and private property. European legal scholars were often divided about the issue. In the Netherlands, for example, during the first decades of the twentieth century this politico-legal conflict dominated both policy and academic debates concerning laws in the Netherlands-Indies. The Leiden scholar Van Vollenhoven (1918) and his *Adatrechtschool* made a principled and empirically grounded plea for continued recognition of indigenous law and communal tenure. He developed the hybrid '*adat* law' as a conceptual bridge between *adat* (custom) and law. Such unwritten flexible *adat* law differed sharply from the positivist notions of law, prevailing in Europe. Van Vollenhoven's view was eventually accepted, and enacted into Dutch colonial legislation. So, in the 1930s *adat* law became well embedded in the laws, case law and legal education in the Netherlands-Indies. A sophisticated system of inter-group laws (*intergentiel recht*) was also developed to settle cases which involved members of different *adat* law communities. In other colonies similar debates raged (Mommsen and De Moor 1992).

From 'Big Government' of 1960s to Structural Adjustment in 1980s

The centralist style of postcolonial governance which prevailed since the 1960s led in the area of land law to national codification, land titling and registration in the name of development, national unity, and legal certainty. Thus national governments worked to marginalise communal customary land tenure and community-based traditional authorities. Donors generally supported this trend, the World Bank's 1975 *Land Reform Policy Paper* being a perfect illustration. Especially through the donor-supported 'structural adjustment' of developing economies in the 1980s, central governments now began to strongly promote private property and the development of land markets as the informing

principles of rural land law policies – albeit with some important exceptions like Ghana and Senegal.[13]

But once again 'localists', NGOs representing indigenous communities as well as academics, legal anthropologists and others, entered the scene in the early 1980s, emphasising the tragic failures of centralist approaches. Arguing that private property was actually the newcomer in land policies, they called for attention and respect for continuing local indigenous practices and arrangements (Coldham 1978, Shipton 1988). As they have argued, existing 'customary' land tenure is rooted in the social life of rural people, permeating their social relationships.[14] In fact, state-led reform of land tenure relations – whether socialist or market-based – has caused much resistance and avoidance and left rural areas in many countries with a most unruly pluralism of state law and a variety of local tenure arrangements, which people continued to adhere to.

Against this background, localists continued to plead for community-based tenure arrangements as the basic framework to foster (rural) development. However, a serious, balanced international debate about land, law and development did hardly take place, due to the conflict between underlying ideologies and the fact that both sides have in fact been using different concepts of law.

1990s Good Governance and Rule of Law Promotion

Since the 1992 World Bank report on governance and development, rule of law promotion has risen to unprecedented prominence in donor policies. In this so-called '"new" law and development movement' (Rose 1998)[15] the focus was obviously on effective legal rules and institutions. Following current development economics, policymakers were of the opinion that 'good' governance referred to policies that facilitate the operation of local and global markets. In the area of land law this initially meant individual rights, titles and registration. Thus rule of law and good governance concentrated on 'that part of the economy of a developing country which can be integrated in the global market economy' (McAuslan 1997: 43). Still in line with the structural adjustment policies of the 1980s measures were aimed at downsizing the state, improving legislation, legally protecting the investments of private entrepreneurs, and strengthening courts to solve conflicts in reliable ways.

However, during the 1990s a growing number of development economists and other policy-makers reappraised the role of the state and law in development policy. In the words of Stiglitz, the former chief economist of the World Bank 'the choice should not be whether the

state should be involved but how it gets involved' (Stiglitz 1998: 25). Support started to grow for the suggestion that serious social problems like poverty, inequalities and discrimination had to be tackled by the state, which had to make a comeback. In this line of thinking, the concept of development itself was also defined more broadly; it had to not just cover economic growth but also social justice and sustainability. Consequently, the belief in 'one-size-fits-all' type of solutions begun to shrink. Meanwhile, Amartya Sen's (1999) definition of development as freedom became widely accepted (Newton 2004: 7).

During this period, Bruce and Migot-Adholla (1994) published their evaluation of the strong and weak points of various land law reforms in Africa, promoting what they called the 'adaptation paradigm'. This new paradigm for land law reform suggested that different land use situations and contexts need different approaches to law reform. Besides state-led registration of individual private property in some areas, and leaving customary law undisturbed in other regions, there would also be areas where what we have called 'third ways' are preferred. In the 1990s Platteau (1996: 74) also argued convincingly for building land laws on local, customary practices of regulating and managing land; that is, in as far as desirable, for he also demonstrated awareness of the deficiencies of local customary arrangements, and of situations in which customary law has no local legitimacy any more.

