

USING REMEDIES AND RELATIVITIES TO REGULARISE ACCESS TO LAND

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Key words possession, land rights, remedies, food security, tenure security

Summary

Ubi remedium, ibi jus: rights result from remedies. Cadastral and tenure systems presuppose state based infrastructure or at least organisational capacity to give formal written records sufficient meaning to influence behaviour. Much of the world lacks these advantages, but might have minimal state infrastructure. A minimalist capacity however can deliver security in land occupation by raising expectations of continuing protected use by providing local relief from ejection or eviction. This builds expectations through solution of trouble cases or disputes. Relativity of title and possessory claims developed in English property law offer some ideas for governments faced with relative chaos rather than relative quiet, where most participants are illiterate, agricultural practices are undergoing profound change, and the relationship between citizens and state is volatile. The experience allows a transition of anti-eviction ideas from the urban poor into the more complex rural landscapes.

INTRODUCTION

This paper aims to expand appreciation of the roles of remedies and relativities in land regularisation processes and to suggest tools for land regularisation capable of operating in periods of relative civil unrest, dislocation, post conflict and breakdown of the state. As with other solutions, success depends on the capacity of a state or regional government to allow local decisions to operate and give sympathetic recognition to local activities. For this, no single or foolproof recipe exists. While an organised group is far more able to influence its own future than a disorganized one, its fate will depend on factors beyond its control, ultimately on the capacity of the nation at large.

The strategies in the paper aim to -

- Build on the much more flexible approaches to land policy and project design
- Permit and organise relatively useful occupation and eventually titles, and
- Regularise land attachments through remedies based systems (not tenures and property rights based systems).

Identification of methods of betterment or scaling up to more formalized and familiar tenure arrangements is also an outcome.

LAND POLICY AND PROJECT DESIGN

Advanced theories for pro-poor land delivery

Approaches to formal tenure delivery are now well documented, and, increasingly, so are the less formal approaches driven by HABITAT and active NGOs. Enrichment of development policy and land policy debates and introduction of more flexible tenure delivery tools are to be applauded and form the background for even more adaptable systems of regularisation of access to land. For our purposes, historical development of pro-poor land delivery systems within organised land administration systems (LAS) coalesced in the UN/FIG Bathurst Declaration and Melbourne Conference in 1999 (UN FIG, 1999). The Conference built on previous work beginning in the 1980s and offered a strategic refocus of land policy, project design and administration. Changed directions in land policy include -

- Recognition of the significance of communal and customary humankind to land relationship reflected in the World Bank policy (Deninger, 2003), European Union Land Policy Guidelines (2004) and in food security literature (Meizen-Dick and Di Gregorio, 2004).
- Use of extensive collaborative efforts to settle policy statements: World Bank Development Report, 2005 draft was available for comment before being settled (Payne 2004), and EU Land Policy Guidelines (2004) consultation process.
- The realization that titling works in countries with already existing, or capacity to invent, land markets, widespread acceptance of individualised humankind to land relationships and an expensive and reliable government infrastructure capable of delivering sustained support of land allocation by market methods. And the more significant consequential realization that individual titling is not inappropriate for people suffering dramatic strife and poverty (Holger Magel, 2001). The UN Millennium Project Interim Report for Taskforce 8 (UN, 2004, p 62) expands the critique of attempts to draw land into market based systems.
- Development of pro-poor strategies, including an inchoate tool kit for emergency securing land relationships. An expanded literature (Delville, 2002) has identified possible tools as alternative approaches in pro-poor strategies including food security delivery, sustainable livelihood approach, and social protection of agriculture, particularly as discussed in Natural Resource Perspective Papers of Overseas Development Institute, www.odi.org.uk.
- Recognition of the need to build a land regularisation system from people up not government down. The key factor of **commitment of beneficiaries** to the particular method of delivering land security is now not only on the table, but recognised as the starting point. Similarly, the **cognitive capacity** of participants is now recognised as an essential ingredient in modern land markets (Wallace and Williamson, 2004). The flowering of this idea is perhaps best seen in community-

driven development (CDD), now taking about US\$ 2 billion aid in 2003, critically assessed by Platteau (2004).

