Land Rights and the Rule of Law

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Abstract

A major arena for successful pro-poor rule of law reform has been the provision of secure land rights for the rural poor. The bulk of the 70-75% of the extreme poor on our planet who make their livelihood in the rural sector fall into one of three great groups (altogether around 1.25 billion people) who lack secure land rights: tenants or agricultural labourers on lands of private owners; members of collective farms who have not yet received secure individual land rights in a break-up; and squatters on land claimed under public ownership.

Far more of the land-insecure would exist today, but for the successful carrying out of a number of land tenure reforms in the post-World War II era (including important reforms currently underway in such major developing countries as China and India). Yet much remains to be done.

In carrying out future rule of law reforms to provide secure land rights to the rural poor, a series of lessons can be distilled from the past and present work of Landesa and a number of others: that governments acquire needed private land rights voluntarily and at market price; preference for distribution of intensively used small house-and-garden plots; equal land rights for women; universal allocation of long-term individual land rights where collective farms are broken up; documentation protecting insecure holders of publicly claimed lands; and protection against new forms of insecurity, such as ill-compensated takings of agricultural land for non-agricultural purposes, and so-called “land grabs” by large agricultural users.

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Among the most demanding challenges for application of the rule of law – not just in the past decade but persisting through the entire period since World War II – has been the crafting of land tenure reforms for the benefit of the world’s rural poor. Still today, roughly half of our planet’s population remains rural, including an estimated 70 to 75 percent of the very poorest; and of the latter, the great bulk depend for much or most of their scant livelihood on working agricultural land that belongs to someone else or as to which they have dubious and insecure rights. The land-insecure rural poor fall into three major groups:

1. Tenant farmers or agricultural labourers cultivating someone else’s privately owned land;
2. Insecure holders (jointly or individually) on land that used to be, or sometimes still is, publicly owned and collectively farmed;
3. Squatters or claimants under customary tenure rules, on various lands also claimed by the state or whose formal ownership is unclear.

Altogether, roughly one-and-a-quarter billion people fall into one of these three groups. And where these widespread problems exist, of insecure rights or no rights at all to land which is the principal source of rural families' livelihood, status and security, a whole series of adverse consequences are likely to follow:

- Families whose land rights are insecure cannot risk making mid-to-long-term investments in land improvement and crop diversification, so production remains stagnant and yields remain low.
- Low yields mean limited nutrition for the family, especially for the children and, in many settings, particularly for the girls. An extensive study done a decade ago, concluded that poor nutrition was the primary cause of 53 percent of the ten million annual deaths on our planet of children under five (and those deaths are concentrated among the rural poor).
- Low yields also mean low incomes, with little money to support health, education and other basic consumption outlays.
- Land-based grievances continue to fuel major civil violence – the antithesis of the rule of law – in many parts of the world (here we see a long history of upheaval, from the Zapatistas of the Mexican Revolution to the Naxalites of contemporary India, with a cumulative death toll far into the millions).

By contrast, where basic land tenure reforms that give secure land rights to the rural poor – whether ownership of the land being farmed or something broadly equivalent- have been enacted, and carried out, a whole series of positive results have followed. Since World War II, a partial list of such reforms includes Japan, Taiwan, South Korea, Kerala and West Bengal states in India (and more recently underway in four additional states), Vietnam, Mexico, El Salvador, mainland China (first with ownership rights in 1949-56, then – after a disastrous collectivisation – with decollectivisation in 1980-84, and 30-year individual household land rights legislated in 1998 and 2002 and now implemented in about half of the Chinese villages), Lithuania, Latvia, and Estonia, Kyrgyzstan, and Russia (especially as to the small plots: household auxiliary plots on former collective farms, cottage (dacha) plots, and garden plots). Of all the foregoing, only the earliest stages of the tenure reforms in mainland China and pre-World War II antecedents of the tenure reforms in Mexico can be said to be immediately traceable to revolutionary overthrow of the previous regimes – and thus not to be instances of the reformist application of the "rule of law" – but the others stand as tangible, measurable instances where the rule of law has been effectuated.

Positive results of these reforms have included land investment followed by increased and diversified crop production and increased income. For Taiwan, for example, the ten years following land reform saw a 60 percent increase in grain production and a 150 percent increase in average farm income; in Russia the small plots have doubled in area, from three to over six percent of arable land, and now produce more than half the total value of agricultural production (up from 25-30 percent).

In settings where land tenure reforms have been legislated and effectively carried out, nutrition has greatly improved, infant and child mortality rates have been sharply reduced, land-based grievances (but see the caveat below) have greatly declined, and (where the new land rights are transactable), farm-family wealth has burgeoned. Moreover, the positive impact of greatly increased rural production, and income is felt over the whole economy.

These pro-poor land tenure reforms must be counted – certainly broadly, over the two-thirds of a century since 1945, and over the period of Landesa's own awareness and work on these issues from 1966 onward – as reflecting substantial successes for the application of the rule of law. But it is also of great importance to ask narrower questions as to the needs and opportunities for land tenure reform that have been more recently seen or identified. Certainly the scope for rule-of-law reforms in the land tenure area remains great in 2012, as reflected in the billion-and-a-quarter estimate we made above for the number of people who are still in one of the three groups lacking secure land rights.

