

LAND, LAW AND ECONOMIC DEVELOPMENT

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Real estate is a major source of value in both developed and developing countries. In the United States households have \$9.6 trillion or 16 percent of their wealth in real estate.¹ Farmers have another \$1.3 trillion of equity in their farms, bringing total household wealth in real estate to nearly 20 percent of household assets.² Hernando De Soto, writing in 1993, said that some 70 percent of Peruvian wealth was in real estate.³ One study found that in Uganda “between 50 and 60 percent of the asset endowment of the poorest households” was land.⁴ The World Bank confirms that the proportion of real property is between one-half and three-quarters of wealth in most economies.⁵

In some countries, of course, agricultural production may be less important because mining or fishing or village enterprise take precedence over agriculture, but urban living is still the exception in most of the developing world. In the United States, in contrast, despite its vast expanse, 79.0 percent of residents live in urban areas.⁶ But in

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¹ This is a net figure after deducting mortgages on property. See Federal Reserve. *Flow of Funds Accounts of the United States: Flows and Outstandings Fourth Quarter 2004*. Release Z.1. p. 102, Table B.100 (March 10, 2005).

² Economic Research Service, U.S. Department of Agriculture. *Balance Sheet of the U.S. Farming Sector, 2001-2005F* (February 11, 2005) (estimate for 2005).

³ De Soto (1993, p. 8).

⁴ Deininger (2003, p. xx). This reference is a book-length review of research on land ownership and transactions in developing countries and incorporates results of prior World Bank and academic research.

⁵ World Bank (2006, p. 32). These results appear to be based on 1985 data. See id. at 32 n. 10.

⁶ Britannica Almanac 2003, p. 602.

highly populated India, only 27.8 percent of people lived in urban areas in 2000.⁷ And in some African countries the urban population is an even smaller proportion; for Ethiopia the proportion of urban dwellers was only 15.9 percent.⁸

Legal Uncertainty

To simplify, it is useful to think of agricultural land as the most important development topic so far as real estate is concerned. Yet, in the developing world, agricultural land ownership is often shrouded in legal uncertainty: “In many countries, especially in Africa, ... often more than 90 percent of land remains outside the existing legal system.”⁹ Moreover, in cities the legal situation is often even more uncertain and problematic because social norms and bonds of tradition are much looser than in the less rapidly changing countryside. De Soto’s study of Peru led him to the conclusion that “more than 90 percent of rural and half of urban property rights in Peru are not protected by formalized titles—that is, they are ‘informal.’”¹⁰ African and Asian developing countries present a similar problem: “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.”¹¹

In rural areas, it is not just the livelihood of those who work the land that is at risk. Legal insecurity has broader costs to the economy. For example, where land ownership is not recorded in a land registry, farmers often have to pay for fences, trees, and other boundary markers because there is no other way of knowing where land boundaries begin and end. These capital investments involve costs not just to the farmer but to the economy as a whole. But without them, disputes over ownership and boundaries are more frequent. Of course, neighbors, especially when they are members of the same extended family or tribe, may be able to avoid disputes. But often, as Hernando de Soto famously observed, the only way for a stranger to know when he steps from one

⁷ Britannica Almanac 2003, p. 431.

⁸ Britannica Almanac 2005, p. 292.

⁹ Deininger (2003, p. xxiii). Deininger (2003) is a convenient and comprehensive review of World Bank and similar research on land policies for growth and poverty reduction,” and the reader is therefore referred to the original studies cited and reviewed in the Deininger book.

¹⁰ De Soto (1993, p. 8).

¹¹ Deininger (2003, p. xxv).

person's land to another's is that a different dog barks.¹² Disputes resulting in litigation consume real resources of the disputants and of the state.

The economic and financial consequences of legal uncertainty are profound. The farmer cannot mortgage his property where no legal infrastructure protects his property and prescribes its metes and bounds. And if he cannot mortgage his property, he cannot borrow to improve his property, or to buy more land, or to start a new business. Of course, even with title, he may still be unable to borrow against the land if his property is so small that formal sector lenders have no incentive to lend the commensurately small sums involved. Moreover, social norms in indigenous areas may work against putting land up as collateral because nonpayment may result in transfer of the land to outsiders.¹³

Investment in improving land, whether in drainage, irrigation or new types of crops, is important to output, productivity and the environment. Increasing legal certainty through titling also increases investment in improving the land, leading to higher agricultural production:

Farmers in Thailand with title invested so much more in their land that their output was 14–25 percent higher than those working untitled land of the same quality. In Vietnam rural households with a document assigning clear rights of control and disposition commit 7.5 percent more land to crops requiring a greater initial outlay and yielding returns after several years than households without documentation. In Peru almost half those with title to their property in Lima's squatter settlements have invested in improvements, compared with 13 percent of those without title."¹⁴

Moreover, where greater legal certainty has been created in developing country land markets, prices for land increase. The "value of rural land in Brazil, Indonesia, the Philippines, and Thailand increases by anywhere from 43 percent to 81 percent after being titled."¹⁵ Though higher land prices may be thought to create equity issues, these

¹² De Soto (1993, p. 12). .

¹³ Migot-Adholla et al. (1991).

¹⁴ World Bank (2004, p. 80–81); Feder et al. (1988).

¹⁵ World Bank (2004, p. 80).

higher prices are a good measure of the value of legal certainty created by titling. And the higher prices in turn create the collateral base for obtaining credit to improve the land, in turn leading to even higher prices.¹⁶

Creating security of title thus has a two-part reinforcing effect. Not only does it reinforce the incentive to invest in land, but it also creates the wherewithal to be able to do so by increasing the ability to borrow the requisite funds:

Farmers with secure title in Costa Rica, Ecuador, Honduras, Jamaica, Paraguay, and Thailand obtain larger loans on better terms than those without it. In Thailand farms with title borrowed anywhere from 50 percent to five times more from banks and other institutional lenders than farmers with land identical but without title.¹⁷

Similarly, the ability to start a business with funds obtained from mortgaging real estate is especially important, as developed country experience shows: “In the United States, up to 70% of the credit that new businesses receive comes from using formal titles as collateral for mortgages.”¹⁸

Without legal certainty as to ownership, transferability of land is equally uncertain. Without legal certainty as to transferability, a market in land is difficult to create. And hence the normal function of land markets in moving land into more efficient and productive hands is likely to be slow or nonexistent.

