In Pursuit of Land Tenure Security is a unique book that takes the reader on an international tour of perceptions of land tenure security. It contains an anthology of essays based on contacts with people during assignments in various parts of the world over a period of several years. The essays describe the human pursuit for a higher level of land tenure security. Because land tenure security is a perception, the use of stories of human experience introduces the reader to an array of issues associated with land tenure, among them controversial approaches to providing land tenure security. In this way the pursuit of land tenure security becomes a captivating story for anyone interested in land related policies, land related studies, and all those who have discovered the importance of protection of the rights to real property by people, all over the world.

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IN PURSUIT OF LAND TENURE SECURITY
For my Grandchildren

to understand
‘Opa Bigster’ a little better.
IN PURSUIT OF LAND TENURE SECURITY

Essays on land reform and land tenure

HENRI A. L. DEKKER
The cover picture shows a landless peasant/squatter working a plot of land together with his wife and their fourteen months old daughter (who the wife proudly took from the sling on her back for the picture). This Zambian family does not hold any formal right to the plot of land. They depend completely on the good-will of other people to eventually succeed in harvesting their crop. The courageousness and the obvious trust they (and many others in the area) showed by risking the seed and putting much work in a plot of land for which they have no formal land tenure security impressed me.

Returning to Zambia a few months later I noticed that the rainy season had failed to deliver sufficient water for a good crop. The stakes of corn on the plot of this squatter - and of all the other squatters around him - were brown and dry and the cobs were shrunken, almost empty and brittle, rustling in the hot summer wind. Over time I heard many stories of people going hungry because of insufficient food being available to squatter families in the year 2005 in Zambia.
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IN PURSUIT OF LAND TENURE SECURITY

Essays on Land Reform and Land Tenure

Henri A.L. Dekker

PREFACE

There are many poor people in the world. Poverty is a persistent problem. Poor people often live in so-called less developed countries and the most poor of them live in rural areas of those countries. Mass media regularly remind us that these people live with continuous livelihood insecurity. If the reminder is part of the other 'news' we hear every day, it might hardly affect us. But, for the people in these poor rural regions, livelihood insecurity is part of daily life. Consulting activities in economics, geodesy, and law carried out mainly in poorer rural areas in the world made me aware of such livelihood insecurity as daily reality, not as a passing news item. Most of my assignments were in projects related to a change in rural land tenure (the ‘how’ of rights to land), linked with a re-distribution of land (the ‘who’ and ‘what’ of land rights: who controls what). And although not always clearly recognized, improvement of the perception of land tenure security is the guiding principle in almost all projects to change the existing land tenure situation. This activity is commonly referred to as land reform.

Some of the areas I worked and lived in were clearly poor. The common expectation expressed both by local governments and international donors is that in rural areas of countries with a low livelihood security a change in land tenure, making the tenure more secure, would lead to higher agricultural production. The higher production would result in less food insecurity and in a possible production surplus to be sold on the market. The higher the agricultural production could be made, the more surplus there would be and thus more income could be made to improve the livelihood security. Such land reform projects are an example of a textbook, desktop-based, livelihood insecurity reduction method.
A reduction in livelihood insecurity was not always the chief aim however. In fact, some of the areas where I worked were not significantly poor. But changes in land tenure were expected to bring benefits there also: primarily economic development. The notion here was that a new appropriate property regime would stimulate transfers in land, giving efficient users of the land an advantage. They would be able to acquire more land, produce more efficiently and this would eventually result in higher values of property, thus being an incentive for local people to further improve the productivity of their property.

A problem with poverty is that it is a relative concept. I remember vividly a discussion my youngest son once had with a fisherman who I initially considered to be a poor person. However, I had to adjust my perception as the reader will notice. It happened on one of the typical sunny mornings on the islands in the Caribbean Sea. Our family was escaping the grey and cold winter climate of our home country during this holiday season by having a vacation. My youngest son and I were taking a stroll along the beach, when we came upon a boat in the sand. A man, obviously the owner or at least the user of the boat, was sitting nearby, enjoying the day, the view, and the sunshine. My son, at that time a boy of just eleven years old, was interested to know what the man was doing. My son asked the man, what he did with the boat, and so I witnessed the following dialogue:

‘Early in the morning, I use this boat to go fishing’ the man explained.
‘Can you catch a lot of fish here?’ my son asked the fisherman.
‘Sure, always enough in about two hours time’ said the fisherman.
‘How much did you catch this morning?’
‘Several fish, but I only keep the largest eight, as usual. Then I come back to the shore, get my boat out of the water, deliver the fish, and I take the rest of the day off, like I am doing now!’
‘What do you mean by that? You only keep the largest eight?’
‘Let me tell you boy,’ the fisherman explained. ‘I need only eight fish each day, so the rest I throw back into the sea. I eat at the most one fish each day, I give seven fish to the little restaurant, you can see over there, and in return, they provide me with my other meals, my shelter, and some money.’
My son looked puzzled. ‘Why do you not catch more fish?’
‘Why should I catch more fish, than the amount of fish I need?’
‘You could sell the extra ones and make some money’
‘Well, to keep them fresh I would have to buy a refrigerator and I would have to find buyers, why should I do that?’
‘If you have some extra money you could save it, and someday you could go on a vacation!’ My son was obviously impressed by the change of scenery and the holiday atmosphere we all experienced on this island.
The fisherman smiled and replied: ‘I don’t need that! This way it is vacation. I have vacation every day!’
It was a special morning for us. An almost perfect picture of ‘enough is sufficient’ in life was painted by that fisherman. He was not poor, but he was wise in a distinct manner. He taught us a valuable lesson; why do people let the desire for money, or a constant drive for more dominate their lives? Use as much as is sufficient to sustain your living, and enjoy the rest of your day!

I have come to see that such an attitude is not only possible on the islands in the Caribbean, where the climate and the abundance of the food of the sea, may let people enjoy life. It is applicable in many more regions around the world.

The other day, my wife and I were invited for dinner at the home of American friends in a typical Mid-Western town. The lady of the house works for a cosmetics firm and when very successful by selling enough of the firm’s products, she will be rewarded with a distinctly pink car. There are several types of cars to be awarded and the utmost achievement is to be rewarded with a Cadillac (in the color pink). In their living room a poster reminded her of this goal. Under a glossy picture of a pink Cadillac it says: ‘Believe and Achieve’.

I can not help comparing this incitement on the poster with the slogan that I often saw in my youth; ‘Ora et Labora’ (‘Pray and Work’) on farmhouses, on barges sailing the river Rheine, and on some individual private homes in rural areas. Do these two different slogans reflect something of an anthropological and sociological concept of life?

According to several contemporary philosophers mankind is approaching a new paradigm in viewing our environment and our world as a whole. A new order dawns at the horizon, one of ‘enough is sufficient’. This is replacing the almost universal human attitude of more and still more that dominated the last century. In this new order we will curb our desire for more and replace it with one of using less. And here I like to stress that ‘use less’ is not the equivalent of ‘useless’ as I believe quite some people think. It rather emphasizes that although perhaps surprising, enough can really be satisfactory enough.

However, more is not always a wrong attitude. More knowledge, more wisdom and the like are noble things to pursue. But ‘more and still more’ turns often ugly if it is about material things and when it is achieved at the expense of others. Unfortunately that is often the case. Even our ‘enough’ can imply less for others and also in that case, it is not contributing to a balanced relationship with the people and the global environment we live in.

In a modern and well developed society freedom of expression, security of person, and participation in the decisions of governments, (the human rights) are expected to be present. They are what a good and civilized society should offer its’ population. It is not only expected, but it is seen as an obligation of governments to provide these basic rights equally for all. Of
course, some governments are oppressive or reluctant to fully provide these rights even in developed modern societies, but with economic development it will be increasingly difficult to withhold the granting or even blunt denial of human rights. Above a certain level of economic achievement, granting and protecting human rights become inevitable. As Galbraith remarked:

(Human rights) are the product, or at least extensively the product, not of original virtue but of inescapable need. Nowhere does economic determinism, the controlling role of economics in human affairs, work more relentlessly and with so little recognition … By its nature, economic advance produces more educated men and women than, as a practical matter, can be kept quiet and excluded from a role in public life. Writers and poets; artists; scientists and engineers; journalists and television commentators; university professors and especially their students; lawyers, physicians and other professionals; industrial managers; labor leaders and self-anointed and aspiring statesmen — all are brought into existence and supported by economic development. They are what economic development both needs and provides. Once present and numerous, they cannot, as a wholly practical matter, be denied voice. Nor can they be excluded from decisions on national affairs. They must be permitted to speak and to participate. This is the only solution; public expression and public participation must be allowed … Repression, as earlier observed, is possible in poor peasant lands and those with little or primitive industrialization. There the daily struggle for survival outweighs the urge for expression, and dictatorship is a practical possibility. With economic development that is the case no longer … Economic development is commonly seen in material terms; it is thought to provide people with the necessities and amenities of life. In reality and more importantly, it provides life itself with some measure of security. The Russia of 1917 was a poor country; being poor, the people could be persuaded to slaughter each other with determination. By 1989 and the months following, Soviet economic progress, however imperfect, had, at least for the time, largely outlawed such behavior and such horror for those at risk. The revolution of the 1980s and 1990s involved almost no loss of life compared to the exceptionally bloody revolution of 1917.

The remaining question is of course: Will such a development lead us as humans on a path toward ‘enough is sufficient’ and a life with some measure of security? Only time will tell. But looking at the reasoning of Galbraith and other scholars it does not seem overly silly to consider that such a society can be within reach for humankind.

Most of the above is unknown to people in rural parts of lesser developed countries who daily struggle with livelihood security. For these people land reform can be their ticket out of a daily perception of insecurity. The insecurity whether they will succeed or not today in providing their family with food, to provide shelter for the children and to take care of the elderly in the community. Nor this insecurity, neither land tenure security,
and likewise food security and economic prosperity, can be measured
directly. Although we use the latter terms as common currency, exchanging
them as if they carry objective, universal meaning, land tenure security, food
security, and economic prosperity are complex subjective experiences.
Without exaggeration it can be stated that the experience of a new land
tenure system (after land reform) and the security it provides is extremely
subjective, and its connection to the level of investment people will make in
the productivity of their property is tenuous and unpredictable at best.

Who will tell what goes on in the mind of the poor? Take the poor
farmer in a war torn country whose sons, father, uncles, and various other
family members might have been killed in a string of civil wars of which he
never even understood the purpose. Look at a peasant whose land has been
ruined by heavy armored vehicles of some soldiers (sometimes referred to as
‘liberators’) or whose harvest has been burned by hostile fire or ruined by
chemical weapons. Take the apartment owner in any town in the former
USSR living in a dilapidated apartment building with missing windows in
the hallway and a filthy smelling main entrance. Or the house owner who
cannot get the right materials to fix a leaking roof or to replace cracked and
stained bathroom equipment. Take the peasant in Poland, for example, who
was uprooted, placed here, then there. Or notice the farmer in Bulgaria who
cannot indicate where the land of his ancestors was located on the land of the
vast collective farm that has been completely re-landscaped for miles and
miles. How will he or she be able to indicate the plot of ancestral land he or
she is entitled to claim? For all these people the pursuit of land tenure
security is an attempt to secure their livelihood, and the improvement of the
productivity of their land is realizing a dream.

Land tenure security means something quite different to these people
than it does to the farmer and the urbanized citizen in the USA, Canada, or
Western Europe whose title to land actually carries quite some weight. So
how, really, do we know whether we are doing any good with land reform
projects? In fact, how can the very people who run and implement these
projects know?

Wars and conflicts about access to land are almost as old as mankind.
They erupted soon after the people began to settle in the fertile valleys of the
rivers on the earth where land became scarce and conflicts broke out about
access to land. This bundle of essays will provide a small contribution to a
better understanding of the difficulties and the problems that accompany, in
very general terms, the centuries old pursuit of land tenure security. At the
same time, however, I like to keep the ‘use less’ is not equal to ‘useless’ in
perspective. Economic growth may be best approached in an ‘enough is
sufficient’ way, rather than in a continuous mode of ‘more and still more.’

Sometimes people ask me why we as land surveyors continue measuring
things and why we as land registration people continue to record data on
land. Indeed we are busy with measuring and re-measuring, we use modern tools to assist us with the measuring like photographic images of the earth’s surface, and remote sensing techniques from air- and spacecraft. On clear days there may be moments that regulation is required to prevent the risk that photogrametric data collection planes might collide in mid-air. It is only thanks to modern technology and computer applications that the registers with data on land do not continue to outgrow our archives anymore. But we still collect enormous amounts of data on land. Why do we humans put so much weight on data on land?

The basic answer on the question is that we live in fear. We ourselves want more and even when we do not want more, we are afraid that others will want more at our expense. Our life is filled with insecurity because of our constant human need for more. As great regulators the governments of states have to collect data on land to curb human impulse for more, with, for example, planning and zoning regulations. All this creates fear that we will become worse off than others. If they want more, we will have less.

Sometimes I like to fantasize a little on the thought conveyed to me by that fisherman in the Caribbean. He obviously was not looking for more security and he did not show any clear fear for his livelihood. He was living a life of ‘enough is sufficient’. Would we as humans in general be able to decrease our fear for loosing out on our competitors, on our neighbors and on others when the world population would engage in sharing? Would we avoid land tenure insecurity if the land would be shared by all people?

The realization of a vision of a world with people for whom enough is sufficient makes the leading theme in this book redundant to study and thus this book useless to read. Until the day a new world order of enough is sufficient becomes a global reality and people stop wanting more at the expense of others, humans will need the re-assurance of land tenure security to protect their claims on rights to land, to protect their possibilities for a secured livelihood. For the land is everything, we live on it, we eat from it, we build shelters with what the land offers us and we enjoy the beauty of the land. Until we learn to share the enjoyment and the accessibility of the land with all people without feelings of wanting land (of course outside our private shelters and small yards; I also do respect privacy) exclusively for ourselves more and still more, land surveyors will see to it that the proper data are stored to proof our rights to extensive land claims. Without the need for more, there would be diminishing land reform and there would be a decrease in reasons to seek land tenure security. Until we acknowledge that we have enough and we do not really need more, land tenure security and the perception of land tenure security will need to be assured by human actions to preserve, to collect, to store and to present data on land.

And with these thoughts this book came into being. As with many authors I have been inspired by books I read and I am sure that I have used
some of what I read mostly in my own words. I have tried to give as much as possible credit to the original authors, but I apologize when sometimes I might have used a thought that cannot be contributed to me. Most important to me during writing have been the issues I came upon during many years of consultancy. I realize that the book contains elements of human envy, of human failure to share resources that should be available for everyone, and of human hope for a better future. That is why it is written with humans in mind, trying to explore what goes on in the human mind when we talk of land tenure security. With this bundle of essays I like to pay tribute to all those people who knowingly and often unknowingly simply appeared in my life or in my field of vision, people I read about, and dear people who shared some of their ideas, time, visions, talents, and experiences with me.
NOTES IN PREFACE

1 The term ‘land’ in this book is used in correspondence with international professional custom as a generic term encompassing all real property.

2 Property rights and land tenure regimes are far too complex to explain in a few sentences. How a land tenure regime operates in practice depends on the types of relationships that evolved over time among the participants. But it is not difficult to guess that ‘What’ is the set of rights in the bundle of rights to land held by an individual or distinctive group of people. The ‘Who’ refers to the individual, the individuals, or the legal entity holding a particular bundle of rights (not necessarily the full bundle) and the set of individuals who are expected to respect those rights as legitimate. The set of people who are expected to respect a property right is also an important ‘who’ question. Colonial powers have rarely fully respected the property rights of the original inhabitants of the areas they wanted to colonize, and even less so, when the property regime of the indigenous people was alien to the concepts of the colonizers. As can be expected, the ‘How’ describes the process used to exercise rights. (See ‘The Invisible Line’ chapter 4 by Henri Dekker published by Ashgate London, in 2003).

3 Both the terms ‘land reform’ and ‘agrarian reform’ are used in literature about improvement of land tenure security, agrarian reform puts specific emphasis on improvement of agricultural production, while land reform is used in a wider scope including all changes in tenure on ‘land’ (and again ‘land’ in the meaning encompassing all real property).

Acknowledgement

*In Pursuit of Land Tenure Security* is a bundle of essays on land reform and land tenure security for which I collected data from various sources and for which I also used my own experience gathered during several assignments during the last decade.

Except for the persons mentioned in the scriptures of the Koran and the Bible, most other people mentioned in the book have, in one way or another crossed my path and I spoke with them or learned about them. But I have not used their proper names, so every resemblance with real people bearing the same names is unintentional and purely coincidental.

Indispensable support, encouragement, and inspiration I owe to my Helen. I also greatly appreciated the assistance with corrections and suggestions for improving the readability of the text by Carole.

Unless otherwise specified or clear from the context, the term ‘land’ in this book is used in correspondence with international professional custom as a generic term encompassing all real property. In this way use of the term ‘land’ is similar to the use of land in ‘land tenure’, ‘land information system’, and ‘land registration (system)’ in which land also is the equivalent of real property.
CHAPTER 1

PERCEPTION OF LAND TENURE SECURITY

1.1 A BOOK ON LAND TENURE SECURITY

Although in this book referred to as chapters, the following chapters have originally been written as essays on various aspects of the human pursuit of land tenure security. What is land tenure security and why is it worth or even necessary to pay specific attention to land tenure security?

In a formal way, land tenure security is the perceived certainty of land tenure. Land tenure is the perceived institutional arrangement of rules, principles, procedures, and practices, whereby a society or community defines control over, access to, management of, exploitation of, and use of means of existence and production. Informally expressed; land tenure is the perceived right to hold land (rather than the simple fact of holding land). Land tenure security thus is the perceived certainty of having rights to land for a certain and well defined period of time. The importance of such a perception becomes clear when one realizes that vast numbers of people on this earth are poor and that among poor people the poorest of them live in rural areas. Generally their only way to survive is to use the land by cultivating it. Their most valuable asset is any certainty of having access to some land for a specific period of time.

For the average Westerner, it is hard to imagine what such day to day poverty means. Living in the United States of America, one hears repeatedly of needy people, but the need of this people is relative richness for the people one meets in lesser-developed countries. In the American society it seems that use less is identical to useless. In daily advertisements on TV, in newspapers, and in magazines, Americans are reminded that truck X has a bigger engine, more torque and horsepower than truck Y, that this car is roomier than the competition, that the pizza from A has more cheese than the pizza of chain B and that this vitamin supplement has more effect than the supplement produced by the competition. Americans are bombarded with advertisements telling them that the more they buy the more they save and that it is best to shop while leaving your checkbook at home. Zero percent down payment, zero percent interest and zero repayment until January next
year is often used to convince Americans they have to buy something now (but hurry offer ends soon!). They even might be persuaded to purchase consumer goods or stuff which they do not need.

Most rural poor people depend for livelihood on access to land. But will they feel certain of access to land? It is impossible to read people’s mind. Thus, finding out the truth about a perception is a factual impossibility. Like happiness, love, sadness and compassion, to name a few well known emotional perceptions, land tenure security is a matter of perception and this cannot be measured directly. However, it is occasionally possible to correctly guess what is going on in someone’s mind. Sometimes scientific methods can be used to improve the correctness of such guesses, but the bottom line is that the human mind can not be contained in systems and will continuously surprise.

In a project focusing on land reform and changes of land tenure it is important to monitor progress of a project success, but if the goal of the project is to improve land tenure security, measuring of the effect cannot be done in a direct way. Indirectly and more generally it is possible to observe the effects of the perceived security of land tenure among the rural population using for example statistical data. A method to do so is developed in ‘Property Regimes in Transition’ (by the author of this book; Henri Dekker). The described method uses macro economic data obtainable from national statistics to monitor progress and success of land reform projects which in turn can be used as indication of a change in the perceived level of land tenure security. But one has to be careful. Because land tenure security as a perception occurs in someone’s mind, one can never be fully certain about the level of its existence. It is similar to observe that someone cries or smiles but this can be crying of joy or smiling sadly.

During my consulting activities I have observed many poor people. As depicted on the cover of this book, I met peasants who were tilling land to which they had neither title nor any right. They only had courage and they hoped (and perhaps prayed) that they would not be chased off the land before they could gather the harvest. I have noted how important it obviously is for poor people to be able to lead a beast round margins and along the ridges of a field or up and down the lanes by children or the aged. I saw people grazing a cow on a rope along roads, and people that were watching and herding a couple of cows, some goats or even a flock of chickens on ‘public’ land. I met these people while herding their beasts in the parks of smaller cities and in forest areas surrounding larger urban areas. I have seen people collecting firewood in those areas (the most notable image in my mind is of young soldiers on a wintry cold day chopping down trees in a city park in a Central Asian capital city and carrying the wood to their barracks to be used for heating), and old women carrying heavy loads of small firewood home.
1.2 HUNGER FOR LAND

‘Population is growing, the World is not. Buy land now!’ this well known line by Mark Twain is a slogan used by some real property agents in the USA. The number of people living on the earth is expected to grow to 8 billion before 2050. Most of the increase of the population will be in the Third World. Land settlement projects may be undertaken to expand the land under cultivation. For this reason deforestation may be necessary. Deforestation however is raising more and more alarm by environmentalists. If the current clearing rates continue large portions of the world’s tropical forests will disappear during the first half of this century. Desertification and deforestation in some areas have reached endemic proportions and it has started to threaten the depletion of topsoil and groundwater resources. It also will have a damaging effect on the natural habitat of endangered species of flora and fauna. It will impair biological diversity and sacrifice yet unknown medical applications of plants for mankind. And the lasting effect on increased agricultural production might be relatively short, because of erosive effects of agricultural activity and new settlements on the soil of the newly acquired lands.

Still, in general, it is believed that the growth in human numbers is not going to take us beyond the carrying capacity of our planet and this is contradictory to what Thomas Malthus predicted in 1798 in ‘An Essay on the Principle of Population.’ According to Malthus, population increases geometrically, that is, in the order of 2, 4, 8, 16, 32 and so on. Food supply however can only be increased arithmetically, as 1, 2, 3, 4, and so on. Population would thus outdistance a nation’s food supply causing famine, diseases and eventually war. Two centuries later research shows that the old Malthusian theory of overpopulation although still strong with some, is not supported by most economists anymore. The earth presently produces almost twice as much food as needed to provide every human being with a basic diet. Of course some measures would be necessary. Livestock herding must be cut back for example, but this is a painful process. Increasing fallow periods and taking land out of production must be considered and agricultural bio-techniques must be used.

A guaranteed, secured right to use land for a long term stated period of time is a fundamental condition for agricultural production. In ‘Asset distribution and access’; Land Tenure Programs, Virginia Lambert and Mitchell Seligson review programs for redistributing and access to farmland to increase agricultural productivity, improve the quality of rural life, and reduce social unrest. This review shows near universal agreement that family-size farms are more efficient than large farms, but that distortions in land markets often prevent land distribution in the direction of optimal
efficiency. They argue that both re-distributive land reform and elimination of market distortions are needed to increase efficiency, both arguments run into opposition from powerful forces within a country. The review also concludes that an effective land tenure program must be crafted no single formula will work at all times. It is argued that knowledge of the existing land tenure structure is a sine qua non for any intervention in this area.

Dorner and Kanel\(^1\) 1971, noted that; ‘Though ideological arguments on the best ways of organizing agriculture continue no land tenure system can be judged best in the abstract. Any judgment concerning a particular system must take note of the institutional and technological conditions in the society and the stage at which that society lies in the transformation from an agrarian into an industrial economy. Judgments must also consider what specific groups and individuals in that society are attempting to accomplish.’ It is important to underline this point. Instead of the general tendency to replace existing deteriorated land registration and land titling systems with different systems, it could be wiser to rehabilitate such systems and let the reestablishment and strengthening of existing institutional arrangements take priority over expansion or transformation of the existing systems. In 1994 Bruce and Migot-Adholla\(^4\) finish their implications in ‘Searching for Land Tenure Security in Africa’ with: ‘We realize too, that perverse policies often have their roots not in misconceptions that can be resolved through research but in the self-interest of individuals and groups. Land tenure is profoundly political, and its control continues to be a critical factor in the development of African politics and economies.’ Although this conclusion is directed towards Africa, I dare say that the warning can be made universal. In countries outside Africa in which I lived and worked a situation as indicated in this conclusion was often easy to observe.

One must realize that a country starting agrarian reform will face difficulties. The motivation for agrarian or land reform can be found in theoretical rationales for interventions in agrarian production systems:

- The negative relationship between farm size and farm productivity. On the supply side it boosts production and provides employment for excess labor. On the demand side it can increase of rural incomes, which stimulates demand for industrial goods.
- The positive relationship between land tenure security and productivity. A person secure of long term access will care more for the land, will work intensively, make capital improvements, and will be a good steward environmentally.
- Land reform can improve political stability as shown by empirical evidence from Latin America.

Are these not pretty good motivations to start the challenging task of land reform?
1.3 LAND REFORM IS NOT NEW

Land reform is neither a new idea nor is it easy to accomplish. Research has shown that land reform dates back at least twenty-six centuries (See for example Tuma). Observations in land reform projects, documents by experts during their assignments and findings by researchers studying the effects of land reform make all crystal clear that large scale land reform is a drastic and almost revolutionary activity with an enormous impact on the daily live of the rural population. It requires careful planning and several additional measures to support land reform projects to make them a success. In no way it can be assumed that land reform takes place over night or by just declaring it via new legislation. Land reform passes power, property, and status from one group in the community to another. Most governments of agricultural societies are dominated or strongly influenced by a landholding group, and that group is going to loose some of its prerogatives. It is hard to believe that these people will embrace land legislation that aims at effectively stripping them of some or even considerable amounts of their assets.

Attempts to improve land tenure security may be old, but current research on the improvement of land tenure is often linked to the development of a market oriented society with private individual ownership rights to property. To include the second chapter in a book ‘In Pursuit of Land Tenure Security’ can be seen as an exaggeration because I go back in history long before the time that there was any conception of a market economy in which large scale trading in goods and assets started to develop and in which the concept of land tenure security became important.

There is some confusion about terms associated with land reform, land tenure and indigenous property regimes that are used in literature and I would like to take away a few grounds for confusion already from the beginning.

Land tenure security has been defined earlier as the perceived certainty of having rights to land for a well defined period of time. In other words: it is the assurance of continuing access to land for a certain period of time. ‘Access to land’ differs from ‘control over land’. Control of land is the command an individual has over a particular piece of land and over the benefits that derive from that land; a right based on a type of recognized possession (customary or formal, temporary or permanent). Access to land means that a person is able to make use of the land, access does not necessarily include ownership or possession, but, usually, does include some decision-making over the production process, the products, and the use of that land.

Another confusing matter presents itself in the terminology used for communal tenure. In the literature such tenure is commonly called
‘customary’ or ‘traditional,’ those terms suggest relatively static institutions, unchanged over time, but one has to realize that communal tenure does evolve, regularly and sometimes rapidly. The term ‘informal’ is often used where rules are unwritten, but it seems incongruous to apply the term to some communal systems that, even though unwritten, are nonetheless quite formal and complex.

‘Communal’ has been used in land tenure literature for a variety of situations: 1) where a resource is used by virtually anyone, better characterized as ‘open access’; 2) the unusual situation where land is utilized collectively, with production actually organized and carried out by a community or descent group; 3) where land is utilized co-extensively and simultaneously or serially by members of a defined group of users and/or owners, as with a grazing commons (the ‘common property’ situation); and 4) where social institutions allocate and reallocate land among households as they consider necessary (John Bruce, 2001). Tenure systems which have some or all of these elements are often described as ‘communal,’ though they may in fact include within them land which is perpetual individual and family property. We need to therefore evaluate carefully assertions about control over land as being ‘communal’ and/or ‘indigenous’.

During lectures on land tenure and related issues, I noticed that Westerners often have a problem understanding the way of tenure in historical times. In early days, proof of tenure was not a real issue. Property relations in old times were relations between persons or between a person and a group. Kinship, membership of a community, position within the community, and, it must be admitted, gender, often determined the extent of access to land and control over land. The proof of holding rights to land by someone lays in the perception and the minds of the people of the community and not in some document or register. It is important to realize that any concept of land tenure has changed over time and it can be difficult to fully detach from the notion that we have nowadays about land and rights to land, making it hard to appreciate how our early ancestors perceived issues of land tenure. With the chapters in this bundle I aim to assist the reader getting a more in-depth understanding of land tenure and its many concepts.

1.4 STRUCTURE OF THE BOOK

All chapters in this book are related to land tenure security. It is the leading theme in this book as explained in paragraph 1.1. Land tenure security is the main thread woven throughout the chapters. And although all chapters refer to land and to rights to land, they have not necessarily much else in common.

In the ‘Preface’ of the book the tone is set for the original essays that
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It appears in the book as chapters. It aims at putting into place the basic fencing for the various stories that appear in the chapters, and underlines the common drive of the different people who moved me to write about land tenure security.

The first chapter - together with the Preface - describes the background and the coming into being of this book. It also clarifies most of the terminology used.

The second chapter: ‘Fields, Access to Land, and Stewardship of Land,’ is putting land tenure security in its historical perspective. It is rather doubtful whether people at the time of the beginning of our calendar had a clear notion of land tenure and land tenure security. These people definitely had different concepts of land and ownership of rights to land than people in modern societies have in our days. The pursuit of land tenure security is generally and typically linked to private individual ownership of rights to land. Security for livelihood was in earlier days primarily provided by the community as can be observed from various historical sources. Nevertheless I situated this essay in the context of a pursuit of land tenure security because I do sense the same desire for security among the people pictured in the biblical stories as present among the many contemporary people in rural areas who I met in the last century in Eastern Europe and Central Asia. The choice to give this essay references to the Koran and to biblical stories is because these can be reread so very easily all over the world. It is however not my intention here to convince anyone of any Koran of Bible value or truth other than referencing to earlier times in which matters related to land tenure were recognized and used in accounts of daily events in their own context.

The third chapter: ‘People in Transition,’ is a combination of stories centered around two different land reform (and legal reform) projects as occurring in our days. Here the central theme is land tenure reform and the way it could have been experienced by someone affected by it in his or her personal life. It is told in a more or less personal way from the vintage point of two different influential persons. In this way I hope to illustrate the matters that happened in their environment as seen with their eyes and I can avoid a dry doctrinal expose on the theoretical merits and possible mishaps of land reform. By using two different personages in two different stories I have tried to give the process of land reform in a former communist country and a land reform project in a developing country an emotional dimension. I have used examples collected by other authors mixing regions and countries and blending them into stories of my liking in a liberal way. I know that in doing so I might have crossed some lines of logic, but I have not done so to confuse the reader, but only to elaborate more freely on the various aspects of land reform and legal reform.