2000s and 2010s, Mixed Donor Policies, Towards a Paradigmatic Consensus?

During the last decade international and domestic development policies, in particular on land law reform, have shown an amalgamation of the different strands of thought discussed above. It seems that donors and governments have come to realise the many pro's and con's of all 'silver bullet' approaches, whether old-style land reform, exclusive focus on state, structural adjustment and privatisation or decentralisation. Nowadays, pro-market legal reform programmes go hand in hand with complementary programmes to promote access to justice, legal empowerment, and justice for the poor. Programmes for training paralegals at village levels are reminiscent of the community development projects of the 1970s with their basic health workers and agricultural extension staff. Donors and governments are also open to explore the potential of 'non-state justice' beside regular national legal systems. Whilst this may leave room for experimenting with 'third way' solutions, it has also created a certain ambiguity and haziness, as we may learn when reading reports which the World Bank and UNDPs Commission on Legal Empowerment of the Poor have published.

World Bank, FAO, UN-Habitat, EU

The World Bank has now acknowledged that for a transitional period it is best to recognise customary practices as this extra-legal arrangement often provides a sufficient level of tenure security (World Bank 2003). Yet, the bank seems to see such adaptive policy as a prudent road towards individualised title and rural development through the market. It assumes a gradual individualisation of land tenure rights and increased transferability of land. In contrast, international organisations like the FAO, the EU and UN-Habitat – not to speak of peasant and indigenous movements – are more inclined toward a structural approach based on community rights to land, to food security and to shelter; in short to livelihood security. In their view land seems not merely an economic asset but also a space for living and/or cultural reproduction.[16] In contrast to the World Bank's title-based perspective, the rights-based approach of other institutions allows for a more permanent position of pluralist and intermediate options for the legalisation of land tenure.[17] In the rights-based approach tenure security takes precedent over legal certainty, in a narrow sense.[18]

UNDP's Commission on the Legal Empowerment of the Poor

The various reports made by or on behalf of the Commission on Legal Empowerment of the Poor (CLEP 2008a; 2008b) also strongly stress the need to target rural smallholders – and urban squatters – and to take a series of measures to legally empower them. In fact, the Commission was initially expected to promote the exclusive individual private property title approach following the footsteps of its co-chairman Hernando de Soto. Later on the Commission seems to have modified its position.

For example, the Commission also discusses the problem of how to protect and strengthen communal land rights of indigenous peoples as well as the 'secondary' rights of women. In the final 'Agenda for Property Rights' (CLEP 2008a: 65) the Commission suggests community-based ownership of natural resources (forests, grazing lands, fisheries etc.) and recognition of traditional institutions to manage and use these resources. A similar suggestion is to strive for 'adequate representation and integration of a variety of forms of land tenure such as customary rights, indigenous peoples' rights, group rights...'(ibid.: 65).

In sum, the report does not promote one single, right way forward. Just like we set out in previous sections, the Commission also conceptualises land tenure legalisation as one element out of a series of interrelated policies for rural development. Access to justice includes in

their view 'non-state, informal justice systems' (ibid.: 63). So, it seems the Commission is also inclined to walk 'third ways' in land rights legalisation.

However, the picture remains ambiguous. The reports remain general and do not specify how in practice the Commission would seek to reconcile or combine the 'install full private property' paradigm and the 'leave customary law undisturbed' paradigm. For, the reports also constantly emphasise that smallholders need to be brought to the market, thus incorporating 'the extra-legal economy into the formal economy'.[19]

So, it seems that tensions between a market-oriented policy based on titled land as an economic asset and a justice-oriented policy in which the land primarily serves 'livelihood security' is far from resolved. In spite of the Commission's declared intentions, in the end it seems to emphasise the aspect of economic asset far more than that of livelihood. (Otto 2009, Assies 2009: 914)

Towards a Paradigmatic Consensus?