Lack of legal certainty also makes it difficult for an ambitious farm worker to become a farm owner. The result is that much land in developing countries is farmed by rental tenants. These tenants often enter into sharecropping agreements, in which the owner—who may be a distant city dweller—and the tenant share the crops (or their proceeds). Though such sharecropping agreements need not be notably inefficient from an economic viewpoint, studies show that farms let under such sharing arrangements are

¹⁶ Deininger (2003, p. 42–51).

¹⁷ World Bank (2004, p. 81).

¹⁸ De Soto (1993, p. 11).

not usually as efficient as farms operated by a resident owner.¹⁹ Thus, lack of legal certainty is not only a barrier to social and economic progress for the poor, but it also results in less than optimal agricultural production, a particularly serious economic problem in a developing economy still heavily focused on agriculture.

Finally, legal uncertainty is not even good for the environment (contrary to the primitive notion that measures taken to increase agricultural output necessarily harm the environment). For example, a major cause of deforestation in the Brazilian Amazon is the absence of property rights, which leads to short-term strategies for rapid exploitation of land.²⁰ A study of 53 countries concluded that “a modest improvement in the protection of property rights could reduce the rate of deforestation by as much as one-third.”²¹ But the correlation between greater security for property rights and sounder environmental practices is not limited to the deforestation example. Another study showed that “Ethiopian farmers are less likely to plant trees and build terraces to protect against erosion—and more likely to increase the use of fertilizer and herbicides—if their rights to land are insecure.”²²

In short, steady and sustainable economic development in the rural sector depends upon creating legal certainty with respect to ownership and transferability of land.

Urban Real Estate

Legal uncertainty as to ownership in cities is even more serious for economic development. This is true not just for business premises but also for house and apartment ownership. It is difficult for people living in developed countries with excellent legal certainty to appreciate what urban life, especially for the poor, can be where legal uncertainty prevails. Yet more than 50 percent of the peri-urban population in Africa and more than 40 percent in Asia live under informal tenure systems and have no protection from the formal legal system.²³

Just as security of tenure adds to property values of land, so too with urban residences: “For urban land, titling increases the value by 14 percent in Manila, by almost

¹⁹ See studies and references in Deininger (2003, p. 90–93).

²⁰ Deininger (2003, p. 41) and Alston et al. (1999).

²¹ World Bank (2004, p. 81, Box 4.3).

²² World Bank (2004, p. 81, Box 4.3).

²³ Deininger (2003, p. xxv).

25 percent in both Guayaquil, Ecuador, and Lima, Peru, and by 58 percent in Davao, Philippines.”²⁴ And here too titling leads to investment, although not just in the premises; in Lima, Peru, residents who received title to urban property used that property as “collateral to buy minibuses, build small factories, and start other types of small businesses.”²⁵

In addition to the points comparable to rural areas with regard to the inability to borrow on the equity of a residence to start a business and to transferability issues in trying to buy or sell residences, the economic activities of city dwellers may be circumscribed. For example, the ever-present possibility of seizure or dispossession that arises through an inability to assert legal rights of ownership leads to the need for at least one family member to remain at home to protect the residence. Many are therefore forced to find some way of earning money at home.²⁶ Often, of course, this means that women cannot enter the mainstream labor force and improve their economic position. Beyond the social effects, the economic result is that a large portion of the population is not able to make a reasonable economic contribution through their work. Moreover, the lack of opportunity for the improvement of skills through on-the-job experience and training restricts the economic development of the community. Titling of residential property leads to greater work outside the home with favorable long-term results for the economy.²⁷

Sources of Legal Uncertainty

What are the sources of legal uncertainty? The short answer is that legal uncertainty arises from the fact that the question of ownership often lies outside the legal system. Ownership may be safeguarded by custom or social norms within a tribe or an extended family or even by customary legal systems operating without reference to, or support from, the formal legal system established by the state. Customary legal systems may dominate within vast tracts of territory. But the formal legal system, meaning the courts and administrative bodies of the state, often is not available to provide legal

²⁴ World Bank (2004, p. 80).

²⁵ World Bank (2004, p. 81).

²⁶ Field (2004, p. 839) and Lanjouw and Levy (2004, p. 918–921).

²⁷ World Bank (2004, p. 81).

certainty—or, in common parlance, to protect property rights.

In particular, legal uncertainty starts with the absence of property titles. One's farm or house becomes, so far as the law is concerned, like an article of clothing or a personal computer to a developed country resident. Social norms against stealing and misappropriation may operate. But one's ability to use the legal system to assert ownership and keep possession is minimal. One is best advised to keep one's hands on the clothing and the computer, or lock them away. Though unlike clothing and computers, real estate cannot be moved, an owner without legal title may be dispossessed simply by someone more influential or stronger taking possession.

In the case of land, the situation may not be a problem in a traditional community untroubled by outsiders. But rising population in many developing countries has strained even these communities as more and more people seek to survive and better themselves economically on the same amount of land. But even more disturbing to certainty than the multiplying of the local population is the intrusion of outsiders, whether they be wealthy merchants who seek land as an investment or entrepreneurial land companies or even urban and foreign settlers. An illustration is the case of Kenya in the 1930s, where "land hunger was pronounced due to white settlement" and as a result modern land legal systems were demanded and introduced, even though titling and land registration did not become systematic until the 1950s.²⁸

Economists studying the evolution from traditional communal land arrangements to legal protection have explained the latter as "endogenously" created by the interaction of supply and demand. What is meant is that the new legal system for land was not created because some domestic or international civil servant thought it would be a good idea. Rather, the demand from ordinary people for protection and certainty increased as land pressure and resulting disputes grew. In turn, the state (meaning politicians seeking votes or authoritarian rulers seeking popular support) invested in a legal system for land.

When does demand for titles arise? North traces the transition in Northern Europe from communal ownership to legally protected individual ownership back to population increases.²⁹ The use of titling often occurs in the second stage of development. In China,

²⁸ Platteau (2000p. 124, 134).

