Literature Review of Governance and Secure Access to Land

March 2007

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Professionals in Sustainable Development

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1. Introduction

Still Searching for Tenure Security is the title of a book about farm dwellers in South Africa and their struggles to resist evictions during and post-apartheid (Social Surveys & Nkuzi, 2005). The literature in the broadest sense (books, articles, titles of conferences, CDs and even T-shirts) on secure access to land and security of tenure abounds with such titles and with the difficult and complex issue of how to make tenure more secure, especially for women, for people living under various forms of customary tenure, for indigenous people, for pastoralists and others in the drylands, and for the urban poor.

Governance is a critical issue in DFID's current thinking (DFID, 2005, 2006a) and it is a theme which, not surprisingly, runs through this literature. For example, Paul Mathieu of FAO stresses that 'good governance and the rule of law are closely correlated with the successful implementation of processes to improve access to land.' (Mathieu, 2006). There is a very broad consensus that good governance is an essential, though all too frequently lacking, element of equitable and transparent land administration. Various wish lists, often cast in generalities, are then produced to which no one could reasonably take exception, but which might prove difficult to put into operation in any concrete situation.

This, of course, as DFID will not need reminding, is because land issues are profoundly political in nature and any outsiders who enter this terrain need to do so with eyes wide open and with a good knowledge of the particular context in which they seek to intervene, including the historical context. This is critical for anyone, but especially so for representatives of a former colonial power. Zimbabwe is the most obvious and tragic case of where 'history matters' and where many mistakes were made on all sides because of a failure to recognise this and to adopt long-term horizons.

Another theme which recurs through the literature on land and secure tenure is that we are talking about complex, evolving processes which require sensitive understanding and responses which adopt a long-term perspective. But that is a very difficult thing to ask of local politicians, of land administrators, of civil society organisations - and also of donors. Politicians are notorious for focusing on the short-term, while most institutions seem prone to regular restructurings which mitigate against both institutional learning and the kind of sustained approaches which are ideally desirable in the sensitive arena of land.

This is a somewhat bleak, but necessary, health warning, but the literature does contain good news about lessons being learned from past mistakes and about more promising and appropriate interventions being adopted. As Professor Patrick McAuslan has recently written in a paper on *Improving Tenure Security for the Poor in Africa*:

> 'policy developments of the last few years are very much to be welcomed, whether they were adopted as a result of international pressure, a renewal of democracy or a greater national awareness of the need to develop truly national policies. The commitment to decentralization has been a major step forward in allowing the citizens to manage their own land affairs. The new approach to land registration – the involvement of the community and local institutions, local and simple registration systems - can help protect the tenure rights of the poor... States too are showing a greater willingness to tackle urban poverty by regularizing informal urban

tenure and accepting or even developing modes of financing the informal economy. There also are welcome signs that states are beginning to think about creating a national land law blending the best of the customary and Western law. This...can be both a shield and a sword against unregulated globalization. Progress, at least as regards law, can be shown with respect to women's land and property rights although the Executive Director of UN-Habitat is right to point out that when it comes to implementation, women are too often left to fight their own battles.' (McAuslan, 2006a, pp.51-2).

2. Why is secure access to land important?

The literature abounds with broadly similar answers to this question. Here are some fairly typical examples:

A key Oxfam principle states that:

> 'Access to land and security of tenure are necessary for people to raise and stabilise their incomes and to participate in economic growth. They are also essential prerequisites for diverse land-based livelihoods, sustainable agriculture, economic growth, poverty elimination, for achieving power in markets, managing natural resources sustainably, and preserving a people's culture.' (Oxfam, 2007).

Similarly, for the International Land Coalition (ILC):

> 'Secure access to land and productive resources is a viral link between food security, sustainable resource management, peace and security, and consequently the reduction of poverty. It is not so much a technical challenge but a political process of negotiation, conflict resolution and managing vested interests.' (International Land Coalition, 2007).

And for FAO:

> 'Access to land is a crucial factor in the eradication of food insecurity and rural poverty. Inadequate rights of access to land, and insecure tenure of those rights, often result in entrenched poverty and are significant impediments to rural development and the alleviation of food insecurity. Secure access to land often provides a valuable safety net as a source of shelter, food and income in times of hardship, and a family's land can be the last available resort in the instance of disaster.' (FAO, 2007b).

In the view of the World Bank:

> 'researchers and development practitioners have long recognized that providing poor people with access to land and improving their ability to make effective use of the land they occupy is central to reducing poverty and empowering poor people and communities' (Deininger 2003, p.xx).

For DFID's Renewable Natural Resources and Agriculture (RNRA) team:

> 'There is widespread evidence that, whether a tenure system is communal or individual, freehold or leasehold, farmers are more likely to invest in their land – and achieve productivity gains – when they have secure land rights.' (DFID, 2004a, p.3)

While in the urban sphere COHRE (the Centre on Housing Rights and Evictions) believes that:

> 'Security of tenure is one of the cornerstones of the right to adequate housing. Secure tenure protects people against arbitrary forced eviction, harassment and other threats. Most informal

settlements and communities lack legal security of tenure. Hundreds of millions of people (if not more) currently live in homes without adequate secure tenure protection. Security of tenure is a key issue for all dwellers, particularly women.' (COHRE, 2007).

and UN-HABITAT asserts that:

'it is now recognised that security of tenure is more important for many of the urban poor than home ownership, as policies based on ownership and large scale granting of individual land titles have not always worked.' (UN-HABITAT, 2004, p.2).

On land and conflict, IFAD believes that:

'land tenure insecurity has been a major cause of social instability and conflict in Eastern and Southern Africa at local, regional and national levels. Disputes and conflicts over land have also had a significant impact on the level of investment in land and on agricultural yields.' (IFAD, 2006, p.1).

while for the experienced land specialist Liz Alden Wily, tenure security:

'is also essential for peace, although governing bodies in the world community have been slow to acknowledge the centrality of tenure injustice in triggering conflict and civil war; this is demonstrably the case in many agrarian settings.' (Alden Wily, 2006, p.7).

Finally, UNDP's Drylands Development Centre, the International Land Coalition (ILC), and the Consultative Group on International Agricultural Research (CGIAR) system wide program on Collective Action and Property Rights (CAPRi) began formal collaboration in 2004, and all three organisations now:

'share the conviction that land tenure can be a mechanism through which the goals of gender equity, poverty reduction, efficiency and sustainable resource management can be achieved.' (CAPRi, 2006, p.1)

The key question of course being how is this to be achieved?

3. Secure property rights, economic growth and social justice

There are strong economic reasons for governments to underwrite the security of property rights – a public good. Aristotle, John Locke, Adam Smith and, more recently, Hernando De Soto, have all recognised that the nature and strength of property rights profoundly condition economic decision-making because of their effects on people's expectations of a return on their investment of labour and capital. Klaus Deininger of the World Bank argues that 'secure property rights will increase the incentives of households and individuals to invest, something that will not only help them make such investments, but will also provide an insurance substitute in the event of shocks'. (Deininger, 2003, p.xix).

Such property rights can be community-based or corporate and need not depend on formal, registered, individual ownership, but on the rights holders' confidence that society supports their entitlement to harvest the benefits of their labour and investment. Included are rental arrangements, informal as well as formal. For small farmers, recourse to the land rental market is often essential. Thus 'mixed systems' should be encouraged by governments. The positive impact of individual incentives to family labour was evidenced by the tremendous increases in output and

productivity associated with the change from collective to individual property rights in China in the 1980s when the constitution was amended to legalise private land-use rights and land transfers. (McMillan, Whalley & Zhu, 1989). Although, given the size and complexity of China, lessons can be ambiguous. (For more recent developments in China, see Appendix I).

The vexed events of the centuries-long (1450-1849) enclosure movement in England, a long drawn out process of land tenure reform, also resist generalisation. With regard to social impacts, the conclusions of historians are generally mixed. The open-field system became obsolete as a result of technical innovation and shifts in the demand for labour and farm products. It is now generally agreed that at least after 1700, enclosures in England and Denmark were usually fair to smallholders who received new lands in rough proportion to the value of their prior rights. (The losers were the labourers or cottagers who had no individual right to a parcel of land.) Most villagers appear to have considered enclosure a release from archaic and dysfunctional land tenure arrangements and rarely protested the change. The history of the open-field village offers several lessons for land tenure reform in for example sub-Sahara Africa. First it demonstrates how land use systems evolve in a pragmatic fashion to exploit scale efficiencies and spread risks. Secondly it shows how close-knit rural communities can develop and enforce rules to govern behaviour on common land. Thirdly the events of the enclosure movement in England and Denmark illustrate how long-held land rights can become obsolete and that when this happens the state may usefully intervene to facilitate modernisation. The issue of time-scale and sequencing is important to avoid widespread landlessness and destitution. For example, the phased approach recommended by Gebru Mersha and Mwangi wa Gĩthĩnji (2005)

(I)   labour intensive public investment;
(II)   a national campaign for literacy and education;
(III)   intensify and extend the use of animal draught power and other inputs in farming;
(IV)   where possible consider the introduction of new commercial crops

to prepare the ground for land tenure reform in Ethiopia is far more plausible than a countrywide proclamation allowing for the privatization of small farms. The prelude must include technical innovation and a shift in the demand for labour and farm products, among others.