The fourth chapter: ‘Restitution and Distribution of Land’ describes the
actual process of de-collectivization of land. It is a historical document to
give an account of the practice of land reform in former communist countries
during their transition period after the collapse of the communist regime. In
this essay several personal experiences during my consulting activities are
shared with the reader. While trying to describe the process as neutral as
possible examples and experiences from various countries have been mixed
and much will be recognized by those readers who are familiar with land
reform projects and their accompanying projects in former communist
countries. In this chapter attention is drawn to some critiques on
privatization and to the basic fact that scholars believe that privatization is
most likely successful when applied in a well guided and correct way.

The fifth chapter: ‘Rapid Results and Postponed Problems or Thorough
Research and Sustained Solutions?’ wraps up several of the experiences with
land reform projects. It is contemporary in the sense that currently several
research projects look at the possibility to incorporate traditional, communal,
and customary land tenure systems in statutory law. The essay shows that
too rapid actions in land reform without taking sufficient time to explore all
possibilities for solutions can lead to unwanted effects. It points in particular
to the dangers of unexpected side-effects, when it is considered to make the
traditional land tenure the dominant feature in the national legislation. It also
emphasizes that adaptation will take time that it is short sighted to ignore
viable better resolutions for existing problems in land tenure when sufficient
time is granted for research on the subject. The dilemma for introduction of
autochthonous systems of land tenure and the hesitation to introduce with it
less desired effects is illustrated. The chapter concludes with the bottom line
that following an idiosyncratic approach could open the possibility to build a
communal system of land tenure that gives ample room for individual
proprietorship and even marketability of land.

The sixth chapter: ‘Land Tenure Security in a United Europe,’ draws
attention to land tenure security problems that might occur when land
markets increasingly will open up to the citizens of all member states of the
European Union. With the different land tenure regimes in the various
countries confusion on security will be an issue and there might be an
increase in fraud in land transactions because of ignorance and sometimes
limited protection for citizens. This essay explains why title insurance as
practiced in the USA might be a solution to safeguard transactions in rights
to land and to increase the perception of land tenure security with the
citizens in an expanding European Union. The chapter also describes that
title insurance is not a certain threat for existing land registrations in the
European Union.

The seventh chapter: ‘Measures and Land Tenure Security,’ describes
the importance of weighs and measures to ensure fair exchange and trading
in an imperfect world. The anthropometric measures that developed over the
centuries in Europe were the outcome of centuries of protracted negotiations among artisans, peasants, traders, and lords. But the hodge-podge of weighs and measures that evolved could not serve the purpose of trade and exchange in expanding markets outside of original communities. This chapter summarizes the development of the metric system for length, and the failure of introducing metric weighs and measures as national standards all around the world so far. The land registration system in the USA and the relationship between economy and land tenure is surveyed.

The chapter also requests attention for the final decision maker in the process of land registration – the person who has to take the initiative to register. The last paragraph of the book summarizes the pursuit of land tenure security.
NOTES CHAPTER 1


5 See for example Elias Tuma in ‘Twenty-Six Centuries of Agrarian Reform, 1956

CHAPTER 2
FIELDS, LAND, ACCESS TO LAND, AND STEWARDSHIP OF LAND

LAND TENURE IN HISTORICAL PERSPECTIVE

2.1 ECONOMICS AND RIGHTS TO LAND

There are basically two dominant economic ideologies in our time, capitalism and socialism. Capitalism and socialism can be emotionally loaded terms, but they describe best the two dominant ideologies today existing in a society. Often one of them is dominant and it is to be referred to as the dominant ideology, but in reality there is always a mix noticeable in each society. By the way, economists prefer a less emotionally loaded terminology. They refer to the economic systems as being traditional, command, market or mixed. In a traditional economy decisions are made largely on the basis of the way they have been made in the past. Most primitive societies have traditional economies. In a command economy economic decisions are centralized, decisions are made by a central body, a dictator or a government board. In a market economy economic decisions are decentralized. Citizens are left alone to make their own economic decisions. The course of the economy in a typical market economy is determined by the total of all the private economic choices. A mixed economy combines features of the previous mentioned types of economies. Capitalist economic systems are primarily market economies, in which economic decisions are left to private individuals. Socialist economies are command economies, in which a central authority makes the economic choices. Most economies in the world today are a mixture of the latter two and so mixed economies.

The market-place on which capitalist societies depend for the answers to their economic questions is not new, nor are most of the practices, which are today described as being capitalistic. In ancient Egypt, Greece and the Roman Empire such practices were widely known and used. Long before Europe was ‘civilized’ traders in Africa and Asia used markets. But capitalism as known today is largely the result of developments that took
place in the economies of Europe during the passage of that continent out of the Middle Ages and into the current era.

For roughly 800 years (from 800 - 1600 AD) the economies of Europe were dominated by the interrelated systems of feudalism and manorialism. While the two are closely related to each other distinctions can be made between them. Feudalism usually refers to the system of political and military arrangements by which Europe was organized during that time. Manorialism refers primarily to the society's economic arrangements. The specifics of those arrangements, both economic and political, varied from country to country and from century to century. Manorial feudalism in the economy in Europe was based on agriculture. Most of the people worked and lived on the land, and the main product was food. Because of this, the main source of wealth was land. But land meant much more than just economic wealth. Social prestige and political power also went with land. Land, wealth and power were divided up among the members of a relatively small class of people known as the nobility.

Each of the nobles owed allegiance to the noble from whom he or his (it is a typical patriarchal arrangement) ancestor received the manor, and ultimately to the king from whom all power in the kingdom was passed down. This entire manorial structure was held together by bonds of political loyalty and financial responsibility. Each noble had obligations to these above and below him on the scale of wealth and power. The nobles did not work the land themselves. Instead they relied on a larger class of peasants to do that for them. The peasants had virtually no wealth or power. In return for their work on the lands or the services, they received the lord's protection and the right to live on and from the lands.

Under such a system ownership of rights to land had limited economic meaning. People, nobles and peasants alike 'held' their lands and the right to use them more than they owned them. Their rights were passed down from one generation to another and even for the farmers this was true. Until the 18th century communal land tenure prevailed in most Western societies and private property had a marginal status. In the larger manors there were small factories or shops, a blacksmith or weaver or a single family skilled in trade. If more products were produced than could be used in the manor it would be sold. As an economic system manorial feudalism was simple and non-dynamic. It carried on with relatively very little change and very little economic progress. The excess wealth produced was used up in economically unproductive activities, wars, and parties. Especially maintaining an army was expensive and it meant that the economy had to overproduce. So the kings had to make their economies more productive, to produce more goods that could be traded abroad. But in order to make this happen there should be a favorable balance of trade. They tried to promote the import of resources from colonies since those colonies required very
little wealth in return. And they put tariffs on imports to prevent as much as possible import from competing states. This system is called mercantilism. Mercantilist economies were rather command than market systems. The monarch made the decisions and although mercantilism seemed opposite to capitalism, it laid the foundations for capitalism.

Figure 2.1 Map of a manor

Since land was initially hardly transferred from one family to another (the land stayed in the family by inheritance and marriages) there was no land
market and also no real concept among the people of land tenure insecurity. Land tenure security as an issue developed, according to most scholars, around the start of the great transformation with the various revolutions of the end of the 18th century in Western Europe. These revolutions signaled the start of the industrial era and the end of the era of manorialism and feudalism in rural areas in Western Europe with agriculture as the dominant economic factor. As mentioned, before that time private property was a rare phenomenon, communal use of land prevailed. Under a communal system the average rural inhabitant most likely had a perception of security which was much more community based than land tenure oriented. The community provided a sense of social security to its members among others by giving them access to resources claimed by that community, or the lord of the community, for the exclusive use of its members.

The feudal and manorial structures became inconsistent with the development of trade among manors as could be observed in the late Middle Ages and they did not respond to the requirements of changing from an agrarian system to an industrial society. With the start of industrial plants, peasants got new opportunities for earning their living and several started to move from the manor to developing cities around industrial plants where they could find labor and a different social structure. It is interesting to realize how easy several of these rural people left behind the social security offered by the village community, to discover often too late how little livelihood security the new cities could give them in return. The mutual beneficial relationship between the peasant and the landlord was traded in for a new one-sided relationship with the industrialist who often could not care less about the health and the well-being of his workers. The new industrialists had an abundance of workers at their disposal eagerly willing to replace those who did not meet the standards set by the industrial bosses.

The process of industrialization also made another mark on society. The influence of the nobility that owned rights to land decreased and several successful industrialists and highly appreciated workers in the new industries could become owners of rights to land too. The barter economy of manorialism and feudalist time was gradually replaced by an economy based on money and an expanding market. During the last three centuries, private property became the more accepted form of land tenure parallel with the rise of a market oriented capitalist economy. Nowadays capitalist oriented societies recognize private individual ownership of rights to land, including all the possibilities which ownership contains. In modern societies the fact that ‘land can be bought and sold,’ is widely accepted.

But even today there are societies in which (private) ownership of rights to land or long-term exclusive use rights to land are not recognized. The idea that land can be privately and exclusively ‘owned’ is a concept that has evolved over the centuries starting in those societies that were considered as
The ones most developed. In many indigenous land tenure systems nowadays, as well as in communist doctrine - in particular by the writings of Karl Marx\(^2\) - land is seen as too important for human survival to make it the subject of private individual ownership rights.

Land is the key to human existence. It is the source of all material wealth. From it we get everything that we use whether it is food, clothing, fuel or shelter. We need it simply to survive. We live on the land and from the land, and this has been a plain fact for mankind from early times on.

Land, and in particular access to land, is important for human survival. But over time land has increasingly become a source of material wealth and having access to land often resulted in exercising authority. Ownership of rights to land provided humans with power over other people. Numerous wars have been fought to gain such access to land. With the stronger emphasis on the power and authority bringing aspect of rights to land, people started to forget the other responsibilities for land. They forgot about the stewardship that is needed to preserve the life enabling sustainability of the land.

Stories and rules regarding access to land being of such importance for mankind can be found in ancient literature and in the Bible and the Koran. The Bible is a book telling the story of a God who ‘travels’ with his people through life. It contains stories, and most of it was written during a period of centuries before and after the Common Era\(^3\). The Koran is younger and has been compiled 14 centuries ago. Using the Koran and the Bible – well accessible documents for every one who wants to do so in the Western world – in this book has no other meaning than illustrating my text with narratives and instructions used in Koran and Bible. Both books are full of wisdom. The Koran\(^4\) is much more instructive in character than the Bible.

As can be expected, stories in the Bible do also recognize the importance of access to land as a place to work and live. Biblical storytellers were keen to use the dependency on land for human survival in their stories. It is no surprise that when thinking about the relationship between God and humans, the land humans so depend on would get some special attention, because the possibility to use land for planting crops and raising cattle determines the wealth of people. The more land one could – preferably exclusively – use, the more the harvest and the larger the herd. Land has been made an issue from the perception of creation and still today most people experience access to land as valuable and many have emotional ties with land. The first creation story in the book of Genesis – a story underlining that male and female are created equal – tells us how God in his creation sets boundaries to the waters of the chaos. Out of the receding waters of chaos dry land emerged. The second creation story (in Genesis 2) tells of a garden for use and enjoyment of mankind. After giving in to temptation (in Genesis 3), mankind was banned from this ‘Garden of Eden’ and started tilling land...
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outside the garden.

In the Koran (Baqarah or Surah 2) ayât (verses) 35-36 we read:

And We said: O Adam! Dwell you and your wife in the garden and eat from it a plenteous (food) wherever you wish and do not approach this tree, for then you will be of the unjust. But the Shaitan made them both fall from it, and caused them to depart from that (state) in which they were; and We said: Get forth, some of you being the enemies of others, and there is for you in the earth an abode and a provision for a time.

In the Bible a similar event is described in Genesis 3:

...therefore the Lord God sent him forth from the Garden of Eden, to till the ground from which he was taken. (Genesis 3:23)

After giving in to temptation life no longer is the given leisurely enjoyment of the land, but it is labor on the land that is required from humans to survive.

The opening account in Genesis 1 - a poetic narrative of creation that moves from chaos to cosmos - shows us the proper place of human beings. The vast universe and all the other creatures come first, and God sees their goodness apart from any human presence or role (Gen. 1:1-25). This larger context of the universe, in which human beings are finally placed but which is immensely greater than any human sphere of activity or responsibility, is important. In the Bible we are reminded of it often. It is true that human beings are given ‘dominion’ (verse 28) over all the creatures of the earth (not just those in the Garden of Eden, which does appear in another - and older - creation story in chapter 2) and told to ‘subdue it’. The connotation of the word used here in Hebrew can be ‘subdue,’ but it also has a strong element of serving. So while serving the earth, humans have to subdue the earth, meaning that our objective should be to assist the earth in sustaining us by ‘serving’ it in the right way. Being given ‘dominion' does not include killing and eating animals for food, for in the very next verse, 29, only plants with seed and fruit are given to the people to eat. Having dominion and subduing the earth also cannot include being ‘fruitful and multiplying’ at the expense of other creatures, for they also are commanded to be fruitful and multiply (verse 22).

Carol Johnston states that: ‘After the flood in the story of Noah, permission to eat meat is granted (Genesis 8:17, 9:3-5, a permission that is later carefully restricted by the Levitical Code), but the command to all creatures to be ‘fruitful and multiply’ is reaffirmed.’ As a result it should be clear that ‘dominion’ is strongly related with ‘serving the earth’ to describe the human role. At no time can a careful reading construe it as giving human beings license to do as they please with the rest of creation or even with the
sphere they are given ‘to till and to keep.’ Likewise, subduing the earth has more in common with the way God restrains chaos to bring forth an ordered biosphere, than it has in common with contemporary notions of exploitation. The continued use of ‘dominion’ and ‘subduing’ as an excuse for the rampant destruction of species and ecosystems is contradictory to our human vocation.

Very few people nowadays will follow the line of thinking as expressed by Solow, when he writes in ‘Sustainability: An Economist’s Perspective’ in ‘Economics of the Environment’ in 1993:

‘History tells us an important fact, namely that goods and services can be substituted for one another. If you don’t eat one species of fish, you can eat another species of fish. Resources are, to use a word of economists, fungible in a certain sense. They can take the place of each other. This lesson from history is important because it suggests that we do not owe to the future any particular thing. There is no specific object that the goal of sustainability, the obligation of sustainability, requires us to leave untouched. …Sustainability does not require that any particular species of fish or any particular tract of forest be preserved.’

This philosophy certainly is not the common view in our days. It is today globally understood that there are limits to the carrying capacity of our planet and that the fragile balance in nature can provide us in the future with many species of flora and fauna that we do not know yet. Their possible contribution to medicine, research and in general a better understanding of our planet may not get lost by carelessness. So we must be careful not to destroy the sustainability of the earth. Responsible stewardship of the natural environment is a requirement we owe to ourselves and, in particular, to next generations.

There can be no doubt that for the story tellers in the Bible human ‘dominion’ is limited and meant to be imitative of the dominion in the sense of serving as exercised by God. Dominion means caring for both domestic and wild creatures in their appropriate habitats, for the sake of the mutual flourishing of all species. The human vocation of ‘tilling and keeping’ the garden (Genesis 2:15) is also one of imitation of the God who brings forth a multitude of different kinds of creatures who live in healthy ecosystems. Nowhere does the Bible provide any kind of image of trying to expand the ‘garden’, or human habitation, to take over the whole earth and crowd out the habitats of wild creatures. Wilderness not only always remains, it is a sacred (while also frightening) place where people in Biblical stories go to find God (See for example 1 Kings 19: Elijah meeting God in the wilderness, and Luke 4: the temptations of Jesus).

An account of the significance of access to land and the power this brings is given a little further in the Bible. According to the Genesis story, Joseph, sold into Egypt by his brothers to be a slave, ends up in Pharaoh’s
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government, second only to Pharaoh himself. His foresight enables Egypt to prepare for seven years of famine by storing grain. When the famine came, he was able to sell the grain, until no Egyptian had any money left, then he took their livestock, then their cattle, and finally their land:

... All the Egyptians sold their fields, because the famine was severe upon them; and the land became the Pharaoh’s. As for the people, he made slaves of them from one end of Egypt to the other. (Genesis 47:20-21)

This account shows that people without land simply become slaves of the one owning land - in this case the Pharaoh. In rural areas in a dominantly agrarian society most people without sufficient access to land are poor and are often unable to sustain their families. In Egypt, ironically, it was some generations later that the descendents of Joseph’s own family became enslaved there (Exodus 1:8-14), because Israelites had grown numerous and powerful and were perceived as a threat. Consequently, a new Pharaoh, ‘who did not know Joseph’ set out to oppress the Israelites and he said to his people ‘let us deal shrewdly with them or they will increase’ to impoverish them and in the same manner enslave them.

2.2 LAND AND SEA

In the God glorifying creation story as it is told in Genesis 1, it is stated that the very beginning our planet was a formless void and darkness covered the face of the deep (water?). Poetically described it reads: ‘While a wind from God swept over the face of the waters,’ and it’s meaning is that the Spirit of God hovers over the formless void covered in darkness. Then in one of the creation stories is told about how God starts His creative work. After creating light He creates a dome ‘in the midst of the waters’ (Genesis 1:6), to separate the waters under the dome from the waters that were above the dome. This Bible story closely follows the common belief in those days of a three tiered universe. So the creation story tells that creation established a world in three tiers: An upper world (also referred to as the heavens), a middle world on which all life is concentrated, and an underworld. As far as the sea and the dry land are concerned, Genesis 1:9-10 gives the account of God saying:

... ‘Let the waters under the sky be gathered together into one place, and let the dry land appear.’ And it was so. God called the dry land Earth and the waters that were gathered together he called Seas.

Here the sea has got its place to border the dry land. When writing about land it is impossible to ignore the fact that the Creator sets boundaries to the
sea to protect the land. When the Bible mentions ‘the Sea’ as a physical phenomenon, it is always referring to the Mediterranean Sea the only well-known sea to the writers of the Bible stories. But in the Bible stories ‘Sea’ can also have another meaning. In the almost last chapter of the Bible as we know it, the sea is mentioned in a remarkable different way. Revelation 21:1 reads:

Then I saw a new heaven and a new earth; for the first heaven and the first earth had passed away, and the sea was no more.

The use of ‘sea’ in Revelation 21 is metaphorical and here ‘sea’ stands for all that represents chaos and disorder similarly to the formless void as described at the beginning of Creation. The passage in Revelation reveals that God does away with chaos and disorder, in His new order that type of sea does not have a place.

One of the well-know stories in the Bible using the sea in these two meanings is the story of Jonah. In that story Jonah flees from his calling by boarding a ship, which sets out to sail over the sea to Tarshish. While on its journey, very strong winds cause havoc and the ship is in danger. The fear among the sailors is vividly described and at the same time Jonah is fast asleep. Jonah is woken up and urgently asked to pray to his god because of the expected calamity. After casting lots, the lot falls on Jonah and he is finally thrown into the sea and the sea ceases from raging. Now the sea and what is in it turns into its metaphorical mode. Jonah is swallowed by a big fish and in the belly of that fish he prays to his God, confessing that he was doing wrong and Jonah is saved through the waters and after three days and three nights the fish spews Jonah out upon dry land. An interesting implication in this story is the fact that Jonah spent three days and nights in the sea.

A reference to the boundaries set by God between sea and land can be found not only in Genesis but also in Jeremiah 5:22:

I placed the sand as a boundary for the sea, a perpetual barrier that it cannot pass; though the waves toss, they cannot prevail, though they roar, they cannot pass over it.

In more poetical wording Psalm 33:7 says it like this:

He gathered the waters of the sea as in a bottle; he put the deeps in storehouses

The metaphorical meaning of sea as the chaos bringing destruction and fear is underlined in Daniel 7:2-3:

I, Daniel, saw in my vision by night the four winds of heaven stirring up the
great sea, and four great beasts came up out of the sea, different from one another.

We recognize the metaphorical meaning of ‘sea’ in the use of the church as a ship sailing over the seas to rescue people and to bring them back ashore and onto dry land. And does not get the calling of the first disciples by Jesus in Matthew 4:19 a new meaning when he says to them, the fisherman at the sea:

‘Follow me, and I will make you fish for people’?

It certainly underlines that people can not survive at sea and that Jesus assigns his disciples with a special mission: to save people from the ‘chaos’ (the sea, as it is portrayed in the creation story) by bringing them under the covenant of God and humankind.

In the movie ‘Bruce Almighty’, the title character can act like God and in one scene in the movie he walks on water similarly as Jesus walked over the sea as is described in Matthew 14:25. When regarding the sea as the source of destruction and chaos, it is for the Bible writer a matter of course that Jesus can walk over the sea and that he can command the sea to be calm (Matthew 8:24-26). God has power over the chaos of the sea and so has the Son of God. However, I presume that few viewers of the film ‘Bruce Almighty’ will make this connection.

The search for security in livelihood leads to secure land claims to enable humans to grow crops and plant fruits. On the sea demarcation of claims to a particular area is difficult and almost impossible to maintain. On dry land such claims can be made clear by signs, fences or other features that mark the boundaries of the claims. ‘Area (Land) tenure security’ is challenging at sea.

Using sea and land, Revelation 10:2-6 makes the connection between sea and land in the description of the angel with the little scroll:

Setting his right foot on the sea and his left foot on the land, he gave a great shout, like a lion roaring. And when he shouted the seven thunders sounded. And when the seven thunders had sounded, I was about to write, but I heard a voice from heaven saying, ‘Seal up what the seven thunders have said, and do not write it down’. Then the angel whom I saw standing on the sea and the land raised his right hand to heaven and swore by him who lives forever and ever.

In this scripture the angel ‘stands’ on the sea and the land, and in doing so, connects the two. The sea ‘was’ before the dry land. The sea surrounds the land already from the third day of creation, thus approaching the subject of land cannot be done without paying attention to the sea as we did. Let us now return to land.
2.3 STEWARDSHIP

Most people will agree that in terms of stewardship of the earth and the environment, humankind has failed miserably. The idea that the earth and all upon it were for use and exploitation by the people has become deeply established over the centuries. Kenneth Davis\textsuperscript{9} states:

The Judeo-Christian tradition in the Western world gave rise to the concept that people were created separately, after other living things, and were not a part of nature. People were admonished to “be fruitful, and multiply, and replenish the earth, and subdue it.” The idea that the earth and all upon it were for people has become deeply established. Recently, however, the source of authority has shifted from God to the state or “society.” In any case, the notion of the supremacy of human beings has been widely used to justify conquest and exploitation of natural resources as an unquestioned human right.

In the conquest and settlement of the New World from Europe, for example, the urge to “subdue” the wilderness (and necessarily the people already on the land) and to “multiply and be fruitful” was strong indeed and frankly expressed. It is also well to recognize that the word “wilderness” meant land as something to be conquered and taken by European settlers coming to the New World. Likewise, use of terms like “undeveloped” or “developing” to characterize countries or peoples is basically an expression of a Western and relative point of view stemming from the same general concept that people are entitled to and should use land resources to the fullest.

Also of biblical origin is the different and more complex notion of stewardship. This word carries the general meaning of responsibility for continuing and prudent management of something held in trust, as an agent for another, without impairment to what is being managed - and also, it is hoped, with improvement or augmentation. Stewardship also contains the idea of dominion over that which is managed and can include the concept of harmony of opinion and interests, which well describes the goal of good land use.

Authority over land and access to land has been established by conquest, by might, and in Judeo-Christian areas, God has frequently been invoked as the superior authority. Land was regarded as being there to be available for humankind. In this respect Genesis 1 and Genesis 2 present the special vocation of human beings in two ways. It is expressed in Genesis 1:28 as ‘… and fill the earth and subdue it; and have dominion…’ over the creatures of the earth, and in Genesis 2:15 as ‘tilling and keeping’ the garden in which they have been placed. These two origin stories have different implications - suggesting that we are to be enlightened rulers of other creatures on the one hand, and, on the other hand, we are to be careful gardeners – ‘keeping’ - within earth community. Their common theme is that humans are to foster the flourishing of all creatures of earth together. In Psalm 8:4-8 this power of dominion given to humankind is put into poetic wording, while ending with
recognizing the sovereignty of God in Psalm 8:4-9:

What are human beings that You are mindful of them, mortals that You care for them? Yet You have made them a little lower than God, and crowned them with glory and honor. You have given them dominion over the works of Your hands; You have put all things under their feet, all sheep and oxen, and also the beasts of the field, the birds of the air, and the fish of the sea, whatever passes along the paths of the seas.

O Lord our Sovereign, how majestic is your name in all the earth!

The recognition and glorifying of God as the sovereign in this Psalm might have been inspired by the vastness and the wonders of creation as experienced by the poet. Nowadays we only can echo the words of the poet and as Carol Johnston puts it: ‘…looking at the unimaginable span of a universe of billions of galaxies each with billions of stars. Looking up at night we cannot help but be awed at the immensity of it, and our comparative insignificance.’

Nevertheless, the glorifying of a creator has not taught us to be modest in respect to exercising dominion over the earth. On the contrary; we prefer to act like we are only ‘a little lower than God’ as expressed in verse 5 of Psalm 8. In Genesis 13:17 God says to Abram:

Rise up, walk through the length and the breadth of the land, for I will give it to you.

But this does not imply that Abram can exploit the land. When the people are living the covenant life, biblical texts shows them how to learn from nature, how to see their proper sphere in it, and how to appreciate the larger cosmos in which God operates. When they stray from the covenant, the Bible calls them to return to Torah (God’s regulations for life) and return to the vocation of living rightly with each other and the land. The latter is for example made clear in Leviticus. The land that God has given to Abram and his descendents is subject to rules and regulations about the way humans can make use of it. What is more, Leviticus 25 gives the rules for the year of the Jubilee, and in Leviticus 25:23 we are reminded that God is the sovereign Lord of the land:

The land shall not be sold in perpetuity, for the land is mine; with Me you are but aliens and tenants.

The Jubilee year concluded a cycle of sabbatical years. Each seventh year is a sabbatical year and this is marked with cessation of work in field, orchard and vineyard. Exodus 23:10-11 reads:
For six years you shall sow your land and gather in its yield; but the seventh year you shall let it rest and lie fallow, so that the poor of your people may eat; and what they leave the wild animals may eat. You shall do the same with your vineyard, and with your olive orchard.

Farm produce that grows without tilling during the recurrent seventh year is freely available as food for all people and anything not consumed is available for the wild animals. In Deuteronomy the meaning of the sabbatical year is extended beyond agricultural produce. Scholars indicate that this extension is most likely the effect of growing commercial activity and early urbanization. In referring to Leviticus 25:1-7, Deuteronomy 15:1-18 gives clear rules for this extended meaning of the Sabbatical year. Nehemia 10:31 combines the suspension of crops and the cancellation of debts in the seventh year saying:

...and we will forego the crops of the seventh year and the exaction of every debt.

The purpose of marking the seventh year in this way has clearly social roots. It provided for free food for the poor while at the same moment creating time for the land to recover from over-exploitation by yearly harvests and it also prevented in a more commercially tinted era the creation of a permanent class of debtors.

Seven such sabbatical years culminated in the year of the Jubilee. Its appearance in the Jewish laws resembles a similar practice in Mesopotamia of royal emission of debts and obligations and the restoration of property to its lawful owner. The Jubilee year thus concluded a cycle of 7 sabbatical years and it directly followed the seventh sabbatical year. After 49 years the land reverted to its original right holder from whomever had been leasing it. The Jubilee year was considered to be holy and it had the same agricultural implications for the land to remain fallow, even though the previous year it had been fallow – being the seventh sabbatical year - also. It was the year of the release when people returned to their homes and property reverted to its ancestral owner. In all sales of rights to land the price took into consideration the years remaining until an eventual return of the land to its original owner as Leviticus 25:15-16 points out:

When you buy from your neighbor, you shall pay only for the number of years since the jubilee; the seller shall charge you only for the remaining crop years. If the years are more, you shall increase the price and if the years are fewer, you shall diminish the price; for it is a certain number of harvests that you are being sold to.

The text suggests that it is not custom to buy or sell ownership rights to
land, but as verse 16 clearly implies: to buy a number of harvests. The year of the Jubilee underlines the limitation of possessing use rights to land. It is also almost endearing to read how God in Leviticus 25:18-22 sets the mind of his people at ease with this, especially for farming people, seemingly harsh rule of no agricultural activities during the sabbatical and jubilee years:

You shall observe my statutes and faithfully keep my ordinances, so that you may live on the land securely. The land will yield its fruit and you will eat your fill and live on it securely. Should you ask: What shall we eat in the seventh year, if we may not sow or gather in our crop? I will order my blessing for you in the sixth year, so that it will yield a crop for three year. When you sow in the eighth year you will be eating from the old crop; until the ninth year, when its produce comes in, you shall eat the old.

The year of the Jubilee provided a kind of perpetuity of land tenure to a family. A person who had to sell the rights to land could redeem it at any time; should he or she be unable to pay the full redemption price, the land would nevertheless revert to him or her at the year of jubilee.

For other kinds of property, different rules applied. A house within a walled city could only be redeemed during the first year after the sale. If unredeemed it did not revert to the original owner in the year of the jubilee but remained in the possession of the purchaser. And anyone who had to sell him- or herself into bondage due to poverty had to be released in the year of the jubilee. Such a person - a bound laborer - had also the possibility to redeem him-/herself for a price taking into account the time until the jubilee year according to Leviticus 25:39-55.

In the New Testament we find a reference to the year of Jubilee in Luke (called the year of the Lord’s favor) in the story of Jesus in the synagogue at the beginning of his Galilean Ministry. Luke wants to make clear again that the human vocation includes liberating the poor and suffering of the world, and reestablishing right relations with the land and nature in Luke 4:18-19:

The Spirit of the Lord is upon me, because he has anointed me to bring good news to the poor. He has sent me to proclaim release to the captives and recovery of sight to the blind, to let the oppressed go free to proclaim the year of the Lord’s favor.

The legal concept of the Jubilee Year was common in ancient times in the Near East and certainly not an ‘invention’ of Bible writers. The innovation that the Bible brought was to assimilate the concept of a jubilee year into the relationship of God and his chosen people. The year of the Jubilee allows all people to be ‘restored’, having the right to start anew in equality. God allows all people to start their careers afresh. The year of the jubilee forms the source of the perpetual right of Israelites to ancestral land.
In Leviticus 25:23, mentioned earlier, we read that God proclaims the land as His.

Modern societies have lost the sanctification of the year of the Jubilee as well as the sabbatical year. It does not fit in our system of a capitalist economy with privatized individual property rights. But to be honest, the tradition of the year of the Jubilee was felt as too heavy a burden in most of the Middle East countries already in Biblical times and scholars agree that it was almost custom to circumvent the most radical effects of it.