²⁹ North and Thomas (1973, p. 59–64).

as discussed below, 30 year-use rights have recently been created and given at least some legal protection; but outright ownership and especially titling, along with their economic development advantages, remain only future possibilities. Sometimes, as the Kenya example discussed above shows, the demand for titles arises either from, or because of, new groups that enter the space that was previously communal. Titling is a mechanism to promote legal certainty. Of course, the demand for titles sometimes creates disputes between different population groups.

An interesting example of the combination of population increase, new groups entering, and disputes between groups can be found in U.S. history. A major feature of the nineteenth century saga of westward expansion in the United States was conflict between ranchers and farmers. Most of the United States between the Great Plains and the Pacific coastal region is relatively arid, more appropriate in the pre-irrigation era for ranching than farming. But U.S. public land policy, including the famous Homestead Act of 1862 (allowing those who improved land over a five-year period to obtain title), was patterned on the idea that land sales and homestead grants by the U.S. government should be for 160 acres (1/4 of a “section” measuring one mile square) per family since 160 acres was large enough for one farm family’s economic success in the part of the country already settled. In the western United States the ranchers were the first to arrive since in the early part of the nineteenth century plenty of good farming land remained available in the eastern half of the country. But 160 acres was not enough for profitable ranching and so the ranchers, being unable to acquire government-owned land, simply made informal claims to much larger areas. By a combination of local agreement and social mores coupled with violence against those, especially newcomers, who did not recognize the informal claims, an informal land system of ranch-size claims arose.³⁰

But as the better farmland in the eastern United States grew scarce and the growing population of landless farmers, fed in part by immigration from Europe, pushed westward, conflict—sometimes violent—was inevitable. Naturally the farmers sought to homestead the land or buy from the U.S. government, thereby obtaining titles to the same land that the ranchers were exploiting without titles.³¹ The ranchers—considering the

³⁰ Anderson and Hill (2004, p. 160–166).

³¹ Anderson and Hill (2004, p. 23).

farmers mere squatters—acted, first, by illegally fencing their claimed lands, and then by taking their cause to the U.S. Congress, where various compromises resulted over a period of decades.³²

Issues in Titling

The most common issues concerning titling involve finding a way to give existing “owners” actual titles. De Soto popularized the idea of titling in his 1989 and 2000 books.³³ But titling was a government response, even in the developing world, before DeSoto wrote his two books. Titling was introduced successfully in the 1980s in Thailand.³⁴ A major titling effort in Ecuador beginning in 1993 was directed at urban areas.³⁵

One of the problems in titling, especially in urban areas, is determining the identity of the actual owner who should be awarded the title. In the massive movement of people off the land into cities in the latter part of the twentieth century in the developing world, vast informal urban agglomerations grew up without effective governance and law. In Peru, De Soto’s home country, a massive titling effort ran into difficulties in these informal areas due to conflicting claims to the same parcel of land.³⁶

Titling is only half of the battle if the objective is to create economic development. The elimination of existing restrictions on free transferability of land is equally important. First, land, even if titled, cannot be used as a means of raising money for investment in the land, whether for improved productivity or for side commercial ventures, unless the land can be mortgaged. And mortgages will not be available unless foreclosure is possible, which means that the lender must be able to assume title to the land.

One study of Thailand found that the major benefit of titling was precisely the ability to borrow from formal financial institutions, rather than security of ownership as such. Access to credit was over three times greater on titled than untitled land.³⁷ Hence,

³² Libecap (1981, p. 3, 20–23, 31–36) and Gates (1968, p. 466–468).

³³ De Soto (1989) and De Soto (2000).

³⁴ World Bank (2001, p. 36).

³⁵ Lanjouw and Levy (2004, p. 912).

³⁶ Payne (2002, p. 17).

³⁷ Deininger (2003, p. 49, Figure 2.5).

the benefit of titling comes in large measure, at least in Thailand, from legal transferability.³⁸

A political, and sometimes ideological, issue that sometimes arises in developing countries is that free transferability of land evokes an image of landless rural poor. The notion is that small farm owners will be duped or coerced into selling out. Indeed, market-oriented land reform involving free transferability is at odds with the ideology of land reform that in many countries earlier supported the breaking up of large estates in favor of landless peasants. At the same time, it must be recognized that these early land reform efforts were not only successful in breaking up large estates but sometimes increased output and productivity through transfer to individual farmer ownership.³⁹ In more policy-oriented terms, the fear is simply that transferability will lead to greater income inequality. Yet lack of transferability is likely to limit the economic development promise of titling efforts in the countryside. Moreover, transferability was shown, in a World Bank study of Colombia, to “make a significant contribution to greater equalization of the operational structure of land holdings and, to a more limited extent, the ownership structure.”⁴⁰ In short, “rental and sales markets were more effective in transferring land to poor but productive producers than was administrative land reform.”⁴¹

A different kind of problem arises from the hard-to-escape condition that titling involving free transferability must be based on the existence of a land registry.⁴² It is only by land registration that a buyer can be sure to be dealing with the legal owner, that the land is free of legal encumbrances such as mortgages, and that the boundaries of the plot of land correspond to the seller’s representations. A registration system must not only be

³⁸ Feder and Feeney (1991).

³⁹ Deininger (2003, p. 16–17) and sources cited therein.

⁴⁰ Deininger et al. (2004).

⁴¹ Deininger et al. (2004, Abstract).