- Recognition of the interconnectedness of land delivery and delivery of basic amenities, particularly water, sanitation and housing and particularly food security (Slaymaker and Newborn, 2004).
- Recognition broad scale differences between rural and urban needs, and the consequential and gradual abandonment of the assumption that “one size fits all” titling systems can assist.
- Recognition of the unique nature of local land holding and distribution patterns, and, at the highest level, the movement of the land policy debate away from recognition of **local land rights** and towards **local management**, as ideas of legal dualism permit recognition of national or regional laws and local customs (Delville, 2002, p 11).

The relationship between secure land and civil peace is now regarded as axiomatic: the place of regular access to land in delivering small business opportunities, food security and sustainable lives is also accepted. Land markets are no longer the only or even the principle focus of land projects for the poor. In many countries, opportunities to deliver security need to be constructed well before a land market appears. While securing land particularly by delivering sufficient regular and protected access to enable people to self manage their lives is the standard aim of many of pro-poor projects, the methods of delivering security now rely on how people attach themselves to land and how they manage these attachments, rather than formal land identification and titling (Fourie, 2001). The depth of the influence of these (and other) changes is seen dramatically in the title of Task Force 8 of the UN Millennium projects: What is now accepted as a **Slum Dwellers Betterment Program** would, in 1995, probably have been designed and described as a Land Title Delivery Program.

Disengagement from standard legal theory and property rights analysis

The analysis here is independent of theories of law in which legal apparatus partakes of neat and tidy relativities between rights and obligations, or which see law as statements of a sovereign, (classic legal positivism of Jeremy Bentham and John Austin) or normative derivatives of a Grundnorm (Kelsen’s Pure Theory of Law.) The analytical versions of property theory of Honore, Hohfeld and Salmond, inter alia, and of land rights as bundles of opportunities are likewise unhelpful. We are technically outside the formal legal analysis and must build on the *realpolitik* of how people behave when unconstrained by organisational power. The effort to implement land policy by developing tools capable of working in much more unstructured situations is better assisted by critical legal theory and its antecedents in legal realism, especially from American and Scandinavian jurisprudence.

Some land policy analysts have favoured the conceptual capture of virtually all people to land relationships within tenure categories (McAuslan, 2002; Craig Johnson, 2004). While this has advanced our capacity to use tenure theory to assist inclusive administration and law for informal land uses (especially the nomadic and indigenous

uses, urban fringe dwellers and illegal squatters), the focus of land policy analysis capable of working in post-conflict or severely challenged administrations needs to be shifted away from tenures and towards managing people's behaviour. This change of focus is apparent in land management literature which suggests analysis of the people to land relationship must move away from a model of possession/individual ownership to comprehend open-ended, locally defined, sociopolitical arrangements in which people (rather than norms) distribute land according to criteria of infinite variety, principally not through application of rules but through protracted, multi faceted, negotiation of selected opportunity sets: transmission, management, transfer, access for a purpose by a time of the surface, water, trees, land, inheritance, payment terms, and so on. These experiences are dynamic.

[I]n a field of interaction characterized by: (i) the procedural logic of the actors (individual and collective), (ii) the weakness of stable and respected legal frame and (iii) the complexity of land tenure and land use, we observe a *double dynamic of innovation*, through which actors try – as much as they can – to create new rules or institutional arrangements, and to stabilize certain procedures of negotiation or arbitration to warrant them, in order to be able to instil a *minimal predictability in everyday life and to assure a minimal securing of land rights* which have been acquired on a longer term, outside or parallel to the market or to the rules guaranteed by public authorities. Local agents of official public organizations (who act according to non-official norms but in the name of the legitimacy which is recognized to the state services), as well as private actors who have a local legitimacy, are involved in these configurations, eventually leading to a certain land securization combining the two types of legitimacy.

(Delville 2002, p 9 (emphasis added).)