4. The scale of insecure access to land

UN-HABITAT (2004, p.6) asserts that 'an estimated 924 million people are presently living without secure tenure in informal settlements in the urban areas of developing countries. This number is projected to increase to 1.5 billion by 2020 and 2 billion by 2030 unless urgent action is taken.' The World Bank says that 'more than 50 percent of the peri-urban population in Africa and more than 40 percent in Asia live under informal tenure and therefore have highly insecure land rights.' (Deininger 2003, p.xxv). In the rural world, where numbers are less easy to count, tenure insecurity is equally prevalent. In his important book, *Breaking Ground: Development Aid for Land Reform*, Martin Adams notes that 'tenure insecurity is pervasive over extensive areas of state-owned land' in his case studies of the Philippines, Zimbabwe and

South Africa and that 'insecurity results from the breakdown of customary systems and former colonial or apartheid land administration.' He also argues that 'much of the current tenure reform debate focuses on the so-called communal areas of Africa, the indigenous areas of Latin America, south-east Asia (e.g. the Philippines) and the Pacific region (e.g. Fiji, Papua New Guinea and the Solomon Islands, where customary systems of tenure exist side-by-side with private ownership.' (Adams, 2000, pp.67, 2).

The debate Adams refers to stretches well back into colonial times and was characterised for decades by the presumption that the customary should and must give way to the modern, and by modern was usually meant individual title. This was a view strongly promoted until very recently by the World Bank and it was only through serious policy engagement with DFID, GTZ and AFD, with civil society organisations globally, and with international NGOs such as IIED and Oxfam, that the Bank revised its hitherto dogmatic posture into something more flexible and nuanced in the form of its 2003 Policy Research Report on *Land Policies for Growth and Poverty Reduction*. (Deininger, 2003).

5. The issue of political contestation

The issue of political contestation confronts anyone seeking to engage in land issues at whatever level. It is stark, blunt and unavoidable. This can be observed in a number of different arena. For example, James Putzel introduces his classic study of agrarian reform in the Philippines with these words:

> 'While every national debate over 'agrarian' or 'land' reform policy must be understood in its own historical context, there has been a common thread running through most debates. Debates everywhere have seen a confrontation between those who believe that agrarian reform must be centred on the redistribution of property rights and effective control over productive agricultural land and those opposed to extensive redistribution who wish to focus on measures to raise agricultural productivity.' (Putzel,1992, p.xxiii).

Lionel Cliffe, another distinguished academic with huge experience is this area, is even blunter:

> 'Redistributive land reforms are inherently political and will always be contested at the level of policy formulation and implementation.' (Cliffe, cited in DFID, 2004a, p.8).

Another dimension of political contestation concerns the choice of land reform intervention or 'redistributive instrument', all of which constitute an intervention in the land market in one form or another and range from **revolutionary** (confiscation without compensation aka 'fast-track') to **evolutionary** (sponsored credits for land purchase through land banks, land taxes, death duties, etc). Reflecting on this over 10 years ago, Martin Adams wrote:

> 'Those favouring **revolutionary** change advocate a drastic, planned, public intervention to redistribute land. Yet attempts at drastic redistribution of private land, in the face of strong opposition from landed interests (and in some cases related budgetary impediments), may distract from more feasible **evolutionary** policies aimed at improving access and security of tenure for small farmers under alternative forms of individual and communal tenure, which do not involve expropriation and compensation.' (Adams, 1995, p.1).

A further aspect, of great relevance to donors, is that of 'cyclical policy changes'. Martin Adams drew attention to this in his book, *Breaking Ground: Development Aid for Land Reform* (Adams, 2000a, p.59) and this much quoted section was reproduced in the working paper for DFID on *Land reform, agriculture and poverty reduction*:

> 'A cyclical element is often evident in redistributive reform policy. An initially strong political commitment to land redistribution is often followed by caution as the opportunity costs and organisational complexities become apparent. Modification of the initial policy and a switch of emphasis to so-called 'economic' goals, rather than the eradication of landlessness poverty, may accompany this. Governments may then again reaffirm the needs of the landless, but in more modest terms than in the initial phase. However, in many unequal societies, extreme poverty and the threat of rural violence are endemic. It follows that the problems arising from the inequitable distribution of land will not go away and will surely recur. The issue returns to the agenda whenever the balance of political power swings in favour of the rural poor, or when politicians see a need to mobilise rural support to underpin their power base. For the majority of countries, redistributive land reform has been an extremely difficult process to carry through and the cycles contribute little to the stability needed to promote investment and confidence in agriculture.' (DFID, 2004a, p.8, based on Adams, 2000a, p.59).

Finally, Martin Adams issues this word of health warning on politicians. Coming from someone with great experience of policy engagement in many parts of the world, it deserves to be listened to:

> Politicians persistently seek to manipulate and control people's access to land in order to further party and personal interests and to retain political power. They may tolerate bottom-up participatory processes in other areas, but not in matters that require them to relinquish control (directly or indirectly) over land allocation. Any analysis of the prospects for land reform, including tenure reform, should not be divorced from a study of the political processes at work. (Adams, 2000a, pp.60-1).

6. A cautious but necessary role for donors?

All acknowledge that land is a sensitive arena for donors to enter, that it is far easier and safer to disengage, do nothing or confine oneself to the purely technical where possible – though the latter often proves in practice to be a delusion. But Klaus Deininger of the World Bank believes that donors 'are now starting to realise that the cost of ignoring land may be much higher, and more broadly distributed, than originally thought' (IIED, NRI & RAS, 2004, p.58). This appears to have been accepted in the DFID RNRA working paper which, citing Darfur, argues that 'the costs to government of taking no action to resolve problems of local-level land rights management...can be very high indeed' (DFID, 2004a, p.14).

The EU Land Policy Guidelines (2004) also agree with Deininger that:

> 'there is now greater recognition among donors of the importance of addressing land issues. While land policy reform is a long and complex process, requiring broad political debate inside the country, donors can make a major contribution, if they play a cautious role. They can facilitate the public debate, support processes without forcing the pace...They can contribute to research, institutional and capacity building for the different actors involved (government departments, land administration bodies, local government bodies, farmers' organisations, etc.) and monitoring and evaluation of the processes.' (EU, 2004, p.23).

In a welcome development, DFID is now saying that 'improving poor people's access to land and water' is one of seven priority areas following the launch of its Agricultural Policy Paper in December 2005 (DFID, 2005), which reads in part:

> *Improving poor people's access to land and water*
> 142. Working with developing country governments, civil society and other development agencies, we will, in accordance with EU guidelines;
> - when requested, support programmes for voluntary land redistribution by increasing poor people's ability to buy land and by making legal processes more accessible to them;
> - support efforts to improve land policy and legal and administration systems, including initiatives to make leasehold and other systems operate more efficiently and consistently with the land rights of marginalised groups and women; and
> - support programmes seeking to improve access to water resources by the poor. (ibid, p.40).

7. IIED v. FIG – two contrasting ways of looking at land issues

It is a striking feature of both the literature and the reality as observed in 'expert meetings', conferences and the like that people who specialise in land issues are divided into 'soft' and 'hard' camps. People see the world – and what ought to be done to improve it – in often quite contrasting ways. At the risk of caricature, one could call them the 'IIED' and the 'FIG' schools.

For IIED (International Institute for Environment and Development), with much of its now extensive experience drawn from Francophone West Africa and predominantly drawn by social scientists, the world of land is full of complexity, uncertainty, ambiguity, of ongoing processes, of the 'traditional' and the 'customary' changing and evolving as the world changes. This is well captured in this observation from Paul Mathieu and colleagues:

> 'In many parts of Africa, rural dwellers find themselves in a period of uncertainty – a time of hesitation between two systems and two periods: a time not long ago when customary principles were the point of reference, and an uncertain future, in which new rules and norms are inevitable.' (Cotula, Toulmin & Quan, 2006, p.5, citing Mathieu et al, 2003).

In practical terms, many of those who have written for IIED, such as Camilla Toulmin, now IIED's Director, have argued the need for policy makers to recognise and legalise customary ways of resolving disputes over land at the local level, rather than trying to impose uniformity from the centre. In some parts of West Africa this approach has been gaining political favour, but it clearly challenges all the basic instincts of those brought up within highly centralised traditions. (Cotula, 2007).

In stark contrast lies a hard scientific world of precision and certainty, the world of FIG (the International Federation of Surveyors). They have had something of a field day in recent years, surveying and mapping many of the transition states of Eastern Europe and the former Soviet Union. Much (though not all) of this work has been hugely impressive – for example in Lithuania, with its centralised, computerised land administration. This works on a cost recovery basis, involving both the state and the private sector on a competitive basis in both cadastral work and individual valuation, and has a Real Property Cadastre and Register located within one organisation. It is

presented as simple, effective, accessible, economical and, above all, highly transparent. (Kasperavicius in FAO, 2006).