⁴² The United States does not use a land registration system but rather a system for the recordation of deeds and encumbrances such as mortgages. A Torrens land registration system was partially adopted in some states in the twentieth century, but even in those states land registration has not been a successful competitor with an already well-established recording system (supplemented by title insurance). Casner et al. (2000, p. 783–820) and Miceli et al. (2002). Britain made a major move to a land registration system in 1925. Bostick (1987). The reason land registration has not been successful in the United States has little relevance to developing countries, which would most probably find it even more difficult to introduce an American deed and mortgage recording system, which in practice requires not just qualified civil servants but also private lawyers (to interpret the result of title searches) and a title insurance system.

created, but the existing owner has to know about the land registration process and be motivated to register. The result in Kenya has been that it is the larger farms with better access to markets that turn out to be the farms that are registered.⁴³

Titling costs money. It cannot function properly without the rest of the legal infrastructure that goes with it: A cadastral survey showing property boundaries and landmarks is indispensable. So too land registries are expensive to create and maintain.⁴⁴

More than just the mechanics of surveys and registries is involved. A competent administration of the system is needed. Accuracy and promptness are important:

In Mozambique there is a backlog of about 10,000 applications for land rights, which means long delays between receipt of an investment plan and eventual granting of the land right. In Cameroon the minimum amount of time it takes to register a plot is 15 months, and registration commonly takes between 2 and 7 years. In Peru the official adjudication process takes 43 months and 207 steps in 48 offices, although an expedited process is now being implemented in selected areas.⁴⁵

Obviously middle-income countries are more likely than poorer countries to be able to afford the infrastructure and perhaps also to field a sufficiently competent bureaucracy to make land registration work smoothly. A further important factor is that the judiciary has to be educated in the new system and be ready to enforce these newly created formal rights. Land registration is thus an example of a situation where some economic development is required to generate the resources necessary for legal solutions that create the basis for further economic development. In short, legal development and economic development in such instances must necessarily advance hand in hand.

If the advantages that a developed legal system for land titling, registration and transferability are to be realized, especially with regard to enabling mortgage borrowing through the use of land as security, appropriate laws on mortgage security are necessary, though by no means sufficient. The judiciary must be prepared to foreclose in accordance

⁴³ Platteau (2000, p. 134–135).

⁴⁴ Deininger (2003, p. 70–71).

⁴⁵ World Bank (2001, p. 35, Box 2.4).

with the statute. Otherwise, banks and other financial institutions will not lend. Among the problems that can arise, aside from corruption, is that judges may be reluctant to throw the poor off their land or out of their houses. And still another problem is that financial institutions may be unwilling to lend for other reasons. In Brazil, India, and Russia, macroeconomic instability and the resulting rampant inflation made the development of a mortgage market difficult.⁴⁶ In any case banks may be unwilling to lend to borrowers of small sums; capacity to pay and the costs of servicing small bank loans remain crucial to bank lending decisions.⁴⁷

Transferability: Precedents and Problems

Titling and land registration, even with all the administrative and legal infrastructure, will fail to deliver the full economic benefits if transferability is limited by statutory restrictions. One common kind of such restrictions limits transfer to the transferor's kinship line.⁴⁸ Alternatively, transfer may be subject to approval by some specified authority.⁴⁹

Similar restraints on alienation of land were common in early English history. These restraints contrast with the ancient world of Greece and Rome, where free alienability was more common. "Plato bought a farm. Cicero sold his house."⁵⁰ In England restraints arose mainly as part of feudal land relationships established in the Middle Ages and modified over time in the ensuing struggle between the Crown and nobles. Under the early feudal system all land was, in principle, owned by the Crown and held in a chain of dependent ownership through the high nobility and down to the actual tenant owner. Furthermore, all transfers required, in principle, the approval of the Crown or an intervening noble in the feudal chain.⁵¹

Even after the 1290 statute *Quia Emptores* simplified the feudal system by prohibiting "subinfeudation," and thereby restricting chains of dependent ownership, problems arose under this modified feudal system that would not have arisen under a

⁴⁶ Lewis (2004, p. 155, 240).

⁴⁷ Kagawa and Turksta (2002, p. 68).

⁴⁸ Ellickson (1993, p. 1375).

⁴⁹ Ellickson (1993, p. 1375).

⁵⁰ Ellickson (1993, p. 1377).

⁵¹ Casner et al. (2000, p. 253–258).

system where each plot of land was owned outright by a single person. Over the centuries the English aristocracy and later the rising gentry class⁵² sought to insure that their landed estates would remain within the family generation after generation by using various legal devices, especially strict settlement and common recovery.⁵³

These legal techniques were restraints on alienation that kept land off the market. Eventually, in an evolution that lasted some centuries, entail (which was an interest in land normally created, for example, in the use of strict settlement) was abolished.⁵⁴ (In Virginia the entail was abolished by statute under the leadership of the 33 year old Thomas Jefferson.⁵⁵) The abolition of entail constituted a rejection of the aristocratic desire to keep land permanently within a family and a transition to the principle that land, in a modern economy, should be freely transferable. But even under modern Anglo-American land law, it is possible for an owner to find alternatives to the entail in other ways so long as the conveyed interest vests in some person within, under one formulation of the Rule Against Perpetuities, “a life in being plus 21 years.” The policy of this Rule is that “a man of property...[may] provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority.”⁵⁶ Quite recently legislation in some U.S. states has amended the Rule Against Perpetuities to allow so-called perpetual trusts and other devices for tax avoidance in the transfer of property from one generation to another.⁵⁷ But, in general, contemporary policy in developed countries, certainly in Anglo-Saxon law countries, treats land as a commodity in a market economy, subject to land use restrictions imposed by public regulation.

The gradual elimination of restraints on alienation in the developed world was accompanied by more rapid economic growth, and assured that that growth was enjoyed in the agricultural as well as in the commercial and emerging industrial economies. Some economic studies substantiate the importance of removing restraints on alienation.

⁵² For a general discussion on the gentry, see Tawney (1941).

⁵³ For a nontechnical explanation of strict settlement, see English and Saville (1983) and Spring (1993, p. 123–147). On common recovery, see the example in definition for “common recovery” in *Black’s Law Dictionary*, 8th ed. ed. Bryan A. Garner, p. 295 (2004) and Simpson (1983, p. 129–132). For further details, see Biancalana (2001).

⁵⁴ See Leach and Tudor (1952, § 24.16) and Reid (1995) and sources cited therein.

⁵⁵ “Entail.” *Encyclopædia Britannica*. 1970. 607–608.

⁵⁶ Quoted in Dukeminier and Krier (1988, p. 251).

⁵⁷ See Sitkoff and Schanzenbach (2005 forthcoming).