The localist's promise of community-based tenure security for all smallholders has its own problems. What to do about discriminatory practices toward women and local minorities and about unfettered authoritarian power of traditional leaders? What to do when communal land tenure institutions are absent and/or do not function well any more? And how can unregistered community-based tenure arrangements survive anyway under the attack of land-hungry enterprises and foreign governments?

At present we notice a rapidly growing consensus among international and national decision makers, experts in development studies and in land tenure matters that the way forward should be based on careful assessments of the very specific local situations within a country. In this view policies should build where possible on local tenure arrangements or at least on local needs and potentialities, adopting a participatory, responsive approach. Regarding the core question of this volume of how to legalise land rights for rural development, we notice that 'third way' land rights regimes are now springing up in many countries, particularly but not only in sub-Saharan Africa. Solid evaluations of the effects of such novel enterprise are still rare. Recently scholars like Lavigne Delville and Fitzpatrick have sought to identify best practices among 'third way' experiments undertaken by several countries. Our previous study with country and case studies (Ubink, Hoekema & Assies 2009) on national land law and local implementation in a variety of countries in Africa, Asia and Latin America also provides

insights, we hope, that may help governments, civil society organisations, donors, and academics, in their search of just land governance for development.

A Closer Look at the Chapters

Bruce, the practitioner-scholar who advocated the adaptation paradigm already in 1994, tackles the question 'does development (...) require full private ownership?' head on (see page 33). His answer 'Not necessarily!' derives from decades of intensive experiences with formalisation of land rights for development, particularly the vicissitudes of registration of a person's entitlement as a full property right of a Western type. Do or did all such programmes bring real tenure security and did it boost development for the poor? The many evaluation studies he draws in show very mixed results and this in turn leads him to the centrepiece of his chapter, key questions about the conventional policy of land formalisation as private property. Among his questions are the following: 'Is there a provision for registration of common property, the property of local communities?', 'Is it possible to register customary rights rather than converting them to private ownership for registration?', and 'If the judiciary is corrupt and there is no use turning to the courts, what is the point of registering property rights?'. These and similar questions underscore the compelling need to rethink conventional legalisation projects and pay ample attention to other than private property schemes of land rights, particularly, but not only, to recognition and registration of communal land tenure.[20] In this context Bruce gives us a well-balanced discussion of De Soto's book *The Mystery of Capital* (2000), reaching the conclusion that the old recipe of introducing full private individual property cum titling and sophisticated registration of land parcels and titles cannot be the 'silver bullet'. In some conditions, it is, but in many others it is not. But De Soto has the great merit to have been the first to emphasise the potentialities of land formalisation for the poor, although in his plea for a particular form of formalisation he misses out on the many problematic experiences with the type of programmes he is actually advocating.

Cotula discusses the land law regimes of developing countries, mainly in (sub-Saharan) Africa, and their socio-economic effects, in a historical perspective. The sprawling of cities, demographic pressures, trade liberalisation and multinational large-scale agricultural and biofuel projects foster fierce competition in land, making just and effective land law policies difficult but all the more urgent. Particularly in rural Africa, where private registered property is rare, states often are the formal

land owning entities, while communal, 'customary' forms of land tenure dominate the scene, although often not in an official status. But this is changing rapidly. 'There is now greater recognition that land laws must build on local concepts and practice rather than importing one-size-fits-all models.' Basically these new locally adapted land laws follow two routes: one is to protect customary land rights of the communal type, and make for their simple and quick registration in land records. The second route is to introduce long term use or lease rights over (formally) state-owned land.[21] In both cases it is crucial to provide for low-cost and simple registration procedures in a small, accessible office nearby.

Discussing some of these new land laws Cotula finds important weaknesses unsolved or not yet solved satisfactorily. Women's rights including their secondary rights, are still in jeopardy; pastoralists – often overlooked and considered backward – rarely find protection in the new laws for their grazing needs. Apart from these problems with customary arrangements (and ways to legalise these) Cotula devotes considerable attention to the recent developments that affect the land position and tenure security of smallholders in Africa, namely national governments mainly from Asia investing in African land, as well as an increase of large-scale multinational agro-investments in cash crops for export and/or biofuel projects. In this regard he pays attention to investment treaties and international investments law and arbitration. Other international impacts on national and local land rights stem from court cases brought before interregional human rights fora (such as the Awas Tingi case in Nicaragua). He foresees 'an increasingly globalised system of property rights influenced by claims based on interlinked national, international and local rules'. Some of these international tendencies work towards depriving smallholders of their land, others may strengthen their position. 'Securing local land rights is today more urgent than ever', he concludes.