Paul van der Molen, Chair of FIG Commission 7 on Cadastre and Land Management, and his colleagues at Kadaster International in the Netherlands are hugely in demand as a result of what modern technologies can achieve in a country such as Lithuania, with its high level of literacy and ease of access to the internet. He wryly acknowledges that 'land registrars and land surveyors are not always reputed to be the most flexible professionals' and recognises that the standard approach of aiming for registration of full titles 'hampers the provision of security to people that live in countries that cannot afford the huge investments in the establishment and maintenance of such quality systems.' Therefore there is a need to consider unconventional approaches. (van der Molen, in FIG, 2006, pp.19, 141).

One of the people who would welcome such an attitude is Clarissa Augustinus, of UN-HABITAT's Land and Tenure Section, and one of the relatively few people with a background in both the 'IIED' and the 'FIG' camps. She has observed over many years that in many forums the two camps, set in their own silos and with their own extensive vested interests to protect, 'are still mostly talking past each other' though she feels that this is slowly improving. In order to change land administration systems, she argues forcefully for the need to break out of these silos and for both sides to listen to each other, be open to criticism and 'alter our approach about how we go about our business.' (Augustinus, in FIG, 2006, p.41).

This is surely something which donors such as DFID can and should encourage.

8. The issue of governance
According to the FAO's recent draft 'good practice' guidelines on *Good governance in land tenure and land administration*, 'it has been recognised only recently that a modern land administration project should include a focus on improving governance.' It is therefore hardly surprising that 'there is comparatively little material on good governance in land tenure and land administration.' (FAO, 2007a, pp. 40, 1). Yet this is a theme on which there is much agreement in principle in much of the literature.

Paul Mathieu of FAO argues that 'good governance and the rule of law are closely correlated with the successful implementation of processes to improve access to land.' (Mathieu, 2006).

The UNDP's Global Drylands Imperative (previously Initiative) stresses that:

> 'land tenure – and in particular land tenure reforms – are not only a legal issue but also one of governance. Security of tenure is most genuinely guaranteed by the political neutrality of the bodies that write and enforce legislation, and by the transparency of land reform processes themselves.' (UNDP, 2003, pp.4-5).

The FAO, at its 24th regional conference for Africa in 2006, noted among key trends: 'the growing importance of governance, decentralization and institution building' and the fact that past dominance of state-led centralised rural development initiatives 'have inhibited development of local institutional capacity and resource mobilisation, while undermining popular accountability and participation.' (FAO, 2006, p.4).

UN-HABITAT asserts that:

'tenure issues cannot be divorced from the broader issues of governance. UN-HABITAT governance campaign defines good governance as characterised by sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement and citizenship and security. It recognises that the quality of urban governance is the single most important factor for the eradication of poverty and for prosperous cities.' (UN-HABITAT, 2004, p.11).

In Southern Africa, Botswana's history of land administration has frequently been held up as a model of good governance for others. (See Appendix II - Adams et al, 2003, p.68).

The FAO's recent guidelines, still in draft, of *Good governance in land tenure and land administration* (FAO, 2007a, pp.9-10) contain this perhaps somewhat platitudinous table presenting characteristics of good governance:

Good governance is:
Efficient, effective, and competent: Formulates policy and implements it efficiently by delivering services of a high quality.
Responsive: Delivers the services that citizens want and need.
Legitimate: Those in power have earned the right to govern, have been endorsed by society through democratic processes, and can be replaced if the citizens are dissatisfied with them.
Transparent: Open
Consistent, predictable and impartial: Outcomes from the governance processes are predictable and in accordance with published laws, rules and regulations. There is legal redress and enforcement of law by an impartial judiciary in the event of inconsistency.
Accountable: Demonstrates stewardship by responding to questioning, explaining its actions, and providing evidence of how it functions.
Equitable: Deals fairly and impartially with individuals and groups.
Sustainable: Balances the economic, social, and environmental needs of present and future generations.
Locally responsive: Locates service provision at the closest level to citizens consistent with efficient and cost-effective delivery.
Participatory: Enables citizens to participate fully in governance through consensus-building and engages with civil society without curbs on the media, expression or association.
Provides security and stability: Provides security of livelihoods, from crime and from intolerance, security from human conflicts and natural disasters, and security of tenure.
Integrity: Officials perform their duties diligently and objectively without seeking bribes and give independent advice and judgements, and the government respects confidentiality. There is a clear separation between the private interests of officials and politicians and the affairs of government.

They go on to detail the potential impact of weak governance and list:
- Poverty and social exclusion
- Negative social behaviour
- Environmental degradation
- Constraints on economic development
- Reduced public revenues
- Tenure insecurity
- Weak land and credit markets
- Abuse of compulsory purchase (ibid, pp.20-3).

The guidelines conclude that:

> 'Addressing governance issues is not easy. Donors have been tempted to avoid political risks associated with governance and to focus on technical solutions that allow relatively full control of inputs and outputs. Donors need both courage and realism. Addressing governance problems requires the recognition of the problems and the willingness to support governments in their responses....If there is a realistic chance to improve the standards of governance, it is worth trying.' (ibid, pp.40-1).

In terms of tactics, FAO advises:

> 'Trying to impose change from the top alone is unlikely to be successful. A transformation in governance is rarely possible through reform in a single area of activity. However, it is important to start with some easy areas where success can be achieved so that momentum for change can be established.' (ibid, p.42).

This advice is broadly underlined by Daley and Hobley, in their study of land for DFID, who argue that because:

> 'local governments (and the officials within them) are not neutral actors in the development process...it is important for DFID to engage with land issues at both middle ('meso') and local levels of government in developing countries as well as at the national level.' (Daley & Hobley, 2005, p.31).

9. The issue of corruption

'Corruption hits the poor particularly badly' argue FAO, adding:

> 'They lack the ability to pay the bribes to get the services and legal protection, particularly to defend their rights to land. Weak governance may promote inequality as the rich are able to benefit from the opportunities for self-enrichment while the poor may lose their rights to land and common property resources such as communal grazing areas and forests. The poor who cannot afford the formal legal services are doomed to rely on informal and extralegal arrangements, becoming effectively excluded from the protection and reach of the law. Politically the consequences can be severe, as grievances may fuel violent conflict.' (FAO, 2007a, p.20)

FIG, the International Federation of Surveyors, has as its 'article of the month' for March 2007 a global study of *Corruption and Land Administration* which argues the need for transparency as a core principle of good governance. It suggests that best potential measures against corruption in the land sector are:

- Creation of inventory of existing land tenure (cadastre);
- Open access to information about ownership, value and use of land;
- Standardized procedures for determination, recording and dissemination of information;
- Supervision and possibility of appeal;
- Computerization (FIG, 2007b, pp.6, 9).

In another publication relating to a recent expert meeting on Africa, FIG asserts that:

> 'Transparency is a critical component of a functioning land administration, in particular in view of the scarcity of clear and credible information on land availability and transactions, and the poor dissemination of public information on land rights an policies. The risk of corruption and inequalities are very real in land allocation and management. The consequences to the poor often takes the form of difficult access to land assets, unawareness of land policies and legal frameworks, ignorance about land transactions and prices, misallocation of land rights, land

grabbing and abuse. When in place, transparency can encourage civil engagement and stakeholders' accountability by rendering the public decision making arena more accessible. This in turn strengthens confidence in governments and public agencies, and has a positive economic impact.' (FIG, 2007a).

Both FIG and FAO champion the virtues of widely used indicators of governance including the World Bank's Governance and Doing Business Index, UN-HABITAT's Urban Governance Index, the Bertelsmann Transformation Index, and Transparency International's Corruption Perception Index.

FAO argues that weak governance is often associated with two principal types of corruption, *state capture* and *administrative corruption*. The former involves corruption on a grand scale, transferring economic resources from the state to private interests, with the state 'captured' by individuals, families, clans or commercial interests, who can then direct government policy to their own benefit. The latter concerns the abuse of office by individual officials who use their power for self-enrichment. Officials seek bribes to evade or speed up procedures to produce results that favour the bribers. A chaotic or unclear policy environment encourages this and 'inevitably the poor lose out as they have the least resources with which to bribe corrupt officials.' (FAO, 2007a, pp.13-4).

The most cited case, certainly in Africa, is that of Kenya, a country combines both of the above forms and where 'titling of communal land has had a devastating impact on the livelihoods of the poor' (DFID, 2004a, p.12) and where one commission of inquiry reported that 'many officials now fail to see anything morally wrong with their allocating land illegally...the lead in public plunder has consistently been given from the top' (Government of Kenya, 2004). The curious thing about Kenya has been how open all this has been, with commissions of inquiry and civil society organisations and a vocal local media all exposing the scandals in great detail but without being able to change the fundamentals of the body politic. This is indeed a curious case of transparency. A new government under Mwai Kibaki came to power on a promise to clean things up. There is both a vigorous and vocal civil society and media. Two impressive commissions of inquiry (Government of Kenya, 2002, 2004). revealed a great deal of what was wrong and what needed to change. DFID has been supporting the land sector for some years in highly sensitive and seemingly effective ways, including Technical Assistance on national land policy formulation, engaging with both government and civil society and urging them to engage seriously with each other. Oxfam and other international NGOs have done something similar. UN-HABITAT, along with other UN agencies, is based in Nairobi and has worked hard with others to fight against slum clearances in Nairobi.