“Several studies of China, one of the few countries that has experimented with allowing different systems of transfer rights across different provinces, have confirmed that higher levels of transferability were positively correlated with higher levels of farm investment.”⁵⁸

Restrictions on, and regulation of, land markets can have major economic effects for the entire economy. A recent World Bank analysis pointed out:

High transactions costs in land markets can also either increase the cost of providing credit or require the costly development of collateral substitutes, in both cases constraining private sector development.... [A] recent study that estimates that taking both direct and indirect effects together, land market distortions reduce the annual rate of gross domestic product growth in India by 1.3 percent.⁵⁹

A poorly functioning land registry system is a de facto restriction on landmarkets and thereby on both financial markets and on entrepreneurship in creating new enterprises.⁶⁰ Property registration need take no more than a week, but it takes on average 274 days in Nigeria, 363 days in Bangladesh and 683 days in Haiti.⁶¹ Costs can be on average much less than one percent of the property value, but they range as high as 18 percent in Senegal, 22 percent in Zimbabwe, and 30 percent in Syria.⁶²

One particularly pernicious restraint involves restrictions on land rentals. Such restrictions can have profound effects in view of the popularity of rentals as a dominant form of farmland exploitation. Even where communal holdings are not a factor, the family-owned farm is not necessarily the model followed. In developed countries a large percentage of all farmland is rented, with rental percentages ranging from 71 percent in Belgium to 43 percent in the United States, where in certain regions the family-owned

⁵⁸ World Bank (2001, p. 35).

⁵⁹ Deininger (2003, p. 2).

⁶⁰ World Bank (2006, p. 27-32).

⁶¹ World Bank (2006, p. 29, Table 5.2).

⁶² World Bank (2006, p. 19, Table 5.2).

farm has iconic importance.⁶³ A variety of economic factors lead to the conclusion that the owner-operated farm is not always the optimal form of farm enterprise.⁶⁴ Land rental has the social advantage of allowing people who would otherwise be farm employees or even unemployed to become independent farm operators. In fact, where the objective is to provide the poor with their own land, land rental has been shown to be more effective than land reform.⁶⁵

From a Rule of Law perspective, restrictions on land sales and rentals are restrictions on enforcement of contracts as well as limitations on property rights. However, restrictions on land sales are usually byproducts of national real property systems. To take just one example, if land is legally held in communal form, then individual farmers—whatever their rights within the community—have no governmentally protected right to transfer their particular parcel to nonmembers of the community. Restrictions on rentals, however, take many forms, some having little to do with the underlying property rights system. A prime example involves rent controls, which make illegal any rental contract exceeding the ceiling rental amount. Such rent controls have seriously discouraged land rentals.⁶⁶

A number of countries do not recognize land rental contracts at all.⁶⁷ Often these prohibitions are part of a land reform program involving the breaking up of large estates, and the prohibition was motivated by a desire to assure that the recipients of the redistributed land actually farmed them. This is no doubt the motivation for the purported prohibition in land reform regulations of rental tenancy in India, which led to a much lower rate of even informal land tenancy.⁶⁸

Some countries prohibit certain forms of rental contract; the most common is a prohibition on sharecropping, where the landlord and tenant share crop harvests (or the proceeds).⁶⁹ One motive for such prohibitions may have been to protect those who worked the fields. Despite a long tradition even among economists of viewing sharecropping as an inefficient substitute for cash rentals, restraints on sharecropping are

⁶³ Deininger (2003, p. 99).

⁶⁴ Bierlen et al. (2000).

⁶⁵ Deininger et al. (2004) and Deininger and Jin (2002).

⁶⁶ Deininger (2003, p. 116–118).

⁶⁷ Deininger (2003, p. 117–118).

⁶⁸ Deininger (2003, p. 108). See also Ray (1996).

⁶⁹ Deininger (2003, p. 119).

today generally considered unfortunate from an economic viewpoint; sharecropping allows the poor, who do not have the resources to acquire land, to benefit nevertheless from their energy and skill as farmers without having to limit themselves to being simply farm laborers. Thus, although as previously noted, sharecropping may not be as efficient as owner-operated farming, sharecropping is often the most efficient form of rental contract available.

Recent decades have seen the gradual shedding in the developing world of restraints on sale and rental that were imposed by earlier governments of a revolutionary or socialist ideology and that sought thereby to reduce inequality in income and wealth. The gradual lifting of these restraints on alienation appears in part to be the result of greater understanding that these restraints have limited economic growth and have not necessarily led to greater equality. An interesting historical parallel can thus be drawn to the gradual elimination of restraints on alienation in traditional English (and early American) land law, again as the pernicious impact of the restraints came to be understood. The difference between the recent developing country experience and the earlier experience is, of course, that the English-origin restraints on alienation were originally intended to preserve inequality of income and wealth by keeping land within aristocratic families generation after generation.

Implementation problems

If titling and registration are so important, why don't developing countries adopt the appropriate measures immediately? Aside from the cost and the absence of a trained bureaucracy, titling and registration are sometimes resisted by the very people who could benefit. Their objections may, in part at least, be rational from their individual point of view, but as in so many issues of economic policy, individual preferences do not necessarily add up to an optimum result for the economy as a whole. Still, one reason why optimism about the economic development effects of titling should be tempered is that land constitutes, in many countries, a combination of insurance and pension fund:

Land continues to be perceived as a crucial asset for the present and/or future subsistence of the family, all the more so as it is a secure form of

holding wealth and a good hedge against inflation. ('It is our bank and we will not part with it', said the member of a founding lineage in a village close to Matam, Senegal). That considerations of social insurance determine attitudes of deep attachment to land is understandable in a context of scarce alternative employment opportunities and risky labour markets.⁷⁰

One of the transition problems in moving from the traditional concept is that the patriarch of an extended family may very well be the person who would register the land on behalf of the family. Other members of the family may feel dispossessed by the movement to a market economy concept of ownership if they lose the implicit right to be supported in their old age, or if they become disabled or seriously ill. For a lawyer trained in the common law system, the situation is analogous to one where a trustee of a trust on behalf of a widow and minor children decides to transfer the property held as trustee into the trustee's own name; the trustee may still feel responsible to the beneficiaries, but they cannot count on it.

Hence, social norms and family pressures may work against land registration. This is especially true because even if a family patriarch or clan leader might want to recognize, through the land registration process itself, the rights and expectations of the rest of the members of the extended family or clan, it is almost impossible to see how that could be done without losing many of the benefits of land registration: If members of the extended family were to be listed as co-owners, the written agreement of all would be necessary to mortgage the property or to sell the land. The upshot is that for some people in the developing world, land registration creates more legal and economic uncertainty than it eliminates. An Anglo-American type of trust (or its civil law equivalents) might work, but the trust—which arose over the centuries in the evolution of English law—may not be available and in any event the institution of the trust evokes a culture distant from most traditional societies in the developing world.⁷¹

Another kind of problem that developed country lawyers might classify as a law

⁷⁰ Platteau (2000, p. 152).