Later, when degrees of institutionalisation have been absorbed by the intended beneficiaries so that the levels of predictability work not only among participant groups but between their members and strangers, governments can identify clearer paths to market construction via tenures and property rights (though we should never underestimate the difficulties of delivering these in practice) (Deininger and Feder, 2002; FAO and World Bank, 2001).

PROTECTION OF POSSESSION AND RELATIVITY OF TITLE

Introducing relativity of title

The English were late arrivals at the cadastral door. In contrast to the comparatively systematic European cadastres, the English land administration system (LAS) had to rationalize reliance on -

- general boundaries
- possession as a source of unassailable title and repairer of defective titles generated by deeds conveyancing, and
- a poorly designed deeds registration system of the late 19th century.

On the other hand, the English developed highly flexible property theory: they simultaneously recognised three different legitimate sources of property rights – legal, equitable and possessory ownership.

Formal rights depended on simultaneous running of two legal systems, common law using the Kings Courts and equity law using the courts of the Chancellor. Separate administration of the courts lasted till the late 19th century and both sets of rights survived amalgamation. Multiple valid ownerships left English property theory with a heritage of relative titles. While no one (other than lawyers) would recommend any other country go through this process, the English legacy demonstrates that a country can industrialise and modernize by institutionalizing multiple and complex property systems in which neither spatial boundaries or legal definitions are absolute, in contrast to the hard-wired approach of modern land administration. The tools the English used to manage the relativities provided sufficient transaction certainty while retaining and indeed encouraging flexibility. These tools included -

Prioritisation system: Priority rules to determine the order of interests

Alert system: Patterns imposed on holders of interests to alert members of the group to their existence

Transparency mechanisms: Patterns imposed on transactions to publicise or put interests within the realm of knowledge of strangers, eventually deeds and registration

Discovery systems: Patterns for searching to discover interests, including looking at the land, and eventually title searching and register searching

Removal or failure systems: Overreaching of titles and interests if they were concealed from a person dealing with the land.

While the practices related to these changed as land formalised, the tools remained universal until they were absorbed into the land registration system. At the initial stage the tools work within the group, but as formalities are introduced, the tools become useful in land allocation and regularisation processes between group members and strangers.

Possessory titles

The English experience with possessory rights was sourced in pragmatism (Rose, 1985). The relative title system worked because the English very early on refined methods for distributing possession in terms of present and future entitlements and for pacifying land-grabbing behaviour. The predominantly legal tools protecting possession from interference became so seamless and successful that the idea of a owner who could claim to be “seised” of the freehold estate and eventually “registered” owner was also accurate.

To understand how the English managed to deal with the disintegration of the feudal system, severe agricultural depressions, industrialization and opening of rigidly held aristocratic estates to the middle class entrepreneurs without revolution, we need to go back even further into history. The shortened account below is designed to help build a

model within which our tool set might operate: it does not aspire to detailed historical accuracy. The two basic factors stimulated the need to protect possessory titles:

Widespread acknowledgement of the failure or unavailability of a formal titling system, and

Rudimentary enforcement systems activated by interference with occupation (not claims of title) - availability of local systems capable of returning ousted *possessors* to possession and embarguing any self help recovery.

To convert the remedies based system into a betterment path, a third ingredient was added:

Gradual spillage of the remedies into situations based on rights to land, irrespective of whether a dispossession had occurred (Prosterman and Hanstad, 1999).

Examples of the first 2 ingredients are provided by English property law. The English story is a little more complicated given its long historical development beginning with the feudal system. In brief, possessory claims were related to the development of remedies for leaseholders, for whom property titles were unavailable because leases developed after the concepts of real estate had solidified. Leases were merely personal property unable to carry "seisin" or the technical possession of freehold owners and hence unable to attract legal protection as property rights. For their trouble, freehold owners were protected by complex systems of rights and remedies that gradually became unworkable. For practical reasons leases grew in popularity and by the 13th century they were common. Remedies which eventually developed to assist leaseholders (available against landlords from 1285) were comparatively modern and focused on protecting "possession" not on an estate in freehold or a fee simple. By 1499 these leasehold actions allowed recovery against all comers. The basic remedy was an action of ejectment which returned land *in specie* if someone interfered with the possession of the leaseholder. A remedy in trespass allowed the person removed to recover damages, but not the land.