The answer probably lies embedded in a history running back through the Cold War years to colonial times. Kenya was always a staunch ally of the West in a sensitive region and hence no questions of good governance were raised for three decades while the first families, Kenyatta then Moi, accumulated for themselves and encouraged their key allies to do likewise. It is extremely difficult to turn around a system which has been entrenched so deeply at so many levels for so long and where so many vested interests have been established.

10. Recourse to legal remedies

Lorenzo Cotula of IIED has written an excellent 6-page 'sustainable development opinion' entitled *Making law work for the poor* (IIED, 2005). The main thrusts of his argument are:

- Legal processes can help improve the lives of the poor in developing countries – for instance through establishing fair rules on international trade and securing land access in rural Africa.

- For this to happen, poorer actors – whether individuals or states – must have equitable access to the legal system. This includes a fair say in law-making processes, and access to effective enforcement institutions.

- Development agencies should take law seriously. They should support local, national and international processes that improve legal access and make law work for the poor – including law reform, litigation, training, legal assistance and advocacy.

Like many IIED authors, Cotula stresses the 'legal pluralism' existing in much of Africa, the result of imposing land legislation based on European concepts 'that have little relevance to land relations on the ground' and are 'not geared towards protecting the assets and interests of the rural poor.' Such a situation, Cotula argues, 'creates confusion and tenure insecurity, which in turn foster conflict, discourage agricultural investment and enables elites to grab common lands.' He believes that 'legal interventions to secure the land right of rural populations can help address these issues.' The national legal system must build on local concepts and practice rather than 'importing' one-size-fits-all models, which entails legally recognising local land rights 'which are the entitlements through which most people gain access to rural land.'

Cotula is not naive. He recognises that 'the design and adoption of legal interventions – far from being a technical matter – is a highly political issue, as it may effect the distribution of income, wealth and power within society.' Hence 'strong political will to implement legislation, and access for the poor to enforcement institutions are key.' In practical terms, he calls on development agencies to:

> 'support government efforts to reform the national legal system. [They] may support work to generate knowledge on local resource tenure issue; support the facilitation of participatory policy debates; and provide legal training and technical assistance for legislative drafting. Given the great diversity of social contexts in which legal tools operate, this support requires not only excellent legal expertise, but also a solid understanding of a range of extra-legal factors. Rather than importing expert solutions, development agencies should accompany local processes to design and implement context-specific solutions.' (IIED, 2005).

Cotula's approach is endorsed by the World Bank's foremost researcher on land, Klaus Deininger, who argues that:

> 'the legal framework for land ownership should not only be comprehensive, but should also be flexible, allowing for different options depending on population density, levels of economic development, and infrastructure access. Furthermore, it should explicitly recognize the rights of women and other groups that have traditionally been neglected or disadvantaged [and] should include formal recognition of customary rights' (Deininger, 2003, p.51).

A number of contributors to the very useful collection of CAPRi policy briefs, *Land Rights for African Development – From Knowledge to Action* (CAPRi, 2006) engage

with legal issues, particularly the issue of legal pluralism in Africa. The vastly experienced law professor Patrick McAuslan makes the important assertion that:

> 'Customary tenure is – and always has been – one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism. (McAuslan, 2006b, p.9).

Martin Adams and Stephen Turner argue that tenure dualism needs to be recognized as a resource, rather than an obstacle, in the changing livelihoods of the poor. What is needed, they say, 'in the necessary legal reappraisal is to catch up with the tenure approaches and mechanisms that citizens have themselves devised in the face of legislative and institutional inertia or diffidence.' Such proactive approaches:

> 'demand realism from policymakers and legislators about the capacity of African states to influence the evolution of tenure and administer their citizens' land affairs. They also require governments to recognize the continuing limitations of state policy and statute law and the ongoing significance of customary law and tenure in the land rights and transactions of their citizens.' (Adams and Turner in CAPRI, 2006, p.7).

Last from this collection, in the context of post-apartheid South Africa, Ben Cousins and colleagues argue the need to build a better understanding of the complexity of multiple, informal tenures within the extra-legal sector and that:

> 'Much more attention should be paid to supporting existing social practices that have widespread legitimacy rather than expensive solutions that try to replace them. Some features of extra-legal property regimes found in South Africa's informal settlements and communal areas provide a key to the solutions; their social embeddedness; the importance of land and housing as assets that help secure livelihoods; the layered and relative nature of rights; and the flexible character of boundaries. Approaches based on Western property regimes fail to acknowledge and respond to these features.

For such suggestions to take root, they argue:

> 'reform of the dominant legal and administrative frameworks for holding and regulating property are urgently required, so that the principles that govern extra-legal property in rural and urban informal settlements can receive legal recognition and practical support.'

But doing this, so that these frameworks work to support the interests of the poor, they ruefully acknowledge, 'is no easy task.' (Cousins et al in CAPRI, 2006, pp.27-9).

Finally, at the international level, a former colleague Shaun Williams reflected:

> 'Working in Australia, Asia and Africa for more than twenty years on peasant land rights, indigenous land rights and the property rights of women, I have come to realise that the existing legal framework for the protection of property rights of those who become displaced because of poverty, discrimination, conflict or natural disasters is woefully inadequate.' (Shaun Williams, personal communication).

This is clearly a matter requiring international attention.

11. Struggling for urban security – between a rock and a hard place

The majority of the world's population will soon be urban. The tenure situation of the 1 billion people who live in informal settlements (also referred to in some of the literature as slums) is notoriously fragile. All continents have witnessed evictions of the urban poor, often on a massive scale and frequently carried through with great cruelty, as in Zimbabwe's notorious Operation *Murambatsvina* (clean up the filth). The hugely experienced urban specialist Geoffrey Payne believes that the situation of the urban poor is deteriorating. While securing access to land for them is critical:

> 'the reality is that the urban poor are being squeezed out of options for obtaining legal and affordable housing by higher land prices which now bear little relationship to levels of household affordability...At the same time, traditional options of settling on unused public land and building informal settlements are declining as all available land is already settled and many national or state governments are evicting settlers from such locations. As if these constraints were not enough, regulatory frameworks often impose unrealistically high standards, restrictive regulations and complex procedures which all add to the costs which private sector developers have to charge, further reducing access to legal housing. The poor are living between a rock and a hard place.' (Payne and Tehrani, in FIG, 2006a, p.256).

Faced with such a situation, there are many calls in the literature for a radical rethink of urban tenure issues 'freed from the notion of a fixed connection to the soil' (Wanjala, in Saruchera, 2004, p.13) and for moving away from the 'business as usual' approach of those vested interests determined to resist change, and to look instead for 'new innovative and affordable approaches.' (Augustinus, in FIG, 2006, pp.37-8).

In its publication *Urban Land for All*, UN-HABITAT (2004, p.3) sets out 'a synthesis of different types of policy instruments that could be used by government officials to introduce more appropriate and flexible tenure systems, uphold the rights of the urban poor, and secure urban land for slum dwellers.' In the short term it suggests some steps which can help to stabilise the existing situation and provide a foundation for longer-term options. These include:

- Provide basic short-term security for *all* households in slums and unauthorised settlements;
- Survey all extra-legal settlements and identify any that are in areas subject to environmental hazards or required for strategic purposes;
- Offer residents of all such settlements priority for relocation to sites that offer close access to existing livelihood opportunities;
- Designate all other extra-legal settlements as entitled to medium term forms of tenure with increased rights, but not necessarily full titles. Where possible, the precise form of tenure and rights should be based on tenure systems already known to local communities. (ibid, p.4).

UN-HABITAT argues that the role of government housing policy should be to encourage a pluralistic land and housing market in which a diverse range of suppliers compete on equal terms to meet the different needs of different sectors of the population, while that of the state should be to create a regulatory framework and level playing field as well as a safety net. Security of tenure is key in rental and owner-occupied housing and in both formal and informal settlements. As security increases, so do levels of savings and investments at the individual, household and community level. UN-HABITAT emphasizes the need to introduce or expand 'intermediate' forms of tenure such as community land trusts, temporary occupation licences, certificates of rights, homeowners' associations, shares in land-buying companies, shared titles or land leases to provide a pragmatic, medium term security

at prices lower than formal title would command. It cites examples of such forms from Bangkok, Bolivia, Colombia, Kenya and the Philippines.

> *'Temporary land rental in Bangkok*
> Low-income communities in Bangkok have evolved a practical arrangement with land-owners to enable them to live in areas with good access to livelihood opportunities which would otherwise be too expensive for them to access. The communities find land-owners who are waiting for the market price of their land to rise even higher before developing it and offer to rent the land on a short to medium term lease, paying what they can afford. In this way, land-owners avoid third parties invading their land.
>
> In recent years, communities and authorities have been looking at ways by which they can provide basic services to the temporary settlements, though if a longer term lease is agreed, they may provide higher standards. This arrangement depends on the residents agreeing to move out when required and reflects a more deferential approach to those higher up the social pecking order than applies in many other countries. However, it has enabled large numbers of poor households to live in areas that would otherwise be beyond their reach. As urban growth brings livelihood opportunities to other locations, so the poor can move with the flow and negotiate a similar arrangement with another land-owner.' (ibid, p.15).