Nevertheless there is a lesson for us today in the year of the Jubilee, and albeit we might not do the same things in the described way, would it not be a worthwhile issue for every society to make a provision for the periodic restoration of just relations among its members when matters get out of balance over time? In rural societies certainly land reform to redistribute equal distribution of land after it has gotten concentrated into a few hands is of central importance. So is periodical fallowness for the land, to restore its fertility and maintain its potential for next generations. Finally, debts are to be forgiven periodically, and forcing members of the community into debt through usurious loans is forbidden; members of the community may not be deprived of their means of livelihood by charging them outrages rents for loans and making them financially dependent.

In agrarian societies people often experience a strong bond with land, although this bond is not always expressed as a strong sense of stewardship. Most rural people want to keep the land in the family. A typical perception of the value of inheriting ownership of rights to land in this respect is depicted in the story about the vineyard of Naboth as told in 1 Kings 21:2-4.

This story is illustrative for the perceived duty an Israelite could have toward ancestral land:

*And Ahab said to Naboth, ‘Give me your vineyard, so that I may have it for a vegetable garden, because it is near my house; I will give you its value in money.’ But Naboth said to Ahab, ‘The Lord forbid that I should give you my inheritance’. Ahab went home resentful and sullen because of what Naboth the Jezre-elite had said to him; for he said, ‘I will not give you my ancestral inheritance.’ He lay down on his bed, turned away his face and would not eat.*

The vineyard was Naboth’s inheritance from his ancestors, the hereditary property of his kin. Naboth therefore had the perception that the vineyard did not belong to him, but to his whole family, past and still to be born. Properly acting, he could not do otherwise than just refuse to sell the right to the vineyard. It could not be sold, neither for money nor in exchange for any other field. With making an offer Ahab came in conflict with ancient custom, the rights exercised by peasants from time immortal. So there is nothing he could do about it for the moment.
2.4 IS LAND TRANSFERABLE?

Several customary property regimes recognize limited transferability of rights to land. As an example I can use the view expressed by an autochthonous Australian.

In 1988, Australia celebrated its bicentennial. But only the imported Australians made it a celebration! Hardly any attention was paid to the original inhabitants of Australia who live already for many centuries on that continent. In an attempt to explain the feelings of these aborigines about the celebration one of them tried to tell how his people felt about rights to land (‘tried’; because Western languages are incapable of really catching all the expressions and concepts which aborigines use to express their relationship with land):

White people are running to churches and praying, while we aboriginal people talk to the land. We talk to the trees, the rocks and the ground. They live, they breathe, how else could there be respiration of trees, growth of seeds put in the ground, if there was no life in land? Land gives us everything we need. Land is our mother and without land we are lost. In return we must be loyal to the land. If white people see land they see dollar signs as well. For us land means no money. Land is priceless; it is more than all the money in the world put together. We are as babies and we need the mother’s breast to be fed on. We can not grow without our mother. We cannot live without the land. White people explore the land and dig into it to find minerals and precious stones. Mining minerals can be compared for us aborigines with pulling the bones out of our bodies. That hurts very much, and how can you stay up straight without the bones of your body? The earth will collapse by unlimited mining.

Such a concept of land and as a consequence the different attitude toward sales and purchases of rights to land is hard to understand for Western people. Western people lost the sanctified bond indigenous people have with land and in a modern society not the land but the government provides (some) livelihood security. In a society where private individual ownership of rights to land is dominant, most of the social functions of land have been marginalized.

Another well-known description of a specific view on land ownership is found in ‘How can one sell the air?’ The manifesto of Indian Chief Seattle of the Duwamish people in 1855 (Native American Books; 1943 on p.1-5):

The Great - and I presume - good White Chief sends us word that he wishes to buy our lands but is willing to allow us enough to live comfortably. We shall consider your offer to buy our land. What is it that the White Man wants to buy my people will ask. It is difficult for us to understand. How can one buy or sell the air, the warmth of the land? That is difficult for us to imagine. If we don’t
own the sweet air and the bubbling water, how can you buy it from us? Each pine tree shining in the sun, each sandy beach, the mist hanging in the dark woods, every space, each humming bee is holy in the thoughts and memory of our people.... We know that the White Man does not understand our way of life. To him, one piece of land is much like the other. He is a stranger coming in the night taking from the land what he needs....' And: 'Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove has been hallowed by some sad or happy event in days long vanished. Even the rocks which seem to be dumb and dead as they swelter in the sun along the silent shore thrill with memories of stirring events connected with the lives of my people, and the very dust upon which you now stand responds more lovingly to their footsteps than to yours because it is rich with the dust of our ancestors, and our bare feet are conscious of the sympathetic touch. (Indian Chief Seattle of the Puget Sound tribes in 1855)

The emotions a contemporary farmer feels about farmland are well depicted by Hector de Crevecoeur in his book ‘Letters from an American Farmer’. As a follow-up Victor Davis Hanson engages himself in 1999 in a renewed attempt to describe the bond of the (American) farmer with the natural world like Hector de Crevecoeur had done before him. But strong sentimental feelings toward land are not only found among farmers. Several non-farmers also show a remarkable emotional attachment to ‘their’ land, and we all might have seen pictures of people kissing the ground when arriving following a long absence far away, or witnessed people taking a handful of soil from ‘home’ when moving to a new residence.

Emotional feelings toward land have resulted in discussions over rights to land. Land surveyors are regularly asked to re-establish the original boundaries between two adjacent properties to settle a dispute. The legal boundary between two properties is an invisible line, is it not? Unfortunately several discords about the extent of a territory between neighboring states have erupted and wars have been fought over access to land and ownership of rights to land. People show a strong tendency to make land their own. They want to exercise private, exclusive ownership rights over land and they show a sense of attachment to the land once it has become their own. The loss of the family farm or the family estate to outsiders is often very negatively experienced and landowners try to find ways to keep the land in the family as long as possible.

In early days the might and power of a god were often evoked to protect rights to land. Any intruder upon the land was threatened by the curse of the favorite god of the owner of rights to that land. The source of authority has shifted from ‘god’ to the state or ‘society’. In our times laws given by government or state have mostly replaced might or power in matters of tenure, but even recent history shows that rights of tenure are no stronger than the power of the sovereignty that grants them. History tells us that in the
conquest and settlement of colonizing states, settlers blatantly considered the newly ‘discovered’ land as being theirs (or at least as that of their government). In an urge to subdue the wilderness (and necessarily removing the people already on the land) this view was frankly exercised.

In American history the supremacy of landowners over tenants is recognizable in the colonial practice of limiting suffrage to property owners and in a constitution that protects the ones with landed property from the property-less majority. Even now, after the suffrage test has disappeared, the property bias persists. Kreuckeberg\textsuperscript{12} argues that survey data reveal a persistent looking down on renters in American society and he pleads for a new fostering of renters as being ‘owners’ too of the American lands.

We take the notion of buying and selling land often too literally. One does not buy or sell land as such. What happens is that only rights to land are bought and sold and although people commonly talk about buying and selling land, and it is custom to talk about ‘my land’, people should realize that neither land in itself can ever be bought or sold, nor are there absolute rights to land to possess. We all have to acknowledge the fact that the government – in this representing us all – will tax the right(s) to land we have. The government can also exercise eminent domain over ‘our’ land, and a responsible government can (and will) limit us in the use of ‘our’ land by for example zoning and planning and increasingly in usage regulations.

2.5 ARE WE TENANTS OR OWNERS?

The sabbatical year, the jubilee year, and the quite clear assignment in Leviticus 25:23 about humans being tenants make us aware of our status as only stewards and not owners of the earth. But this idea of stewardship seems contradictory to the way ‘dominion’ has been understood in most of Christian history, particularly nowadays. And although we have not completely lost the intuitive relationship with land, large-scale urbanization has for many people taken away most of the strong emotional ties with the land. However, it is not only urban people that seem alienated from our call to stewardship to till and keep the earth in order for the land to provide enjoyment to all creatures.

Reading papers and documents, I occasionally come across statements of people making claims about ‘their land’. I remember reading about a female farmer who resisted the idea of having a high voltage power line crossing over ‘her land’ (for which she would be duly compensated). In light of our stewardship for the earth and for one another one can wonder what kind of mentality this is. I can hardly imagine that people really perceive such absolute and exclusive ownership of rights to land. I also read in another publication some farmer’s son describing how he learned to understand his
father’s love for the fields and to see their beauty as fields in their own nature. But I could not follow that farmer’s son when he concludes his story with the sentence that he, like his father, joins a local pressure group. The group was formed to prevent a conversion of some of the former local fields (no longer used for farming because of the agricultural quota and possibly also low prices for some traditional crops) into a golf course. Can we not all enjoy what the land has to offer?

The common theme in Genesis 1 and 2 is that humans are to foster the flourishing of all the creatures of the earth together. Although, these two origin stories have different implications - suggesting that we are to be enlightened rulers of other creatures on the one hand, and, on the other hand, we are to be careful gardeners within earth community. Land is there to be enjoyed by all people and to sustain the whole creation. I always feel that something is wrong when the individual ownership of exclusive rights to land is expressed too dominantly. It does not seem to correspond with the bounty of the earth and the stewardship covenant.

In the New Testament, we find the Christian covenant to be consistent with the Hebraic covenant. In Jesus Christ, God acts once again to reestablish the human vocation, so that as John 3:17 has it, ‘the cosmos might be saved.’

According to John, this is the point of the incarnation, and so he sees the resurrection as the ultimate affirmation of the value of creation.

Paul asserts that human salvation is connected to setting ‘creation free from its bondage to decay’ (Romans 8:21). Paul also shows us how Jesus Christ reestablishes yet again the human vocation, by giving us the ‘ministry of reconciliation’ as ambassadors for Christ in whom God is ‘reconciling the world (cosmos)’ to God self (II Corinthians 5:18-20). And the ultimate image of salvation, the very last image in the Christian scriptures, is that of Revelation 22:2, where the New Jerusalem is established within a restored earth where human communities, God, and nature, are reconciled at last.

God’s relationship with nature, and the human relationship with nature, is definitely a recurring biblical theme of great importance. One crucial theme or important point with respect to nature becomes especially clear. This theme contradicts the view commonly held by twentieth century Christians — that in the Bible, nature is only a stage on which divine history with humans takes place. Again and again throughout the biblical witness, the whole of creation (In Greek, the cosmos) is included not only in God’s sustaining care, but just as much in God’s redemptive work, and ultimately in the salvation God brings.

On September 28 of the year 1855, a ‘Land Purchase’ document is issued. It is a so-called Crown Grant - a paper granting someone an exclusive use right to land by the King or Queen. In this case a right to a piece of suburban land of 8 acres situated in the County of Goulburn in the
Parish of Albany in New South Wales in Australia. The piece of land is precisely described in ink, using natural features as boundaries, and stating the purchase price of seventy pounds sterling. But the most interesting feature of the document is a printed part reading:

To Hold unto (here follows the purchasers name), his Heirs and Assigns for ever, Yielding and Paying therefore Yearly unto Us, Our Heirs and Successors, the Quit-Rent of One Peppercorn for ever, if demanded; Provided nevertheless, And We do hereby reserve Unto Us, Our Heirs and Successors, all such parts and so much of the said Land as may hereafter be required for making Public Ways, Canals, or Railroads, in, over, and through the same, to be set out by Our Governor for the time-being of Our said territory, or some person by him authorised in that respect; And also, all Sand, Clay, Stone, Gravel, and Indigenous Timber, and all other Materials, the natural produce of said Land, which may be required at any time or times hereafter, for the construction and repair of any Public Ways, bridges, Canals, and Railroads, or any Fences, Embankments, Dams, Sewers, or Drains, necessary for the same, together with the right of taking and removing all such Materials; And We do Hereby Further Reserve unto Us, Our Heirs and Successors, the right of full and free ingress, egress, and regress, into, out of, and upon the said Land, for the several purposes aforesaid: In Testimony Whereof, We have caused this our Grant to be Sealed with the Seal of Our Territory.

This long printed sentence appears on the land grant. It is obviously the usual clause in documents of transfer of land in that era. A quit-rent of one peppercorn ‘if demanded’, symbolizes the dependence on the Crown to use the land and to exercise rights to land. No absolute ownership right to land has been acquired. The quit-rent is to underline that (in the case of Australia) the British Crown has the highest authority about rights to land.

Although without an explicit referral to quit-rent, similar dependence situations can be found in most civilized societies. The State or the Crown reserves for itself higher rights to land and can limit private individual rights to land and when this is realized it must influence the perception of absoluteness of rights to land that we might have.

From a different angle there is another dent in the perceived absoluteness of rights to land. Several countries follow a principle of justice in which possession is the root of ownership. Among scholars of English law the expression, ‘Possession is nine/tenths of the law,’ points clearly in that direction. Possession of land – which in it self is immovable – under this principle, leads to ownership as long as the possession is in good faith and has lasted for a reasonable period of time. Under the doctrine of constructive adverse possession in the USA, for example, a claimant may acquire title by adverse possession even though he does not take actual possession of all the land in question. His actual possession of a part of the claimed land adversely affords constructive possession of the remaining area. However,
this doctrine is applicable only if claim to the entire area is made by one who acts in good faith and under ‘color of title.’ That is to say, his claim must be based upon a written instrument that purports to be a conveyance. This instrument must contain a description of the land in question. (A claim of constructive possession fails with respect to land that is in the actual possession of someone else).

In Sweden there is one right that everyone, young and old alike, respects. This is the ‘Allemansrätt’ (everyman’s right), an ancient tradition that is not written in law. It allows everyone passage over any wood or field, regardless of ownership. It not only covers the possibility to walk over fields and through forests, but it also allows passers to gather wild flowers and mushrooms, or even camp, on private property. There are no laws of trespass. This right, which Swedish people treasure, is rarely abused. Those who make use of it are careful not to destroy the natural environment that they have come to appreciate and to share with each other. It is an example of sharing the enjoyment of property by landowners who obviously do not have to fear loss of any rights to the property. Denman (1972 p 27) refers to a similar right in Britain, which he calls ‘Rights to enter upon land vested in members of the public at large.’ He states:

Similar rights are given to the public under the authority of access agreements or access orders authorized by the provisions of the National Parks and Access to the Countryside Act 1949 in Britain. The privileges have universality about them. Such access rights give sanction to a positive act - to enter upon land for recreation and exercise; and also although the area of land over which the rights are exercisable may be very extensive, it is nonetheless identifiable by specific boundaries. Clearly this is so in Britain where the land involved in the terms of the access agreement or order, and in Sweden the allemansrätt is not indiscriminate as it is limited to open land beyond specified distances from buildings.

The Swedish and British examples show that in democratic capitalist societies ‘absolute’ rights to land imply the sharing of the enjoyment of using land. As mentioned before, all former communist countries exercised a form of abolition of private property that only very recently changed after the overthrow of the communist regime. Very soon in almost all former communist countries the trend to abolish private property was reversed. And while it is not always clear what the precise motive is to convert landed property from the government into private hands, all former communist countries implemented a form of land reform to do just that. This land reform activity has often been supported by donor funding and western expatriate experts supporting the view that private individual rights to land will generally lead to higher agricultural production and so boost national economies as well as improving national food security. Scholars have shown
that although a straightforward relationship between land reform and economic development in former communist countries does not evolve automatically, there are grounds to be optimistic, albeit not overly. In fact it is a little sad to be forced to acknowledge that the communist ideology of sharing land by placing it in the hands of the government – representing us all – does not work well. But it is more than naive to expect that in particular a capitalistic approach to property with private individual and absolute ownership rights to land is the best form to sustain the carrying capacity of the earth.

The autochthonous way of using land under a land tenure system that is generally based on communal land, has proven to have a less damaging effect on the environment, while sustaining its ecological balance. Recent research also shows that such land can serve economic development, although perhaps in a slower and less disruptive pace than a radical land reform program introducing western style land tenure for indigenous people. Obviously private individual and exclusive - excluding others from the land - rights to land are not the only way to develop an economy. Looking at Sweden in this respect it is clear that having individual rights to land while at the same time making the land accessible for everyone who wants passage to enjoy nature does not seem to influence the Swedish economy in a negative way.

2.6 BUYING AND SELLING OF (RIGHTS TO) LAND

Returning to biblical times, it is important to realize that Egypt had a highly developed society especially around the Nile delta with its seasonal flooding. It is known, for example, that in Egypt the science of land surveying was well developed as a necessity to return the land to their original users or owners after the periodical floods.

After the floods surveyors were able to re-establish the location of the original fields. Obviously, in this developed society a right giving access to land became already in biblical times a commodity that could be bought and sold. It is doubtful, however, whether or not people in those times had the perception to see land in itself as a commodity to be bought and sold, but there certainly was the option of buying and selling of rights to land in the fertile valley of the Nile where land was a scarce and valuable means of agricultural production.

Nevertheless, in most of the known world in biblical times land tenure was exercised in the form of communal land tenure. Land around a village had a social function and was often distributed among the people living in the village to be used exclusively for a certain period of time to grow crops. They could use a plot of land for planting crops and it was not uncommon
that other locals could use the land for grazing after the harvest. On common grazing fields they could herd their cattle with rules set for the number of animals each of them could herd.

Research shows that most local communities controlled and managed the use of the fields around the village or city in order to distribute it fairly - according to personal needs - among the locals. Thus although local people sometimes could use a plot of land exclusively for some period of time as seen above, they were not owners and they could not sell the land. Land in those societies was seen as having a too important social function to be traded without a certain control by elders or village heads because it sustained the existence of the local people.

From early times on, people have sought ways to prove the transfer of rights to land. The purchasers cannot simply pick up the property and take it home. The seller can still walk over the land and pretend to have rights to it. How does one make clear that a transfer of rights has taken place? It was ancient custom to use witnesses for important transactions and the transfer of land certainly fell in that category. In early times transactions of rights to land were always a ceremonial affair with witnesses present. Sometime later taking off one’s shoe or sandal, or using the roof tile of a house, breaking a branch of a tree on the land, getting a sod from the land and handing this as a symbol, representing the handing over of the rights to the property, became popular. Taking off one’s sandal or shoe to conclude a transaction, and particularly of a transfer of land, was a widespread custom not only in Israel, but also in the whole area in earlier biblical times.

Reference to customs of conveying rights to land can be found throughout the Bible and in laws of that time like the law of Hammurabi, written in cuneiform script in 1750 BCE. One of the legal codes of that law is about acquisition: ‘Thus you shall do every acquisition with witnesses and written consent. If not done so, the transaction is void the obtainer will be punished as a thief, with the death penalty’.

The use of witnesses at important dealings was widespread practice in the ancient world. It is mentioned in the Koran (for example in Baqarah : 282, Nisa : 166, and Talaq : 2) but also on several places in the Bible. An old story that bears evidence of this practice is found in Genesis 23. It tells us of the death of Abraham’s wife, Sarah, and about Abraham’s wish to buy a place in which he could bury her body. Abraham, being a stranger in that land, had to go to a place where the Hittites – the original inhabitants of the country – usually met. In those days enough witnesses could be found around the city gate and here all matters of importance where discussed. So, disputes and transactions were settled near the city gate because there were also always elders present among the people. In the English translation Abraham is called a ‘prince,’ in other translations he is referred to as a rich and noble man. It is commonly accepted that Abraham was wealthy and
prosperous. Genesis 23:4-18 tells about the purchase of land:

$I am a stranger and an alien residing among you; give me property among you for a burial-place, so that I may bury my dead out of my sight.' The Hittites answered Abraham, 'Hear us my lord; you are a mighty prince among us. Bury your dead in the choicest of our burial places; none of us will withhold from you any burial ground for burying your dead.' Abraham rose and bowed to the Hittites, the people of the land. He said to them, 'If you are willing that I should bury the dead out of my sight, hear me and entreat for me Ephron son of Zohar, so that he may give me the cave of Machpelah, which he owns, it is at the end of his field. For the full price let him give it to me in your presence as a possession for a burying place. Now Ephron the Hittite was sitting among the Hittites and Ephron the Hittite answered Abraham in the hearing of the Hittites of all who went in at the gate of his city, 'No my lord; hear me; I give you the field and I give you the cave that is in it; in the presence of my people I give it to you; bury your dead'. Then Abraham bowed down before the people of the land. He said to Ephron in the hearing of the people of the land, 'If you only will listen to me! I will give the price of the field accept it from me so that I may bury my dead there. Ephron answered Abraham; My lord listen to me, a piece of land worth four hundred shekels of silver - what is that between you and me? Bury your dead.' Abraham agreed with Ephron and Abraham weighed out the silver that he had named in the hearing of the Hittites, four hundred shekels according to the weights current among merchants. So the field of Ephron in Machpelah, which was to the east of Mamre, the field with the cave that was in it and all the trees that were in the field throughout its whole area, passed to Abraham as a legal possession in the presence of the Hittites of all who went in at the gate of his city.

Apart from the clear evidence that witnesses were essential – and the frequent reference made to their presence underlines that – there are other interesting notes to be made here. Firstly, it is clear that there can be no misunderstanding about the parcel of land that Abraham acquires. It is described quite meticulously. Secondly, note that Abraham would have been satisfied with only the cave, but that Ephron makes him buy a whole field with the cave at the far end. Ephron clearly would avoid any right of way over his territory he rather sells the right to the whole field. And thirdly, it is noticeable that Ephron refers to his kinsman during the transaction. In doing so his people are committed to the transfer and will recognize Abraham as the legal possessor of the acquired field. Attention is also drawn to the explicitly mentioned fact that every tree on the parcel became the legal possession of Abraham. In those times it was not unusual that, for example, trees and springs were public property. Remainders of that can still be found in Hindu tradition.

Using a physical attribute to prove the transfer of rights to land has also found its way into scriptures. One of the most intriguing accounts of the use
of a shoe or sandal to attest to a transaction of rights to land is given in Deuteronomy with the rules for the levirate marriage. If the brother of a deceased husband is unwilling to perform the rite of the levirate marriage to his sister-in-law, the widowed wife can go to the elders to complain. (Deut. 25:8-10):

If he persists, saying, ‘I have no desire to marry her,’ then his brother’s wife shall go up to him in the presence of the elders, pull his sandal off his foot, spit in his face, and declare; ‘This is what is done to the man who does not build up his brother’s house’. Throughout Israel his family shall be known as ‘The house of him whose sandal was pulled off’.

A sandal- or shoe-less family means in that society; this family is not longer able to acquire land or other important possessions via transactions. The function of the sandal or shoe to claim possession can also be found in the Psalms (60:8 and 108:9) where God says: ‘On Edom I will hurl my shoe’, attesting to the fact that He will make Edom His own.

But it is also highly insulting to keep on one’s shoes or sandals on holy ground (like in a Mosque nowadays) as is told in the story of the burning bush and Moses. In Exodus 3:5 we read:

Then He said: ‘Come no closer! Remove the sandals from your feet, for the place on which you are standing is holy ground.’

A similar story can be found in Joshua 5: 15. It simply comes down to the custom that one cannot keep to one’s sandals after selling land, or keep to one’s sandals on ground claimed as holy ground by the Lord because that means there remains a claim on that land with the person wearing the sandals or shoes.

In later days when reading and writing became more common knowledge, clay tablets or documents would be used to register a transaction. Nevertheless for a long time the use of witnesses remains. An interesting description can be found in Jeremiah 32, 9-15:

... And I bought the field of Anathoth in Benjamin from my cousin Hanamel and weighed out the money to him, seventeen shekels of silver. I signed the deed, sealed it, got witnesses, and weighed the money on scales. Then I took the sealed deed of purchase containing the terms and conditions and the open copy; and I gave the deed of purchase to Baruch son of Neriah, son of Mahseiah, in the presence of my cousin Hanamel, in the presence of the witnesses who signed the deed of purchase, and in the presence of all the Judeans who were sitting in the court of the guard. In their presence I charged Baruch saying: Thus says the Lord of Hosts, the God of Israel: Take these deeds, both this sealed deed of purchase and this open deed, and put them in an earthenware jar, in order that they may last for a long time.
In Pursuit of Land Tenure Security

Jeremiah himself is - at the time of the formal purchase - imprisoned in the court of the guardhouse attached to the royal palace and therefore he has to instruct a friend to take care of the deeds; the sealed and the unsealed copy. The sealed one could be kept sealed at all times - it is the original document, while the unsealed is the ‘open’ copy. If a prospective buyer did not trust the seller, the sealed copy could be brought to the court, in the presence of witnesses the seals were broken and the contents of the sealed copy could be compared with the contents of the ‘open’ copy.

Ever since, many societies use documents to register the ownership of land and today most ‘civilized’ countries offer institutionalized systems of land registration where registration is based on written evidence. But some societies survived very well without any form of written documentation about rights to land.

There is a new trend noticeable in thinking about land tenure among scholars. The notion that only Western style land tenure with its individual private ownership rights to land is able to stimulate economic growth has been challenged by several scholars studying indigenous land tenure systems. It has been found that communal tenure as exercised by indigenous people does not have to impede economic growth, and ironically it is also proven that the establishment of private individual ownership rights to land does not under all circumstances trigger economic growth. Growing respect for indigenous tenure with its less exploitative character is on the rise. There are numerous accounts of the care that indigenous people take of communal lands. It certainly is not true that what is common property is everyone’s property. Most local tenure regimes have strict rules and limitations in place to sustain the life supporting function of the land over the centuries. And these tenure systems have a proven record in that respect. Nowadays researchers promote to maintain communal land tenure where it has been in practice for many years and are even considering to re-establish communal land tenure in areas where recently attempts have been made to convert the tenure system into a more western oriented system of private individual ownership.

2.7 SOME LAND NEAR BETHLEHEM?

The city of Bethlehem – house of bread – in Israel is associated with the birth of Jesus. Luke’s account of the birth of Jesus is the most detailed and it is also the one that people are most familiar with. (Matthew gives a shorter account while the other two evangelists in the Bible, Mark and John, do not give an account of the birth at all). The well-known story of Luke reads (Luke 2:1-5a):
In those days a decree went out from Emperor Augustus that all the world should be registered. This was the first registration and was taken while Quirinius was governor of Syria. All went to their own towns to be registered. Joseph also went from the town of Nazareth in Galilee to Judea, to the city of David called Bethlehem, because he was a descendent from the house and family of David. He went to be registered with Mary.

This situates the birth of Jesus around Bethlehem. Bethlehem is also referred to as the city of David. Already in the days of Jesus, Bethlehem could be considered to be a suburb of Jerusalem and it is believed that the shepherds in Luke’s story were watching over sheep in a very careful fashion. These sheep were to be sold at the temple as sacrificial animals and thus they had to be healthy and without any wounds or other defects, thus the (careful) watch of the shepherds.

Luke gives an extensive account of the birth. He focuses in his story on Mary. As mentioned, the only other evangelist who refers to the birth of Jesus is Matthew and his focus is mainly on Joseph. Matthew is much more concise in his telling than Luke. Following Luke (Luke 2), one might wonder why Jesus’ family had to travel from Nazareth to Bethlehem. In Luke it is said that Joseph went to Bethlehem together with Mary to register.

For many people the story and circumstances as told about the birth of Jesus, have little connection with land registration and land tax, and indeed a lot of Bible translations all over the world do not clarify this relationship. Nevertheless if we really want to understand the story of the birth of Jesus, the land tax has to get its place in it.

In most Bible translations the birth of Jesus is set into a story giving an account of an intended census to take place. A census required by the Romans to have a reliable count of the inhabitants of one of their conquered provinces, and that is the way most Bible readers interpret this story: A Roman intruder implying a census on the inhabitants of a part of the Roman Empire. The word census is translated from the Greek word ‘apographe’: ‘an enrolment in the public records of persons together with their property and income’, that has much more to do with taxation than with only a census. Just imagine what really was going on. The Bible describes a scene in which thousands of people were on the move to travel to the cities of their ancestors in order to be registered. The Bible story reveals that in Bethlehem there were many people – Bethlehem was busy with travelers; ...there was no place for them in the inn (Luke 2:7b) – as a result of the registration decree. This does not seem the logical way to conduct a reliable census. Bear also in mind that most of the Jews had hostile feelings against everything that had to do with the Roman conqueror. Why should the Romans do an obviously silly thing like that? Were they interested in the number of inhabitants and if so for what reason? Most oppressed people are not cooperative with an
oppressor. How could the Romans rely on a census to be organized among people with in general a hostile attitude towards them? To do a thing like that is providing the Jews with a mighty tool to sabotage the whole registration. It is naive to think that the Romans were so ignorant. To let people travel from their hometown, where every neighbor would know them to a foreign town, a place where they hardly could find sufficient shelter, because nobody knows them, is like giving the Jews an invitation to cheat with a census. How can the Romans be sure that the Jew under interrogation about his name and family is not one of the Jews they saw before? There is no neighbor who can confirm the stories told by all these Jews on the move! Besides, what use has a number of oppressed people to the Romans when that number varied from day to day by birth, death and oppression, not in the least because the Romans were, as history shows, rather easy with executing people? It does not make sense.

And, another thing, why should Jews start traveling anyway from their homes? It is hard to think that Joseph left his hometown and his carpenter shop to travel to Bethlehem in order to please a Roman conqueror. His first question might have been: ‘Who is going to pay me for my loss of income?’ And why should he take a pregnant wife with him all the way to Bethlehem on a far from safe journey?

If one thinks about that, it is hard to believe that the Romans could get thousands of people to travel just to allow them a census that in any way was linked to the Jewish ancestors. What was the significance of a Jewish ancestor anyway to the Romans? Even many Jews would have difficulties in tracing their own ancestors after the several deportations of Jews from their home country that had occurred in the Jewish lands, and the mixing with foreign people of their ancestors when in exile for many years, before the Romans came to Judea.

If the Romans wanted a proper census then they would have asked the people to stay at home in order to ask neighbors to confirm the census results. It is almost without doubt that in the hometown social control would have been quite strict in those days. It is really hard to believe that the Romans should have been so interested in the descendents of the Jews to order them to travel to the towns of their ancestors. And even so, how far should one go back in ancestors?

No, the obvious reason for Joseph to take his pregnant wife Mary on a difficult and dangerous trip from Nazareth to Bethlehem was different. The Roman Empire needed funds to maintain a mighty army. A simple way of levying taxes of subjected people was to tax their lands to which they held claims. Joseph as a descendent of David was heir to land - family property - in Bethlehem, the town of his forefathers. Land in those days was not a commercial commodity and people tended to preserve the right to the land, while it might have been used by others - perhaps even not of the same
kinship - if they had to move away from the land of their ancestors for some reason.

From many sources we know that land tax was not new in the ‘old world’. In ancient Egypt and in Mesopotamia, land tax was even common before the invention of money. It was collected as part of the harvest as we know from the bible story of Joseph, the first one under the king of Egypt. He was responsible for the collection and re-distribution of grain. So in Egypt a land tax collectors office always had a big shed for the collection of the collected tax in the form of ‘confiscated’ crops. And although land tax was not unknown in the area, it can be doubted that land tax was levied in the region occupied by the Jews in the time of Jesus’ birth. And so, everyone living in Jewish territory occupied by the Romans and having a claim to land was obliged to register this claim in order to protect that claim. In doing so the claimant could at the same time be registered as taxpayer.