⁷¹ According to Johnston (1988), the trust was available under Roman law, and Helmholz and Zimmermann (1998) find equivalents of the trust have been worked out in some civil law countries.

enforcement matter, but in the field is more often classified as “land grabbing,” involves fraud in the land registration process. Platteau summarizes documented examples of Kenya where “clever, well-informed or powerful (and usually educated) individuals ... often successfully jockey to have parcels not previously theirs registered in their own name while the mass of rural people are generally unaware of the new land provisions or do not grasp the implications of registration.”⁷² He also refers to a “few well-connected Kenyans who succeeded in having pasture lands registered in their own names on the ground that they would bring them into cultivation” whereas “their intent was not to exploit the land in question but just to use it as collateral in order to obtain loans from banks in Nairobi” to be used for personal purposes without intention of repayment but rather with the intent to allow the land to be foreclosed.⁷³ In peri-urban areas where wealthy city dwellers are intent on real estate development in nearby formerly agricultural areas, fraud and corruption in the titling process may lead the farm population to perceive titling as more of a threat than a benefit.

In a developed country with the Rule of Law, a few well-publicized criminal prosecutions might stamp out such unfortunate practices. But in poor rural areas where the Rule of Law itself is still in question and when neither the legal and administrative infrastructure nor the countryside literacy required to build confidence in the intention and integrity of the new system has yet been developed, such frauds are more likely. At least in Africa, feelings of resentment and jealous toward groups that benefited from land registration led to social tensions and a reassertion of tribal and clan rights, even to the extent of rewriting history to reinforce those rights. These feelings have been exacerbated by ethnic tensions where one ethnic group sees itself losing by land registration to a stronger, wealthier ethnic group.⁷⁴

The conclusion for agricultural land is that land registration may be an important stimulus to economic development, but its adoption is likely to be resisted by many people in the developing world who would ultimately benefit by the economic advantages it could bring over time. In the case of urban real estate, say houses or apartments, one can see that this property serves “both as insurance against uncertain

⁷² Platteau (2000, p. 166).

⁷³ Platteau (2000, p. 166).

⁷⁴ Platteau (2000, p. 164–177) and sources cited therein.

employment ... in the next generation of the family, and as a pension fund for their old days.”⁷⁵ To these practical individual considerations one must also add tribal traditions and social mores demanding that land that belonged to ancestors should be kept.⁷⁶ At least in earlier decades local violence and more subtle forms of resistance were used to keep ancestral land in some African countries out of the hands of outsiders, particularly foreigners.⁷⁷

Communal Land

Thus far the discussion in this chapter has been mostly about titling and market transfer of land that is already in private hands. Logically a prior question is involved in land that remains owned by tribes or other group entities. Such land would have to be spun off into individual hands (in what is often called freehold tenure to distinguish it from communal ownership) before the process just discussed would even come into question.

The question of communal (often called customary tenure) land is extremely important. In many developing countries, communal land, operating under traditional institutions, has preceded not just independence but colonization itself. With few exceptions, issues involving communal land are outside the formal legal system. The formal legal system in Africa, for example, “covers at most between 2 and 10 percent of the total land area.”⁷⁸ Disputes that arise therefore have to be dealt with by customary institutions—say, within the tribe or clan—and no effective resort to the regular courts is possible because the national substantive land law simply does not apply. In general, colonial powers applied their own law to their citizens and often to disputes between citizens and the native population, but the native population was left to its own customary law. Until such time as land is titled and registered, a developing country may have no way of applying national rules concerning land. As a result, “in Africa, customary institutions administer virtually all of the land area, including some peri-urban areas with

⁷⁵ Platteau (2000, p. 152).

⁷⁶ Platteau (2000, p. 154).

⁷⁷ Platteau (2000, p. 154–155).

⁷⁸ Deininger (2003, p. 62).

high land values where demand for land transactions and more formal property rights is increasing.”⁷⁹

As we have seen in the preceding chapter, it is a fundamental economic proposition that land subject to open access—by analogy, let’s say, to ocean fisheries—is likely to be overexploited. Not only is the current use therefore likely to be inefficient but the long-term negative consequences, both environmental and economic, are likely to be serious if not sometimes catastrophic.

U.S. history is ripe with examples. The two most famous American settlements, Jamestown and Plymouth, started off with communal ownership. But both soon switched to individual ownership. The results for productivity were positive. In both cases, the switch may have been just in time for survival.⁸⁰

It would be a mistake, however, to conclude that all communal ownership is so inefficient that it is an obstacle to economic development. The prime reason is that much communal property is not truly open access property.⁸¹ The most common communal arrangement involves plots controlled by individuals with, say, pasture and perhaps hunting areas subject to open access for members of the community—but not open to access by outsiders. In many cases, the strips are scattered. But because the tribe or clan is sufficiently close-knit with local governance and social norms assuring compliance with the strip boundaries, there is no problem of a tragedy of the commons. Indeed, an advantage is that only the land of the community as a whole has to be fenced to keep out animals and perhaps strangers.

The communal property arrangements are under a special legal system—communal law administered by the tribe or clan. Often the individual plots can be bought and sold, albeit within the tribe or clan. And they often can be inherited. Thus, a good deal of legal certainty obtains, but as the foregoing discussion of titling and land registration indicates, the arrangements are not optimum for economic development of the kind enjoyed in the developed world. That does not necessarily mean that communal property arrangements are not efficient within the communal land area itself, at least

⁷⁹ Deininger (2003, p. 62).

⁸⁰ Ellickson (1993, p. 1335–1341).

⁸¹ See discussion in Dahlman (1980, p. 200–210).

where exchange and sale among members of the community can occur and rights are inheritable.