As part of its global advocacy work, UN-HABITAT initiated a Global Campaign for Secure Tenure which encourages negotiation as an alternative to forced eviction and the establishment of systems of tenure that minimise bureaucratic lags and the displacement of the poor by market forces. It is also now working, with others, on a Global Land Tool Network (www.gltn.net) which aims to establish a continuum of land rights and improve and develop pro poor gendered land tools, though one of its principal actors, Clarissa Augustinus, confesses that 'we do not yet have a methodology to guide us in the creation of gendered land tools to scale.' (Augustinus, in FIG, 2006, p.43).

In their policy brief, *Informal Land Delivery Processes and Access to Land for the Poor: A Comparative Study of Six African Cities*, Carole Rakodi and Clement R. Leduka (Rakodi and Leduka, 2004) share Geoffrey Payne's view that, with a few minor exceptions, 'it is no longer possible for poor households to access land for new residential building' and that for many newly formed households the only way they can access a plot or house is through their parents, which sometimes involves plot sharing. But scope for this will decrease in future. They believe that it is clear that 'informal systems are often effective in delivering land for housing, because of their user-friendly characteristics and social legitimacy.' This derives from widely understood and accepted social institutions that regulate transactions. These tend to be derived from customary institutions which have evolved over time and in an urban context have often borrowed from and mimicked formal rules and procedures. They may also take advantage of formal rules where these are ambiguous or inconsistent. In the difficult terrain of women's rights, Rakodi and Leduka argue that these should be tackled through matrimonial as well as property law.

Drawing policy implications from their research, Rakodi and Leduka argue that since informal land delivery systems are so prevalent and have not resulted in chaos, they should be tolerated and accommodated, while also identifying and addressing their weaknesses. The emphasis should be on improving tenure security, though not normally through individual titling, not least because it massively increases the value of urban land, making it less accessible to low-income groups. One of the main threats come from governments which, instead of evicting people, should provide

basic short-term security, perhaps by a simple statement that residents will not be evicted. (There is a recent history of this in the Philippines). Another possibility is for public sector agencies to accept innovations in procedures and documentation which have emerged in informal settlements, because they are popularly understood, widely accepted, cheap and procedurally simple. Recognising informal subdivision and sale can pave the way for working with subdividers and sellers to improve layouts, ensure the reservation of access ways and sites for social facilities and make possible the early provision of basic services, as happened in Eldoret, Kenya. Once there is de facto recognition, utilities can be provided on a full or partial cost recovery basis. Much urban legislation, they argue, was inherited from colonial times and is inappropriate and outdated and in need of revision so as to build on the strengths of informal delivery systems. The formal land administration system needs to be decentralised to provide for local registration of land rights and transactions and compensation provisions need to be revised. Hopefully this would deter premature subdivision, improve the operation of some state-led subdivision and allocation processes, increase the ability of governments to provide land for infrastructure or industry, and enable governments to increase the supply of serviced land for low-income housing. (Rakodi and Leduka, 2004, pp.37-42).

On the question of donor interest in urban issues, Geoffrey Payne and Evelyn Tehrani observe wryly that:

> 'It is perhaps ironic that at the very time when the world's population is about to become predominantly urban, and when urban growth and urban poverty are both increasing in Asia and other parts of the world, many of the major bi-lateral development agencies (e.g. the UK Department for International Development, the Swiss SDC and the Netherlands) have actually reduced their interest in urban issues and disbanded departments dealing with urban issues. The amount of research on urban issues is reducing as a result, despite the need for more.' (Payne and Tehrani, in FIG, 2006, p.256).

12. There is no magic bullet

One of the constant refrains in the literature is that there is no single magic solution to these complex rural and urban tenure security issues which is neatly transferable from one context to another. This comes as no surprise to this reviewer whose work as a land rights adviser with Oxfam involved trying to make such connections and links and assess what experiences gained in one context might be relevant and applicable in another.

Among many examples, Clarissa Augustinus of UN-HABITAT concludes:

> 'tenure issues are extremely complex. No single tenure option can solve all these problems. Policy on land tenure and property rights can best reconcile social and economic needs by encouraging a diverse range of options rather than putting emphasis on one option, such as land titling. This will involve adapting and expanding existing tenure and land administration systems where possible and introducing new ones selectively. UN-HABITAT advocates a continuum of land rights and legal instruments, with land titling being only one of the legal instruments.' (Augustinus, in FIG, 2006, p.38).

On approaches to land policy and tenure security in East Asia, Keith Bell of the World Bank reflects:

'There is no template for land policy that can be readily applied to any country. Every country has its own unique social, economic, political, environmental, historical, ethnic, cultural, religious and other idiosyncrasies. Donors and other agencies involved in supporting land policy agendas, need to be cognizant of, and sensitive to, local conditions and issues and work constructively and flexibly. Past experience indicates that what works in one country may not be suitable or transportable to another country and that land reform is not short term. It is a long-term commitment.' (Bell in FIG, 2006, pp.23, 27).

In similar vein, Lorenzo Cotula, Camilla Toulmin and Julian Quan, writing for IIED and the FAO, assert that:

'The land policy agenda must be driven and owned at the country level and, whilst lessons of good practice can be shared across countries, simple one-size-fits-all solutions are unlikely to help. Reform requires sustained and long-term commitment from governments and development agencies.' (Cotula, Toulmin & Quan, 2006, p.2).

The EU Land Policy Guidelines state that:

'Due to this diversity, there can be no blueprint approach to land policy reform: the objectives, the political choices they reflect, and the legal and institutional options chosen are highly dependent on the specific economic, social and political context and its historical background, the institutional framework, the main issues to be dealt with, the type of agriculture and relations between government and people. Effective implementation of the options chosen depends on the institutional capacity of the public, private and community-based organisations involved. An assessment of these capacities must be taken into account in the design of the land tenure system.' (EU, 2004, p.11).

Michael Taylor of the International Land Coalition argues that:

'it is important to recognise the value of diversity, and while there is no blueprint solution, the point of departure of each process should be the local systems of governing land, with consideration given to the economic, political, socio-cultural and ecological contexts. A broad based and long-term approach is essential to the development of comprehensive land policy.' (IFAD, 2006, p.21).

Finally, in a sensitive and thought-provoking review of land rights and land conflicts in Africa for the Danish Ministry of Foreign Affairs, Christian Lund, Rie Odgaard and Espen Sjaastad write:

'The policy debate and research about land rights and land conflicts has clearly reflected that when dealing with the land issue in Africa it is advisable to keep a few basics in mind. First, there is no single land issue. A whole series of issues are among other things expressed in terms of access and control over natural resources, i.e. in terms of land tenure. Slow growth, limited technological innovation, equity, social security and conflict are all concerns, which somehow relate to land. Not all are equally pressing in all circumstances and their respective priorities are essentially political. Land policies express, implicitly or explicitly, the political choices made concerning the distribution of power between the state, its citizens, and local systems of authority. From this follows the second basic observation: There is no single remedy or instrument to deal with land issues. Had there been a magic bullet, it almost certainly would have been fired by now. Frustration with the complexity of land related problems may render decision makers susceptible to 'clear-cut', 'once-and-for-all', seemingly 'obvious solutions'. But simplistic policies have a truly poor record in Africa. However, inaction and refusal to deal with land issues politically is not a real option. 'Autonomous' land dynamics have significant socio-economic and political effects, not all of which [are] benign. There is no 'natural evolution' of land tenure systems; they are integral parts of social and political processes. This takes us to the third basic observation. Land issues are in fact not new in Africa. The land tenure situation has always been undergoing change in response to demographic and technological changes, wars, conquests and changes in governance.

Moreover, land has been an object of policy intervention from colonial times to the present, and every spot of land in Africa has a history of changing land policies and different forms of land politics. Any new policy must therefore take previous policies and their effects into account in addition to the socio-economic conditions of land tenure they aim to alter.' (Lund et al, 2006, pp.3-4).

13. Aid instruments

Before the concluding section, it is appropriate to draw attention briefly to three papers on aid instruments.

The DFID practice paper of July 2006, *Guidance on aid instruments* (DFID, 2006b), offers guidance on the choice and mix of instruments in different country contexts and is intended primarily for programme managers and advisers in DFID country offices. The paper stresses the need for donor cooperation and the fact that there is no one size fits all approach. It contains a useful Figure 5 'decision tree for choice of financial aid instruments' (DFID, 2006b, p.11).

The DFID working paper of November 2004 on *Official development assistance to agriculture* produced by the Agriculture and Natural Resources Team (DFID, 2004b) contains a helpful Table 11 on 'advantages and disadvantages of main aid instruments' i.e. projects, SWAPs and PRBS (pp.23-4) and draws the lesson that 'country context and appropriateness of different aid instruments varies enormously' and that 'without some earmarking of resources it will be difficult to ensure that the agriculture sector receives the resources needed to stimulate and maintain its growth.' (DFID, 2004b, p.24).