Alden Wily demonstrates that state-imposed top-down design and implementation of land and resource laws in Tanzania had adverse effects on the ground. In Tanzania state ownership and top-down state management of forests not only antagonised local communities, the traditional owners and users of the forests, but also turned them into forest abusers. She signals the necessity of bottom-up, participative preparation of land and resources laws for these to enjoy legitimacy and foster people's cooperation rather than resistance and sabotage. Alden Wily's story about forest use and management relates to the broader problem of how to deal with commons. More often than not in new land laws, these collectively held and used resources and their management regimes at the local level are left out of the picture – a

striking weakness given the immensity of local common resources in Africa and beyond. The author sketches the 15-year long struggle from the mid 1990s by local people, consultants (including herself), and a few open-minded authorities to arrive at new legal norms for acknowledging possession and conferring management rights on local communities in respect of Tanzania's rich forest resource. She recounts how this community-based process and the 'learning by doing', which marked its progress, eventually resulted in the new Forest Act 2002. One of its main objectives is to devolve forest authority as far as reasonably possible into the hands of ordinary villagers. Alden Wily shows how this was much fairer than previous legislation which operated on the basis that forest conservation and management could only be achieved by removing forests from the customary sector. She also adjudges the new law as providing a more viable route to sustainable forest conservation. The critical element in this, she argues, is that formalisation of village management authority rests upon acknowledgement of customary possession of these areas. If customary tenure over national forests had ceased to exist, local regulation and responsibility had been impossible.

As for the impact of the new forest law, this new paradigm is proving a success, improving relations between rural communities and forestry officials and demonstrably reducing forest degradation where communities secure controlling rights over local forests. The main focus of her chapter is however on the process of making national law. The chapter is aptly entitled 'From State to People's Law'. Alden Wily proposes that a 'learning by doing' approach is essential to modern, democratic law-making. Without this norms in new land and natural resource laws continue to be often unjust, irrelevant, unwanted, ignored or abused in application. A founding issue Alden Wily addresses is how this more genuinely participatory approach can advance rightful recognition of customary land interests as rights of real property, in the face of increasing appropriation by governments. Although this chapter was drafted in early 2008, the issue has become yet more pressing given that the current global land rush affects unfarmed communal lands of rural communities in Africa. Learning by doing, she argues, involves much more than cursory consultation with communities. It requires shared state-people experiential work on the law to overcome unforeseen pitfalls and problems. A learning by doing approach also challenges all those governments, public officials, consultants and donors who still work with 'star drafters' following a one-size-fits-all approach. So often this approach has been shaped around a narrow vision of private property as necessarily involving subdivision and individualisation of resources and registration processes which as narrowly focus on the farm. It is hard to imagine that consultants who

have read Alden Wily's chapter will go on advising a government about future land law on the basis of a one-week visit, producing a sketch of the contours of future land law regimes based on a draft already in their computer when they fly to their new assignment.

Van der Molen, an expert in cadastre and registration with extensive international experience, explores the various concepts and forms of registration schemes. In the field of formalising land holding outside the conventional policy of going for individual private property, one meets three stages. For one, governments need to engage in the development – through learning by doing – of specific 'third way' holding rights, like the community-based ownership of forests, like community titles in the hands of traditional communities, or like individual long-term use or lease rights. Secondly, one needs accessible, transparent and fast ways to assign such rights to either individuals or corporate entities, and thirdly, there is need of simple quick ways of registration, public recording of these rights. It is in this latter domain that Van der Molen shows us the contours of a 'third way'.

The author explains that the conventional cadastral concept is Western and not suited to serve the purposes of 'third way' policies of land holding legalisation. There is 'need to redefine the "traditional Western" basic concepts of a cadastre'. One has to see to it that any system of public recording of rights relates to 'the prevailing standards and values in the country's society (...)'(see page 114). According to him this means at least expanding and redesigning registration institutions and operations on three items, namely: 'The maintenance of records or registration of social groups with non-individualised membership, the maintenance of records or registration of the various forms of customary and non-formal (informal) rights, the maintenance of records or registration of parcels of land which are not defined using geometrics and which possess flexible boundaries.'