To prevent the Romans from making mistakes by setting up the land registration, and to avoid a too high taxation to be paid, Joseph closed his shop for some time and spent time and money on a trip to Bethlehem. He wanted to be present once the Romans started the collection of land data in Bethlehem. It is hard to believe that Joseph was eager to pay land tax, but he wanted to protect his interest and the interest of his unborn child. As descendants they had a claim on some land near David’s city Bethlehem and Joseph wanted that claim to be registered during the establishment of the first Cadastre in the land of the Jews. Joseph traveled to Bethlehem as soon as he heard that the registration in Bethlehem was about to begin and the collection of land claims would take place. That was the reason he traveled to this town of his ancestors. As a practical measure Mary traveled with him, because, was an heir born during the registration period, this heir could be registered as well linking the ancestral land to his or her name.

2.8 RETURNING TO BETHLEHEM

King David is the son of Jesse, and he was born and lived in Bethlehem. The account of Jesse being a Bethlehemite (1 Samuel 16:1), has a reference in the book of Ruth. The book of Ruth also tells another story about a field near Bethlehem.

The characters in the book of Ruth are commonly approached with much emphasis on the well-known sentence Ruth uses to persuade her mother-in-law Naomi to take Ruth with her back to Bethlehem, when Ruth proclaims: ‘...your people shall be my people, and your God my God’ (Ruth 1:16). These words have made her a Moabitess a paradigmatic proselyte to Judaism. The role of Ruth in this respect is even further underlined when after Ruth gives birth to a son, the women of Bethlehem tell Naomi (Ruth
4:14-15):  

_Blessed be the Lord who has not left you this day without next-of-kin; and may his name be renowned in Israel! He shall be to you a restorer of life and a nourisher of your old age; for your daughter-in-law who loves you, who is more to you than seven sons, has borne him._

How is it that the story of Naomi and Ruth is linked to Bethlehem? Let me recall the first chapter of the book of Ruth here (Ruth 1):

_In the days when the judges ruled, there was a famine in the land, and a certain man of Bethlehem in Judah went to live in the country of Moab, he and his wife and two Sons. The name of the man was Elimelech the name of his wife Naomi, and the names of his two sons were Mahlon and Chilion; they were Ephrathites from Bethlehem in Judah. They went into the country of Moab and remained here. But Elimelech the husband of Naomi, died, and she was left with her two Sons. These took Moabite wives; the name of the one was Orpah and the name of the other Ruth. When they had lived there about ten years both Mahlon and Chilion died, so that the woman was left without her sons and her husband. Then she started to return with daughters-in-law from the country of Moab, for she had heard in the country of Moab that the Lord had considered his people and given them food. So she set out from the place she had been living, she and her daughters-in-law, and they went their way to go back to the land of Judah. But Naomi said to her two daughters-in-law, ‘Go back each of you to your mother’s house. May the Lord deal kindly with you, as you have with the dead and with me. The Lord grant that you may find security, each of you in the house of your husband.’ Then she kissed them, and they wept aloud. They said to her, ‘No, we will return with you to your people.’ But Naomi said; turn back, my daughters, why will you go with me? Do I still have sons in my womb that may become your husbands? Turn back, my daughters, go your way for I am too old to have a husband. Even if I thought there was hope for me, even if I should have a husband tonight and bear sons, would you then wait until they were grown? Would you then refrain from marrying? No, my daughters, it has been far more bitter for me than for you, because the hand of the Lord has turned against me.’ Then they wept aloud again. Orpah kissed her mother-in-law, but Ruth clung to her. So she said. ‘See, your sister-in-law has gone back to her people and to her gods: return after your sister-in-law.’ But Ruth said; ‘Do not press me to leave you or to turn back from following you. Where you go, I will go; where you lodge, I will lodge; your people shall be my people, and your God my God. Where you die, I will die - there will I be buried. May the Lord do thus and so to me and more as well, if even death parts me from you. When Naomi saw that she was determined to go with her, she said no more to her. So the two of them went on until they came to Bethlehem. When they came to Bethlehem, the whole town was stirred because of them; and the women said, ‘Is this Naomi?’ She said to them, ‘Call me no longer Naomi, call me Mara, for the Almighty has dealt bitterly with me. I went away full, but the Lord has
brought me back empty; why call me Naomi when the Lord, has dealt harshly with me and the Almighty has brought calamity upon me? 

So Naomi returned together with Ruth the Moabite her daughter-in-law, who came back with her from the country of Moab. They came to Bethlehem at the beginning of the barley harvest.

Moab and Israel maintained a relationship that can be characterized as a constant animosity; sometimes almost a war like relationship and in other times a type of a tolerating co-existence. So a marriage between Israelites and Moabites was at least regarded as unusual, and the marriage of the two Moabites with sons of Elimelech will not have been welcomed by their own Moabite families.

Upon marrying, a woman typically left her family and became part of her husband’s family (the loss of the daughter was compensated by the dowry). She assumed all the rights and responsibilities of a daughter and therefore was prohibited by Israelite law from later marrying her father-in-law. After becoming a widow, a daughter-in-law was always in a difficult position. Although, returning to her own family was an option, the fact that she had been part of the family of her ‘in-laws’ made such a return an unwelcome burden on her original family, because she could claim subsistence at the expense of the other family members. So Orpah’s decision to return to her own Moabite family was a courageous act. Ruth’s adherence to Naomi’s descent with the well-known sentence of devotion can also be seen as a desperate act of someone avoiding a confrontation with a family where she would almost certainly face a hostile welcome, more hostile than usual, after her marriage with an Israelite – not a specific friend of Moabites.

Naomi as the widow of Elimelech, has access to land in Israel because of inheritance rights. Elimelech left Israel, but that did not make his rights to land in his birth town in Israel void. Going back to Bethlehem is an act to secure her livelihood by the fact that she is secure in tenure of land. Going back means pursuing her right to land tenure security. As a result of Ruth’s adherence to her mother-in-law, Naomi is not alone when returning. Her daughter-in-law accompanies her to her homeland. It is not clear if Naomi did welcome this development. She might have felt burdened by Ruth presence even if she also might have enjoyed some company. Naomi’s words in Ruth 1: 20-21 most likely uttered with Ruth present or at least close by, strengthen the impression that Naomi is not all too happy with the company of Ruth:

‘Call me no longer Naomi, call me Mara, for the Almighty has dealt bitterly with me. I went away full, but the Lord has brought me back empty; why call me Naomi when the Lord has dealt harshly with me and the Almighty has brought calamity upon me?’
These are not the remarks one would expect of a loving mother-in-law in the presence of her daughter-in-law as the only surviving member of her family. Closely looking at this text it seems that Naomi sees the fact that Ruth is with her as a burden when she describes her situation as ‘the Almighty has brought calamity on me.’ This confirms the view that Naomi is not too pleased with Ruth her daughter-in-law who left her homeland and came with her to Bethlehem.

2.9 PART OF A FIELD NEAR BETHLEHEM BELONGING TO BOAZ

We will never know what Ruth thought of that remark of her mother-in-law. It certainly did not cause her to leave her mother-in-law and the relative livelihood security it gave her. She also shows initiative to start taking care of herself but not without seeking the approval of Naomi, because we read in Ruth 2:2-3:

\[
\text{And Ruth, the Moabite said to Naomi, ‘Let me go to the field and glean among the ears of grain, behind someone in whose sight I may find favor.’ She said to her, ‘Go my daughter.’ So she went. She came and gleaned in the field behind the reapers....}
\]

The continuation of the story in the book of Ruth shows that Ruth with her initiative to start gleaning has the intention to take care also for her mother-in-law, perhaps in an act to win her favor, but certainly she gains the respect of the community and in particular of Boaz, as can be noticed from the following texts (Ruth 2:3-7):

\[
\text{As it happened, she came to the part of the field belonging to Boaz, who was of the family of Elimelech. Just then Boaz came from Bethlehem. He said to the reapers, ‘The Lord be with you.’ They answered, ‘The Lord bless you.’ Then Boaz said to his servant who was in charge of the reapers, ‘To whom does this young woman belong?’ The servant who was in charge of the reapers answered ‘She is the Moabite who came back with Naomi from the country of Moab.’ She said, ‘Please, let me glean and gather among the sheaves behind the reapers. So she came and she has been on her feet from early this morning until now, without resting even for a moment.’}
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In verse 3 an interesting side-remark must be made. Ruth ‘came to the part of the field belonging to Boaz’. Thus the field (owned by the local community?) was partitioned and Boaz possessed a part of that field. This remark of the storyteller might indicate that the fields around Bethlehem were communal fields and that parts of it were given in exclusive use to
various members of the community.

The story of Ruth gleaning in the field of Boaz unfolds further into a romantic tale (Ruth 2:8-23):

Then Boaz said to Ruth, ‘Now listen, my daughter, do not go to glean in another field or leave this one, but keep close to my young women. Keep your eyes on the field that is being reaped, and follow behind them. I have ordered the young men, not to bother you. If you get thirsty go to the vessels and drink from what the young men have drawn.’ Then she fell prostrate, with her face to the ground, and said to him; ‘Why have I found favor in your sight that you should take notice of me, when I am a foreigner?’ But Boaz answered her, ‘All that you have done for your mother-in-law since the death of your husband has been fully told me, and how you left your father and mother and your native land and came to a people that you did not know before. May the Lord reward you for your deeds, and may you have a full reward from the Lord, the God of Israel, under whose wings you have come for refuge!’ Then she said: ‘May I continue to find favor in your sight, my lord, for you have comforted me and spoken kindly to your servant even though I am not one of your servants.’

At mealtime Boaz said to her ‘Come here, and eat some of this bread and dip your morsel in the sour wine.’ So she sat beside the reapers and he heaped up for her some parched grain. She ate until she was satisfied and she had some left over. When she got up to glean Boaz instructed his young men, ‘Let her glean even among the standing sheaves, and do not reproach her. You must also pull out some handfuls for her from the bundles and leave them for her to glean, and do not rebuke her.’

So she gleaned in the field until evening. Then she beat out what she had gleaned, and it was about an ephah of barley. She picked it up and came into the town and her mother-in-law saw how much she had gleaned. Then she took out and gave her what was left over after she herself had been satisfied. Her mother-in-law said to her, ‘Where did you glean today? And where have you worked? Blessed the man who took notice of you.’ So she told her mother-in-law with whom she had worked, and said, ‘The name of the man with whom I worked today is Boaz.’ Then Naomi said to her daughter-in-law, ‘Blessed be he by the Lord, whose kindness has not forsaken the living or the dead.’ Naomi also said to her, ‘The man is a relative of ours, one of our nearest kin’. Then Ruth the Moabite said; He even said to me, ‘Stay close by my servants, until they have finished all my harvest.’ Naomi said to Ruth her daughter-in-law ‘It is better, my daughter, that you go out with his young women, otherwise you might be bothered in another field.’ So she stayed close to the young women of Boaz, gleaning until the end of the barley and wheat harvests; and she lived with her mother-in-law.

It is interesting to notice how Naomi’s protection for Ruth appears in this part of the story. Self-interest will certainly have played a role in this attitude because Naomi herself does not participate in the labor of gleaning. We can only guess why not, but perhaps she was unable or too old to perform the hard labor in the fields.
In Ruth 2:11, Boaz refers to the gossip going around in Bethlehem, when he lets Ruth know that he has heard about her and Naomi. Most likely he also has heard that Naomi is not able to join Ruth in gleaning and he instructs his men to let Ruth glean unusually much of the harvest to take care of Naomi as well.

And in Ruth 3 we discover that it is not only protection but also an almost ironical muddling of Naomi into Ruth’s life and future (Ruth 3):

Naomi, her mother-in-law, said to her; ‘My daughter, I need to seek some security for you, so that it may be well with you. Now here is our kinsman Boaz, with whose young women you have been working. See, he is winnowing barley tonight at the threshing floor. Now wash and anoint yourself, and put on your best clothes and go down to the threshing floor; but do not make yourself known to the man until he has finished eating and drinking. When he lies down, observe the place where he lies; then, go and uncover his feet and lie down; and he will tell you what to do.’ She said to her, ‘All that you tell me I will do.’

So she went down to the threshing floor and did just as her mother-in-law had instructed her. When Boaz had eaten and drunk, and he was in a contented mood, he went to lie down at the end of the heap of grain. Then she came stealthily and uncovered his feet, and lay down. At midnight the man was startled, and turned over, and there, lying at his feet, was a woman! He said, ‘Who are you?’ And she answered, ‘I am Ruth, your servant; spread your cloak over your servant, for you are next-of-kin.’ He said, ‘May you be blessed by the Lord, my daughter; this last instance of your loyalty is better than the first; you have not gone after young men, whether poor or rich. And now my daughter, do not be afraid. I will do for you all that you ask, for all the assembly of my people know that you are a worthy woman. But now, though it is true I am a near kinsman, there is another kinsman more closely related than I. Remain this night, and in the morning, if he will act as next-of-kin for you, good; let him do it. If he is not willing to act as next-of-kin for you, then, as the Lord lives, I will act as next-of-kin for you. Lie down until the morning.’

So she lay at his feet until morning, but got up before one person could recognize another; for he said, ‘It must not be known that the woman came to the threshing floor.’ Then he said; ‘Bring the cloak you are wearing and hold it out.’ So she held it, and he measured out six measures of barley, and put it on her back; then he went into the city. She came to her mother-in-law, who said, ‘How did things go with you, my daughter?’ Then she told her all that the man had done for her, saying; ‘He gave me these six measures of barley, for he said; ‘Do not go back to your mother-in-law empty-handed.’ She replied, ‘Wait, my daughter, until you learn how the matter turns out, for the man will not rest, but will settle the matter today.’

It is obvious that Ruth is not familiar with the customs in Israel and that Naomi has to guide her daughter-in-law in these matters.
2.10 PURCHASING A PARCEL OF LAND NEAR BETHLEHEM

Naomi trusts Boaz in so far that he will take it from here, by doing something about the situation. As the returned widow of Elimelech, Naomi counts on the community to provide her with some means to live in Bethlehem. But, the initiative is clearly with Boaz presumably, according to custom. It is remarkable that all the decisions are being made with profound consequences for Ruth and that apparently she is not having a voice in this. The sequel of the story does not show any active role for Naomi as well, as we read in Ruth 4: 1-12:

No sooner had Boaz gone up to the gate and sat down there than the next of kin, of whom Boaz had spoken, came passing by. So Boaz said, ‘Come over friend; sit down here.’ And he went over and sat down. Then Boaz took ten men of the elders of the city, and said, ‘Sit down here;’ so they sat down. He then said to the next-of-kin ‘Naomi who has come back from the country of Moab, is selling the parcel of land that belonged to our kinsman Elimelech. So I thought I would tell you of it, and say: Buy it in the presence of those sitting here, and the presence of the elders of my people. If you will redeem it, redeem it; but if you will not, tell me, so that I may know; for there is no one prior to you to redeem it, and I come after you.’ So he said ‘I will redeem it.’

Then Boaz said, ‘The day you acquire the field from the hand of Naomi, you are also acquiring Ruth the Moabite, the widow of the dead man, to maintain the dead man’s name on his inheritance,’ At this, the next-of-kin said, ‘I cannot redeem it for myself without damaging my own inheritance. Take my right of redemption yourself, for I cannot redeem it.’

Now this was the custom in former times in Israel concerning redeeming and exchanging; to confirm a transaction, the one took of a sandal and gave it to the other; this was the manner of attesting in Israel. So when the next-of-kin said to Boaz, ‘Acquire it for yourself,’ he took off his sandal. Then Boaz said to the elders and all the people. ‘Today you are witnesses that I have acquired from the hand of Naomi all that belonged to Elimelech and all that belonged to Chilion and Mahlon. I have also acquired Ruth the Moabite, the wife of Mahlon, to be my wife, to maintain the dead man’s name on his inheritance, in order that the name of the dead may not be cut off from his kindred and from the gate of his native place; today you are witnesses. ’ Then all the people who were at the gate, along with the elders, said. ‘We are witnesses. May the Lord make the woman who is coming into your house like Rachel and Leah who together built up the house of Israel. May you produce children in Ephrathah and bestow a name in Bethlehem; and, through the children that the Lord will give you by this young woman, may your house be like the house of Perez, whom Tamar bore to Judah.’

Land is involved in the acquisition by Boaz because of the fact that the seller took of his sandal. Ironically, he remains a nameless kinsman of
Naomi, because he does not want to redeem, thus he obviously is not worthy to carry on a name in Israel, and he is referred to only as ‘friend.’ To maintain the name of a deceased man on his inheritance biblical scholars explain the custom of the so-called levirate marriage (an obligation of a next of kin to marry a childless widow). Thus a widow can request her brother in law to marry her, in order to give birth to an heir. It is very important that awaiting the coming of the Messiah, your name in Israel does not get lost and this fact is emphasized here. (Among many indigenous people the levirate custom had very practical implications and it is most likely that in Israel such practical implications played an important role as well). We also learn from the above text that Boaz acquires all the belongings of Elimelech, including a parcel of land. That nor Ruth, neither Naomi are playing an active role in this whole matter is surprising because in Israel females were certainly not without voice in matters of marriage. Speaking of orphaned daughters, Numbers 36: 6-7 states:

... Let them marry whom they think best; only it must be into the clan of their father’s tribe that they are married, so that no inheritance of the Israelites shall be transferred from one tribe to another...

Scholars assume that under Israelite law a daughter also can inherit land and inherit possessions of her father if there are no sons and this is based on the text in Numbers 36:6-7.

In the book of Ruth an interesting matter of lineage comes up, and not only in Ruth, but also in the genealogy of Jesus as given by Matthew (Math 1). In the account of the ancestry of Jesus in Matthew, apart from Mary as the wife Joseph, only three other females are mentioned. Together with Rahab, Tamar and Ruth are the only females next to over 40 males appearing in the lineage list of Jesus. Even more remarkable is that all three women are non-Israelites. Tamar was a Canaanite and Rahab - although still debated - is also presumed to be a Canaanite (In the lineage of Jesus as given by Luke (Luke 3:23-38) no women are mentioned).

At the end of the book of Ruth a reference to Jesus’ lineage is made (Ruth 4:13-20) when the son of Boaz and Ruth is placed in this lineage:

So Boaz took Ruth and she became his wife, when they came together, the Lord made her conceive, and she bore a son. Then the women said to Naomi, ‘Blessed be the Lord who has not left you this day without next-of-kin; and may his name be renowned in Israel! He shall be to you a restorer of life and a nourisher or your old age; for your daughter-in-law who loves you, who is more to you than seven sons, has borne him’. Then Naomi took the child and laid him in her bosom, and became his nurse. The women of the neighborhood gave him a name saying, ‘A son has been born to Naomi.’ They named him Obed; he became the father of Jesse, the father of David.
Now these are the descendents of Perez: Perez became the father of Hezron, Hezron of Ram. Ram of Amminadab, Amminadab of Nahshon, Nahshon of Salmon, Salmon of Boaz, Boaz of Obed, Obed of Jesse, and Jesse of David.

The ‘happy end’ of the Ruth story culminates when this son of Ruth is set in the lineage of Israel’s kings as grandfather of David. Scholars still debate if the story in the book of Ruth is preserved to establish the family tree of David or if it is a reminder of God’s mercy extending to everyone, also non-Israelites. The assertion that King David descended from a Moabitess - a non-Israelite - has been interpreted as aimed against the exclusive thinking of Ezra and Nehemiah, who insisted that the Jews of their time annul their marriages to women from Moab and the other nations listed in Deuteronomy 7:1; 23:3-8 (See Ezra 9:10-11; Nehemia 13:1-3). For ‘gentiles’ it contains the strong message that the God of Israel extends His love outside the Jews and that every person can share in His love and liberation.

2.11 JUST A FIELD NEAR BETHLEHEM IN JUDEA?

The stories of Joseph and of Naomi have an interesting similarity with respect to land tenure security and the perpetuity of rights to land in earlier days. Joseph undertakes his travel to the ancestral city in the expectation of recognition of his ancestral rights to land in the Bethlehem community. Naomi travels back to Bethlehem convinced by custom that the community will take care of her livelihood security and will recognize her rights to land. Both seem to be certain in their perception of the preservation of those land claims by the community. Obviously the preservation of land rights of former members of the community is a standard custom in biblical times.

Naomi is recognized at her return by the women of the city and Boaz acts accordingly by indirectly reinstating her claim to land. Joseph and Mary have to travel to Bethlehem because as descendents of the family of David they have to safeguard their claims at the time of Roman’s registration of real property and the subsequent land tax.

It is tempting to assume that this land claim of Joseph may find its origin in the book of Ruth. Here the heirs of land near Bethlehem, land that belonged to both Boaz and Elimelech, are explicitly linked to Jesus’ lineage. If so, that piece of land near Bethlehem is not just a plot of land. It is land that links generations to the city of David mentioned as the city where according to the Bible the work of salvation of all nations will originate.

Just imagine that the shepherds hearing the news of the birth of the Messiah as the first of all the people were actually watching their flock in the fields once ‘tilled and kept’ by Boaz and Elimelech, would that not be an interesting coincidence…?
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NOTES CHAPTER 2

1 This map shows the typical lay-out of a manor in the Middle Ages. Besides the lord’s house in the lord’s demesne, it shows the church lands with the church and the rectory, but also the lord’s toll bridge – an interesting source of revenue for the lord - and the lord’s mill where the tenants of the lord had to have their grain milled providing both the lord and the miller with extra revenue. Together with the tithes and offerings the church demanded it all could add up to a significant burden for the tenants.

2 The basic ideas about property on which Karl Marx published most notably in his book ‘Das Kapital’ (Capital), have been laid down in a Communist Manifesto first published at the end of 1847 in which he and his life-long friend Friedrich Engels propagate the abolition of private property. Accordingly, in communist doctrine, private property as the most important source of power could not be allowed to stay in the hands of private individuals in more than minor amounts. To prevent misuse of its power it was safer to keep it in public hands (a more or less exclusive possession by the state).

3 The oldest documents used to compile the current Bible originated about 900 years before the Common Era, the most recent documents stem from around 100 – 200 years after the beginning of the Common Era. The Bible contains a selection of possible sources. Scientific research shows that the acceptance and rejecting of a potential scripture for the Bible as we know it today is the result of selection dominantly based on the fact whether or not a scripture supported the view and the power struggle of the ones making the selection. Nevertheless the Bible is a book full with stories about everyday life in biblical times and as such a source for use to illustrate the customs and concepts of people living in biblical times without necessarily underwriting the ‘truth’ of the Bible.

4 The word Korân is derived from the Arabic verb ‘karaa’, meaning to read, in other words, the Koran is the Book that ought to be read. It contains doctrine, laws and directions related to faith and religion. And differs thus considerable in character from the Bible in which many stories can be found, while the Koran is basically much more instructive. The Koran is divided into numbered chapters (Surah) of unequal length and these are again divided into ayât (verses). All chapters have not only a number but also a name derived from their text. When referring to the Koran scriptures I will use the Arabic names of these chapters and their numbers as they appear in the Koran.

5 It is important to note that after being expelled from the garden, there is an abode and a provision available for humankind. Adam is further assured of the guidance of Allah although he remains expelled as Baqarah (Surah 2) verse 38 explains:
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We said: Go forth from this (state) all; so surely there will come a guidance from Me, then whoever follows My guidance, no fear shall come upon them, nor shall they grieve.

6 Carol Johnston gives in ‘And the Leaves of the Tree are for the Healing of the Nations’, Biblical and theological formulations for Eco-justice; Presbyterian Distribution Services PCUSA 72-640-97-001; 2002 four ecological essays. She makes this statement in the second essay: ‘The original Human Vocation; Caring for the Garden as God cares for Creation.’

7 Among several indigenous people the traditional rites of initiation require of young men coming to age to go alone into ‘the Wilderness’ for some time to find their own personal ‘totem’. Such a totem may be a protective spirit, a specific animal or other amulet, or as is most likely the case with scriptures to find their mission in life. It underlines the significance of a ‘wilderness’.

8 As mentioned in this chapter already, there are more creation stories in the Bible. Scholars recognize three major creation stories and everywhere in the Bible parts of other creation stories can be found. Already in the first two chapters of Genesis two different creation stories are told. Both stories are used in this chapter. By the way, in the first creation story in the Bible male and female are created equally and at the same time. (In the second creation story, in chapter 2 of the book of Genesis, the female is made following the creation of man out of earth - dust).


10 This particular sentence is taken from the first essay: ‘The Human Vocation: Finding the Balance’ (p. 1) by Carol Johnston (see note 2)

11 Victor Hanson in a re-telling of the story of Hector de Crevecoeur ‘The Land was Everything; Letters from an American farmer’ published by ‘The Free Press’ in 1999.


13 The custom of the levirate marriage is not specific for the Middle East. A scholarly account of the live and customs of Lenape Indians in the North-Eastern part of the USA shows that a levirate marriage was custom among them. The Lenapi considered this necessary because it was not considered proper for a man to do women’s work, and it was not expected that women should do men’s work. Both sexes had distinctive tasks to fulfill in order to
provide for the family. Who would hunt and fish for a woman who remained single? Who would assume the burden of tanning hides, sewing clothing, and cooking for an unmarried man? Even sororal polygamy was allowed among the Lenapi because a man could be obliged to marry his wife’s sister or sisters if there was no other man available to care for these females.
CHAPTER 3

PEOPLE IN TRANSITION

3.1  THE CHAIRMAN OF THE COLLECTIVE FARM

Sitting behind the worn-out desk of his office at the main building of the collective farm, the chairman re-thought the telephone conversation with the national head of the World Bank office in the capital that was just finished. During the conversation about an upcoming visit to the farm, the official had called this region poor. Looking out of the window and overlooking the vast fields of the collective farm, he could distinguish some of the farm workers at work in the part where cotton was grown. They were obviously busy with weeding around the cotton bushes. And he asked himself are these people poor? Would they think of themselves as being poor? The chairman of the collective farm definitely would not regard the farm employees on his farm as being poor. They just did not have enough luck during some of the recent years with the collective farm. By now he knew most of his farm employees by name. The dark, tanned, and somber faces of his farmers did not reveal what actually moved them, but he could see in their eyes the years of toil, struggle, frustration, and hope they had been through together. They were not poor, but they certainly had struggled with the farm recently. He always saw himself as a devout communist, but lately he began to have doubts about this. It was hard to remain faithful when the good life promised so many years ago never materialized, even after all their sacrifices and struggles. And so, when communism collapsed, he declared himself a socialist and he tried to convince himself that this was what he really had been all those years.

I met this chairman when attending a meeting with representatives of the World Bank in a remote rural area of a new ‘socialist’ republic in Central Asia. Finally, just a couple of years after the big political changes, which made his country a new independent republic in the former USSR, there was an expectation of getting support for agricultural improvements and a land reform project in this remote part of the country. So far no one had noticed much change in the region. Officially there was talk of de-collectivization - distribution of farm land of the large collective farm among the peasants to start private individual farms - but how could you de-collectivize when there is no plan or scheme to follow? And how would you change the pattern of
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farming that had become so familiar after decades of collective farming?

In his mind the chairman recalled how it had been during communist times and further back how it was when he was very young and lived with his parents in this rural village. Before communism they had their own farm but following the change to communism they had to give that up. They, like most of the other farmers, became agricultural workers on the collective farm. Most of them had rights to land before the time of collectivization. It was at a time of much political turmoil, but that was mainly far away in Europe where a world war was fought and they did not really suffer from it. They just farmed their own fields and could make a modest living of the private farm. The revolution in Russia had been the subject of stories told by travelers, but again, at first they had hardly noticed that something was changing in the world. News was sparse in those days and their country was rather isolated, not many travelers came to their region to tell about what was happening in the outside world. They farmed as their ancestors had done, living in the village, repairing what had to be repaired and preparing for the busy summer season during the winter time. Because they lived in one of the fertile valleys of the country most of them worked the small fields in the summer successfully. Other peasants in the country had a more nomadic lifestyle. In areas where the land was not fertile and hard to till, farming was more focused on livestock. These peasants were only in permanent settlements during the winter time. They would take the herd up into the mountains in the summer time living in ‘yurts’ the traditional temporary tent-like round shelters of heavy felt spanned over some poles with the characteristic customary open center of the roof.

For the peasants in the valley the changes had been almost dramatic when the communists came to power and their region became part of a Soviet State. Under communist rule, a decent citizen was supposed to submit his land and his agricultural assets to the collective farm. Compliance with this ‘rule’ made the farmer an agricultural worker on his own land. In principle he remained owner of the right to his or her piece of land and to his or her agricultural assets. But over time the management of the collective farm started to make most of the decisions without consulting the original owners, and it also managed all the assets so that gradually many people lost the idea of having a right to some piece of land. Moreover, since the collectivization of land in the fertile valleys made large-scale agriculture a possibility, smaller fields were combined into larger fields to consolidate the land. Theoretically you still had a right to a piece of land, but you lost the idea of where exactly that piece of land was located. Next your interest in your rights to land faded away.

As members of the collective farm, the agricultural workers had a voice during the meetings with the farm management. Initially everyone wanted the chairman to tell them why things were as they were, and when the good
life promised by communist propaganda would finally begin. Recently he
had finished reading a book written by the national icon Aitmatov1 and he
fully agreed with this narrator. It happened all the time just as this author had
portrayed in his book. The farm workers simply wanted to know from him
when they could meet their commitments to the state with the products of
their farm and when the time would come that enough would be left over so
that their work would not be in vain. But it had been a difficult struggle with
few successful years of farming.

Especially the last few years of communism had been difficult for him as
chairman of this collective farm. He vividly remembered how all the
collective farms in the region had taken in a very poor crop in the second last
year before the big political changes. Although their crop had been relatively
promising, the following year, they had to sell cattle and grain to the state
above their own quota to make up for the neighboring farms and to keep the
region out of the red. No one knew what lay ahead or what the collective
farmers could hope for. There was no money in the farm treasury to buy
necessary things to maintain the farm equipment and the farm buildings.
Their flock flourished in the summers, but everything turned to naught in the
winters when the animals died from exposure and starvation. They needed
sheds, barns and silos, but there were no building materials to be had, nor did
anyone promise any. And what were their houses like after all these years of
neglect and absence of upkeep?