Last, Social Development Direct's March 2006 *Aid Instruments, Social Exclusion and Gender* is a background paper for DFID's internal guidance on aid instruments. This is an extremely thorough, detailed report. It has a Diagram 2 on 'opportunities, constraints and interventions of aid instruments' (PRBS, sector programmes and projects, Trust Funds, Social Funds, Cash Transfers, Technical Cooperation, Humanitarian Aid and Policy Dialogue) which is followed by 'key messages / recommendations for guidance on aid instruments relating to gender and social exclusion.' One of these reads:

'There are also real risks for socially excluded groups: particularly where working on land issues, and also where there are strong ethnic and regional divisions. It is important to identify the mix of instruments that will most reduce risk – working with parliamentarians and strengthening links with organisations that have oversight responsibilities for human rights can provide a formal interface with the public, and may allow excluded groups to engage in less public and therefore safer spaces.' (Payne & Neville, 2006, erratic pagination).

14. Lessons and recommendations from the literature

This concluding section will endeavour to distil some of the lessons and recommendations emerging from this literature review on governance and secure access to land.

There is, as already indicated, a very broad agreement that governance is a key issue and a reasonable consensus around certain broad principles. As Lund et al write, 'key words seem to be equity and legitimacy through proper democratic

institutions, transparency, and in general diverse interventions depending on specific contexts.' (Lund et al, 2006, p.11). The seemingly commonsense advice of the World Bank to build on what already exists (with reference to customary tenure) rather than create parallel institutions (Deininger, 2003, p.62) is also quite widely accepted. As Cotula and colleagues put it, 'It is now generally recognised that land policies and laws must build on local concepts and practice, rather than importing one-size-fits-all models.' (Cotula et al, 2006, p.21).

14.1 The need for concerted action

CAPRi, in their policy briefs on *Land Rights for African Development*, argue that:

- 'Land tenure in Africa is complex. The existence of customary, religious and statutory arrangements (i.e. legal pluralism) is a critical, defining feature of African land tenure. Land tenure reform must accommodate this complexity rather than replace it.
- The pitfalls of formalization should be avoided, and in particular codification should be delinked from collateralization. Cheaper ways of registering rights in the cadastre are needed.
- In order to effectively address land tenure security, power issues at local and national levels must be addressed. *There is a need for a multi-level, multiple actor approach. Land tenure reform is an urgent governance issue that can best be addressed by all development partners in collaboration.*
- The implementation and impacts of land tenure reforms should be evaluated at multiple governance levels in order to identify constraints, craft solutions, and to ensure that reforms are securing the rights and livelihoods of women, the poor and marginalized groups.
- New innovations are needed over and above tinkering with existing possibilities. For instance, the development of centres for legal advice and assistance for both rural and urban dwellers may enable the poor to claim their rights and even challenge abuses of power.' (CAPRi, 2006, p.2).

In similar vein, FAO's 24th regional conference for Africa admitted that 'there is as yet limited experience in applying improved land access, tenure security and land distribution to achieve pro-poor economic growth that enables the livelihood strategies and social protection of the poor themselves.' (FAO, 2006, p.3). Reflecting on changing donor financial mechanisms and aid instruments, FAO notes that:

> 'African nations need assistance to negotiate changing aid modalities to obtain effective support for land reforms, since these are long term processes that need sustained donor commitments. Based on the consensus achieved through recent World Bank and European Union consultative processes, there is a growing and constructive trend for coordinated multidonor approaches to land sector reform, but there is as yet limited experience. Donor financing mechanisms have shifted towards budgetary support for governments agreed through the framework of PRSPs, but on the whole these have not proved effective in addressing issues of land, property rights and agrarian change, despite their strategic significance for growth and poverty reduction. Land ministries compete with high spending sectors of more direct concern to governments and donors. Africa's land reforms will involve extensive capacity building and careful monitoring and evaluation, for which project based and sector-wide approaches are generally more appropriate.' (ibid, p.6).

In terms of ways forward for a pro-poor development path, FAO list some of the usual suspects:

- Crafting appropriate land policy and law that protects customary rights and harmonizes statutory and customary practices;
- Building effective, decentralized land institutions;
- Addressing gender inequality;
- Mitigating landlessness caused by HIV and AIDS;

- Enhancing the role of land markets;
- Sustaining the commons, including pastoralist resource access;
- Addressing the links between land and conflict;
- Resourcing land distribution and supporting new small farmers in Southern Africa;
- Promoting land delivery and planning in urban and peri-urban areas;
- Providing an effective and convergent institutional architecture on the part of international development agencies. (ibid, p.7).

14.2 What can outsiders usefully do?
Right at the end of his classic 1999 UNRISD discussion paper on *Land Reform in Developing Countries*, Solon Barraclough turns his attention to what outsiders can usefully do. He suggests that:

> 'Progressive NGOs and committed international organizations can play important roles as catalysts in helping grassroots peasant and landless movements organize and press their demands for land. They can help through research focused on the livelihood and sustainable development problems of the rural poor. They can provide valuable technical assistance, material resources and legal aid. They can facilitate the use of modern communication technologies by peasants and others struggling for reform. They can publicize violations of socio-economic and human rights, corruption and other abuses suffered by the poor.

> But their roles will always be auxiliary to what must be fundamentally a domestic political process. The main actors in bringing about and consolidating land reform must always include the landless and near landless, together with their political allies and the state. Well-intentioned NGOs and international organizations can help. They can also hinder if they fail to take into account the complex social dynamics that land reform implies.' (Barraclough, 1999, p.48).

In their report on *Land Rights and Land Conflicts in Africa* for the Danish Ministry of Foreign Affairs, Lund et al make a case for policy experiments in the realm of land commodification and transactions 'where institutional solutions of various designs are tested in limited scale and specific locations before the most promising are absorbed into national policy.' (Lund et al, 2006, p.15). They go on to reflect on policy instruments:

> 'Policy instruments that affect resource use and potential conflict are numerous and highly varied. They include legislation, executive rules and regulations, financial instruments, public projects and programmes, environmental policy, and policy related to health and demographics. It therefore makes sense to adapt the use of instruments to the different *causes* of tenure problems... Obviously, as problems are connected and overlap, one must expect to employ several instruments at the same time.' (ibid, p.22)

On the question of conflicts over land they conclude:

> 'The challenge can hardly be to avoid conflict of interests, or to end debates over the legitimacy of different forms of property; the challenge is rather to provide legitimate and accessible fora where such conflicts can be settled in an equitable, legitimate and fair manner.' (ibid, p.28).

14.3 Particular cases – (i) The commons
In Liz Alden Wily's study for UNDP *Land Rights Reform and Governance in Africa*, her core thesis is that 'the uncertain ownership status of the commons lays at the root of the problem' and she argues that 'the real tenure of community ownership

over the commonage needs to be formally established'. She concludes that what is needed is:

> 'a move from land administration to land rights reform, and within which a more poverty-centred focus is essential along with adoption of more developmentally sound approach to reform overall. Two practical strategies to achieve this are suggested: *first,* the restructuring of rural land reform in strict accordance with prioritisation of levels of threat to the tenure security of the rural poor, and *second*, pursuing this through a more devolved and landholder-driven approach. This is necessary to generate the focused and action-based process that is required to ensure new policies and land law is on target and to enable practical change on the ground.' (Alden Wily, 2006, pp.57-9).

(ii) HIV and AIDS
In an edited collection of case studies from Zimbabwe of *The land and property rights of women and orphans in the context of HIV and AIDS*, Kaori Izumi of FAO concludes that:

> 'Addressing the tenure insecurity of women requires a multi-pronged approach because of the different factors influencing and directing the insecurity. A number of factors need to be addressed simultaneously. Changes to the cultural facets, legislation and institutional frameworks are thus needed.'

Among her recommendations on tenure are: introduce a simple, low-cost land register; empower an appropriate low level institution to be the final authority that decides in the eviction of women; appoint village based overseers to supervise the distribution of property upon divorce; and ensure that the hierarchy of institutions do not prejudice against widows and other vulnerable women. (Izumi, 2006, p.67).

(iii) The drylands
The Global Drylands Imperative report on *Land Tenure Reform and the Drylands* argues that land tenure security requires more than titles.

> Legislation is just one of the mechanisms necessary for land tenure security. Processes such as recognition of informal rights of use and occupation, codification of tenancy and sharecropping agreements and establishment of cooperative ownership should be supported by land administration and management institutions, which are vital for effective governance. It is crucial that land administration institutions are accessible to ordinary people in drylands and recognize the complexity of land rights on the ground.
>
> Well functioning rights and land institutions underpin economic development and help reduce corruption and social conflict. Democratic land use planning to mediate effectively between competing interests amongst land users in the drylands is crucial. In addition to land tenure security, specific conditions must be in place to encourage investment, such as better access to input and product markets, including savings and credit; appropriate technologies for higher, sustainable productivity, and opportunities to diversify both within and beyond pastoral and agro-pastoral livelihoods.' (Global Drylands Imperative, 2003, p.19).