Let us stress that the first item, the concept of a group with non-individualised membership, is essential in that in many new land law regimes communal land and forest tenure gets to be recognised officially. According to this author registration methods are sufficiently variable to offer space for registration of this kind of community titles. As to the second item, how to record a variety of individual customary rights, like long-term use rights, he shows that this can be done, including the so-called secondary rights such as the rights women often possess within customary systems. This is precisely a sore point in the functioning of conventional registration systems where such rights are not taken into account and therefore annihilated. Also the third element commands attention, as it is crucial to describe and establish

boundaries of land in simple ways like enumerating natural elements that constitute the boundaries of some individual or communal parcel.

Van der Molen even offers to this end a 'migration path for cadastres', analysing what rights might be registered and why one would do that, how subjects of rights may be identified, what entity best keeps the records and how and when the records can be created and kept up to date.

Hoekema continues the search for weak and strong points in those present day land law regimes that try to follow a 'third way' and do not automatically go for private individual property and large-scale Western style registration. He scrutinises a number of such new land laws. Mozambique is a very advanced case in terms of unconditional granting of communal land rights to local communities. Even without registration the law provides communities with rather strong and extensive legal title to their land. They are free to regulate the use rights over the land as well as institutionally manage all the land, negotiate with investors etc. In practice, still a lot goes wrong, promises are not delivered, but the basic legal set up is a major innovation. In Tanzania customary law is recognised, also even without the condition of registration, but in contrast to Mozambique a vast set of provisions regulates land tenure relations. In the relevant laws not much is mentioned about commons, rangeland, woodlands, swamps, and forests. Alden Wily explains in this volume about the adverse effects of state ownership and management of forests and how this crooked system after fifteen years of fighting by local peoples, was replaced by a more successful set-up with people-controlled management rights over forests. Finally in Ethiopia the Federal government and some states chose to provide the smallholders – for the first time ever – with legally backed rights to use and often also to bequeath land to their relatives, and to confirm land management authority in the hands of local government organs (the *kebelle*). Typically the commons are left out of this new land law regime.

Hoekema dresses up an extensive list of strong and weak points of each regime, categorised along three evaluative criteria: does the regime provide real tenure security? Is there such a degree of legal empowerment that smallholders, if they wish, can access independent courts to solve conflicts? Are the local and regional land officials accountable? Many weak spots are detected among which the vast discretion awarded to land officials or village authorities to withdraw land which is not in productive use. Also sectoral laws like mining law, forest and water laws, and investment laws are often not coordinated with the new land law regime. This means that land rights can be annihilated by policies geared towards these other interests, often without adequate procedure and compensation.

This author favours recognition of communal land tenure where its institutions are still resilient, because they normally embody and foster a morale of reciprocity and solidarity and/or incorporate social and spiritual values that are part and parcel of the identity of communities.

Notes

1 The authors would like to thank Janine Ubink for her valuable editorial work on earlier versions of the chapters in this book, and Marco Lankhorst for his useful comments on chapter 1.

2 Interest in a variety of 'third ways', both in rural, peri-urban and urban regions, inspired the research project which resulted in the book *Legalising Land Rights*. The present volume follows up on this interest; this time, however, attempting to sketch in a more general way the possibilities and the weak and strong points of some 'third ways' of legalisation experiments from various places in the world.

3 The *2003 Land Policy Report* written by Klaus Deininger for the World Bank brought a significant change in this respect.

4 Here the term law is, characteristically, used in a broad sense, including various local, non-state norms and practices.

5 In many African and Asian countries the overwhelming majority of rural smallholders do not possess private property or freehold rights, so we will not go into the question if and how people with private property/freehold rights enjoy tenure security, particularly against external threats.

6 We recognise here the distinction made by M. Gluckman (1969: 256-259) between the estate of management of land on the one hand and the estate of use and exploitation of land on the other.

7 In these experiments often the position of so-called commons or common property is 'forgotten', but this may well change. There seems to be a growing concern for the rights of people whose livelihood depends to a great extent precisely on access to and use of these commons. See International Land Coalition 2008.

8 See for countries in West Africa the report by Kandine, Koné, and Larbi (2008).

9 Fitzpatrick (2005) among quite a few others nowadays, pays serious attention to recognition of land rights 'at the level of the group', thus to forms of recognition of the communal variant of customary law.