So attractive was this remedy of ejectment that fictions developed and were perfected by 1650 to make ejectment available to freeholders who asserted title. The writs were framed around a nominal plaintiff called John Doe who asserted in pleadings that he had entered the land as tenant of the real plaintiff, and that he, Doe, was ejected by Richard Roe, a "casual ejector". Only if the real defendant accepted the fiction of the lease, the entry and the ouster was he allowed to defend. What was tried in the court was the "right" of the plaintiff to grant the lease to Doe, that is the title to the land. While the action now takes the modern form of "recovery of land", derivatives of ejectment remain the principle remedy in English property law (Megarry and Wade, 1959).

When the action of ejectment giving recovery of land was no longer available because time had barred its being brought in court, a new way of looking at land was established. When the period of limitation for the action of ejectment was (eventually) reduced to 20 years, possessory titles were firmly established as capable of overriding ownership, both legal and equitable. The logic of possessory titles is not that they are good titles, but that after time had run no one, not even the true owner, could recover the land in a court of law. Mature possessory titles could be asserted to resist claims to the land by owners of

legal freehold estates (though the English Land Registration Act of 2002 reduced the situation to a complex administrative procedure).

A parallel development lay in encouraging people ousted from land into a socially organised process of recovery, rather than self help. While any national experience of controlling retaking of land depends on the public acceptance of the formal remedies, policing of retaking of land by individuals who rely on force and power is necessary for any state interested in monopolizing violence as a corollary for providing citizens with civil peace and good order. The balance is also acted out in any situation where power of a group is sought over individuals. In English law, legislation as early as the 14th and 15th centuries prevented forcible entry onto land likely to breach the peace, even by true owners.

FUNCTIONAL APPROACH TO REMEDIES

Reaction to formal land regularization

UN HABITAT's definition of security of tenure, though narrow in scope and couched in terms of rules and rights, is widely accepted.

“[S]ecurity of tenure describes an agreement between an individual or group to land and residential property, which is governed and regulated by a legal and administrative framework (legal framework includes both customary and statutory systems). The security of tenure derives from the fact that the *right of access to and use of the land and property is underwritten by a known set of rules*, and that this right is justifiable. The tenure can be affected in a variety of ways, depending on constitutional and legal framework, social norms, cultural values and, to some extent, individual preference. **In summary, a person or household can be said to have secure tenure when they are protected from involuntary removal from their land or residence by the State, except in exceptional circumstances, and then only by means of a known and agreed legal procedure, which must itself be objective, equally applicable, contestable and independent.** Such exceptional circumstances might include situations where physical safety of life and property is threatened, or where the persons to be evicted have themselves taken occupation of the property by force or intimidation.

UN 2004 Millennium Project Taskforce 8 Interim Report, p 57.

An important addition comes from the European Union that “a land tenure system is made up of rules, authorities and rights.” (EU, 2004, p 6). For our purposes, we need to add “tools and remedies”.

The familiar structure of titles, tenures, authoritative state recognition, documentary evidence, dispute resolution systems and land administration of some kind hover in the background, usually as possibilities so remote as to be irrelevant to lives of many people capable of benefiting from a different approach to regularising land access. These accoutrements are necessary for property theory, articulation of land rights, enforcement

systems and land administration. They underpin the “titling” systems favoured by legal reformers and technical advisers world wide. However, they demand high levels of capacity in a nation state to deliver property systems. The neo-tenure delivery systems mapped out from 1995 onwards especially by combining elements of the tenure program with administrative systems and service provision, pioneered by UN-HABITAT are more appropriate, though delivery tools remain relatively problematic in the chaotic reality of many modern states.