‘Something is very wrong, comrades, this is not the way things ought to
be. We are doing something wrong,’ the chairman would say. ‘I cannot
believe that this is how things should be. Either we have forgotten how to
work well or we are not being directed properly.’ But this remarks and the
hidden accusation of not working properly raised havoc among the other
members of the board. ‘What’s wrong? What is incorrect?’ the bookkeeper
would ask in an angry voice, shoving a sheaf of papers around on the table.
‘Here, look at the plan, this is what we have received, this is what we have
sold, here is the debit, here is the credit, here is the balance. There are no
profits, nothing but losses. Find out what it is all about before you start
accusing people. Do you think you are the only communist here, the only
one that understands communism and we are all enemies of the people?
Watch your tongue, comrade, you cannot simply accuse us of doing things
wrong without taking responsibility yourself!’

Others joined the conversation, which soon would turn into a heated,
oisy argument. The chairman sat there, pressing his hands to his head,
despairing of ever understanding what was happening. He suffered for the
collective farm. He believed in communism, but he too had to confess that
the system obviously did not work. The manure had to be taken out to the
fields during the winter; it had to be collected from each household. But how
would they do that? There were no wheels for the wagons, that meant they
had have to buy wood and iron for the rims, but where would the money come from, and would they be able to get credit and what would they use for security? The bank would not take their word for it. Their quota of gasoline and other essentials were cut by 30% because of their failure to deliver last year and there was not enough to run all the tractors. They had to repair the old irrigation ditches and dig new ones; it was an enormous job to do by hand. The people would not do it in winter; the ground was frozen so hard you couldn’t drive a pick into it. Because of the lack of operational equipment there would be no time in spring either, everyone would be too busy with the sowing, the lambing time, the weeding and then the harvesting. And what could they do about the flocks? Where were the sheds for the lambs?

Things were no better at the dairy part of the collective farm. The roof of the stables had rotted and was in badly need of repair there was not enough fodder to really feed the cows and nobody wanted to work as milkmaids. What had they to show for all the long hours they put in at the dairy? There were so many other problems and shortages it was frightening to think of them. And yet, he hoped that he could convince them that it was best to muster their courage and discuss the questions again at the Party meeting and after that again at the farm board meeting. Talking seemed to be the only thing that kept him from losing all hope in the future. He knew that he, like all the other peasants, would try to live from the produce of their small garden plots and from the occasional cabbage or fruits they could steal from the collective farm. They would survive somehow. But for now they could blame only him - the chairman - for not managing the farm well enough, like he could blame only his farmers for not working hard enough.

And then all of a sudden an end came to the communist rule. Elections were held and a new socialist government was elected. Now, with the new socialist government ruling, they were told that everything had changed and although many of the familiar faces remained in the government, there were noticeable signs of change. New laws on property, developed in cooperation with international legal experts, had been discussed in Parliament. Those laws created the possibility to establish private individual ownership rights to land. At the same time the large cooperative farms were to be dismantled and their land was to be distributed among the population. But they were living in a more remote area of the new republic and so far private individual ownership rights to land and possessing one’s own farm were still debated in the region. In the meantime, the collective farm just remained as it was. What other way could they have chosen? This was how they earned their meager living and this was the way most of them felt secure.

The chairman was not sure how many of his agricultural employees really would apply for the possibility to start their own private farm when the time would come to be able to do so for them. Would they go back to a
situation as they only vaguely could remember of the time from before communist rule? How certain would they be, that the situation of a new land tenure regime would last under the socialist government? Would there not be a change of government soon again? Although they were in a remote area they all had heard someway or another about the terrible things happening to Russian private farmers under the Stalinist regime. How the ‘kulaks’, as they were called, suffered because of the confiscation of harvests by the Red Army to feed the hungry urban people who were supposed to keep the new industrial society of the Soviets running. The communist regime saw a smoking chimney as a sign of progress, as if agriculture was not at least as important.

The stories were told and retold how farmers hid grain of their harvest and pretended that they had handed over all of the harvest already to the confiscators. How some of them were falsely accused, but many more were at best prosecuted because they actually did hide grain that was eventually found after torture and in the worst cases the disobedient kulaks were simply shot at the spot after discovery of hidden harvests. Other stories were told about kulaks being expropriated and sent to Siberia or similar godforsaken places to languish in the vast cold Northern land in misery and extreme poverty.

The chairman was certain that knowledge of such historical tales would take away any desire of most of the farm employees to consider starting their own farms. Besides, as chairman knowing his employees, he wondered whether they were really up to the task of managing their own farm. Actually he saw most of them as a sorry lot; when it came to farm work, they waited for his orders or the instructions of his staff without much of their own initiative or creativity. Would they know what to sow, what to plant, how to obtain and apply fertilizer and how to market their produce? On their own small garden and house plots they mastered horticulture, although sometimes also only marginally and not always in very clever ways. They tend, for example, to use too much fertilizer resulting in upset stomachs and pain in the abdomen or even sick children in the family when they eat too often their own vegetables. He suspected that they got that much fertilizer anyway by ‘organizing’ it (actually ‘stealing’ it, but that was not the way these people felt about it) from the supplies of the collective farm. How would they ever manage when left on their own without an experienced farm manager at hand?

But the political change would not leave the region untouched. One of the clearest signs was the upcoming meeting with representatives of the World Bank.

And so the day of the meeting arrived. Apart from some local World Bank representatives, the chairman heard that most of the visitors came from abroad, foreign experts in their various fields. They started talking about
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land reform, land distribution and agricultural production improvements. Would this mark the start of a new era in their region? Assisted by a slick-looking young interpreter, who was not from this region but obviously from the capital city, the team of experts talked about setting up a land reform project and a land registration system. This would ensure their new rights to the land that were about to be distributed among them. Now and then the interpreter had to find the right words and several of the questions were seemingly difficult for him to understand and most likely also difficult to translate, because a number of the answers given by the experts missed their mark completely. Half of it did not make sense at all. But parts of the message that these foreigners brought to the area were conveyed nevertheless. During the meeting it became clear that the foreigners believed that giving farmers their own farms with enough land tenure security would solve many of the existing problems. They would be able to get credit with their land as collateral and with the buying power resulting from these loans they not only would be able to buy the things necessary to operate their farms, but also buy other things bringing economic development to the region. It all sounded wonderful, but the chairman could not escape the thought of their more immediate needs. He could see on the faces of his farm workers that they also had their doubts. It would take several years before the project would have any effect and how would they get through these years with dilapidated farm equipment, without the necessary building materials, and without money right now to buy seeds and fertilizer?

After the meeting with the foreigners, and seeing them on their way to the capital, the farmers lingered in the party building. From their conversation he noticed that they wanted from him as the chairman a clearer picture than the one the urbanized young interpreter had painted for them. But for now the chairman was tired and worried. He told them to wait until the Party meeting next week. He would try to explain to them what this pursuit of land tenure security, as discussed by the foreigners, meant for the region. He knew that he would have to talk again and again about the prospects, but for now he was confused and he needed time to collect more information and above all he needed time to set his own mind at peace before more talk about land tenure security with his workers.

3.2  PRIVATE INDIVIDUAL OWNERSHIP OF RIGHTS TO LAND

In most of the Western world, private individual ownership of rights to land is the most common form of land tenure. It suits best the goals of a capitalistic society functioning as a market economy. During my years of consultancy, I have learned that the concept of private individual ownership
of rights to land is difficult to explain to people living with the fresh memory of communism under which rule almost always all land belonged to the State. Private individual ownership of rights to land was a concept contradictory to the values of communism that taught citizens for decades; Land is an important element in providing a livelihood for us all, it should not be in the hands of private persons.

People living under a communist regime show often a much more social solidarity than can be observed in the Western individualized societies. The strong feelings of survival in times of scarcity have formed a citizenship that relies much more on family, kinship, and friends than on protection and security of providing the means for a livelihood that could be - but in most cases was only marginally -offered by the government. Western observers were generally impressed by the strong developed social web of relationships that kept the society going during communist rule. Political reform did not automatically erase these social webs. I have noticed myself how reliance on acquaintances provided people with small benefits. Knowing the local butcher meant that you had always (the best) meat, knowing the local baker provided you always with bread without the necessity to stand in line to purchase it. I have been in line trying to buy bread on Saturdays noticing some people going into the bakery through the back door and appearing with fresh loaves of bread while the people in line were told a few moments later that the bakery was out of bread for the morning. This might be difficult to understand for Westerners, but in a society where the market did not dictate the price of goods, availability of some goods is obtained by knowing someone who is able to put aside the items for you at the right moment. The command economy has left its trace among the people living with it for so many years.

One can wonder if the western world missed an important opportunity when invited to assist with the re-building of societies after communism. Donors hardly attempted nor seriously investigated the possibility to establish a more socially oriented land tenure regime in former communist countries, and they certainly did not exert pressure on local governments to consider the possibilities of such a regime. After all, the western world supplied most of the money involved in changing laws and regulations and in land reform projects, so some pressure would have been justified. In most land reform projects western experts sponsored by western donors were forced to establish a land tenure regime in a quick way. Thus the most effective way was to copy the legislation as it existed in the ‘West’, although that system supported a dominantly capitalistic world. And so the legislation and regulations got filled with imported concepts that were alien to the majority of the autochthonous people. There simply was no time provided to study the merits of a more socially oriented land tenure regime that would also take into consideration elements of customary land tenure as practiced
before communism. Similarly the new system did not pay sufficient attention to the concepts of land tenure as perceived by the inhabitants of the various new Republics. Often misunderstandings came about several years after the re-distribution process and such misunderstandings undermined people’s perception of land tenure for at least some time.

There are other factors as well that negatively influenced the success of land reform and generated misunderstandings. Many collective workers think of themselves as wage earners enjoying the advantages of collective membership; they may be more apt to prefer a wage hike to a grant of land. This group lacks training and exposure to the business aspects of farming, like accounting and marketing. Moreover, they have little experience in such matters as soil conservation and attention to the environment. Decisions on how to avoid post-harvest loss were made by the managers; collective members usually just followed instructions. There is a large step between farm wage-worker and independent entrepreneur; many lack interest or feel inadequate for the task. The expected lack of training and education possibilities among potential private farmers made many of them hesitant to start their own farm even with the convincing stories of sufficient land tenure security.

I remember the high-ranking official in a Central European country who wanted me to explain to him the full concept of private individual ownership of rights to land over and over again. He did not trust any one yet and when he wanted a private discussion he asked me to join him in his recently acquired Lada automobile. He hardly spoke any foreign language, and so we would drive to whatever place his daughter happened to be and he would snatch her from her chores to assist us in interpreting. His daughter was a student studying English at the university in the capital. We would drive through the countryside with him asking me questions and his daughter translating, and now and then talking about the historic places we passed en route. He had been an army officer with wide knowledge of battles fought in his country. His stories were vivid and you could almost see the battles re-enacted for your eyes in the rough and, at some places, unspoiled beautiful scenery. He felt secure that nobody would be able to overhear our conversation in his own car driving around in the rural areas neighboring the capital. At that time I was the team leader of a land reform project and most of his questions had to do with the supposed link between land reform, land tenure security, and economic development that was so strongly advocated by the foreign donors. I think that I never could convince him of that link, because I had doubts myself in particular in respect to the supposed automatism between land reform, land registration, and economic development. As most of the foreign experts assigned to projects of land reform in those days I started with little or no knowledge of the region to which I was assigned to and I quickly discovered that much more was
needed to make a land reform project a success. Any land reform project should be embedded in an encompassing set of supportive projects and measures. But I also always felt the pressure to perform a speedy land reform project because of the political sensitivity of such projects and of the limited time and resources available.

During discussions with farmers it became clear that they still had several suspicious feelings about the promises made during the introduction of the land reform. Of course, there was a new political reality now. They felt more or less free to speak out, but they were weary of all the talk about progress and good life. That story had been told to them too often during communism and the good times never came about. A number of them told me in private discussions that they could hardly believe that individual private ownership of rights to land would remain a reality. The communists took it away not so long ago and what guarantee do we have that a future government would not play this game again? This was the reasoning behind the way they expressed their difficulty with the new concept of land tenure security. Whatever institutional arrangements to register their rights to land the foreign donors and expatriate experts would establish, they simply could not grasp the full meaning of a market economy with dominantly private property.

Never was it so clear to me as when the minister of justice in one of the countries took me aside and told me:

‘You are always talking about private individual ownership of rights to land, do you realize that many of us came from rural areas where it was customary that the land lord told you: ‘This is your land’ and nobody even thought of challenging this decision?’

On an overcast and cold November day in 1992 I was invited to attend the first ever issuing of land title documents of redistributed land in a Central European country to farmers in a small town. Because this was the first of such events in the country the Minister of Agriculture himself would present the documents to the local farmers. The trip to the little town was also pleasant because of limited traffic on the rural roads. This being a noticeable difference with western countries I asked my co-travelers about the lack of private cars on the roads. They taught me one of many lessons I would receive during my stay in former communist countries.

There were not many private cars at that time, a few years after the big political changes. Although many people wanted to buy a car, the price was too high for most of them and there also were hardly cars available. Most of the industrial production was still as it was under communist rule. Cars were considered not an essential industrial product and so production was limited resulting in long waiting lists for potential car buyers. I remember that in several countries so-called car buyer pools were formed. People would make monthly payments into the pool and in a kind of lottery they were selected to
acquire a new car as soon as the pool could manage to lay its hands on one. The pool members continued paying their monthly dues until everyone in the pool had received a new car. It could take up to seven or more years before that happened and by then the first recipients of cars were looking for a possibility of trading their old cars for new ones. In this way such a car buyer pool could go on forever. A discouraging step in the process of acquiring a car and registering it in your name was the registration itself. In one of the capital cities I have seen long lines of people waiting patiently for one of the windows at the car registration office. By the end of the day, at the time the office was about to close, officials would hand out sequential numbers to the people in line, in order for them to know their sequence in line the next working day. During the day family members would take turns in order to relive someone being already several hours in line. The increasing traffic following communist rule had devastating effects on the infrastructure never designed for much traffic. In several of the villages some of the underground water mains crossing roads could not handle the increasing traffic and the increased vibrations this caused. To limit the damage by these small continuous water wells I observed that people used to roll large boulders on the leak sometimes in the middle of the road. At night-time the non-illuminated boulders on the non-illuminated streets were a real driving hazard as one can easily imagine.

But that would not bother us on this bright November day. Driving along the snow capped mountain range we arrived early enough at the village-square to attend the welcoming ceremony for the minister. In traditional regional attire some selected ladies presented salt and bread to the minister after his arrival. In the meantime a small crowd of local people had gathered on the square, among them were the new owners of rights to land. Most of the ones that were about to receive documents of ownership were old and I clearly remember how the minister, in an attempt to set a friendly mood, asked one of the old female farmers what she planned to do with the land. She was apparently not happy with how things had gone. Clutching tightly to her precious documents she snapped: ‘That is none of your business!’ and stalked out of the room of the meeting hall where the ceremony took place. Others were moved by the ceremony and could hardly hold back tears of joy or satisfaction when they were handed the ownership proving documents.

Following the ceremony the county government proudly provided a banquet for the occasion in the town hall of the neighboring county capital. But before going to the banquet, we followed one of the older farmers to inspect with him his newly acquired field. I will never forget how this older man stood in the middle of his plot proudly indulging the feel of being the rightful owner. The wind had picked up during the morning and a light snow was falling and blowing around. The clothing of this elderly farmer was barely suitable for the cold temperature, the wind chill, and the ankle-deep
snow, but he stood there for at least ten minutes with his ownership-proving documents clenched in a cheap plastic bag in his hands obviously deeply enjoying the emotions of having the land of his ancestors back.

During the banquet generous amounts of the strong local drink were served along with ample portions of food, and of course there were speeches. The mood became more and more relaxed. One of the last speakers was the representative of the local farmers. It was clearly hilarious for many of the attendees to hear him use the old fashioned expression ‘Comrade Minister’ several times, but most people in attendance were stunningly silenced by the last sentences of his speech. He asked the minister when the local farmers could expect to be instructed what to do with their fields and what to sow and how to get fertilizer. After a few moments of painful silence the minister had to explain to him that this was now his own responsibility and during that explanation you could see how the farmer became more and more uncomfortable with this newly acquired and apparently unexpected responsibility. And how could he be comfortable knowing that most of the channels for obtaining seed and fertilizer were not in place or at least not yet operational? How would these farmers find their way in the bureaucratic network of government offices to acquire information on agricultural production methods and sowing needs? How would they use the large and awkward farm equipment designed for large scale farming on their small plots of land?

3.3 URBAN PROPERTY

For the urban population the changes experienced following the overthrow of the communist regime were much more direct than they were for the rural population. Newly elected governments were eager to show that matters had changed and they adopted new laws and regulations with extraordinary speed to convince the people how the independence from Russia was working out. The privatization of the ‘housing stock,’ as it is commonly referred to, was seen as a major and populist project. One of the results of this project was that urban people almost overnight were transformed from being renters of their urban apartments into potential owners of the right to their apartment. And the price they were charged for the purchase of the ownership rights was seldom a real obstacle. In one of the countries where I worked the Law on Privatization of Housing Stock contains several exceptions for paying the (full) amount to acquire ownership rights from the State. In the (poor) English translation of that Law the articles four to six read:
Article 4. Methods and order of house stock privatization

State and communal housing stock privatization will be executed as free and payment based transference of apartments and dwelling houses. Apartments and dwelling houses will be freely transferred to:

Great Patriotic War invalids and participants, families of perished and missing warriors, died invalids, war participants and equal to them individuals, in the established order;
Families of persons, died while carrying out official and civic duty; families with 4 and more children;
Invalids of I and II group regardless reasons of becoming an invalid;
Educationalists, health care, culture workers, employees of organs of the Ministry of Home Affairs, Ministry of National Security and servicemen in accordance with the existing legislation;
Persons, having illnesses caused by sequels of the Chernobyl Atomic Electro Station accident, persons, participated in Chernobyl AES accident sequels liquidation, as well as persons, evacuated in 1986 to this Republic out of the estrangement zone;
Persons, illegally convicted during punitive measures, directed by Stalin, and their families (spouses, children);
Officers, ensigns and warrant officers, transferred to the reserve or retired according to the age, health status, staff reduction or family and other important circumstances and having period of service of 20 and more calendar years, occupied or assigned to them state -owned apartments;
Employees of health care organizations in the order, established by the Government of the Republic;
Educationalists in the order, established by the Government of the Republic;
Employees of the organs of Home Affairs and persons, retired according to the age, health status, staff reduction and having period of service no less than 20 calendar years, as well as family members of employees of organs of Home Affairs perished or died executing official activity.

Payment based transference of apartments and dwelling houses will be based on using by dwellings’ buyers special legal tenders of the Republic, their allotment will be regulated by the Regulation, approved by the decree of the President of the Republic.
In accordance with the decision of the local state administration, meetings, conferences of working groups, part of the owned released and new dwellings can be sold on competitive base and through auctions.
Order of registration of individuals, whose living conditions need to be improved, and lease of living accommodations will be defined by the Housing code of the Republic.
Free or payment based transference of living accommodations to persons being on the book for dwelling assigning, will be executed in the methods and order, established for the people having dwelling.
Article 5. Conditions of payment of apartment, dwelling house

If amount of special legal tenders does not cover apartments, dwelling house’s cost, there will be additional paying to the sum that is difference between apartment, dwelling house cost and amount of special legal tenders used.
In case, if sum of special legal tenders is enough and there is a surplus, it can be used when paying off another state and communal owned property, that is subject to privatization.
Payment of apartment, dwelling house can be made through long-term credits, by installments in the order, defined by the Government of the Republic. The initial fee should be no less than 20 per cent of the apartment; dwelling house cost and period of installments should not exceed 10 years. For those, having many children, young and low-income family according to their will, amount of the initial fee will be lowered to 15 per cent, and period of installments will be increased up to 15 years.

Article 6. Right to acquire apartment or dwelling house into the ownership

Lessee of the apartment or dwelling house will have the right to acquire apartment or dwelling house into the ownership by the written permission of all living together members of the family of age, including those being temporary absent and persons on the book for apartment acquisition.
Application for apartment or dwelling house acquisition will be presented by the person, mentioned in the first part of this article to the appropriate organ of the local state administration. In case, if apartment or dwelling house has been assigned to enterprise, organization or agency as the right of full economic or efficient management to the administration of these enterprises, organizations, agencies.
Individuals’ applications on apartment and dwelling house privatization will be examined within 2 months since the day of presentation.
In case of unfounded denial to privatize an apartment or dwelling house, violation of taking decision on privatization terms, the guilty officer should be imposed a fine in accordance with court decision in the amount of up to 20 minimal month wages.
Acts, made by enterprises, organizations, agencies of any forms of property on dwelling issues, should not contradict this Law.

Even when people did not qualify for housing free of charge during the de-collectivization of property, the purchase price was always reasonable as mentioned before. Prices were derived from the real property tax rates and these rates were almost unrealistically low. Despite rapid inflation the rates for land tax were seldom adapted. Interestingly, the perception of land tenure security for urban property was quite high. In the years of communism most regions carried out yearly inspections of the state owned property during which the rightfulness of being a tenant of the real property was re-confirmed. Every urban area had a so-called Bureau of Technical Inventory
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(BTI) where residents had to register and had to apply for permits to make alterations. Following the political changes the BTIs remained functioning as the registration offices for all matters concerning urban real property, and the inspections continued on their yearly basis and that gave urban residents a continued feeling of security of tenure.

Some urban residents, especially when working in a government position, not only had an apartment in town, but under communism, also could acquire the right to exclusively use a ‘dacha’; a small ‘house’ in the countryside. Most of the dachas were rather primitive and had no running water or other sanitary provisions and were meant as summer escapes from the city. During my assignments in former communist countries I have lived in apartments whose owners moved to their ‘dachas’ while renting out the apartment to the expatriate expert. It was apparently lucrative to do so even when you had to endure the harsh circumstances of the Central European winters in a rather primitive dacha. The rent was almost of Western proportions providing most of the landlords and landladies with a considerable additional income when converted to the national currency. In this way I came to live in the apartment of a minister of land registration and cadastral affairs. At the last day - a real cold winter day in December - of our stay in the country my wife and I could hardly complete our packing. The wife and daughter of the minister were so anxious to return to their warm comfortable urban apartment that they took complete possession of the kitchen and living room area in the apartment several hours before our agreed departure time. In another country in which we executed our foreign donor sponsored project, we actually lived in the apartment of the Mayor of the town where the project was located. His family also obviously preferred the extra income above the comfort of their apartment.

In one country I ended up living in the expanded dacha of a teacher who was recently retired from a vocational school where for many years he taught masonry and woodworking. The dacha was situated in one of the suburbs surrounding the capital. For us it was an ideal location. We could escape the hot summers in the city by living on the slopes of a mountain that was quite close to the capital. One of the things I will always remember is the huge cherry tree behind the house. In season we could pick the large dark red cherries from one of the balconies. My landlord had been able to extend and rebuild the simple cottage, even during the years of communism, into a comfortable villa. When asking this teacher how he accomplished to acquire all the necessary building materials, which were very scarce to lay one’s hands on during communism, his answer was simple. ‘Communist doctrine taught us that everything belonged to the State and also that we represented the State. Well, since I worked in a school with ample building materials available I could ‘organize’ some of it to use for building this villa. That was not stealing of course, it was State property and I am a member of this State,
so I simply used what was mine!’ And as always when he told me such things, his dark brown eyes started to twinkle in a naughty way.

3.4 RURAL LIFE

One of my assignments brought me to a smaller country in Central Europe. It was part of my task to inform local managers and officials of the purpose of our project; improving the cadastral registration in the country. While visiting a remote rural village, I met with the Mayor and the manager of the local state farm. After explaining the purpose of my visit with the help of an interpreter, we had a small discussion about the benefits of an operational system of land registration for the improvement of security of land tenure. But I felt uncomfortable because I got the impression that I could not convince these local authorities of the benefits of the project. When it was about time to leave it finally became clear why they did not show much enthusiasm for the project. It was not before we shared another glass of local wine of an excellent vintage that they loosened up a little and confessed what really bothered them. They told me that last year the farm had submitted most of the grape harvest to the local state run winery. But before the wine was produced the winery was declared bankrupt, and they had not seen any money for the harvest so far and they likely would never see it. Their tractor had broken down last fall - the only one available in the whole village - and they were in great need of a new one. So they kindly asked me if it would be possible to use a little of the project money to assist them in buying such an essential tool for farming together with some gas to get it going. All the way back to the capital I was thinking of the obvious mismatch in the messages that foreign donor funded assistance sometimes would give. A cadastral project is a beneficial tool to increase land tenure security, but it only does so in the long run. In the meantime there might be many urgent needs in the targeted rural area that need to be solved first before the people can show genuine enthusiasm for any long term projects.

In that same country I witnessed another remarkable miscommunication. After a ceremony to distribute ownership showing documents of rights to land among farmers, I asked our local car driver to visit the recently redistributed fields in the area before returning to the capital city. During the ceremony I was given maps of the fields, and being a land surveyor, it was not too difficult for me to find the location of the newly distributed fields once we were near. To my astonishment, however, the map showed a different landscape. On the map access roads linked all the newly demarcated plots of land to the main road. But in the field there were no such access roads. The next day I asked the project manager how these roads would come about. The project manager confessed that there probably was a
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problem. It was pre-supposed in the project plans that the farmers themselves would take care of that project element themselves following the re-distribution of land. To understand this problem fully it must be told that in this country most farmers seldom used money in their daily routine. The rural areas of the country relied on a barter system. Goods and services were exchanged directly rather than any payments were made with some mistrusted money. It was hard to imagine how these farmers would succeed in constructing their own access roads. Of course, they could prepare a strip of land for that purpose - if they would be able to agree on how much land each of them had to disband for that - but all materials they needed to make it a kind of road would have to be purchased. A year later I returned to the same area to notice that there were - as expected - no access roads. The farmers told me that they had made mutual arrangements to use each other’s fields to get the harvest to the main road. In order to do that without spoiling some of the neighbor’s crop they had to arrange their planting and sowing in such a way that the fields closest to the main road had the earliest harvest times.

From the beginning of communist rule in the rural areas, the collective or state farm became the means of managing agricultural production. But the farm turned out to be much more than just an agricultural production unit. It also served as social community center and local government. Most collective and state farms had facilities built as social gathering place, movie-theater and as music hall. The farm management altered and maintained the infrastructure, like roads, sewer systems and the scarce telecommunications. It was not unusual that there was only one telephone on the farm—the only telephone in the whole village. The farm also provided space for a day-care center, a local hospital or rather first aid post, and sometimes the farm had its own school buildings. Originally there was a local Soviet government, but in rural areas the local governments rapidly declined in influence in relation to the farm authorities. The management of the collective farm (in reality, its chairman) controlled the budget for schools, clubs, roads and similar facilities while the rural local government had virtually no funds to carry out their work. Residence permits and internal passports were issued to, and held by, the farm authorities in order to prevent the peasants from leaving without permission. The management of the farm dictated where the members could live, giving them building lots and household plots on which to grow their own food and keep a little livestock. Much of the farmers’ real earnings came not in cash, but in work clothes, free meals, and other in-kind payments either openly given or stolen (this is the term VonAtta uses, I often heard it translated as ‘organized’) as a matter of right. The ‘private’ plots of the farmers produced much of the country’s high-value, labor-intensive crops such as vegetables, in large part because the farm management winked at the theft (‘organizing’) of inputs
and working time from the collective.

The chairman of the farm management controlled the lives of his farmers. He chose whether or not to provide them with transportation to the city in cases of sickness, he could evict them at will, and he and his subordinate bookkeepers and brigadiers can assign the farmer good-paying or poorly-paid jobs or simply cheat him of his pay. The chairman’s taste in cultural activities determined what kind of amateur groups would be formed and whether or not a church could be opened or restored. A dictatorially-inclined chairman - and the job tends to make even the most democratic managers dictatorial - could impose his own punishments and even jail people with little opposition or review. Even after the recent political changes, now the farmers have their own internal passports, villagers are formally prevented from moving to major cities by the retention of the residence permit (propiska) system. In return for his powers, his superiors and subordinates both expect the farm manager will make the farm operate, see to everything and keep the roads in good repair. Running a kolkhoz is a killing job in which four hours of sleep a night for years on end is normal and heart attacks seem to be the most common way good, long-term chairmen leave. Good chairmen, however, like the good landowners in other societies they resemble, can derive enormous social prestige as well as considerable wealth from being seen to care for their workers and manage the farm successfully.

VonAtta states that the large farms also provide their rank-and-file members with a considerable range of psychic and economic payoff. Until the mid-1960s, Soviet farmers had little share in the benefits, such as job security and guaranteed earnings, that socialism’s welfare measures brought to the urban population. In the minds of Soviet leaders, these guaranteed welfare measures were offered in exchange for political quiescence, providing a kind of ‘social contract’ between the rulers and the ruled. Leonid Brezhnev’s decision to greatly increase the resources given to the countryside extended the social contract to the countryside. Rural welfare measures are still meager in comparison to those provided in Soviet cities or those offered by the ‘safety net’ in most developed capitalist countries. But the security and benefits provided by the existing farms to an increasingly aged and low-skilled rural population are real and much greater than they used to be.

The Brezhnev-era ‘stability of cadres’ policy greatly reduced personnel turnover and gave many local and regional officials effective lifetime tenure in their posts. Under communist rule, local officials could use the new funds to shore up their positions as long as they held their jobs. ‘Good’ farm managers often invested part of the benevolence in their superiors, ensuring their own tenure as they shared the ill-gotten gains.

Since the Soviet system worked with quota that had to be delivered to the
central government as payment for the use of the State property, shrinkage of farmland was a widespread practice. Farmers everywhere have always hidden land from authorities; but beginning particularly in the 1950s, farmers in communist countries did so with desperation. Katherine Verdery states:

At the end of the 1940s, partly to force villagers into collectivizing and partly to assure the post-WWII state an adequate food supply for its industrial ambitions, the Soviet Party assigned each peasant household a delivery quota whose magnitude increased exponentially with the size of the holding. The difference between owning four hectares and owning five could be the difference between having and not having enough to eat for the winter.

Verdery’s observations in ‘The Elasticity of Land’ describe what happened all over the USSR with agricultural land in rural areas. For those with too much land, one way to handle the problem was to donate or sell parcels to friends or relatives, with the secret understanding that the sale was merely a fiction. This has created myriad difficulties for property restitution, as those who participated in these fake transactions are now reluctant to give them back to the real owner. But this practice did not shrink the total land available. Another practice that was quite common did just that: declaring less land areas than one actually held. Because the quotas were set according to agricultural registers based in many regions, not on existing cadastral data (and in several regions reliable cadastral data did not exist at all) but on self-declaration, there was ample opportunity to hide land. There is a story of a village clerk of those years who was notorious as a drunk and could readily be persuaded, for a bottle of brandy, to reduce the recorded size of one’s holdings. (A sociologist from another village told that his mother had seven different recorded figures for the area of her farm, each figure responding to a particular need of the time, and each the result of liberal applications of brandy.) Any holding thus dipped in brandy shrank the size of the farm and with that not just the farm of that person got smaller on paper, but the area of the entire settlement shrank, thereby invalidating the areas reported in official figures from the 1950s. Such shrinkages have effects in the present time of redistribution of land, as owners of shrunken fields often find it difficult now to stretch the fields back out to their former dimensions. The extra land involved, however, helps to make the village’s total area more elastic.