14.4 Thinking from the IIED school
One of the common themes emerging through much of the literature published by IIED is that of flexibility. There is often talk about a 'menu of options', about 'gradual evolution', of 'getting the right mix of approaches tailored to different areas, circumstances and market conditions', and of the need for compromise, for example

in redistribution, in order 'to square the circle of protecting private property, so as to encourage investment, while achieving a more equitable land distribution.' (Cotula et al, 2006, p.17).

A study of *Changes in land access and governance in West Africa* reflects that:

> 'initiatives to increase tenure security should be accompanied by careful consideration of the arrangements regarding socio-land authorities (decentralisation, local citizenship), so that the norms that they embody and interests they defend better reflect the diversity of status and interests involved. Decentralisation could be an opportunity to do this.'

The writers go on to argue that:

> 'Land policies should not be based on simplistic assumptions about the transition from collective to individual landholdings. The technocratic illusion that tools and procedures will achieve the desired results on their own must be avoided.'

Rather what is needed is to offer:

> 'a range of legal and institutional solutions that will help accompany and guide developments in the desired direction, according to the context in which they occur.' (Chauveau et al, 2006, pp.71, 73).

Smokin' Wanjala is not an IIED author, but he shares the emphasis they place on integrating the two legal orders and establishing 'hybrid tenure forms in line with constitutional provisions on democracy, human rights and gender equality' (Cotula et al, 2004, p.7). Wanjala writes that:

> 'Attempts to ensure security of tenure through legislation have not always been successful. Security of tenure is in practice achieved through open-ended and continuous processes of negotiation and political manoeuvring. Okoth-Ogendo has creatively argued that secure rights in land range along a continuum from the most temporary to the most permanent, and can swing backwards and forwards along the continuum...Creativity and innovation are needed to harmonise the inherent rigidities and fluidities in customary tenure with the needs of a modern society.' (Wanjala, in Saruchera, 2004, p.17).

In their most recent publication on *Changes in 'Customary' Land Tenure Systems in Africa*, Cotula and colleagues conclude:

> 'As there is no universal solution on how to secure local resource rights in Africa, emphasis should rather be on the process to design and implement context-specific approaches. This raises the need to properly understand the changing dynamics of customary land tenure in that specific context; to fully take account of these dynamics, and of the diversity and often overlapping nature of land rights, in devising tailored interventions to secure local resource rights; to tackle power imbalances at the national as well as at the local level; and to establish processes for accountability and transparency in both policy design and implementation.' (Cotula, 2007, p.111).

Last, in their *Innovation in Securing Land Rights in Africa*, IIED note that land is becoming more concentrated in the hands of a few, that pastoralists, women and youth are losing overlapping and negotiated rights to land, that plot sizes are falling and that formal tenure systems tend to be 'expensive, badly tailored to local contexts and inaccessible for poor groups.' But they reflect positively on innovations in recent tenure reform in Ethiopia, Mozambique and Niger which demonstrate that pro-poor frameworks can be developed, while localised initiatives in Uganda, Namibia and

South Africa illustrate 'more appropriate and more flexible land tenure systems, which build on positive aspects of socially embedded rules and on group organisation.' In some cases verbal as well as written evidence is accepted for registering land rights; elsewhere collective rights can be registered. More transparent systems of governance, including conflict resolution mechanisms, are also critical. Finally, they argue:

> 'land tenure systems cannot be considered in isolation. Many factors including service provision, revenue generation, socio-cultural factors and compatibility with other forms of legislation, such as inheritance law, influence the outcomes. Much more needs to be done to promote better governance of land and to build mechanisms for accountability to land users...there is valuable knowledge and experience to build on.' (IIED, 2006, p.11).

14.5 The FAO guidelines and good governance
Prefacing its general 'solutions for improving governance in land tenure and land administration', the FAO guidelines note that:

> 'The solutions put forward in this chapter work where there is reasonable quality of governance and respect for its principles. They are likely to work best in a society in which progress is being made to improve the governance of society as a whole. In many countries the standard of governance is so low that it is difficult to see how improvements in the governance of land tenure and land administration can be made without fundamental changes in the system of government. If the government is not committed to democracy, the rule of law and human rights, improvements in the governance of land tenure and land administration will be difficult to achieve. However, working to achieve higher standards of land administration can be one of the ways in which a dysfunctional society improves its governance.' (FAO, 2007a, pp.42-3).

It then lists a number of very broad key areas: set service standards, improve systems and procedures, build capacity, secure finances, develop a human resources policy, establish independent auditing, make effective use of information technology and communications, support professional organizations, strengthen customary institutions. It concludes that features of good governance in land tenure and land administration include:

- The legitimacy of land agencies and land administrators is widely recognised by citizens;
- Land agencies provide services that respond to the needs of their customers, e.g. the nature of the services and accessibility to them;
- The results of the services are consistent, predictable and impartial;
- The services are provided efficiently, effectively and competently;
- The services are provided with integrity, transparency and accountability. (ibid, p.59).

This last echoes the views of eight national and international donors meeting at the World Bank in March 2000, that:

> 'Without having a good governance structure and a coherent and consistent policy framework, complemented by an international environment to implement such a policy, interventions in the area of land policy will not achieve their objectives and can actually do more harm than good.' (Cited in Adams, 2000, p.118).

14.6 The EU Land Policy Guidelines
The EU Land Policy Guidelines (2004) argue that because policy reforms 'are likely to be long-term, complex and highly political, governments, donors and other groups involved in supporting these processes must be willing to take a long-term strategic approach, and make a commitment to see it through.' (EU, 2004, p.18).

Section (6.3) on the role of donors includes:

'Past experience suggests some key principles for donor engagement:
- Land policy reforms are extremely case specific. Donors should support **tailor-made solutions**, strongly linked to local social and institutional context and avoid blueprints.
- Land policy reforms are complex undertakings which require: **firm political commitment** by the state and support from society at large. Donor support must be non-dogmatic, non-intrusive and well informed on the situation prevailing locally. Programmes must be appropriate to the local social and institutional context.
- Donor support must be **accompanied by an in-depth dialogue** with the state at the highest level, and must encourage large inter-ministerial coordination and debate.
- **Land policy reform reforms are long-term processes**, going through a series of successive phases requiring an iterative approach. Donors should stand ready to accompany such processes over the long period. Sector approaches can provide some safeguards against the risk of one or the other donor discontinuing support.
- **Gender-aware legislative reforms** are essential, though not sufficient to secure enforceable access to, control over and use of, land resources by both women and men.
- **Information and awareness are key**. Donors must contribute to the understanding of different stakeholder interests and strategies and should encourage the search for consensual solutions.
- **Research** can be a powerful tool for understanding and steering national processes. Donors can be instrumental in accompanying implementation with research and encouraging feedback and debate of emerging issues.
- Donor support for land reform should **in no case result in further deprivation for women and poor people** from access to and control over land nor in the **dispossession or eviction of ethnic minorities or tribal and indigenous peoples** from the territories they traditionally occupy. (ibid, p.24)

The Guidelines suggest that possible interventions include research and analysis, policy formulation, legislation, land administration, land management, taxation, land use and planning, environmental impact, monitoring and evaluation. They conclude with these rough and ready *indicators of tenure security*:

- Trends in land ownership, access and utilisation by both men and women. Size of plots. Equity of land distribution (Gini coefficient). Number of landless and related trends;
- Share of land (number of parcels and total area) registered individually and communally;
- Cost of registration (time and money) to land owners / communities and duration of registration process;
- Level of protection of rights of indigenous peoples, pastoralists, minorities.
- Number and extent of land conflicts, localisation. Number of new conflicts over the year. Prevalence of forced evictions, land grabbing and illegal appropriation of land;
- Existence and effectiveness of conflict / dispute resolution mechanisms. Existence of appeal mechanisms. (ibid, pp.32-4).

14.7 The Daley & Hobley paper on land for DFID
It seems worth recapturing some of the key points in Liz Daley and Mary Hobley's extensive 2005 review of land issues for DFID's Urban-Rural Change Team. They argue that in terms of *entry-points for DFID's engagement with civil society*:

> 'this points the way to facilitating debate and research, and to supporting within-country policy dialogues that can respond to negotiation around potentially common interests. This requires investment in multiple sets of relationships involving a wide range of different actors, so as to help build an environment in which the highly political issue of land can become part of a negotiated state-civil society agenda.' (Daley & Hobley, 2005, p.39).

In terms of *donor ways of working*, they argue that:

> 'it is important for donors to consider themselves as actors, and to consider the implications of this…donors have an important role to play in supporting land policy-making and its subsequent implementation…many donor-supported policies have had negative effects for poor people in the past. One key problem that may have contributed to this (and could yet do so again) is the continuing donor tendency to support a set of 'silos' within the land sector, ranging from the organisational separation of 'urban' and 'rural' land to the separation of social scientists from their more technical colleagues (surveyors, GIS experts, etc).' (ibid, p.40).

In addition:

> 'within DFID, land is generally dealt with exclusively by the Livelihood advisory cadre, when many of the issues around land, poverty and power would benefit from broader input, for example from Governance and Social Development advisers. Arguably, access to land is first and foremost a Governance issue.' (ibid, p.40).