Larger questions arise where population pressures, encroachment of urban life, and discontinuities cause communal systems to break down. Certainly the unorganized squalor on the outskirts of some developing country cities (which is presumably what De Soto had in mind in the Lima area that he researched) is not an example of communal property at all. Here the new residents often have no property rights, either individually or through their membership in a communal property group. A confusion between communal property and “unofficial” settlements simply clouds understanding and analysis.

As already discussed, communal pasture and hunting areas are normally open access land, but only to members of the community. If outsiders can be kept out, then it is up to local governance and social norms to prevent the “overgrazing” that the tragedy of the commons postulates. In effect, some kind of quota system has to be worked out, explicitly or implicitly, if pasture and hunting land proves scarce. Here again one can see that private ownership would in principle be better for economic development. On the other hand, even the common areas have something to be said for them, again so long as nonmembers of the community can be kept out. Not only are fences dividing pasture and hunting areas of the community unnecessary, but it is possible to take advantage of certain efficiencies; for example, one part of the common pasture area may be better in certain seasons than other parts and hence the ability of herds of all farmers to move with the season may be an efficiency consideration that offsets any tendency toward overgrazing.

Another Look at History

A short summary of the discussion thus far is that the process of moving to a market economy in land is likely to be evolutionary rather than purely technocratic. Legal transplants can help, but only if the legal infrastructure is in place and even then results are likely to be measured in most countries in years, if not decades. This conclusion is all the more important for the process of moving from communal to individual ownership. Again the lessons of Northern Europe some centuries ago, especially the conflict

involved in the enclosure movement, suggest that attitudes and practices involving something as fundamental as land are likely to take at least one or two generations to change.

Although communal land systems today unquestionably differ greatly from country to country, even within a region such as sub-Saharan Africa, the resemblance of the economic aspects of traditional communal tenure arrangements to the historical situation in Northern Europe prior to the enclosure movement is nevertheless remarkable. Although the details in Northern Europe differed from country to country, the well-documented system in England conveys the strengths and weakness of communal ownership. It also shows how an evolution, largely through legislative action, can move successfully, though not without controversy, a country's land system from communal to individual ownership over a period of time.

Beginning at least as far back as the fifteenth century and continuing until Parliamentary legislation became the standard method in the mid-eighteenth century, the enclosure movement in the English Midlands involved converting communal land to private ownership through mutually agreed transactions among all members of the community (the "proprietors") or bilaterally between two of them, such as by purchase or exchange.⁸² As land became less plentiful and population increased, controversy arose as to the impact of enclosures on the poor. Finally, beginning in the mid-eighteenth century enclosures pursuant to private acts of Parliament increased and in 1801 a General Enclosure Act created a procedure for enclosure.⁸³

The structure of "open fields" in England in the "parliamentary enclosure" period resembles communal property in much of today's developing world. Individual farmers had strips within a community, and there was a common pasture. The strips could be sold or exchanged, the common pasture was available to open access by all members of the community, and even the strips were open to pasture when no crops were being grown at the time.

Strip farming had its disadvantages and its advantages. On the disadvantage side, the strips in England were often so small that plows could be used only in the lengthwise

⁸² Allen (1992, p. 27–28).

⁸³ "Enclosure." Encyclopædia Britannica. 2003. Encyclopædia Britannica Online.

direction of a given strip and even if a given farmer's lands might be more rectangular in shape, a farmer's separate plots might be too widely spaced to permit efficient use. McCloskey uses the following image: "A moderately prosperous peasant would hold his 20 acres in 20 plots scattered over the face of a village the size of Central Park."⁸⁴ But many villages did not even have plots of that one-acre average size, and in many cases a farmer's lands would be spread over many more plots. Turner points to a village in Lincolnshire where a 105 acre farm was separated into 162 separate plots and to a farm in Buckinghamshire where a Mr. Yates, though he had 78.5 acres, had to farm them in 218 separate plots.⁸⁵

But there were advantages to the open fields system as well. One was that fences were not necessary, except perhaps around the village as a whole, although of course a shepherding or other arrangement had to be used to keep the sheep and cattle out of the crops during part of the year. The absence of fences was a substantial cost saving to the agricultural economy. Other advantages were that the separate strips might have had diversification or insurance payoffs since the quality of land and even the temperatures might vary from one plot to another; hence, the farmer could specialize within his own acreage by matching plants to soil and frost conditions, while at the same time not putting "all of his eggs in one basket."⁸⁶

From Communal Property to Individual Property

Given the advantages of communal property arrangements and the political sensitivity of any changes that might threaten individual economic well-being and even survival, one policy implication is that the transition from communal ownership to individual ownership has to be handled carefully. The history of the Côte d'Ivoire, which committed itself to a transition to full nationwide individual ownership within ten years, is instructive. The task (which, remember, includes surveys, demarcation of boundaries, a registration process involving a large governmental staff, and more) was simply too much for an inadequate bureaucracy. It has been suggested that the recent civil war in that

⁸⁴ McCloskey (1991, p. 344).

⁸⁵ Turner (1986, p. 671–672).

⁸⁶ McCloskey (1989, p. 34–46). See also Smith (2000).

country is not unrelated to the difficulties created by the land tenure conversion effort.⁸⁷ Fortunately, alternatives exist permitting the upgrading of tenure security over time as opposed to a one-shot conversion from communal to pure individual ownership. An experiment along such gradualist lines was carried out in Namibia.⁸⁸ Similarly, Botswana has successfully used gradualism to make the transitions.⁸⁹

Certainly a move from communal ownership, however much tempered by individual use rights, to full-fledged individual titles and land registration is likely to meet some resistance. One constraint that has sometimes stood in the way of thoroughgoing titling and registration reforms is a set of social norms that conflict with the individualistic philosophy of the reforms. One particular problem, for example, has been the difficulty of assuring women the right to participate in ownership and registration upon the death of a spouse, especially where the prior communal systems subordinated their rights to those of their husband or extended family.⁹⁰

A different kind of problem arises in those countries such as China, Mexico, and Ethiopia in which collective ownership was imposed in the wake of revolutions. The consequence was that neither local governance nor social norms worked to ameliorate the negative economic effects of the resulting “communal” system. The negative consequences of such forced communalization can be found in the Mexican *ejido* system introduced in the 1920s and 1930s, and not fully reformed until 1992.⁹¹ Under the earlier system investment fell, the work became more labor intensive, and even crop choice was biased toward short-term payoffs.⁹² The reformed system provides for full privatization, including land registration and the ability to mortgage land, but at least in some parts of Mexico, farmers have been reluctant to take advantage of such titling, in part because “land taxes rise sharply upon privatization,⁹³ surely a counterproductive approach to improving productivity and farm incomes.