Following collectivization in 1959 - 1962, authorities further concealed the land that peasants had previously hidden. Local officials, pushed to increase their production figures, found it very convenient that peasants had hidden land: it enabled them to swell their productivity by planting and harvesting areas that were officially recorded as smaller than they actually were. If a collective farm sowed 200 hectares (500 acres) and harvested 600
tons, the productivity would be 3000 kg/ha; but if higher officials thought there were only 150 hectares (375 acres) producing the same 600 tons, the yield would be a much more impressive 4000 kg/ha. The difference might mean a bonus or a promotion for the mayor or farm president.

During my assignments in former communist countries, I repeatedly heard those stories of hidden land. Although the competition among managers of farms was enormous because of the reward system and there will be much truth in the stories, some stories are perhaps an exaggeration. But Katherine Verdery gives an account of a village that had the highest productivity in the county. It was told that this village had 100 hectares (about 250 acres) or more of land hidden by local authorities (something they were able to do because someone from the village headed the county cadastral office where the figures were kept). Apart from the fact that commune mayors and collective farm presidents hid land from higher authorities, they also created land. A good source for creating land was the area of so called unproductive and often lesser quality land. By clearing and draining this land it was made suitable for agricultural production but, of course, without registering the newly acquired area as productive land. Registering this kind of land as productive would certainly have been a silly act. The soil quality of the land was poor and the harvests were similarly less than on the good fields, but it contributed to the harvest as a whole and as such it also contributed to easier meeting the production quota assigned to the farm.

However, such practices did not always go undetected. In one of the countries, for example, satellite maps showed massive discrepancies between the surfaces recorded from the air and those reported from below. The central government became enraged and ordered an investigation. The official who was asked to discover what had happened to some of the land missing from the reported statistics of one county, was told by county authorities to stop looking for the missing land ‘because we need it to be missing.’ It is believed that official collusion in hiding land extended to the top levels of the Ministries of Agriculture, a parallel to the hoarding of raw materials that occurred in all branches of the communist economies. This phantom land clouds and negatively influences the process of land restitution as people discover that the figures they have used to request return of their parental holdings understate those holdings, but without other forms of proof they may not regain all that once was theirs. On the other hand, what some thought would be a four-hectare farm suddenly might turn out to be a five-hectare farm.

The widely known practice of hiding land tempted some farmers to use this knowledge in an unmerited, but sometimes not too clever way. I even doubt to say that it was an unfair way, because the difference between fairness and dishonesty became quite vague as far as matters of possession
between state and citizens are concerned in communist times. There was so much nepotism, favoritism, and log-rolling going on that taking advantage of knowledge to cut a bigger pie for oneself was perceived as a normal attitude. Knowing of the practice to diminish the size of the land available in the collective farm records tempted some people to use this knowledge to their own benefit. I have seen documents submitted to the land re-adjudicating authorities showing amounts of land and agricultural assets submitted to the collective farm in the early 1950s. On the basis of these documents farmers could apply for restitution of their land and compensation for their assets. In the documents the original figures written in black ink were roughly changed in higher numbers in bleu ballpoint pen, while a ballpoint pen was not introduced before much later in the rural areas of the country.

3.5 FROM CUSTOMARY TO STATUTORY LAND TENURE

3.5.1 Questioning change

The night was as usual warm and humid, in this country close to the equator. It was also pitch dark with the new moon just about to start. He heard the beasts in the corral, the various calls of predators in the forest further away and very close by the quiet breathing of his wife asleep next to where he lay on his mat. But the familiar sounds of the village could not give him comfort this night. Sleep did not yet come to Mbele, the chief of the village. His mind was too busy processing what happened today and what he had experienced during the last few months. So much was going on that he needed the quiet of the night to debate inwardly in his mind and to reflect on what the effects of all this might be to ‘his’ village and his community.

His confusion began some weeks ago, following the return of his nephew from a country in Western Europe after completing a course in law and land tenure. The bright young man had earned the tuition for this overseas course, at a well known prestigious institute, by his excellent results at the University in the capital of his native country. He had been offered the chance to study abroad for one full year. Mbele was proud of him and as head of the village he was the one to inform the young man about the developments in their village now that he had returned. Of course, Mbele also wanted to ask him what he had learned and how he thought to apply the newly acquired knowledge in their region.

One of the first things his nephew had told him was that the customary land tenure regime exercised on the land of the village had to change. In the opinion of his nephew the tenure system was outdated it would not serve future needs of the community. Not only did they still recognize customary land tenure rules, but also most of the land was not exclusively individually
owned. The village community should consider as soon as possible introducing the statutory tenure regime of the new laws of the central government with individual private property rights instead of continuing the old ways of customary land tenure as done for centuries. One of the professors at the Institute had clearly indicated that much in his lectures.

‘Look uncle,’ said his nephew, ‘here it is:’ …’we observe that customary areas will have problems in coping with increasing scarcity of land, because of population pressure, the mobility of the people, the use of land as commodity, and urbanization, causing a breakdown of customary structures into individual ownership.’ And look here I also have another example; a report of the UN/FAO World Land Reform Conference in 1966 in Rome. Here on page 10 of the report it is stated that ‘With some exceptions, the general feeling was that customary tenures had to be changed speedily to attune them to the requirements of modern agriculture…’ During this talk with his nephew, Mbele noticed that the young man became more and more excited, full of the new ideas about how to involve this native region of his in a nationwide development scheme. ‘Uncle, without a new system of property rights, the village will never be able to catch up with the new times’ his nephew told him. And asking what kind of new property rights would be necessary, the nephew explained to him that the new system would hand over private individual and lasting exclusive use rights to land to the people. By making the people individual owners of rights to land it would contribute to their perception of land tenure security. The new land tenure regime would also provide land registration and land titling which would make it easier to prove one’s title to land and to enable easier transfers of rights to land and ease in obtaining credit using the land as collateral. And Mbele asked his nephew; ‘But how does such a property regime work in practice?’ How do you adjust the land in use by the families in the village to accommodate someone who would return to this village after having been away for many years? Custom dictated that such a person was entitled to receive land to use for his or her subsistence, but if land is documented and registered somewhere in a far away land registry, how does that work out? Without any documentation it was easy to just reshuffle the existing pattern of land use in such a way that a returning villager could fairly participate in the use of land available to the community, or that the land of someone leaving the community would be used by others in a fair way. Land would never be useless in the customary system as practiced in his village for so long.

Together with his nephew he figured out that under the customary system matters of exclusive land use were primarily dealt with in the relations between people. It was a person to person or a person to community relationship that determined the exclusive use of land and other property. His nephew could tell him that the new system was primarily based
on the relationship of person to land. The question was not so much as to what is your relationship with the people of the community, but much more what kind of rights do you have to land that determined your use of land. Mbele had asked whether that would not lead to someone ending up with all the land and others with no land at all. His nephew had told him that indeed this was the beauty of the new system. It would encourage the most effective and efficient user of the land to get more land in order to make this land also more productive, serving the economic progress of the whole area. But Mbele had asked: ‘What happens to the ones losing their land?’ His nephew had been silent for some time and had come up with some vague reasoning of which Mbele got the impression that this was obviously not a matter given too much attention in the economic progress theory his nephew had spelled out for him.

And so Mbele had a sleepless night after that discussion with his nephew. He recalled in his mind the stories his father and grandfather had told him about a new property regime, different from their unwritten customary land tenure system. It was a system designed to suit the needs of the white settlers in the country. He had always approached the ideas of such a property regime as not fitting for their village. He even had opposed upcoming thoughts among younger members of the community to implement some of these ideas. ‘They are not based on the desire to increase productivity among indigenous Africans, but to ‘free’ land for expatriate settlers, plantation owners and mercantile traders,’ he would say. And he never failed to add the fact that indigenous African people suffered because there were settlement and resettlement processes involved in the tenure change with the indigenous people ending up at the least fertile and hard to reach plots of land. He also had heard the stories of how marginalized the livelihood of those resettled people had become after their move to the new areas. But now his nephew had come back from Europe and had almost accused him of hampering progress in his village by resisting the ideas of a new property regime. So during the sleepless night he made up his mind. He would have to investigate whether he had been wrong in his actions to preserve the centuries old customary rules for the use of land in his village. Was the central government right in pressuring the implementation of that ‘colonial’ type of land tenure?

3.5.2 Introduction to Statutory Land Tenure

Mbele had asked to be introduced to the background of the new system of land tenure as proposed for his village. He had addressed this request to the legislation officials in the capital. Some time later he received message that officials in the government office would be happy to explain the proposed new land tenure system to him when he would visit them. And so Mbele was
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prepared to go on a trip to the capital. He took his nephew with him to be certain that they both would understand what was happening and how the new property regime would work out in his village. During their visit to the officials in the capital city they had discussed almost everything. The officials started with telling him of the widespread belief among the scholars studying law and economics that for economic development, the perception of tenure security is an important condition. Secure rights based on economic theory are believed to increase credit use by greater incentives for investment in land, to increase land transfers by increasing the certainty of contracts, to reduce land disputes and to raise productivity through increased agricultural investment. He had to smile a little when they were talking about land disputes. In his village land disputes never took place. People simply came to him with a question and he decided about the use of land and that was always the end of it. But his question if the new system would not evoke land disputes was answered in a vague, and for him, unconvincing way although his nephew seemed quite pleased with the answers.

The officials also showed him how the new property regime worked with a hierarchy of rights to land. The most important right to land was that of ownership. The owner is the boss and that is the one who can give out other rights of a lesser order to others for the same plot of land. Mbele thought that he understood what they were telling and used an example of his own village where anyone of the villagers could use the land for grazing after the family that had generally used the plot for arable purposes had harvested their crop. Everyone in the village knew the customary rule that as long as a field is cropped by one household, it is in exclusive use by that household year after year for the time from planting to just after harvest. But that was not the same as they explained to him. No, you had to see the new system of rights as a pyramid. The holder of the ownership right to land always has the most encompassing right, and he or she can give away rights of lesser importance like lease rights or use rights. Even if the owner would live in the capital city he or she would still remain the holder of the ownership right to the land, irrespective of who leased or used the land. It was explained that the ownership right to land had something of absoluteness. An owner could distribute lesser order rights to others but he or she could also do with the land whatever he or she pleased. Mbele understood then that land to which someone had ownership rights became almost untouchable by authorities. He as village chief would not be able to distribute that land among other people in need of a plot of land in the village without the explicit permission of the owner.

It became clear to Mbele that the current customary land tenure as exercised on the land of his village would no longer be applicable. The new system was static and documented without much flexibility while the current system worked like a bath tub filled with soap bubbles in which their plots of
land were arranged like the bubbles that would always fit into place by shrinking or expanding when bubbles were added or bubbles were pricked. What is more, their current system also recognized some horizontal splits in rights like bubbles mounting on top of each other. Trees planted on someone’s land but cared for by someone else benefited both parties. Customary land tenure approached rights to land as being juxtaposed both horizontally and vertically instead of ordered in a hierarchical way like the western system. Mbele could not figure out how to translate customary rights as for example exercised for some fruit trees in his village. And so Mbele told the officials how in his village they were used to distribute the fruits of the Baobab tree on the land of the Misfud family, but planted by the great-grandfather of Mustafa Jodha and cared for by the Nabli family. When harvest time came, the fruits of the tree were gathered in three equal heaps. The four heirs of the Misfud family distributed their heap, the nine heirs of Mustafa Jodha took their heap and the eight heirs of the Nabli family took their heap home to be distributed equally among them. How would they register that in the new property regime? The answer had only been an evacuative smile. But seeing the distress Mbele was in, the officials recommended that he visit some of the village chiefs near the capital city. Some time ago the new system of land tenure according to statutory law had been implemented in the regions surrounding the capital city and these chiefs would be able to share their experiences with the new system with him. His nephew in the meantime had made such a good impression on the officials of the central government that they invited the young man to join them in their efforts of convincing the nation to adapt the new land tenure system nationwide. So, the young man stayed behind and Mbele undertook the journey to visit some of the village chiefs near the capital alone.

Unfortunately these visits did not turn out to be comforting for his mood. It was revealed to him that before the implementation of the new system of individual private land tenure, the people in the villages were quite certain about their tenure rights. They knew the unwritten customary rules and could anticipate and predict their impact. The promulgation of the new laws and regulations had caused lengthy discussions and debates and had the immediate effect of introducing uncertainty about land tenure security. The new laws were vague in their definitions and when officials of the central government were asked for an explanation of the new rules during their visit to the region they had been unclear in their answers and evasive in their affirmations. Moreover, when the existing customary rules of land tenure were explained to the officials, there had been much confusion because the official imported western language used by them proved to be poorly equipped with terms and expressions to capture the real meaning of many of the customary rules. Mbele got the strong impression that most of the villagers saw the officials as ignorant dummies because of the lack of clarity
they could provide and that the trust in the new system was far less than the people he spoke to in the capital had wanted him to believe. Other village chiefs told him that some of their villagers had taken advantage of the relatively unknown new rules to enrich themselves with land actually used for many years by others under the customary system. Mbele could hardly believe that these chiefs could not have prevented such actions, but they were quite convincing in their stories and as proof they told him also that the implementation of the new law had been put on hold for the time being.

They all had faced problems by implementing the recently established land registration system and land-titling program because their attempts had failed in abolishing the non-documented customary or traditional tenure systems. The people wanted to continue their traditional ways of land tenure. Under mounting evidence that the registration activities undertaken by government were followed by widespread failures to register subsequent transfers and successions they had pressed to suspend the implementation of the new land tenure system. Some of them had also noticed that, although under the new land registration systems women were not be overtly prohibited from registration, nevertheless conventions obviously formed barriers to registration by women or in the name of women. In many cases male household heads had just registered all land in their own name and hardly any names of women appeared in the registers. The village chiefs had asked for a revision of the land tenure laws to assure that more possibilities would be created to continue elements of customary rules of land tenure. So far, they only had been told that currently legislators were studying such possibilities.

3.5.3 Statutory Land Tenure together with Customary Rules?

After returning to his village Mbele learned that his wife’s sister had returned from the country she had moved to after marriage. Her husband had recently died and she had been without any relatives in that foreign country, a widow with her two children. She had returned to her native village knowing that as a widow with two dependent children she was to be recognized as a household under the customary rule of the village. Similarly, a household recognized as such by the community, made her eligible to receive a plot of arable land for cultivation. Being of his kin, he had to arrange some arable land for her by taking it away from other kinfolk and, as usual, that did not cause too much trouble, because although the households have secure rights to cultivate or otherwise use the land, and as a rule pass it on to heirs, the community is and remains the owner of the land. But while doing this, Mbele became all of sudden very worried that a new system of land tenure would not allow such actions in which the rights to land and the plots of land themselves were treated as having some elasticity. How could
one be guaranteed the possibility of providing a returning widow with some arable land under that new tenure system? How could a village chief provide people with a sense of security and social justice if arable land was suddenly a commodity registered as a static entry in a register? Their customary tenure had always provided for such security, not only because of the social justice, but also as a very practical matter for survival of the community. In a close community like this malnutrition was a serious threat to the community as whole, someone getting a high fever could affect the whole village, and the shared responsibility for providing security about one’s livelihood was the best guarantee against such disasters. In addition, Mbele knew that in other parts of the continent other rules would apply. In their customary law his widowed sister-in-law was, in some sense, lucky because their customary law recognized access to land by females. Most of the continent however knows only very limited rights for women under customary rules. Would a transformation of the legal system make women the big losers in the end?

The other day his sister-in-law had told him about some of the practices that had happened in her village and that contributed to Mbele’s distress about all the new measures and rules; changes apparently would not leave the traditional way of life in his village untouched. In the distant region in which his sister-in-law had lived with her now deceased husband an irrigation project had been carried out a couple of years ago. Under the customary rules of the region both common and individual property rights are recognized. Land cleared by a family was designated as ‘maruo’ land. It was collectively farmed by the family but under the control of the male household head. But land that was individually cleared, designated ‘kamanyango’ land, was individually used. Thus if cleared by a woman kamanyango land gives her access to that land and gives her partial autonomy. She can control the profits and is able to transfer that land to daughters. In the late 1940s and early 1950s women sought to establish kamanyango rights of new rice lands by clearing former mangrove swamps in the region. In 1984 an irrigation project was carried out, designed to increase productivity of the rice paddies by enabling year-round cultivation. Recognizing that women were the key farmers on this land the project planners sought to title the land to women. Household heads (generally male) registered the land in women’s names but then designated it as maruo land, giving them as men control over the land and not the women. This could most likely be done because the registration officers did perhaps not exactly understand the difference between the designation maruo and kamanyango. Mbele felt shame about the villainous behavior of his fellow gender when he heard stories like this. He knew things like that happened but he hoped it only happened sporadically.

Yesterday Mbele was again reminded of the risk of misunderstandings caused by language and dialect during a meeting he had organized for his
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They felt freer to express themselves and his nephew could make himself very useful by assisting with interpretations when the dialect and the official language seemed to cause problems of understanding each other.

The discussions had been intense but very open from both sides. Nevertheless, there was the impression that the officials had difficulty understanding most of the customary rules because proper translation into their official language frequently failed. One of the most striking examples was about the subtle differences in classification of land tenure that almost fully escaped the officials. For example, some of the officials did not get the difference between control of land and access to land. While in customary tenure, the one who has control over land can give access to another but remains in control by having some benefit of the labor of the person receiving access. Women would often have access without control as in the situation of the irrigation project told by his sister-in-law. Mbele could only fear that in the new system the customary rules regarding how a male can claim women’s labor, unpaid and uncompensated for work on some fields would be lost in the discussions. The subtle difference regarding fields from which the product is for family subsistence or could be individually appropriated, remained a vague element in the talks.

Another aspect of customary rules as applied in Mbele’s village would also have to change he understood. A widow, especially a widow with young children, retained access and cultivation rights to her deceased husband’s land, but if she leaves the community of her husband, she loses all access and user rights to any land in that community. Under the new system as Mbele understood it, the widow would simply inherit the land and would retain all the rights to it unless she decided to sell those rights. What also became clear was that, with the introduction of statutory law, many of the customary use rights determined by function of the land – i.e. arable land, grazing land, land for ritual customs, burial ground and land for building huts – would disappear together with the distinction of use of land in time. Grazing the herd on land of others after the harvest would have to be explicitly permitted. What would remain of the current system of cultivation with separate plots of land for men and women? Generally women now grow crops to feed the family, while men grow cash crops. Women are obliged to work on the men’s plots for weeding and other tasks, and the members of the household are supposed to work on the plots of women used for feeding the household. Would such a system remain in place? What would replace that customary system under the new law? Mbele also told them what he had learned from the village chief close to the capital city. Indeed, the implementation of the new land tenure system had been put on
hold and legal experts together with donor sponsored expatriate experts were studying the possibilities of developing a system of legal pluralism for land tenure. That new land tenure regime would certainly change the situation in respect to gender (See Lastarria9) was by now very clear to Mbele and he needed time to ponder if this was really an advantage or not.

The officials had left the village later in the day, but his nephew had stayed behind in his native village. His nephew and Mbele had spent the evening talking about what happened that day. When Mbele asked him to clarify the concept of legal pluralism, his nephew told him about a recent development regarding customary tenure. His nephew had explained that several government officials – he himself included - had recently attended a workshop in the capital city about legal pluralism. Western legal experts had lectured and discussed with them the possibility of a dual legal system, which would imply a preservation of elements of customary land tenure next to the implementation of statutory law. It would require still further discussions and study to arrive at such a situation, but his nephew had assured him that this should give him hope for the future.

According to Mbele’s nephew, scholars were increasingly studying and publishing on the subject of customary law. One of the scholars had given an important lecture during a congress on the African Commons9. He stated that ‘the development of customary land law will depend, in the first instance, on how customary law continues to be treated in national legal systems. This scholar actually proposed legislative action in three directions. Firstly, to raise the status of customary law in the hierarchy of applicable laws to a level that would force courts to apply it and not just ‘be guided by it.’ Secondly, customary law should be seen as the personal law of the majority of indigenous people to avoid the hopping in and out of foreign law to accommodate the situation or case at hand or to declare customary law unsuitable to avoid an unfavorable outcome. And thirdly, the codification of customary law should be pursued in progressive manner.

Of course, this process of codification should be approached with caution. Customary rules are rooted in community norms, which govern indigenous behavior in a wide spectrum of every day life events. Mbele conveyed to his nephew his fear of marginalizing the rights to property of women and his nephew agreed that it was one of the aspects that needed careful attention in the codification of customary rules. But it was undoubtedly an advantage of a system of legal pluralism that most of the customary rules could be retained for the time being. Mbele began to understand that this was perhaps the best solution for his village at this time.

It had been a long evening when they finally parted. His nephew would travel back to the capital tomorrow but he promised to keep his uncle informed about the developments.

All these thoughts went through Mbele’s head during this quiet time of
‘Legal pluralism’; Meble did not fully comprehend what that would eventually mean, but he felt that being provided with hope for the future by a young and clever man as one’s own nephew is a good thing anyway … and with that reassuring thought he eventually fell asleep.

3.6 LEGAL PLURALISM AND SELF-RULE

Legal pluralism can be encountered in two forms: formal and empirical pluralism. Formal or official legal pluralism is the situation where in a national legal order a principle of ‘other law’ is recognized. Empirical legal pluralism covers any situation when within the jurisdiction of a state a variety of differently organized norms and patterns of enforcement effectively and legitimately control the behavior of specific groups of the population. In the latter case it does not matter whether or not the plurality has any official legal recognition within the legal order of society at large. It must be realized, that one may come across situations of empirical plus legal pluralism, situations of only empirical pluralism without legal pluralism, and even cases of legal pluralism without empirical pluralism (e.g. when a constitution recognizes distinct legal orders which, however, no longer are practiced)\(^{10}\).

In a small number of federal states, the national constitution contains measures that support the desire of various indigenous groups in the nation to legally strengthen their own identity by providing fragmentation of the national public and legal authority giving way to self-determination. It gives, inter alia, these groups the power to maintain and develop distinct own legal and public authority institutions. If the former is the case the State ideology expressly acknowledges the existence of various ethno-national collectives\(^{11}\). In a wide sense, it is possible to observe quite a number of cases that would qualify as legal pluralism because there are several states in which different institutions in a few matters only manifest themselves.

Cases where on a large scale rules, principles, doctrine and institutions differ from those practiced in the federation are much more limited. If the latter is the case the real challenge is to organize a peaceful coexistence of different communities, while at the same time a common set of shared values and institutions on the federative level is respected and nurtured. A matter requesting special attention in these situations is the prevention of hopping in and out of the various systems to seek maximum benefits or minimum punishment and the full recognition of equality of systems in the legal order.

The most common cause of the development of legal pluralism in a nation is former colonization or occupation by people who were feeling superior to the indigenous population. In many cases foreign ‘western’ law was introduced by alien occupants, colonizers, or their descendents and for
strategic subjects like land, the foreign laws would have priority over the traditional laws and rules of the indigenous people. Often indigenous people were considered inferior and were moved from the most fertile land. In the newly cultivated regions western laws reigned, resulting in a situation of a de facto dual legal system; one in the areas occupied by colonizers and one in the areas where land occupied by indigenous people because the land there was considered not of importance or not of use to the foreign invaders. As long as it did not bother the invaders, distinct communities could continue to practice their various traditional laws although these were not always confirming to the concepts of western laws. Cultural differences were welcomed, now and then even promoted, if those did not interfere with the concepts of law and state and the affairs of a colonizing population. Against this backdrop legal pluralism was merely treated as a cultural variety but it was often not a fashionable topic. Colonial powers tolerated and often also formally acknowledged the existence of traditional or customary law. In the official legal field customary law was ignored or at best only accepted in court in so far as the dominant legal system explicitly referred to it. Legal pluralism, although a real fact of life in a great many African, Asian, Latin American, and Northern American states, was not accepted as an essential and fundamental state of affairs in the legal system itself. McLachlan states: ‘Customary law had been given a specific and restricted place within the legal order by and under the control of the dominant state law. This official legal pluralism that existed could be seen as a less developed system of uniform state law, as a station in the direction of a unified official legal system. Customary law was deemed to be transient, and at most would leave some adorning traces in a new, uniform national legal system.

However, a growing population, the discovery of useful minerals, and sometimes tourism, made former useless land grow in importance and where it happened, the colonial or occupant state started to interfere with the traditional laws especially those regarding land tenure, resulting in tensions between western and traditional elements in society much to the confusion of the population. Indigenous property regimes have long been treated as inferior to ‘western style’ property regimes in most of the legal engineering processes taking place in the past century.

Research shows that indigenous values and land tenure systems are both persistent and flexible. Renewed attention for possible benefits of an indigenous property regime has generated attempts to integrate elements of indigenous land tenure into statutory law or more recently to recognition of indigenous property regimes as a separate legal entity next to statutory law in what is commonly referred to as legal pluralism. In other cases formal law and the policy geared toward economic development, individualization, and commercialization of property clashes with ongoing practices of indigenous people. In particular, indigenous farmers and pastoralists experience and
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Perceive little certainty about their traditional rights and land use methods. Vulnerable groups in the society generally see their access to resources mainly by a system of indigenous land tenure. Limiting, undermining and/or eliminating the traditional land tenure system have considerable consequences for large groups in the society.

Recent revaluations of indigenous values and attempts to dampen the feelings of injustice and discrimination abundantly present among indigenous people, have resulted in considerations to develop customary land tenure rules to become the primary tenure regime, but so far indigenous property regimes have not yet received recognition as the leading – let alone exclusive – property regime in a country. Generally such allowances for traditional property regimes are limited to reservations or distinctive areas well separated from the other parts of the country. Among local politicians and international donors remains doubt whether a customary tenure regime can be developed in practice in which the economic rules of a typical capitalist society can be applied.

But there are important and worthwhile concerns about the applicability of traditional law in a contemporary society. The interesting proposal of some scholars stating that the status of customary law in the hierarchy of applicable laws should be raised to a level that would force courts to apply it, can have unexpected and unwanted effects. Sometimes application of traditional law can lead to ethnic inequality, expelling people, and not tolerating specific religious practices, which devalues the legal equality under governmental laws. It is not uncommon to encounter gender inequality in traditional law contradictory to statutory laws of the central government. That can be a limited disequilibrium between males and females, for example by not allowing females to drive an automobile unsupervised or to oblige them to wear specific garments in public, or the custom to arrange marriages. It also can have more serious effects when for example females experience much harsher punishments than male for similar actions that undermine their marital status. For many western legislators it will not be acceptable that males come away relatively easy with adultery, while women for the similar trespass face the punishment of being stoned. In this regard it is important to realize that in most cultures (also today the western culture) men by rituals, customs, education, division of labor, or sheer force have determined which part women are allowed to play and which role not, and in which role part the female is everywhere subsumed under the male. This position of the male goes way beyond what would be ‘naturally’ necessary actions by males to protect women. It is ‘natural’ that males have to perform dangerous tasks and have to undertake perilous expeditions far from home to find new hunting grounds or areas for settlement. That natural order stems from the fact that males can easily be replaced in society, contradictory to females who bear and nurse children and have to stay closer to the home.
than males. For the continuation of the people in the community you only need a few males, but the more females there are the better the prospects. So males have to protect and safeguard the females of the community. But for tens of centuries males used the natural task of protecting ‘their’ females to dominate them in a system of patriarchy and this has become the common rule in most societies. It must be realized that patriarchy as system has until recently never been openly challenged in a massive way and whose doctrines were so universally accepted that they seemed to be laws of nature. In this respect it is most unfortunate that the feminist movement has not (yet) succeeded in developing a new paradigm and that most of the efforts to break down the male domination have only resulted in changes in the margin. What then to expect from (re-)introducing again traditional law?

Traditional law may present the possibility of polygamy which might not be formally recognized under statutory law. Some elements of traditional penal law could include corporal punishment by way of flogging, (the earlier mentioned) stoning, or dismemberment, elements that no-one would like to (re-)introduce in a contemporary society. Several traditional law systems recognize a system of punishment that can be much harsher for women than it is for men committing similar crimes. Although these elements seldom will influence matters of land tenure, it can have an effect in decreasing the land tenure security of certain groups of a local community. Even in a specific field of law as rules regarding land tenure one therefore enters already headlong in the debate if this can be squared with respect for the principle of equality of all before the law. It appears in societies where married females are not supposed to act on their own and are not always accepted as registrants in land registration offices. The family farm is registered in the name of the oldest male and seldom female names appear in the land registry documents. It easily occurs that they get landless after becoming widows or divorcees, nevertheless remaining in the responsibility for dependent children. There is much variation in the position of women in different traditional law systems.

These examples of elements in traditional law make it difficult to straightforwardly apply it in society, even in a distinct region of a nation. It underlines the necessity of sufficient awareness in any process of codification of traditional law making it the dominant legal system. Such a process should be managed with much caution, but it will also be a very challenging task. Elites in society have always tried to use legislators to document rules that favor them more than others in the society. It is not uncommon to notice that obviously customary or rules are ‘invented’ or interpreted to benefit specific groups. Customary rules are rooted in community norms, which govern indigenous behavior in a wide spectrum of every day life events and using concepts that are unknown of in many western style legal systems.
3.7 THE PRACTICE OF INDIGENOUS SELF-RULE

In the tendency to come to terms with indigenous demands for more autonomy and respect, the term ‘new partnership relations’ is sometimes heard. All this has to do with regionalization of state power and pluralizing the state. In the case of indigenous peoples one can witness assimilation policies and a change from central to federal policies. There are several areas in the world where this process is noticeable. The following two examples are selected with no other goal then to illustrate the status of some contemporary legal pluralism.

The two examples of legal pluralism given of Tuva and the North Eastern part of Canada, have been chosen as examples of developing legal pluralism. The big challenge already felt in both regions is that of overcoming a hampering economic development by a government given responsibility for part of what initially were responsibilities of the federal government. Nevertheless it must be possible to formulate conditions for international donors to pinpoint funds and resources in an attempt to diminish initial hesitation by banks and others to support economic development under a less ‘western style’ legal property regime, and requirements in practice for an indigenous tenure regime with a clearly defined customary character to provide similar—but likely specific in nature—perception of security of tenure as ‘western style’ tenure regimes. The challenge is to subsequently construct a legal framework for the indigenous land tenure—as the national jurisdiction—in which the elements that dominate economic development can be recognized, supported, and nurtured.