Ten points stand out in looking at what has been learned, especially in the last decade or so, about the still very large needs for effective rule-of-law reform in the land tenure arena:

1. The approaches of the period from the end of World War II until the 1980s are less likely to provide the models for future land tenure reform – especially approaches in which privately owned land was compulsorily taken and redistributed to tenants. There is less political and ideological pressure for such reforms after the effective end of the Cold War, and the political pressures against them have further increased with sharp increases in the market prices of the private land involved. (A corollary will be that unimplementable laws on the books attempting to prohibit or limit tenant farming may need to be repealed, allowing more of the rural poor to become, or remain, small tenants – usually a better option than casual paid labour).

2. Experience has underlined that whatever tenure reform does involve taking and redistribution of private land should be fully compliant with the rule of law. In particular, it should not involve group-wide penalties levied without due process of law (confiscatory takings) against existing land owners, and beneficiaries should have free choice as to how they wish to farm.

3. Consistent with the last point (no forced collectivisation) countries that still have obviously unsuccessful imposed collectivised farming should be encouraged, with technical and financial assistance from the international community, to allow the voluntary break-up of such holdings, as happened in China and Vietnam.

4. Where collective farms have already been broken up, there is no plausible reason not to give the resulting individual farmers rights which are as long-term, secure, and "owner-like" as possible. Field evidence shows, for example, that China will benefit greatly if 30 year land rights are effectively extended to the roughly one-half of villages they have not yet reached.

5. With increasingly unaffordable land prices, a highly promising alternative to "full size" farms, is the distribution of small house-and-garden plots. These may be as small as 1/10th acre (1/25th hectare) or even less, requiring modest quantities of land that can be acquired voluntarily, at market price. Or existing public land may be available, not already used by the poor. Such programmes are now being successfully implemented in several Indian states, and a great deal of global evidence – see the small-plot sector in Russia, discussed above – demonstrates that benefits rise extremely rapidly with the first few thousand square feet of land allocated beyond the footprint of the house.

6. A further advantage of such micro-plot distributions is that it is often possible to reinforce women's rights to primary control of the food and income produced, by titling such land jointly in the names of both wife and husband (or even in the wife's name alone, where research confirms that this is feasible). A goal generally of land tenure reforms should be formalisation of equal rights for women.

7. Yet another opportunity for extending the rule of law with respect to land rights arises as to those with insecure rights to what the state regards as public land. A further successful tenure reform programme in India – now operating in four states and with extension likely – involves training and deploying local youths as paralegals to help customary and tribal holders or claimants of land that was supposed to be distributed in past land reform programmes (but where there is typically possession without documentation of rights or documentation without possession) to fully claim their rights, including the rights of women to joint recognition in the title document.

8. Another opportunity for legal protection of the land claims of traditional communities (found in various African settings, and also in Asia) is through the formal delineation and protection of the external boundaries of the territory claimed by the group, while leaving most internal land use allocations within these boundaries to traditional forms of settlement.

9. Also as to lands presently claimed by the state which are or may be subject of contention, there may be claims of "historical injustices," some of which may be post-conflict or post-displacement claims. Kenya is in the process of establishing legal rules and procedures for consideration of such claims, and South Africa has done extensive adjudication of such claims.

10. Finally, there is our earlier caveat as to land-based grievances that may persist or arise out of new causes, and give rise to civil conflict, even where initial land tenure reform may have taken place. Two such categories of grievances have come especially to public awareness in the past five to ten years, both having to do with small farmers being deprived of their land under circumstances where due process and adequate compensation are lacking: government taking of agricultural land for non-agricultural purposes (with widely publicised cases, and civil disruptions, in both China and India, for example); and government dispositions of large tracts of land to companies or foreign governments for agricultural use. These have been commonly called "land grabs," and a number have taken place in Africa, as well as others in Asia. Both of these categories of grievance may be ones where international help with fact-finding, access to dispute resolution, and technical assistance may have useful roles to play. And would-be investors in land, for ethical, financial, and reputational reasons, must become accustomed to doing their own independent "due diligence" wherever land rights are involved.

Bibliography

- Binswanger-Mkhize, H. P., Bourguignon, C., & van den Brink, R. (Eds.). (2009). Agricultural Land Redistribution: Toward Greater Consensus. Washington, D.C.: The World Bank.
- Bruce, J. W., Giovarelli, R., Rolfes Jr., L., Bledsoe, D., & Mitchell, R. (2006). Land Law Reform: Achieving Development Policy Objectives. Washington, D.C.: The World Bank.
- Deininger, K., Augustinus, C., Enemark, S., & Munro-Faure, P. (Eds.). (2010). Innovations in Land Rights Recognition, Administration, and Governance. Washington, D.C.: The World Bank.
- Lipton, M. (2009). Land Reform in Developing Countries: Property Rights and Property Wrongs. Oxford: Routledge.
- Prosterman, R., Mitchell, R., & Hanstad, T. (Eds.). (2009). One Billion Rising: Law, Land and the Alleviation of Global Poverty. Leiden: Leiden University Press.
- Website: www.landesa.org