Remedies based regularisation ideas fit within standard tenure theory because they do not rely on “rules about access”. The ideas are both reactive to and built on formalized land delivery systems and related tenure theory. Where a capacity for governance is developing, concepts of title, tenure and security need to be separated as policy goals for a betterment path and meanwhile opportunities sought to regularise land occupation without having to first build an apparatus of legal property rights.

The ideas also derive from another perceived source of limitation of property rights theory relating to communal land uses. Rights are the common element in sophisticated tenure systems and in market based systems are typically individualistic and national. Inclusion of communal, indigenous and other rights within formal systems is therefore difficult because they are local, seldom national, in operation. McKean (2000) and others do not see gradual transition of these land arrangements into a property based, market friendly system. They regard “leaving them alone” and a formal recognition of the right to be left alone as core deliverables in the protection of communal people to land relationships. The more recent versions of this refer to neo-customary systems (Durand-Lasserre and Royston, 2002).

The standard features of land rights are not available in the contexts of post conflict and poverty. These involve opportunities constructed in a legal order to occupy land or to use it for annual and perennial crops, make improvements, bury the dead and access natural resources; then in monetarised systems to transfer, give, mortgage, rent, devise (leave by will); opportunities to manage entry on the land, particularly to exclude strangers and trespassers, in some cases through communal decision and in others by family or individual decision; with some enforcement opportunities. While the content and complexity of these opportunities vary from place to place, the assumption behind the rights regime is the availability of legal apparatus to announce and enforce the rights. This availability is the question for many communities experiencing an earlier stage of reliance on socio-political norms where the paraphernalia or trappings of enforcement, or worse, the arbitrariness of unfettered personal power predominate. These people must rely on other strategies and instruments.

Anti-Eviction distinguished

The recognition of importance of lesser tenures, especially rentals, stimulated new ideas about land regularisation. Payne’s work (1999b) in seeking to raise the opportunities of using less formal tenures, particularly leasehold tenures, into the land administration project spectrum are now accepted (Deininger, 2002). The consumer movement in 1970’s and 1980’s in landlord and tenant directed efforts to protect tenants towards continuance

of their possession and constitutes a parallel thread in the development of anti-eviction remedies. Task Force 8 Millennium paper (pp 69-70) recognises the primacy of anti-eviction in the stabilisation of land, and relates this to all possession, even illegal, capturing the threads of earlier literature. Traditionally anti-eviction laws govern relationship between land owners (private or public) and their occupiers. They predominantly relate to the management of the continued occupation vis-à-vis one foe or antagonist (UN-HABITAT 2003, p 11).

Anti eviction rules are a successful intervention in many situations. Though theoretically attractive from the viewpoint of legal formalism, even anti-eviction strategy sets too high a bar for security delivery where the state lacks organisational capacity. The point about insecurity of tenure is that the access to land is typically 'protected' by informal power. This space between having no protection by state and no protection at all is occupied by a multitude of tribal, communal and opportunistic but organised access mechanisms.

This area between state based and more marginal local power is recognised by the UN Millennium Project Taskforce 8 Interim Report:

Some forms of residential tenure arrangement can guarantee a reasonably good level of security. This is the case, for example, in sub-Saharan African countries, in **communal or customary land delivery systems** (even when these are not formally recognized by the state) Recognition by the community itself and by the neighbourhood is often considered more important than recognition by public authorities for ensuring secure tenure. (p 59)

The relative volatility of these relationships is the problem faced by land policy makers.

REMEDIES BASED REGULARISATION TOOLBOX

The collection of tools below is drawn both from the English experience and recent literature on land and development policy.

Articulated land policies capable of attracting wide public acceptance

Acceptable policies capable of influencing and calming people's responses to land organisation strategies need to be articulated. In the case of East Timor, the policies included housing of refugees, stabilisation of post conflict land uses, and compliance with the United Nations human rights instruments. Given United Nations Temporary Administration of East Timor (UNTAET) was the governing body, these policies delivered integrity to land delivery systems basically authorising ad hoc land distribution through refugee placement. The experience provides a useful illustration of the universality of the human rights instruments and using them as a starting point.