10 A persuasive and clear sketch of the working of such a morale of reciprocity is to be found in the book *Dancing with a Ghost* (Ross 2006).

11 This is taken from the 2004 IIED booklet *Land in Africa: Market asset or secure livelihood?*.

12 This evaluation of customary arrangements comes from a report by Golan describing the discussion in the 1960s among the newly independent Senegalese authorities where to go with their land law (Golan 1990).

13 See Ubink & Amanor (2008) about Ghana, and Hesseling about Senegal, in Ubink, Hoekema and Assies (2009).

14 See for example Watts (1992: 161) who deals with The Gambia: 'rights over resources such as land and crops are inseparable from (...) rights over people. To alter property rights is (...) to redefine social relationships'. Or a bit more abstract: 'Property rights are always embedded in the institutional structure of a society ...' (Ensminger 1997: 167)

15 The first law & development movement had its heyday in the 1960s and early 1970s but then disappeared rapidly, at least from donor policies.

16 In view of the discussion about the pressures on world food production caused by the large demand for land for biofuel and other purposes, the fact that in many countries almost all the food is produced by smallholders, makes pro-smallholder policies a must, if only in socio-economic terms.
17 In 2000 Toulmin and Quan noted the emergence of a new paradigm which does not prescribe a specific approach to land tenure reform, but is based on 'pluralism'.
18 The development debate that undergirds the two approaches is summarised nicely by Joseph Hanlon, when he is talking about the 'preferred' agents of development in the countryside. Hanlon (2002), writing on 'The Land Debate in Mozambique' uses as subtitle of his report: 'will foreign investors, the urban elite, advanced peasants or family farmers drive rural development?' This question hammers home the truth that any development concept implies socio-political choices, and that these choices determine the main features of the land law reform chosen.
19 Extra-legal in our conception would mean that a local tenure arrangement is ignored by national law. We follow here the FAO (FAO 2002: 11-12, Assies 2006: 576).
20 Bruce does not like the term 'communal', he fears confusion with 'collective'. Indeed as both Cotula and Hoekema explain in their contributions to this book, communal land tenure is not just about collective holding of land; individual and family rights are present too. Since in socio-legal studies the terminology of communal land tenure is current, we therefore use that term.
21 In the initial part of this introduction we also distinguished between these two types of land tenure arrangements that fall under the one label of 'customary law'.

Bibliography

Assies, W. (2009), 'Land Tenure in Bolivia: From Colonial Times to Post Neo-Liberalism', in Ubink, J., A. Hoekema & W. Assies (eds.), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden: Leiden University Press.

Assies, W. (2006), 'Bolivia: Land Tenure Legislation in a Pluri-Cultural and Multi-Ethnic Society', *Journal of Peasant Studies* 33 (4): 569-611.

Coldham, S. (1978), ' The effect of registration of title upon customary land rights in Kenya', *Journal of African Law* 22 (9): 91.

Commission on Legal Empowerment of the Poor (2008a), *Making the Law Work for Everyone Volume I. Report of the Commission of Legal Empowerment of the Poor*. New York: Commission on Legal Empowerment of the Poor & UNDP.

Commission on Legal Empowerment of the Poor (2008b), *Making the Law Work for Everyone Volume II. Working group reports*. New York: Commission on Legal Empowerment of the Poor & UNDP.

De Soto, H. (2000), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books.

Deininger, K. (2003), *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report. Washington DC: World Bank; Oxford: Oxford University Press.

Downs, R., and S. Reyna (eds.) (1988), *Land and society in contemporary Africa*. Hannover and London: University Press of New England.

Ensminger, J. (1997), 'Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa', in Drobak, J. & J. Nye (eds.) *The Frontiers of the New Institutional Economics*. London, Boston: Academic Press: 165-196.

Fitzpatrick, D. (2005), '"Best Practice" Option for the Legal Recognition of Customary Tenure', *Development and Change* 36(4): 449-475.

Food and Agriculture Organisation (2002), 'Land Tenure and Rural Development', *FAO Land Tenure Studies 3*. Rome: FAO.

Gluckman, M. (1969), *Ideas and Procedures in African Customary Law*. London: Oxford University Press.

Golan, E. (1990), *Land Tenure Reform in Senegal: an Economic Study from the Peanut Basin*, Research Paper 1001. Madison (WI): Land Tenure Centre.