China has nonetheless used a gradualist approach, with good effect for productivity and output, by implementing, through the household responsibility system,

⁸⁷ Deininger (2003, p. 64).

⁸⁸ Deininger (2003, p. 65, Box 2.4).

⁸⁹ Deininger (2003, p. 52).

⁹⁰ Deininger (2003, p. 57–62).

⁹¹ Deininger (2003, p. 121–122, including Box 3.2).

⁹² De Allesi (2003, p. 103).

⁹³ Brown (2004, p. 2).

individual use rights in the early 1980s, which has ameliorated the effects of collectivization.⁹⁴ It is interesting, however, that neither local governance nor the social norms that give effective rights to individual farmers under traditional communal systems were available to cushion the transition. For example, corruption and abuses of power by village authorities were reasons why the degree of tenure security varied greatly from village to village and why the Chinese government moved more recently to deal with those problems.⁹⁵ In 2003 a Rural Land Contracting Law became effective, giving farmers thirty-year use rights to their land, subject to some limitations, without any land registration system; abuses by local government and party officials remain a problem, and mortgaging of land has not been fully institutionalized across the country.⁹⁶

Similarly, urban property owners have found little protection of their 30-year land use rights. Four million residents in Shanghai and Beijing were evicted without compensation between 1991 and 2003.⁹⁷ Although some cities have acted to allow mortgages, the legal basis for mortgages is not uniformly available across China. Moreover, as the 2005 prospectus for a Hong Kong offering of shares of China Construction Bank, one of China's largest banks, makes clear:

The procedures for liquidating or otherwise realizing the value of collateral of borrowers in China may be protracted, and the enforcement process in China may be difficult. As a result, it may be difficult and time-consuming for banks to take control of or liquidate the collateral securing nonperforming loans. Furthermore, according to a judicial interpretation issued by the Supreme Court of the PRC...courts may not foreclose on, auction off, or otherwise collateral if such collateral is the borrower's essential residence. Accordingly, we may be unable to realize the expected value on collateral in a timely manner or at all.⁹⁸

Nevertheless, the reforms show that the central government has attempted to guide the

⁹⁴ Deininger (2003, p. 55, Box 2.2).

⁹⁵ Deininger (2003, p. 55, Box 2.2).

⁹⁶ Ping Li (2003). The 2003 Law followed on a 1993 decision by the Party to the same effect. Lubman (1999, p. 184). According to a World Bank survey at about the turn of the century, some 55 percent of farmers had signed a 30-year contract but only 12 percent felt it would "definitely prevent [administrative] reallocations, and 46 percent felt that reallocations will definitely continue despite the new policy." (Lohman 2000).

⁹⁷ Wilhelm (2004, p. 231).

⁹⁸ China Construction Bank Corporation (2005, p. 23).

evolution of land holdings toward a more efficient system despite the reluctance of local authorities who fear loss of flexibility and, no doubt in some cases, of opportunities for personal gain.

A further approach involves starting by giving official legal status to existing communal institutions. Colombia, for example, has introduced collective land titling for particular indigenous groups.⁹⁹ In Mozambique a 1997 statute recognized customary rights of individuals, but gave communities what amounts to titles and registration. This approach was a reaction to the circumstance that in Mozambique some 20 different customary systems were operating (which was one reason why giving land titles to individuals was beyond the fiscal and bureaucratic capacity of the country at the time). And while the system does not provide the credit advantages of individual titling and registration, it does provide a system by which individuals can transfer their land and it also allows the community to negotiate with outsiders for the exploitation of natural resources.¹⁰⁰

An increasing number of countries simply recognize in their formal legal systems the validity of individual rights under existing communal systems. This approach, which bows to the fiscal and bureaucratic difficulties of full-scale individual titling and registration, is only a small step in the direction of a market economy approach to economic development.

Nonetheless, formal legal recognition of individual rights to a plot in a larger tract of communal land may have some economic value. Indeed, as suggested earlier in this chapter, such recognition of individual rights already exists in many communal systems. However, traditional communal law frequently gives elders or chiefs the power to reallocate some or all of a plot, where—for example—they conclude that the owners are not properly working the plot. Since naturally at least some neighbors want more land, the resulting pressures for reallocation cause current owners to be cautious, especially about taking part-time jobs off the farm because they fear it may lead to land being reallocated away from them. Since “greater involvement by rural households in the off-farm economy is widely recognized as a critical pre-condition for broad-based rural

⁹⁹ Plant and Hvalkof (2001, p. 33–34) published by the Inter-American Development Bank.

¹⁰⁰ Tanner (2002).

development,”¹⁰¹ protecting farmers against reallocation through the formal legal system can assist national economic development. Though it is difficult to know the quantitative effect on labor supply of threatened land reallocation, we do know that comprehensive titling and registration has on average increased labor supply by households in Peru quite substantially.¹⁰²

Encroaching Realities

The thrust of the foregoing discussion is that communal land systems need not be inefficient and therefore automatically in need of conversion to individual ownership. But that conclusion suffers from becoming irrelevant where the forces of economic and population expansion encroach upon communal land. Expansion of cities, new mining and logging ventures, and discovery of oil resources are examples of the kind of economic changes that can undermine communal systems when the changes encroach on the boundaries of communal land. Then property arrangements will have to be modified, and the tactical issue for the country is whether to attempt to safeguard the communal land system or to attempt to adjust to the encroaching reality by a transition to individual freehold ownership. In any event, for countries with substantial indigenous populations, a change in substantive land law is clearly a major economic development decision. Titling is important, but the implementation of a titling program is fraught with administrative, financial, and even human capital issues involving surveys and registration systems. And, as in so many other areas of substantive law, even a successful implementation of a titling program will run into longer-term difficulties if the judiciary does not possess integrity and competence.

¹⁰¹ Deininger et al. (2003).

¹⁰² Field (2004, p. 860-861).

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