3.7.1 Tuva

Tuva is situated in the heart of Asia between Southern Siberia and Mongolia with a territory of about 170,500 square kilometers (1% of the Russian Federation). It has 320,000 inhabitants of which 247,000 are of Turkish/Mongolian descendents, the rest is mainly Russian. Between 1921 and 1944 Tuva has been an independent state. The longest distance North-South is about 400 km, and East-West about 700 km. The capital Kyzyl has 93,000 inhabitants, the second town is Ak-Dovurak with 30,000 inhabitants. When asked, most Tuvans will not be able to give a simple answer on the question if Tuva can be considered a republic with self-rule within the Russian Federation.

Self-rule can be approached as a situation of a people who are practically independent and free from outside interference, because of the remoteness and isolation of their territory, irrespective of the legal fact that a sovereign state claims sovereign rights over their territory. This is not the situation in
Tuva. The experienced self-rule in Tuva is a right awarded to a people within a sovereign state. Usually this happens on the basis of some federal construction of that state. However, the view on self-rule in Tuva is not meant to be a strictly legal exercise. The question that is of interest is if Tuvans in daily practice possess or lack affective means to self-rule. The right to self-rule is usually linked to the principle of self-determination, a principle enshrined in many international treaties but fervently contested as to its scope and meaning. It is possible to distinguish internal and external self-determination. Internal self-determination leads to a regime of self-rule within the ultimate sovereignty of a state. External self-determination refers to the right of a people or territory to obtain the international status of a sovereign state. The latter is not the matter in Tuva.

A variety of topics comes to mind when considering to what extent a people formally possesses the right of self-rule and what chance this formal position gives for a real exercise of self-rule. For example control over a territory and its natural resources, indigenous jurisdiction, representation in the various organs of power (not only in the autonomous territorial unit but also in the national government), fiscal autonomy (including the power to raise revenues and receive a share of the national revenues), and cultural freedom. Obviously, one has to distinguish carefully between the legal domain in which some forms of power-sharing between the Russian Federation and Tuva are expressed, and the real relations of dependence and power between these two. It must be realized that the first is easier to observe because the reality appears to be continuously changing. But let me just describe some land tenure related issues here to give some idea of how the self-rule of the Tuvans got form in practice.

Since 1993 Tuva has its own Constitution and here one can read Tuva’s ambition to be a sovereign state, because the first chapter states:

The Republic of Tuva is an independent democratic state within the Russian Federation and has a right to self-determination and a right to exit from the Russian Federation if this is approved by a national referendum in Tuva. The status of the Republic of Tuva cannot be changed without the consent of Tuva. (Art.1).

Such a change requires that two-thirds of the Tuvan people vote for it. Although, there is currently no ambition for seeking more autonomy among the Tuvans, it is interesting to note that there are various elements in the Tuvan constitution that do not comply with the Constitution of the Russian Federation. For example, the mentioned Tuvan provision in art.1 contradicts the Russian Federal Constitution because in that Constitution no secession from the Federation is allowed. Hoekema summarizes several more contradictions or rather points of possible confusion that can be encountered by studying the Constitution of Tuva and comparing it with the Constitution of the Russian Federation.
Regarding the control of natural resources, the Tuvan Constitution states: ‘The territory and natural resources of Tuva belong to the Republic of Tuva ...’ (Art. 1); ‘all natural resources and all types of property located on the territory of the Republic of Tuva belong to the Republic of Tuva’ (Art. 14). These clauses clearly contradict the Russian Federation Constitution. The Tuvan Constitution claims that the ownership and use of all natural resources is solely governed by Tuvan law. However, this issue is referred to the joint jurisdiction of the Federation and Tuva. Art. 112 contains provisions which do not conform with the Constitution of the Russian Federation as it declares that the Constitution of the Republic of Tuva shall prevail over the Federal Constitution, should the provisions of the latter relating to matters of joint jurisdiction contradict the Tuvan Constitution. Also, regarding the judicial system, the Tuvan prerogatives specified in its Constitution are not in conformity with the Constitution of the Russian Federation.

As far as land tenure is concerned, there is an interesting contested item about private property. In the Federal Constitution (Art. 9), private property is declared a legal institution through which individuals relate to land and other objects of ownership. This concept of private property implies that the holder has the right to dispose freely of the land or sub-soil resources. Moscow or Kyzyl authorities have to step back and leave development in the hands of private persons. This approach goes against Tuvan concepts. In the Tuvan Constitution, private ownership of land is explicitly ruled out (also in Art. 9), a provision which has been confirmed by a nationwide referendum. The Tuvan way of life, at least as registered in the collective memory, is more community-oriented than individual-oriented. Its nomadic past still influences the outlook many Tuvans have on the way to deal with their natural resources. It is well known that nomadic or pastoralist (as it is called today) people all over the world do not well-understand the concept of private property, which is thoroughly alien to their trekking way of life. For pastoralists, it is of vital importance to be able to move around with their herds over considerable distances, in order to cope with the problems of a harsh climate. Naturally, these people developed many law-like rules, made, changed and upheld by themselves, which refer to the order of access to or, if need be, the sharing of grazing lands, water wells and other scarce goods. These social rules are first and foremost community-oriented and do not allow the idea of private property. There is another background factor at work here, the specific religious orientation of the Tuvans. Most Tuvans are shamanists and in the shamanist view natural resources have spirits and are worshipped as a gift for mankind, to be preserved for later generations. Exploitation is only permitted within strict limits determined by a relation of reciprocity between human beings and Nature. In this view, there is no place for the Western concepts of private property or large-scale exploitation and
the massive destruction and pollution of nature that go with it.

Hoekema also shows an example of the practical application of joint jurisdiction as prescribed by the Federal Constitution. The Federal land code does not contain any regulation with regard to the reservation of a large tract of land for the exclusive use of and management by a nomadic people. Let’s suppose the Tuvan government wants to promote the economic position of the very isolated nomads living in the northeast (the district of Todzha) by instituting a special legal regime providing the Todzhans with long-term rights of disposition and use of vast tracts of land. Such a regime might be thought of as well adapted to their nomadic way of life. It provides collective ownership to the Todzhan community itself and gives them the rights to exclude others, to regulate their own affairs, and so on (practical communal land tenure). Since there is no provision with regard to communal land tenure for (in this case Todzha) nomads, the conclusion is that Tuva is free to do what it wishes (provided there is no contradiction with the Tuvan Constitution). However, if the federal land code were to be amended, Tuvan freedom would be over. (And Hoekema adds: Such a sudden change, by the way, is not very likely in this particular example).

The Federal Constitution declares all natural resources the property of the Federation. In the Tuvan Constitution, however, full property rights to the natural resources on and under the territory are vested in Tuva itself. Clearly, these two legal positions contradict each other. As the Federal Constitution and relevant laws are of higher order legally, there is no serious doubt as to the fact that Tuva cannot follow its own course in natural resource exploitation nor unilaterally stop possible Moscow-led developments on its territory. In daily economic and political practice, agreements may be worked out, revenue-sharing agreed upon, and other modalities found to satisfy some of Tuva’s needs. In addition, we have to mention the fact that a series of specific federal laws regulate the exploration and exploitation of natural resources, which is declared an issue under joint jurisdiction. In practice, these laws give great power to the Federal Ministry in Moscow. Tuva’s legal position to develop its own way of controlling and exploiting its natural resources is rather weak.

3.7.2 Northern Canada

In 1999, the largest part of the North West Territories (0.85 million square miles) of Canada was made a semi autonomous Eskimo territory with the name Nunavut as a result of two agreements; the Nunavut political accord and the Nunavut land claims agreement. The word Eskimo comes from a native American term meaning ‘eater of raw meat’ or ‘netter of snowshoes’ and although it is widely used for the inhabitants of the sub-arctic area of our planet it is considered insulting among the Inuit and the Yuit people who
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make up the Eskimo population. By the way, Inuit (‘people’) is plural; the singular is Inuk (‘person’). On the 1st April of 1999, the new territory of Nunavut, meaning ‘Our land’ in Inuktitut—the most used Inuit language, was officially born. It covers one-fifth of the Canadian landmass and will be fully governed and partly owned by the Inuit majority. It was the result of both pressure from the Inuit—the indigenous population of Nunavut—but even more the next chapter in a long struggle of the federal Canadian government with its substantially autonomous provinces of which French speaking Québec has been the most rebellious. Of the Canadian population less than 25% speaks dominantly French and over 60% dominantly English. Ratification of the 1987 reached compromise at Meech Lake turned out to be unacceptable for several provincial governments because of the special position Québec would be given. In 1990 the federal government was forced to promise more autonomy for the other provinces as well. But the population rejected a referendum on the issue. Nevertheless this struggle between federal government and provinces benefited the indigenous groups, around 2% of the total population in Canada, and the creation of Nunavut is partly the result of this resistance and at least for the Inuit one of the positive outcomes of this struggle.

The establishment of Nunavut will give the Inuit far greater control over their own affairs than they have had since the 16th century when Europeans (whalers, explorers, merchants, and of course missionaries) arrived at this rocky and snowy region where the sun hardly can be seen in winter and where it during the short summer barely sets. The Arctic Circle runs almost through the center point of the territory.

The treaty between the federal government and the Inuit is two-fold: A land and compensation claim settled in 1993 and the creation of an autonomous territory in 1999; Nunavut. The Land Claims Act in 1993 for the land-claim settlement is the largest in Canadian history. It gives the Inuit control over parts of their traditional hunting grounds and compensates them for land once confiscated by the federal government. The government will pay cash compensation of about $1 billion over 14 years and transfer rights to 135,000 square miles (350,000 square kilometers) with the right to subsurface mineral rights in one-tenth of that land to the Inuit population. Like all other Canadian citizens, Nunavut residents have their rights and responsibilities determined by the Canadian Charter of Rights and Freedoms. But unlike other provinces and territories in Canada, Nunavut has a public government and a land claim agreement which is linked on several issues. For example this agreement specifies that the number of Inuit employed in public service must directly be proportional to the number of Inuit in Nunavut society. In 1999 the initial figure was set at 50 per cent (in the core government that started in 1999), but it will slowly be increased to 85 per cent to reflect the real number. The government of Nunavut is able to make
decisions in areas of jurisdiction reserved for the federal government in Canada’s other territories and provinces.

Historically, the survival of Inuit depended solely on the wildlife that the land and waters provide to them. No wonder that the current five lands and resources co-management bodies, giving considerable control to the Inuit themselves in areas normally the prerogative of the federal government were revered so much by the Inuit. The co-management bodies (also called Institutions of Public Government) are made responsible for five distinctive issues that are of vital importance for the Inuit. These are the management of the wildlife (regulates sustainable hunting and fishing), the planning (land-use to guide and direct exploration companies), the water (regulates water-use applications for all lakes, rivers and coastal waters in the Nunavut settlement area), the surface rights (regulates the access to Inuit land by developers) and the cultural, socio-economic and environmental impact on land, water and air of project proposals (mixing traditional Inuit knowledge and modern scientific methods to examine the impact). The establishment of these five co-management bodies puts the future well-being of Inuit land in their own hands. This institution provides the Inuit with a high degree of land tenure security.

The division of the Northwest Territories of Canada in 1999 marked the creation of the territory of Nunavut—roughly the size of Western Europe. This will make the 27,000 Nunavut residents, with an 85% Inuit majority responsible for such things as education (including language), health, social services, and housing. The Nunavut government will be seated in the capital Iqaluit, at the top end of Frobisher Bay. The capital is located in the southern part of Baffin Island in the Eastern part of Nunavut near the Labrador Sea.

3.7.3 What Does Self-Rule Mean in Daily Practice?

To understand the meaning for the Inuit of having their ‘own’ state, let me introduce you to Taqalikitaq Kusugak, one of them.

By now she is used to the surname Kusugak, which she acquired in 1969 during the project ‘Surname’ that ran form 1968 to 1970. Until that time Inuit did traditionally not use surnames in their communities, and for bureaucratic reasons they were given numbers by the Canadian government, which the Inuit always saw as an insult. Just to be a ‘number’ and not a person with a name was felt as being given a lower level citizenship. That is why in 1968 the project Surname was started. The missionary priest in her village had given her also a Christian name different from her Inuit name but she nowadays exclusively uses her Inuit name Taqalikitaq. But the given Christian name ‘Hannah’ also reminded her too much of the feelings of being inferior to white people. So she felt much more comfortable with Taqalikitaq, conscious as she was of her Inuit heritage. Her surname
Kusugak fitted well with her Inuit given name she thought.

On almost every contemporary map showing the Northern part of the American Continent, Taqalikitaq now being one of the older Inuit women living in the capital, would find the name Nunavut - ‘Our Land’… To see the name Nunavut on a map always made her feel both proud and sad. Proud of her Inuit heritage and the long struggle it had been to have that name finally printed on each map and sad, because her father had never seen it on a map because of his untimely death. Sitting in the rocker at the home of her eldest son in Iqaluit, formerly called Frobisher Bay - the capital of their new nation - and feeding her grandson of almost half a year his bottle, she really felt at home. Her satisfaction about the accomplishment of having their own Inuit land showed because she could not stop telling her children and grandchildren about the past of their people and how different from today it had been when she was young.

She was born more than sixty years ago in a tent made of Caribou hides, as most of the Inuit that had her age and were born during the short summer season. The tent of her parents was one of several tents forming the community Inukjuak, (Port Harrison) on the Eastern shore of the Hudson Bay in northern Quebec. That is where she grew up. She remembered her father being away for weeks to talk with the government of the North West Territories in the capital Yellowknife more than 2000 km west from Inukjuak. Her father was an influential man in his community and in the whole region, so it was only natural that he was asked to make the pleas with the government for more recognition of the Inuit identity. Although he never lived to see it established, his work laid the foundation of the Inuit Tapirisat of Canada representing all Inuit to voice concern over the welfare of the land and wildlife threatened by exploration companies in the early 1970s. Her father’s stories and the little presents he always carried with him when coming back from such official visits were memories to cherish.

Taqalikitaq also remembered the other trips her father made on a hunting expedition also staying away for weeks when he went with the dogs, the sledge, the harpoons and the kayak. He then never brought back presents, but meat and fish from the hunting trip. She enjoyed the freshly made seal fillets her mother would make following his return from such trips and she was eager for her mother to teach her how to prepare the meat of the geese, ptarmigan, seals, and the caribou and to clean and preserve the skin and fur of the latter two. She still vividly remembered how to prepare a festive meal of the occasional snow-hare that her father would bring home to have some fresh meat just from the area close by when he did not had the opportunity to go for bigger game on one of his hunting trips.

She knew from the gossip in the community that her father was not only an excellent hunter, but also a clever builder of igluit (igloos), perhaps the best of the community. She chuckled and cooed to her grandson while
feeding him, telling him the story of the ignorant qallunaaq (white men) down south, who believed that the Inuit were constantly living in igloos, while every Inuit knew that igloos were mainly built as temporary shelters during fishing or hunting trips for seals, walrus, arctic char, ptarmigan and geese, but also to provide shelter to a family on an occasional nomadic trip to follow herds of Caribou.

They say that children are more immune to cold than elderly people. Indeed, she could not remember ever feeling cold during her youth. Now with her aging bones, slightly affected by arthritis, the cold would chill her and make her feel old. She now was able to understand the constant complaining of her father about the cold in the months following that day in August of 1953 when a government chartered ship almost literally dumped her family and the other families of their community, some 2000 kilometers North from their original community, with their tents, dogs, sledges, harpoons, and kayaks on a pebbled beach of Grise Fiord in the High Arctic. Although it was still August it was snowing and there was no man made building in sight as far as they could see in the grayish and snow filled air of the afternoon. She did not feel the cold then, but a chill would still go along the spine of her now old body when she remembered looking up in the desperate eyes of her parents. The utter disbelief and the desperation were clearly readable in their eyes even for her as a child of barely ten years old. They felt totally and utterly isolated from the rest of the world in this place on the edge of a vast sub-arctic tree-less tundra of the Northern Territories of Canada. In this wilderness with its many arctic bays and islands the people of their community would repeatedly ask themselves during the first months they were there: What are we doing here in this vast wilderness?

In a long term policy of isolation the Canadian government forcibly relocated the native Inuit, which shattered their traditional society. Her father never was himself again after that day in August 1954. He did not only complain of the cold but increasingly about almost everything, and a few months later, after becoming an alcoholic he took his own life. It was a terrible shock for her to realize that her father had not been able to overcome his despair. With him she lost most of her childhood. But her mother was different, she did not give in. She was a brave and courageous woman who held her head high and fought for her family of four to survive after the passing away of her husband. Taqalikitaq vowed then and there to keep the legacy of her mother alive and that is why she told her children and grandchildren the story of her family again and again. Her grandson now almost asleep in her lap with his bottle half empty did not understand her, but with his vivid brown eyes he encouraged her to bond with him and to share with him the stories of their people. What better time to tell him about it all while feeding him? Her husband would ridicule her for her story telling to such a young infant. ‘The boy does not understand you,’ he would
repeatedly say. But as a female she knew that this was important. Raising young children and in particular babies was for her husband a technical matter. You feed them and they extract from the food what they need and poop what is useless to them. But for her, feeding a child was not only a physical event, it was a sacred time to share with him what moved her and to fill his young mind with useful Inuit knowledge. She just felt that she had to convey to her grandchildren the legacy of the ancestors and the progress made so far by her people on the way to recognition of their traditional rights and the accomplishment of self-rule. Her apartment home just one block away from where her son and his family lived in Iqaluit, the name meaning place of fish, was a far cry from the hide tent she once lived in during her youth with her parents and siblings. It was also a lifetime away from the first attempts to free the Inuit from foreign influences and make them responsible for their own destiny. But the story of the forceful relocations and the long struggle for some form of greater control over their own Inuit affairs should be known by all Inuit by heart.

Takalikitaq saw the historical treaty with the Canadian government of 1993 as a culmination of the persistence of her people and a closing chapter in the indigenous resistance against foreign whalers, hunters, trappers, explorers, and missionaries that came to their land since the sixteenth century. By telling her grandchildren the Inuit history she hoped to prepare them for a new appreciation of the traditional Inuit ways of life. The bond between Inuit and the land was weakened when permanent settlements gradually replaced their nomadic lifestyle. With her own children she almost lost the battle of Inuit traditions with the modern times in the form of videos and chips instead of drum dances and maktaaq (whale skin; a traditional Inuit snack). She could not blame her children too much though. The wage economy had taken precedence over hunting and fishing that united the communities in one to survive fighting nature. Now individuals started to compete with each other for jobs, education, business deals and ‘in keeping up with the Joneses.’ The computer, the internet and the two-way radio had an enormous impact on their traditional customs. The video player became an almost indispensable tool for her children during the long winter season when the sun hardly rose above the horizon. It was one of the many threats attacking the original ways of her people that came with modernity. Luckily her children could still appreciate a good seal fillet or stuffed goose prepared by her according to the recipe that her mother passed on to her.

Despite her concerns for the future of the Inuit, Takalikitaq also has high hopes. Her concern focuses on the new lifestyle of comfort and ease by the introduction of the Inuit to instant food, snowmobiles, wooden houses and rifles. That weakens the relationship between Inuit and the land which always had been a challenge to them. But the fact that most Inuit, also the younger ones, used any opportunity to leave the community and to live out
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on the land for a time was proof that her people were still very connected to their roots and this gave her hope. Takalikitaq knew that the role of Inuit elders had disappeared to a great extent, which had a detrimental effect on the Inuit way of doing things, but with the creation of Nunavut came new opportunities. The legislators of their own nation will be more attuned to Inuit values. The elders were given more say in community structures. She expected for sure that this should have an effect on some of the social problems eroding the traditional way of life she knew. But for such a thing to happen, the young majority of the Inuit has to be convinced of the values of tradition and customs by listening closer to elder Inuit like her.

Living to see the creation of Nunavut had been wonderful, but to reach that milestone had not been easy and long negotiations had preceded the establishment of ‘Our Land’. Some of the involved Inuit stated it like this: ‘The government representatives initially came to the negotiation table with a very difficult attitude. But over the years, they changed their position. We think that the government recognized that this was part of a reconciliation process between the original citizens of North America and the Europeans who have arrived over the past 500 years. Our people have demonstrated their resilience, their determination, and their toughness. This speaks well for us and is encouraging for the future. We are not afraid for any disruptive consequences for the environment by hunting and fishing now that we are responsible for it ourselves as a result of the creation of Nunavut. We are the original citizens of this country; so we care very much about this nation. We want other Canadians to feel good about this treaty and I think they do. Nunavut is something they can point to and say that we, as a nation, have negotiated a treaty with an aboriginal group that benefits not only the Inuit but the whole country.’

Taqalikitaq knew that the challenges facing the newly appointed governors, however, were enormous. Statistically, Nunavut is at the top in Canadian unemployment, teen suicides, domestic violence, homicides, sexual assault, alcoholism and gasoline sniffing. It is a tragic and almost unbelievable state for a culture that, traditionally, has thrived on the knowledge of how to survive under difficult circumstances. These are tragic symptoms of colonialism she would say. Until recently, people in the Canadian government thought that the best thing for indigenous people in this country was to forget their identity and become little Eskimo images of the white man. But from now on the Inuit children would not have to deal with the things she and the fellow Inuit of her age had to face. These children certainly will have opportunities she did not have.

For the Inuit it is important to realize that the people who will run their government will be their friends, their neighbors and their relatives, which has never been the case before. These governing people will not be in a far-away place like Yellowknife or Ottawa, where the climate is different and
where the language normally spoken is not able to translate properly Inuit customary concepts. Their government will be here and it will be Inuit.

Her son followed in the footsteps of her too early deceased grandfather, although it did not seem so at first. He grew up on Baffin Island with parents who spoke only Inuktitut. She and her husband had decided to speak their native language at home and would not allow any other language in the household. Her son saw his first tree at the age of 14 on a trip to Ottawa, but he was educated in Iqaluit, and started his career as a drug and alcohol counselor. But eventually the genetically determined interest in politics took over. He got his seat in parliament in 1995 at age 30. So he first was a politician in Yellowknife before being able to draw on his experiences of mainstream life as a politician now here in Iqaluit in the Inuit government. Luckily he was open for the education his parents gave him in the Inuit traditions and this explained his appreciation of the important role hunters and elders should play as providers of food and cultural values throughout most of Nunavut. She considered it a necessary knowledge for politicians to reconcile the tensions that wracked Inuit society lately. And the Inuit now have a much better starting position than ever before to realize the long cherished ideal of taking the Inuit destiny in their own hands.

Her grandson had finished his bottle by now and she was stopped cold in the middle of her line of thought by his sigh of content. Looking down on his satisfaction showing little face, she knew in her heart how important it was to her that he would enjoy the result of all their struggles. Her people simply must take advantage not only of their own relative independence but also of the accomplished successes by other indigenous groups in Canada.

In respect to the latter it can be noted that already in 1975, long before the Canadian Federal Government considered indigenous autonomy, an agreement has been reached to establish a kind of co-management recognizing the existence and functioning of a local system of resource regulation. Hoekema\textsuperscript{18} gives an account of the contents of this agreement. The so-called James Bay Agreement came to be as a result of a compromise between the desire for the Cree Indians living in the Northern part of Quebec and the wish to explore the riches of the northern region. The Cree feared that they would lose their subsistence resources for hunting and fishing by a hydroelectric project supported by the government of Quebec. The Cree accepted eternal abolition of all their claims to rights of ownership or authority in the whole territory in exchange for firmly grounded official rights which would allow them to safeguard their daily means of survival and obtain public powers to defend themselves against other threats on their environment in the future (next to a substantial amount of compensation money).

The result is that the indigenous peoples obtained rights to hunting and fishing in the whole territory on the condition that hunting is for traditional
subsistence only. For some species they hold exclusive rights and non-native hunters are banned. The federal authorities are not allowed to interfere with the regulation of native use except in emergencies. State regulation should guarantee that the indigenous people have maximum access to the animals, which serve, for their basic nutrition, while hunting of non-natives should be restricted throughout the territory. In this way the communal ownership of the indigenous identity is recognized.

With the now sleeping baby in her arm, Taqalikitaq got up from the rocker to put the empty bottle in the sink in the kitchen. Her daughter-in-law would be home soon and she would have to go to their own apartment, because her husband expected a meal on the table at dinner time. It was getting dark already outside, with that long afterglow so characteristic for the sub-arctic region. How lucky she felt to experience all this. Her own apartment home in Iqaluit, their homes, their security for holding rights to their own private property in their own land. ‘Our Land’ a name full of symbolism, and walking to the kitchen she hummed her own song on Nunavut in Inuktitut:

‘Your home, my home, our homes. Igluit
Your town, my town, our town, Iqaluit,
Your land, my land, Our Land, Our Land! (Nunavut)’

Smiling about her own silliness for creating such a song, Taqalikitaq carefully lowered her grandson in his crib. Do not change his diaper now, she thought, it will wake him up. ‘Sleep comforted little baby,’ she said softly pressing a kiss on his chubby cheek. Not only could she wish for a comforted sleep for her grandson, she herself felt comfort knowing that the self-rule of the Inuit would finally provide her and her people with a new sense of tenure security and a continuous access to land because they as Inuit had authority over such matters now. Taqalikitaq felt the pride of being Inuit spreading through her own mind while thinking of their home in Iqaluit, giving her that special feeling she perceived; ‘Our land at last!’
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Soviet Affairs, 1994
NOTES CHAPTER 3

1 The Kirghiz author Chinghis Aitmatov gives an account of life on a collective farm in ‘Speak out in Words of Truth’ that appeared in the bundle ‘Tales of the Mountains and Steppes’, and I have used some of his portraying here in this narrative.

2 I do know that implementing a more socially oriented land tenure system would be a time consuming affair. It would be just a little over-idealistic to presume that in a project the time and means would be provided to establish such a land tenure regime, because it also would have to be implemented gradually. What I really miss is that international donor organizations as yet do hardly seek to sponsor research in this field in order to use the results of such research in upcoming projects. All officials and other representatives of international donor organizations I met in my consultancy activities so far were only keen to make a quick fix and adhered both in word and action to economic growth paradigm typical for a western capitalistic society.

3 On purpose I use the poor English translation to show what kind of texts most expatriate experts have to work with in daily practice. The translators were doing a good job, but most of them were unfamiliar with the specific aspects of the subjects covered in the documents to be translated. Some of the translators used an English language that was clearly not in touch with contemporary English. In this respect I like to convey one of the experiences I had with my team that almost sounds as being invented on the spot. We had proposed a text for an instruction for the staff of the new style land registration office. Contradictory to the attitude of the past of officials we wanted them to be courteous and friendly customer-oriented civil servants. So in one of instructions it was written that in contacts with the customers the staff should be careful to be friendly and helpful. This was translated in the local language and reviewed by the management. Following their approval we asked for a re-translation of the new local text into English for us to check. We were amused to read that; ‘...during intercourse with the customers the staff of the registration office had to be extra careful and helpful...’ The use of an old-fashioned English word that had got a new and very specific meaning here did not make much sense. We could only hope that in the original version of the text in the national language that specific meaning would not apply...

4 The internal passport and the ‘propiska’ must be carried and shown on demand to officials. It serves as a document to prove identity. It is in general not valid for foreign travel. In Soviet time major roads had inspection stations where travelers had to have their documents checked in order to continue their journey. Nowadays travelers in the former communist countries may encounter some of these stations that are still operational and manned by police to check
speeding and in general to control the flow of traffic.

5 The term peasant is often used in documents on Russia. It should be noted that the term is not meant to be used for something ‘backward’ or ‘subsistence’. A peasant runs an individually operated farm and the term came into use because of poor translations and Russian censorship (See also note 28)

6 A considerable debt is owed here to Donald VonAtta and Katherine Verdery who inspired me for this paragraph and of whom I used some ideas and some small parts of text.


8 Suzanna Lastarria-Cornhiel, discusses a number of gender related issues that need to be considered when autochthonous rules are changed in ‘Impact of Privatization on Gender and Property Rights in Africa’, World Development, Vol. 25, No.8, pp. 1317-1333, 1997

9 H.W.O. Okoth-Ogendo presented this view in a keynote address at the African Public Interest Law & Community-Based Property Rights Workshop, August 1-4, 2000, Arusha, Tanzania

10 This is taken from the compendium by Hoekema, André. J. ; ‘Communal Land Tenure; The Concept and its Historical Defeat against Capitalism’. Law Faculty, University of Amsterdam 1999.

11 See Asch, M and Smith, S (1992) Consociation revisited: Nunavut, Denendeh and Canadian constitutional consciousness. ‘Etudes Inuit Studies’ (Université Laval, Québec, Canada) 16 1-2, pp. 97-114

12 From a research point of view, an interesting case can be reported from a reservation set aside for indigenous people where they practiced their traditional land tenure law. What would happen when a non-indigenous person resides in the reservation area? Would traditional land tenure also apply? Singer (1991) documents that zoning laws by an Indian nation were declared null and void by the Supreme Court of the USA when pertaining to non-Indian inhabitants of the reservation. Exercising of authority by a tribal government over a non-Indian property owner apparently is seen as abhorrent (Singer, Joseph W, Sovereignty and Property, in Northwestern University Law Review 86, 1991 no.1, pp.1-56).

In post colonial states the ‘cultivation’ of customary law as it existed in its various forms in the various communities was scorned by a new national elite as an impediment to unification and building a strong new post colonial nation. It provides rebellious minorities with a justification to resist unification and acceptance of the power of the central authorities.


Much of the contents of this contribution I owe to a brochure André Hoekema and others prepared about Tuva; ‘Rulers of the Steppe’ (2000), University of Amsterdam Faculty of Law, Dept. of Sociology and Anthropology of Law

The journalist Miki Dedijer gives an impression of the creation of Nunavut in an article in the SAS-airline magazine ‘Scanorama’ in April 1999 and I have freely used some of his data in this paragraph.

CHAPTER 4
PRIVATIZATION OF FARMLAND IN
FORMER COMMUNIST COUNTRIES

4.1 REVERSING THE COLLECTIVIZATION OF FARM LAND

In the early 1990s, following the political changes in the communist world, many newly formed republics on the territory of the USSR, wanted to embark on a course to develop a market economy in their societies. All kinds of actions were undertaken to support this development. Newly democratic elected parliaments discussed proposals for new laws and regulations. International contacts raised the expectation of foreign aid to be supplied in order to assist not only in legislative activities but also in providing expertise and above all resources to stimulate market developments. Quite high on many government lists was the development of a real property market. This is not surprising, because in most former soviet countries, land is the most valuable asset that is available to be shared by citizens. For a real property market to evolve land should be made the subject of private individual ownership rights. The result of the drive toward a market economy with a functioning real property market was a development of large-scale programs for land reform projects for the de-collectivization of most of the state-owned land in cooperation with international donors.