Hanlon, J. (2002), *The Land Debate in Mozambique: Will Foreign Investors, the Urban Elite, Advanced Peasants or Family Farmers Drive Rural Development?* OXFAM Research Paper.

Hesseling, G. (2009), 'Land Reform in Senegal: l'histoire se répète?', in Ubink, J., A. Hoekema & W. Assies (eds.), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden: Leiden University Press.

Kandine, M., M. Koné, & W. Larbi (2008), *Land Policy Initiative: a Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods. A Regional Assessment on Land Policy in West Africa*. Ouagadougou: UNECA.

Lavigne Delville, P. (2000), 'Harmonising Formal Law and Customary Land Rights in French-speaking West Africa', in Toulmin, C. & J. Quan (eds.), *Evolving Land Rights, Policy and Tenure in Africa*. London: IIED.

Li, T. (2009), 'To make Live or Let Die? Rural Dispossession and the Protection of Surplus Populations', *Antipode* 41 (51): 66-93.

McAuslan, P. (1997), 'Law, governance and the development of a market: practical problems and possible solutions', in Faundez, J. (ed.), *Good governance and the Law: legal and institutional reforms in developing countries*. London: MacMillan Press.

Migot-Adholla, S. & J. Bruce (1994), 'Are Indigenous African Tenure Systems Insecure?', in Bruce, J. & S. Migot-Adholla (eds.), *Searching for Land Tenure Security in Africa*. Dubuque: Kendall/Hunt Publishers: 1-14.

Mommsen, W.J., J. & J. de Moor (1992), *European Expansion and Law: the Encounter of European and Indigenous Law in 19th- and 20th-century Africa and Asia*. Oxford, New York: Berg Publishers.

Newton, S. (2009), 'Law and Development, Law and Economics and the Fate of Technical Legal Assistance', in Arnscheidt, J., B. van Rooij & J.M. Otto (eds.), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects*. Leiden: Leiden University Press.

North, D. C. (1990), *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.

Otto, J. M. (2009), 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto', *Hague Journal on the Rule of Law* 1: 173-195.

Platteau, J-P. (1996), 'The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: a Critical Assessment', *Development and Change* 27 (1): 29-86.

Prosterman, R., R. Mitchell & T. Hanstad (eds.) (2009), *One Billion Rising: Law Land and the Alleviation of Global Poverty*. Leiden: Leiden University Press.

Quan, J., S. F. Tan & C. Toulmin (2004), *Land in Africa: Market asset or secure livelihood?*. London: IIED.

Rose, C. (1998), 'The "new" land law and development movement in the post Coldwar Era: a Vietnamese case study', *Law and Society Review* 32: 93-140.

Ross, R. (2006), *Dancing with a Ghost: Exploring Aboriginal Reality*. Toronto: Penguin Group Canada (1st print: 1992).

Schumacher, E. (1973), *Small is Beautiful: Economics as if People Mattered*. London: Blond and Briggs.

Sen, A. (1999), *Development as Freedom*. Oxford: Oxford University Press.

Shipton, P. (1988), 'The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property', in Downs, R. & S. Renya (eds.), *Land and Society in Contemporary Africa*. Hanover: University Press of New England: 91-135.

Stiglitz, J. (1998), 'More Instruments and Broader Goals: Moving Toward the Post–Washington Consensus', The 1998 WIDER Annual Lecture. Helsinki: UNU-WIDER.

Toulmin, C. & J. Quan (eds.) (2000), *Evolving Land Rights, Policy and Tenure in Africa*. London: IIED.

Ubink, J. & K. Amanor (eds.) (2008), *Contesting Land and Custom in Ghana: State, Chief, and the Citizen*. Leiden: Leiden University Press.

Ubink, J., A. Hoekema & W. Assies (eds.) (2009), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden: Leiden University Press.

Watts, M. (1992), 'Idioms of Land and Labour: Producing Politics and Rice in Senegambia' in T. Bassett and D. Crummy (eds.), *Land in African Agrarian Systems*. Madison: University of Wisconsin Press: 157-193.

World Bank (1992), *Governance and Development*. Washington DC: The World Bank.

World Bank (1975), *Land Reform. Sector Policy Paper*. Washington DC: The World Bank.