Deliver remedies related to aberrant behaviour, not land title enforcement

Local systems should be capable of returning people to land used for business, food production and housing. Local remedies need to be available on occasion of disruption of possession or occupation, independent of claim to the land.

These remedies focus on reversal of aberrant behaviour, particularly removal of or interference with prior possession. Remedies need to be simple, offering authoritative return to possession. The focus is not on who owns, or how the person gained possession, but simply on the act of removal. Even a person with a “better” title is captured by the remedy and must rely on pleading “title” to seek institutional aid in recovering land if and when land rights are developed. In this way, the precedent offered by anti-eviction remedies is extended to cover even simple occupation. The idea is to regularise opportunities for small business, street trading, kitchen gardens, annual crops, and to build these into more permanent land uses including construction of houses and business premises, wide scale cropping and grazing.

Rather than a property right, this suite of remedies creates an expectation of being left alone which is capable of maturing into an expectation of entitlement.

Inclusion of customary, communal and common access systems

The remedies need to be widely available, including to people managing resources in common through a framework capable of managing contests among multiple users (Adams, 2002; Dietz and others 2003).

Transaction and inheritance tracking

Possessory and anti-eviction remedies are only sustainable if the dynamism of people to land relationships is recognised. The remedies therefore work best in conjunction with rudimentary record keeping. Simultaneous construction of local systems of remembering, and, eventually, of recording stabilises expectations and improves understanding of reality by outsiders. Access to services and consensual transfer of occupation (UN Millennium project paper, page 65) and even opportunity to sell are compatible; so is a degree of monetarisation.

Overlaying occupation patterns

Simultaneous recognition of multiple possessions is often required to generate shared opportunities for cropping, grazing, business, housing, access to tree and bush products, and access to water. In mature systems overlapping or layering of use occurs when two or more people access a parcel at the same time for different purposes: lessee and owner, land owners and miners, easement owner and land owner, and so on. The requirements are no less complicated systems where legal rules are not available.

Focus on behaviour and capacity of local people

Building on the basic realizations that the community must be brought into the process and that systems only survive if they resonate with their users (Fourie, 1999), robust land delivery system must be sustainable among its immediate beneficiaries. They must accept it. The traditional path towards land security

involved projects aimed at announcing rights and enforcing them. The better path is to utilize the ways people think about and organise their land and build these into betterment strategies.

Betterment strategies

Use of remedies and dispute patterns protecting continued occupation reinforce expectations both among community members and among citizens and their state. Stability in land access reinforces civil peace and vice versa. Even simple options, for example announcement by government that a slum will remain for a decade (Marie-Amiot, 1999) can offer relief from threat.

Anticipation of hard cases

The substantial level of dispositions by non disruptive means of removing HIV/AIDS widows and orphans from land they would otherwise use raises special issues of a profound and complex nature, varying from locality to locality. Arbitrary distribution of possession in the context of an HIV/AIDS crisis requires different strategies and approaches.

FUTURE CHALLENGES

From the perspective of a land policy lawyer, four more improvements in design of regularisation projects are awaited:

1. Improvement in capacity to understand and reflect labour based land distribution systems (particularly for women, since they traditionally provide the labour resources turning land into food) into regularisation opportunities
2. Integration of informal credit systems into land regularisation systems to balance lenders' and debtors' access to land in more sustainable and less predatory ways
3. Improved capture of transactions, inheritance and passive alterations in land use in formal and informal systems, particularly the non-volitional changes through the diverse and sometimes complex hereditary patterns. These are often administered through customary and or religious systems separately from the land allocation and regularisation processes
4. Articulation of rights relating to resources, water, servitudes, provision of roads and services.

The extensive efforts to frame land policy in terms of practical opportunities and informal but deliverable incremental improvements, the realisation that people to land relationships are durable (and are not moved aside by a "new approach"), and multi-disciplinary and consultative approaches are evident in the literature of the past five years. While many of the participants and producers of these insights suggest that their contributions could have delivered more, their achievements are tangible. Large formal land projects still have a place, but now there is extensive capacity to build projects from the ground up.

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