They draw these major *lessons for donors supporting land rights:*

- 'There is, first, a need to engage with developing country governments on land at several levels so as to manage transitions from old to new institutions and to manage the broader political environment within which such transitions take place. This includes paying attention to the broader governance and institutional arena within which organisational change is taking place;

- Second, there is a need to develop an engaged and informed citizenry in support of land-related change;

- Third, there is a need for long-term and consistent follow-through and commitment on the part of donors engaging with land. GTZ, for example, recently recognised that support is required for at least 20 years.' (ibid, p.42).

On *funding challenges*, they note that:

> 'DFID (along with many other donor organisations) has firmly moved its funding mechanisms towards central budgetary support. Yet in this current era of limited aid instruments, with its desire for lower transaction costs and rapid results, there are two broad challenges that DFID must address if it is to effectively engage with and support processes of land policy formulation and implementation in developing countries. First, the success of a pro-poor approach to land in part depends both on various factors outside the land sector and on having a long-term process of engagement and change. This requires donors to support a shift towards a depth of analysis and breadth of cross-sectoral integration that in many countries remains elusive. It also requires continuing engagement (and financial commitment) over the longer term, working with different branches and levels of government and with civil and political society (the latter being particularly important in countries with fundamental governance problems, such as dysfunctional judiciaries, widespread corruption etc., so as to encourage the development of within-country pressures for accountability, transparency and

pro-poor change). The question, then, is whether DFID is prepared to make this commitment and whether DFID is prepared to develop the array of instruments and flexibility of financing that this requires?' (ibid, pp.43-4).

Lastly, they draw attention to a number of *possible entry-points for DFID*.

'For example, DFID should support work around the issue of access to justice and, in considering the changing role of land in livelihoods, DFID should consider both direct support to land through such measures as environmental/infrastructure services and improved access to affordable agricultural inputs and services, support for rental market regulations and more flexible tenure arrangements (the latter being of particular importance in urban areas), as well as indirect support to land through measures around health-care and the encouragement of non-land-based livelihood opportunities.' (ibid, p.45).

They point to several *key issues and conclusions*:

- 'Donors can be important catalysts of change on land issues, particularly where the presence of powerful vested interests hinders pro-poor change;

- Donor efforts will be more effective if they are joined-up and non-sectoral, and if they are targeted at middle ('meso') and local levels of government as well as at the national level;

- Land policy-making and especially policy implementation are long-term processes that require credible relationships and alliances to be developed (including among civil society) so as to build a pro-poor consensus and be able to seize 'moments of opportunity' to push for change;

- Implementation requires particular support through building the capacity of land administration systems;

- Decentralisation of land administration systems must be engaged with cautiously and balanced by support to central governments as the provider of policy that protects the rights of the poor; reforms that give new powers over land to 'customary' institutions must be engaged with even more cautiously;

- New administrative tools and technologies offer interesting pro-poor possibilities, but again must be engaged with cautiously and particularly in a joined-up non-sectoral way;

- Donors require an array of aid instruments and flexibility of financing to be able to engage in the way that is necessary to effect pro-poor change around land. Budgetary support alone does not permit the necessary level of engagement with the issues and practices (and with all branches and levels of government and with civil and political society);

- Any engagement with land must be based on a thorough, detailed and historically-informed understanding of the various factors set out in our pro-poor approach (based on a differentiated understanding of vulnerability, poverty and wealth) within the specific country-contexts that DFID operates;

- Any engagement with land must also be built on an understanding of the spatial, social, economic and political interconnectedness of the lives and livelihoods of rural, urban and peri-urban poor which recognises that, while land is a central factor in development, support to land-related initiatives will not by itself solve the problem of poverty.

In sum, the fundamentally political nature of any transformation of land rights means that engaging with processes of land policy formulation and implementation in developing countries must also be a political process. It must therefore also be part of broader thinking about how to engage with issues of poverty and power.' (ibid, pp.45-6).

14.8 A sting in the tail?

In the afterword of their 2002 book *Negotiating Property in Africa*, Kristine Juul and Christian Lund have some challenging words for both researchers and all who enter the terrain of policy. They reflect on the uncomfortable position of many such who offer alternatives to try to secure the rights of the poorest and weakest, but whose efforts might have the opposite effect to that intended. They conclude:

> 'We are facing a peculiar paradox in the state's capacity to govern property and, as a corollary, the efforts of development assistance in the field. On the one hand, policies are proposed and carried out with the strikingly naive expectation that a precise remedy can be applied to the problems identified. These policies seem not to recognise the immensity, vivacity and downright stubbornness of social dynamics which are not under state or policy control. On the other hand, the same policies are often proposed and implemented with an equally naive appraisal of their discretion. Policies are expected to hit the target with marksman-like precision, leaving the rest of the social fabric intact. The evidence suggests that the opposite is often the case: state activities that barely achieve their goals are accompanied by massive and unanticipated effects, as policies are negotiated with people's agendas. Policy makers ought to beware of this paradox, and researchers should recognise that policy makers and researchers are themselves part of it, and continue to investigate it.' (Juul and Lund, 2002, p.249).

The same lesson surely applies to donors.

APPENDIX I:

China – economic growth, asymmetric property rights and social costs

In a paper on 'Asymmetric Property Rights in China's Economic Growth', Xiabo Zhang (2006) examines the contradiction of a country which has enjoyed demonstrable recent economic growth despite its people enjoying very weak property rights. This runs counter to the broad consensus in the economics literature that institutions, including property rights, are important if not vital or, in some views, even a necessary condition for, economic growth.

Zhang points out the important differences in China between de jure and de facto property rights, arguing that it is the greater and real strength of the latter which works to the benefit of local government and investors and to the detriment of farmers. Over 34 million Chinese have lost land since 1987. They have generally been paid compensation amounting to between 5-10 per cent of the market value of land. This has fuelled corruption but not impeded economic growth. The weak bargaining position of both farmers and workers has created something of a paradise for the growing number of foreign investors, while local governments decide compensation values, retain a monopoly on whether or not land is in the public interest, and hence have every incentive to grab land. In such a context, the transaction costs of acquiring land are far lower than in a country such as India, which has greater political and stronger de jure property rights.

Zhang concludes by pointing out some of the contractions of China's phenomenal economic growth – that a new privileged class has emerged which is likely to block future reforms, while disaffected peasants and workers might threaten the very social stability which, hitherto, has been a major asset in China's highly favourable investment climate and its economic growth. Moreover, as countries such as Korea and Taiwan have grown richer, their people have demanded more secure protection of property rights.

Zhang asks will the Chinese Government be adaptive enough to ride the bumpy road that lies ahead?

APPENDIX II:

Drawing governance lessons from Botswana

Systems of land administration cannot be exported wholesale to other countries, but experiences with different types of tenure, land institutions and the harmonisation of statutory and customary law can be usefully drawn upon. Botswana's land institutions are often held up as a model of democratic development. As periodic land policy reviews have revealed, there have been both successes and failures, but after investigation and discussion problems have generally been acknowledged and rectified. (Notable exceptions are issues relating to the land rights of the San and other minorities and the related problem of privatisation of the commons for ranching). In no other country in the region has land been so judiciously administered as an essential component of good governance. Some would argue that Botswana has little to offer in the way of lessons to the region because it is unrepresentative. Its population is modest in size and ethnically relatively homogeneous. By comparison with neighbouring countries, it is relatively wealthy and has no impairing legacy of colonial settlement. These points have some validity. But it should be noted that Botswana set out to democratise its land administration shortly after its independence in 1968, when it was still one of the poorest countries in Africa. The costs of Botswana's land administration are modest. In current 2002/03 prices the combined recurrent expenditure of all the institutions in the land sector grew from 51 million Pula in 1989/90 to 165 million Pula in 2002/03. This represents 0.8% to 1.2% of total annual government expenditure over the period.

The nature of the policy making process
Because of its sensitivity and complexity, land tenure reform is a time-consuming process. The necessary institutional development is likely to take decades. Progress is dependent on appropriate constitutional and legal frameworks and requires thorough public consultation and careful preparation. For the last quarter of a century in Botswana, iterative policymaking in the different sectors, including land, has followed a process extending up to two years: (i) a commission of inquiry (or an expert review); calls for written submissions; public meetings involving a wide range of stakeholders; (ii) the preparation of a draft report, oral presentations and discussions at a national workshop covered by the media; (iii) a draft paper which is debated in Parliament; (iv) the publication of a government white paper setting out the policy change adopted; the recommendations which have been accepted, amended and deferred (or rejected) with a justification for government having done so; (v) finally, where relevant, the drafting of laws or amending of existing laws.

This process of policy development and change is in stark contrast to that played out elsewhere in southern Africa over the last decade. It is difficult to detect a linear relationship (or any kind of systematic relationship) between the analysis of the problem or opportunity and the assessment of the evidence, the formulation of recommendations and the announcement of the policy change. In Zimbabwe, Zambia, Namibia, Lesotho and Swaziland land policymaking is seen as a Cabinet task. Even then, the consistency associated with collective decision-making is absent, perhaps because policy is the prerogative of the President and/ or the Prime Minister and reflects political short-term expediency. (Source: Adams et al, 2003, pp.68-9)

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