De-collectivization of land is generally practiced in all former communist countries according to separate domains, like the domain of agricultural land and real property, the domain of forest land, and the domain of urban real property under laws that effectively reverse the communist collectivization of land. This essay focuses on privatization of farmland and is thus mainly zooming in on the domain of agricultural land and buildings, because it is one of the measures having the most impact on rural life, but urban de-collectivization will also be mentioned. At the beginning of the communist era, private individual ownership of land was gradually abolished in accordance with the statements of Soviet leaders and inspired by the land rent theories of Ricardo and Marx. Lenin argued that land was an integral part of nature and the essential base on which all human activities - production and daily life - took place. Land could not be subdivided and kept under the control of self-motivated individuals or institutions. They would
over-exploit the natural resources and they would force laborers to pay maximum land rent to occupy and use land they needed for their survival. Under early communism therefore, land in each region was defined as the commonwealth of workers, to be allocated and administered by the responsible Soviet in the peoples’ name. Nobody was recognized as owner of rights to land. All questions about occupation and use of land had to be answered by economical, social and administrative relationships. For a farm, for example, this meant that each collective unit was given its order to produce a certain amount of product and was given an amount of land suitable for accomplishing that production goal. The necessary amount of land was calculated by scientific planning methods using all kinds of parameters. Soil qualities, for example, were divided in ten classes and each of these subdivided in ten subclasses in some of the states of the USSR. It meant that in one (large) field – Soviet agriculture always used large-scale fields - one could encounter more than five different sub soil classes. All this was recorded both in numerical and graphical form. An enormous bureaucracy of (semi-)scientific institutions kept track of the location and the possible changes in soil qualities. Land management became an important field of study and research on Universities all over the Soviet Union.

4.2 SOVCHOZY AND KOLCHOZY

State or collective farms were the dominant units for agricultural production. Originally there was a significant difference between the two, but later in time the differences became smaller and less significant. State farms (Sovchozy) were run as state enterprises with salaried labor and an appointed director, neither employees nor the director had any necessary relation to the land the farm worked. Much state farmland came from expropriating large landowners, political prisoners, or ‘war criminals.’ Collective farms (Kolchozy) were formed by villagers who ‘voluntary’ donated their land to the collective. The government officials used all kinds of subtle and not so subtle methods to convince and force small farmers to convey their land (and agricultural assets) to the collective farm. It ranged from propaganda to downright physical force by, for example, imprisonment and physical beatings until peasants signed the papers of transfer of their land. The peasants became both the members of and the labor force on the collective farm. Members were not paid a fixed salary but various forms of remuneration in cash and kind; the rates were determined variously at various points in time. Although a Kolchoz might have members who had given no land to it, the bulk of its members - and quite possibly its chairman - would have close ties to the land they worked since it had once been theirs. Initially Sovchozy tended to be favored in the distribution of state resources.
and to specialize in capital - rather than labor - intensive farming; Kolchozy did both, the latter particularly in the form of member’s ‘private plots’.

Over time the farm management in most of the Kolchozy started to make decisions without asking the consent of the members. Original fields were combined to larger ones and irrigation works were carried out adapting the field layout to suit such applications. New roads were built and fishing ponds were excavated. This all made it increasingly difficult for the members of the Kolchoz to identify with ‘their’ original fields over time. Influenced also by communist propaganda they lost interest in their rights to land.

The Kolchozy increasingly used State channels to obtain essential equipment, fertilizers, and seeds and so the difference between the Sovchozy and Kolchozy started to fade. The distinction between state and collective farms was formally eliminated in several countries as state farms were given their production assets.

In most of the economies of the former countries that were part of the USSR, agriculture was an important production factor. Emphasis on industrial production during communism did change that statistically, but many citizens remained parochial and rural in their thinking and in their attitudes. Even the massive compulsory moves from rural village housing to semi-urban apartments - justified by the drive to provide all Soviet citizens with healthy sanitary conditions and nearby educational facilities - did not basically change that rural attitude and the perceived relationship with the land. That Soviet large scale farming was a failure was clear for insiders in the Soviet Union already in the 1980s and it became increasingly visible for Western observers also. Although perhaps never fully understood, there were circumstances that pointed towards a possible dramatic change on the political scene in communist countries. No-one is surprised by the statistical evidence that small privately owned farms produce more and better than large scale farms. This is often blamed on the free-rider attitude among large farm employees. I personally doubt that in the Soviet Union wide-spread free-rider behavior occurred. Most of the time it was a kind of easy rider mentality together with the mentioned tendency to look for opportunities to use the large scale farm supplies to improve production on the private garden plots that caused most of the problems. In the Soviet industrial complexes employees enjoyed specified hours and reasonable working conditions. In traditional family farming however, the farmer and his family are supposed to work from dawn to dusk. A good farmer is a committed farmer who will not take vacations or in general days off, because the farm needs his or her labor day in day out. By converting family farms into large scale farm complexes, the communists abolished this traditional farming attitude to be substituted by the more leisureed, more socially companionable and more civilized working conditions of the state or collective farm. But the result of such a more relaxed farm life together with the continually unsolved
difficulties in timely supplying fertilizer, machinery and machine parts and in getting farm products efficiently from the farm, fuelled a kind of easy-rider mentality leading to the failure in farming, more than real free riding. Only the private plots and the private farmers’ markets, where individual responsibility and family exploitation were preserved, could be continuously successful in agricultural production.

Although not the subject in this chapter, it was also the continuing scarcity of consumer goods that contributed to the collapse of communism. After providing the people with all the basic essentials of life in the urban areas of the Soviet Union, accumulating consumer products became the focus of their desire. The well-known shortcomings in the supply of consumer products grew out to a problem and an important element of the people’s discontent with the government. This might be surprising at first sight, but stylish and easily available consumer products are what people increasingly demand when their basic needs are fulfilled.

The scarcity of consumer goods was one element that led to dissatisfaction among the population. But there an important other element; in a modern society basic human rights like freedom of expression, security of person, participation in decisions by the government are a normal element of life. With the almost eradication of illiteracy in the Soviet Union, communism created its own opponent: a growing number of well educated citizens. As Galbraith⁴ argues:

By its nature, economic advance produces more educated men and women than, as a practical matter, can be kept quiet and excluded from a role in public life. Writers and poets; artists; scientists and engineers; journalists and television commentators; university professors and especially their students; lawyers, physicians and other professionals; industrial managers; labor leaders and self-anointed and aspiring statesmen - all are brought into existence and supported by economic development. They are what economic development both needs and provides. Once present and numerous, they cannot, as a wholly practical matter, be denied voice. Nor can they be excluded from decisions on national affairs. They must be permitted to speak and to participate. This is the only solution; public expression and public participation must be allowed. So, without exception, it has been in all countries as they have developed economically. So it was in recent times in Spain, Portugal, Greece, South Korea, Taiwan, and, in substantial measure, in Thailand and Malaysia. And so it was predictably in the Soviet Union and in Eastern Europe. Present therein were more educationally, professionally or artistically qualified people with more interests and ideas than could any longer be kept in silence and excluded from participation in government. Repression, as earlier observed, is possible in poor peasant lands and those with little or primitive industrialization. There the daily struggle for survival outweighs the urge for expression, and dictatorship is a practical possibility. With economic development that is the case no longer. Communism sought to combine economic development, substantial if
imperfect, with oppression, and this combination could not exist. Strongly adverse economic factors under capitalism can likewise, it should be noted, produce and cultivate repression, totalitarianism. That was seen clearly in Italy and Germany in the decades following World War I, leading on to Mussolini and Hitler. The danger may be present, as this is written, in the economic disorder of post-revolutionary Russia. This only affirms the point: economic success is a basic underpinning of human rights.

The growing urge for self expression, although almost ignored or overlooked by Western observers were a pushing force towards political changes in the communist world. This force combined with the fact that Soviet agriculture was rapidly becoming problematic were the reasons for a strong growth of resistance against communism in the second half of the 1980s, although some Western historians like to credit foreign - especially American - international policy for this.

It would also be a gross underestimation of the insight of Soviet politicians to pretend that they did not realize the logistical problems stemming from the communist system of land relations which could hardly be overseen by Soviets at all levels. It failed to guarantee fair distribution because of lack of adequate discipline and administration. Land ownership became vested only in the state, giving central agencies control over the land in the regions. As executioners of the law, central agencies could allocate rights of use of land to collectives, enterprises, and also individuals. This system grew out of hand by bureaucracy and miscommunication among the layers in the Soviet hierarchy of central planning. Too often matters went wrong. The communist system was about to change.

4.3 JANIS AND VAIVA

State ownership of land turned out to provide insufficient incentives for rational use and efficient management of the natural resources. Already during the final years of communist rule (1987 – 1990, the years of ‘perestroika’) some concepts of civil law were introduced aimed at breaking the monopolistic control of central agencies over land and resources and over the process of economic production. Greater responsibility was laid in the hands of enterprises and individuals in the expectation that they would manage the land more efficiently as means of production. Words were used to describe the ‘stock of land and resources’ as the ‘ownership of the people’ and as ‘national wealth’. Soviet commentators described this principle as being closer to Lenin’s principle that control over land must be exercised by the persons working on it and caring for it. I met personally some farmers who were selected for these experiments and who could start their own individual farm before 1990. What I remember most was the mistrust in the
new politicians, their fear and great disappointment about their loss of land tenure security, when following the fall of communism, old land claims started to break up their shortly-lived dream of being individual farmers. One farming couple was particularly hostile toward the new government in their attitude. Let me tell you what they told me when I met with them.

Janis and Vaiva were considered good communists in their community. Janis was a foreman on the large collective farm and at the same farm Vaiva was in charge of overseeing the kindergarten. The farm was situated near a small town of about 50 kilometers south from the big city. They both were good members of the Party and served in several commissions during the years of communism. But the large farm did not produce well. Although Janis and Vaiva never saw the exact figures, they could, together with the other workers on the farm, observe that it was difficult to meet the production quota because harvests were unsatisfactory, especially when compared with what their private small gardens produced. They also noted how some agricultural workers behaved on the farm, avoiding hard work at the farm, but using all their saved energy to make their small private gardens a success. Their wives often were seen going to the local market to sell surplus produce from the crop of the private gardens. He and Vaiva discussed these things sometimes in the evening, but it was obvious that the two of them could not do much about it. Janis would complain to Vaiva that some of his men tried to get the easy jobs, and took too much time for accomplishing simple tasks. Vaiva would remark that she noticed that the delivery of new school materials was postponed again, that the window of one classroom was not yet repaired and they concluded that this would be something to discuss during the next party meeting. But in recent party meetings the chairman had given only vague and evasive answers and only few of the other farm workers had supported them. The chairman even had taken Vaiva apart following the meeting and told her that Janis was highly appreciated because of his dedication to the farm and the party but that his soft opposition during the meeting could damage his reputation. So Janis decided to avoid being too outspoken and when in a next meeting with the board of the farm it became clear that there was less money for necessary purchases and repairs, he did not speak up and kept quiet.

With all the mounting troubles plaguing the farm management, word spread in the spring of 1988 that the Soviet government had decided to start experimenting with smaller agricultural production units. On a February day in 1989, the chairman of the farm showed Janis a letter, which the farm management had got from the government ordering them to start an experiment with setting up small individual private farms. The chairman told Janis that the farm management wanted to propose him as one of the private farmers for this experiment. He had been selected because of his outstanding service to the party and to the people as foreman on the farm, which together
with his wife’s long standing reputation of dedication to the children of the farm community made them a good choice. Would they consider starting their own private farm? It just took him and his wife one evening of pondering to decide to accept the proposal by the farm management. And so on a day in the fall of 1989 he was made one of the first private individual farmers in the region under Gorbachev’s perestroika experiment. The board of the farm praised him while an official of the Party who had come from the capital for the occasion officially handed him the keys of his own tractor. In a festive atmosphere they were all gone to the land that was his to work from now on and they had been given several toasts on his good fortune and his success. The land for his farm came from the collective farm and furthermore, assistance with obtaining seeds and farm equipment was assured to him by the chairman of the farm board. Of course, several people showed some sour feelings both out of envy but also because the new private farm was going to use part of the fields to which they suspected they had ownership rights to before communist time. But most people congratulated the couple and wished them good luck. In turn Janis and Vaiva still beaming from being the center of attention had invited the party members to visit them next year to celebrate their first harvest as individual farm.

The first year they had been rather lucky. The old farm provided them with most of what they needed to start farming on their own and they benefited from contacts that he had among members of the large farm board. Their farm produced well, partly due to a good winter with lots of snow and perfect weather during spring and summer. Regular rain showers and periods of sunshine had kept his crop growing steadily and the harvest was likewise successful. However it had not been that easy the second year for him and his wife to manage the farm. His good relationship with the collective farm board had paid off well during the start up of the farm, but after that first year the board showed reluctance to support him as they originally promised. There were big problems on the large farm and they had to struggle to get enough seed for their own fields and to keep all the machinery in working order. It would be difficult enough for the large farm to produce its quota and although they showed sympathy for the problems of Janis and Vaiva, this sympathy did not materialize in much actual support. Several times Janis visited the party office and he also pleaded for some help by the management of the old farm but despite various promises in the end it did not deliver. So the second year their farm produced less than 70% of the previous year. They had to borrow money to buy seed themselves and needed repairs had to be postponed. Under such circumstances they did not want to invite the party members to see how they were doing on the farm and the visit planned to celebrate their second year as private farmers had been canceled. They started to wonder whether they would be able to make a relative success of the farm and thus of the experiment.
But then, things started to change politically. Communism was abolished and his former friends in politics changed their political faith from communist to socialist. New laws were developed to re-adjudicate the land of the collective farm to former owners. As a result of all this, he was confronted in 1993 by heirs of former owners of rights to land, by claims to ‘his’ land, since he was farming land that once belonged to the collective farm. One of these claimants was actually even living in the United States for many years already after fleeing his country and now claiming back the land of his parents who once farmed in the area of the collective farm. Janis doubted if this claimant would ever work the land in the future or just wanted the land as revenge and perhaps to make a profit on it later. But what was much more disappointing to him, was that his old pals in the Party showed no sign of compassion with him since they converted to socialism. He and his wife were all alone in coping with this blow to his perception of land tenure security. They knew that they had to give up the farm, and since their ancestors were never farmers but town people, they hardly could claim any land and were made dependent on the distribution of some land set aside for former workers on the collective farm who did not have enough land to start a subsistence farm. Janis knew that the land set apart was of marginal quality and at a reasonable distance from the farming community. He also felt that his former co-workers on the farm were not enthusiastic to share the little land that was available for distribution after re-adjudication with Janis who had to show off that he could manage on his own private farm only a few years ago. Janis and Vaiva were afraid of their future. What would become of them without a farm to make a living? But even more, they were angry with the politicians that let them down so easily. That is how I met them on their farm yard on a day in September 1993 when they told me the story of how they lost their perception of land tenure security.

4.4 PROBLEMS OF LARGE-SCALE FARMING

All over the USSR, the perestroika experiments with farms could not deliver quickly enough. Agricultural production levels in general decreased steadily over the years, although the grain production was seen as the backbone of agricultural production and this has been monitored and kept on the same level as much as possible, but in other sectors the decline was clearly visible. To maintain a high level of grain production became almost an obsession. Even years after communism was abolished, TV stations in many of the new republics paid considerable attention to grain production and the successful harvests of barley, oats and wheat in the country during the daily news broadcasts in season, as several Westerners living there will have observed.
The problems of large-scale agricultural production were well-known in communist countries. There was a growing difference between the production level per hectare on the large-scale farms and the production per hectare on the private household plots. This clearly indicated that Soviet agriculture was not in good shape. Much of the decline in production was in the livestock sector. The fall in livestock meant a real shift and change in the average diet of the people. However, many Central Europeans ate far more meat than citizens of other countries with a comparable standard of living. Some of that fall in livestock represents an adjustment to the end of policies, which favored livestock products at the expense of other consumer goods. The decline in agricultural investment, which means that farms have been living on stocks of accumulated capital goods, and the continuing shortage of production credit showed their effect although payments arrears were often cancelled out across the economy as they were in previous years. This all added to the insight that a major shift in policies was necessary.

So, after the well-known political changes in 1989, many Eastern European countries designed the already mentioned large-scale programs to re-establish private ownership of rights to farm land on the land of the former large scale farms so typical for communist agricultural production. Most of these programs were only possible to succeed with substantial support from and in cooperation with international donors like the EU, the World Bank and the UN. During the last decade of the twentieth century, a vast number of land reform projects started in former communist countries. In summarizing the reasons for land reform it can be said that these are two-fold and sometimes three-fold.

First, there is the evidence that agricultural production on large-scale farms is substantially lower than productivity on small family-size farms. Large-scale farming suffers of the effects of the so-called free-rider attitude. Apart from this empirical evidence a theoretical reason could be given as well. Making former peasants agricultural employees on a large farm takes away the perception of responsibility for one’s own farm and replaces it with the more leisure like attitude that is found in most industrial settings. The theory of Maslow about human satisfaction in life, assumes that humans find satisfaction in higher levels of the emotional hierarchy once lower levels are satisfied. Responsibility can not been asked from peasants who themselves have no responsibilities. When a family grows its own food and produces for their own living, the work they put into the production brings personal rewards higher than the basic emotional level of food and shelter. It takes them to the level of security and will give a desire to reach beyond that. Responsible stewardship for land and environment can only be expected if the peasant has been made responsible him or herself. It presents peasants in rural areas with a chance to improve their life, decreasing the attraction of a move to the city. A peasant farmer and land owner will
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protect the land from overproduction and overgrazing in his own interest and generally will exercise responsible stewardship for the land.

Secondly, most of these countries want to improve the living standard for the peasants. By de-collectivization and privatizing the lands (and other assets) of the large state and collective farms, governments hope to increase the participation of peasant-owners in the development of the national economy. Private individual ownership of rights to land will improve the credit possibilities and facilitate transfers of land to increase efficiency of farming and the use of mechanization resulting in higher agricultural production levels.

In several countries there is a third reason. It is the now seen illegality of many actions taken by former communist regimes. A clear distinction should be made in this respect between the former parts of the USSR located in Europe and those in Asia. In Central Asian countries the communist doctrine of state ownership of (almost) all real property existed for over sixty years by the end of the communist era. Hardly anyone now alive had a sense of private ownership of land and the whole rural infrastructure was based on large-scale farming. For most European countries private individual land ownership was common in the 1940s, although, in some countries more widespread than in others. During the gradual de-privatization of farmland in the late 1940s and 50s, private farmers were expropriated or they joined cooperative farms. Although, originally the cooperative farm did recognize the formal ownership of the members of the cooperation, in practice the farm management gradually took over the responsibilities and rights of ownership.

In an urge to reverse the declared illegal expropriation or taking by the state of agriculture land, the land reform projects that started could follow two basic modalities; re-adjudication or distribution of farmland. As seen above, in most of the former communist European countries there was the choice for reversing the collectivization of land, it could be done as a re-adjudication of former owners of rights to land or done as a general distribution of rights to land among the citizens. However, in reality often a mixture of these possibilities was chosen and sometimes beneficiaries of distributed land were only selected categories of citizens.

4.5 LEGISLATION REGULATING LAND REFORM

Almost all former communist countries in Central and Eastern Europe adapted a series of new laws in the early 1990s to reverse the collectivization under communist rule. Most of these laws liquidated collective farms (the Kolechozy) and returned their lands to the households that had given them over at the time of collectivization in the 1950s. As far as the State farms
(Sovchozy) are concerned, these were not (yet) split up in most of the former
communist countries. Different patterns were followed in the various new
republics. But the justification given to retain State farms in the hands of the
government, was the necessity to ensure that production of food could
continue uninterrupted (on the state farms) while the collectives are being
dismantled. This leaves several prior landowners locked out of properties
that happen to be located in state farms, and in the countries were it occurred
they have resisted both by suits and by forcible occupations. Because
considerable amounts of land in use by State farms came partly from
expropriated ‘enemies of the State’, many of the persons concerned were
expropriated on made up or fake accusations. Being ignored during the
current re-adjudication is an extra injustice and burden. It looks like they are
deceitfully punished again.

To ensure maximum agricultural production, collective farms were
managed by so called liquidation commissions during the de-collectivization
process with a twofold assignment; to distribute the land and assets of the
farm while at the same time continuing production as much as possible.

Some government, like the government of Russia, gave up title to almost
all-agricultural land. In Russia the big farms were required to reorganize
themselves, and regulations provided private individual farmers the legal
right to take a share of the large farm’s land and assets to set up on their own
farm or form a smaller association. The key legislation was the ‘Law on the
Peasant Farm’ of which the first draft appeared in July 1990. Farmers
leaving the kolchoz or sovchoz would receive full property rights over
production assets, but not necessarily own the land. Initially this right to
leave with a share of farmland and assets was hotly contested during the
second Congress of People’s Deputies in November 1990 as VonAtta (p. 21)
describes. There was a lot of hesitation and resistance among politicians.
Eventually, and following several interventions of president Yeltsin himself,
the division of farmland and farm assets started in Russia.

Former owners did in general recover not merely usufruct, or use rights,
but full rights of ownership to land. But as mentioned, it happened often that
beneficiaries were selected on the basis of new legal norms. In Bulgaria for
example it was mainly ancestral ownership of rights to farm land, the place
of residence did not matter in Bulgaria and so it could happen that several
urban dwellers with no experience in, and no incline for farming all of a
sudden became the owners of farmland. In Armenia it was rural village
residence and family size that determined beneficiary status. In Moldova it
was either current employment or retirement of the kolchoz. In Romania
both previous ownership of rights to land and the time of employment at a
collective farm determined one’s share in the re-adjudicated and distributed
land. A number of countries split the kolchoz and assets thereof in shares to
be distributed among the population. The shares could be used to obtain
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property (sometimes with additional payment in money or kind).

In Albania (as the exception in Europe) and Asian new Republics land was distributed among actual workers in agro-industrial complexes either in the form of shares of land or it was a distribution of vouchers good for buying property among all their citizens without recognition of former ownership of rights to land. Most of the time in these countries (part of) the agricultural lands were distributed among all the households in the country. The latter is particularly important in countries were money is in short supply and is mistrusted in general. For many Westerners this may be a little strange. In most societies reliance on money as an easy means to pay for exchanged goods together with the use of debit and credit cards, is so normal that an economy mainly depending on barter and on exchanging of goods in kind seems almost unreal. Nevertheless, in some rural areas of former communist countries the economy was almost completely of the barter type still in the mid 1990s. Under such circumstances money does hardly play a role in the rural economy and only a limited role in the national economy. It is also masking the messages national statistics about the status of the national economy diffuse.

Undoubtedly, many Westerners have asked themselves, like I did, how can people survive without payment in their regular jobs for several months (the absence of funds to pay officials and laborers was certainly not unusual in post communist time)? The solution can partly be found in the barter economy where produce from their own garden plots is exchanged for other goods and produce. It only underlines the dependency on access to land for people in rural areas in dominantly agrarian countries. But it also shows something of the close knit culture in communities during communist time were one’s own produce provided a kind of livelihood safety net for less-fortunate members of the community.

4.6 DIFFERENT LAND REFORM PROJECTS

It will not come as a surprise that most land reform projects are specific for the region where they are planned and carried out. They are idiosyncratic in nature and never fully comparable or similar to land reforms carried out elsewhere. The 1970 US-AID no. 3 Spring Review notes that this strange animal called land reform is an animal that changes its colors, its appearance, its anatomy, and its physiology almost as often as much as other strange animals called democracy, freedom, and capitalism. It seems that almost every author of analytical papers about land reform apparently felt he or she had to define the term again. Definitions vary according to whether the author favors or opposes land reform, whether the writer treats it as an ideological symbol, or as an achievable goal, or looks at actual results.
Although this description reveals difficulty in determining the contents of land reform, the goal of land reform is obvious; land reform aims at changing the existing pattern of land tenure in a society.

It is impossible to describe all the variations as they occur in the different countries. The description of land reform projects given in this chapter is broad and kept in general terms to provide a comprehensive and recognizable overview of how countries coped with the challenging process of privatization of farmland. Land reform in the following paragraphs is the deliberate act to change an existing land tenure structure. The various countries practicing land reform use all kinds of names for the institutional arrangements and for the official agencies involved in the land reform projects. To avoid confusion about terms and concepts, by describing land reform projects in several former communist countries making it a kind of hodge-podge, I have chosen to mainly follow the land reform process as it was implemented in the early 1990s in Bulgaria. I will use the Bulgarian example as framework for most of the text, but I will try to describe project processes in such a way, that the examples shown will be wider applicable and recognizable.

In Bulgaria four classes of owners of rights to land are recognized in the new laws: private physical persons, private juridical persons (including companies, religious bodies), the state and the municipalities. During the communist era, municipal ownership of land was not recognized, and it is not always clear now at the time of de-collectivization, which properties in the urban areas originally belonged to the state and which to the municipalities. State properties including blocks of flats, which have not been privatized, may belong to the municipality or the state according to which managed or used them. Agricultural land, which is not restituted, or claimed by the state, however, is classified as municipal land. Apartments are being sold by municipalities (sometimes on behalf of ministries, when owned by such ministries instead of the municipalities) with shared rights in the building as condominiums (seldom with contracted requirements for shared maintenance), however without the land, partly because of the problem of possible future claims for restitution of land surrounding the apartment blocks. The municipality may also wish to retain some control over the surrounding land.

### 4.7 WHERE ARE MY (FORMER) FIELDS?

Outsiders might imagine that the process of de-collectivization would unfold in quite a simple way. The collectivization of land was the effect of putting together the fields of peasant farms in a village and working them in common. Therefore, because the land and its constituent parcels are fixed
goods so redistribution of the parcels to their original owners is only a matter of determining the coordinates of the fields prior to 1960 and re-attributing them to whoever had them at that time. In the countries that made the choice to re-adjudicate rights to land, it appears that one could simply ask all former owners of rights to present some proof of former ownership and start the process of registration of land in their names. Even simpler must be the procedure that can be followed if the choice has been made to straightforward distribute the land without taking into account any rights to land of former owners. Once it is determined who would be the beneficiaries and how much land of each domain (farmland, wasteland and forest land) is available in the municipality or the settlement, a simple math formula will suffice. The beneficiaries of the land distribution could be provided with a piece of land readily demarcated by land surveys on the ground and shown to them while handing over documents showing their ownership of rights to that piece of land. It is important to bear in mind the difference.

De-collectivization of land came in two modalities as mentioned: (1) re-adjudication of land to former owners of rights to land and (2) distribution of land to pre-determined beneficiaries. It will be clear that in the latter situation there is no re-adjudication and former ownership to rights of land as it might have existed before communist rule is not recognized as such.

Some officials and donor-funded experts started their endeavors in land reform projects also with the idea that land could be re-adjudicated because it still would be out there somewhere and expectedly not too hard to find. They soon discovered that de-collectivization of farm land of the collective and state farms is a massive and challenging operation, requiring much more than just simply marking former pieces of land or marking distributed fields and preparing ownership documents.

The first thing becoming clear at the start of the process is that the new regulations require the re-establishment or at least imaginary re-creation of a property situation as it was at the end of the 1950s, like nothing had changed. It reconstitutes farms of households that were family farm units 30-40 years ago but whose members might have now died, could have emigrated, are married and otherwise might have changed their relationship to land. The result has been conflicts among kin, among members of different ethnic groups, between rural villagers who had land before and those who did not, and between village residents who remained in the village and those who emigrated to a not by agriculture dominated life in town.

After all these years it is not easy to trace back all the fields that originally existed. The scenery has changed and if maps are available it is not always easy to use them. But in many cases people do not possess any maps or documents proving rights to land. Communism effectively abolished private individual rights to land and several individuals shredded their ownership documents or did away with them otherwise, believing that
private ownership of rights would never materialize again. Registers showing ownership of rights to land were neglected or done away with and, as far as they were available in the 1950s, cadastral maps vanished over time. So where to start with the process?

Secondly the topography of the land had changed sometimes drastically during the forty years of communist rule. Many of the difficulties faced by the officials and experts assigned to land reform projects aiming at a change of the existing land tenure occurred in areas where large-scale farms changed the original topography by building irrigation works, new villages to house the agricultural employees and so on. Former villages, roads, and canals are changed or moved and sometimes a whole new infrastructure with new access roads and new fields are created. In these areas a contractor must design a reallocation plan on the basis of claims of former owners of land together with new access roads to the smaller fields. Often the situation remains that people live in small towns or larger villages on quite some distance from their newly acquired fields. Resources to establish new settlements closer to fields are hardly available among the new owners and the government seldom could provide any funding for such projects.

Another problem is that the redistribution regulations in some countries required a redistribution of land in all the types of agricultural land in correspondence with the former situation at the time of collectivization. So a former owner of a vineyard, some agricultural land, and grazing fields, should be restored in ownership of rights to these types of agricultural land. But such pieces of land could now be very far apart as a result of the concentration of specific types of farming at the collective and state farms. The requirement of distributing various types of specific farmland however was less rigidly required when only distribution, and not re-adjudication, of land was practiced.

4.8 LIMITATIONS ON THE SIZE OF THE LAND

There is no fairest way for the distribution of farm land. Each solution for land reform can be criticized even when the land reform project is designed with the best intentions, because each solution is a compromise between the need for speed to maintain agricultural production and exercising fairness. During the years of communism rural demographics changed. Former farming families moved to towns and other people came to work on the farm. It seems unfair to re-adjudicate land to persons living in urban areas with no interest whatsoever to farm the otherwise cultivate the land. On the other hand, they can be heirs of farmers that lived on the farm for many generations and were forced to leave only after the communists came to power. Although, initially collective farm workers were only the former
holders of rights to the land of the collective, over time, immigrants and other workers without land came to work on the farm. It is particularly unfair to not recognize them in the land distribution process because of their contribution to and their dependence on farming. In some countries in particular landless families of gipsy origin made up a substantial part of the current labor force of the farm. These gipsy people had generally large families, contradictory to the original farm members who during communist times limited the family size, and these large families are very dependent on farm labor for their livelihood. To leave them without land would be a tremendous undermining of their livelihood security, because many of the new private farmers do not have the means to employ them as farm workers on their much smaller farms and they also do not need hired farm labor because even the relatively small farmer families can normally generate enough labor force to work the new farm by itself.

Thus, even if the majority of available agricultural land was re-adjudicated there was often a combination of re-adjudication and distribution, the latter mainly to be used for providing land to former agricultural employees without claims for re-adjudication of land. Where did the agricultural land for this land distribution come from? The first source of agricultural land to be distributed came from limitations in the amount of re-adjudicated land. Most of the new republics developed legislation limiting the total amount of agricultural land that one family could posses. So former owners of rights to land received less arable land during re-adjudication than the amount they had rights to before collectivization.

The second source was the land of the state farms. Apart from land owned already by the state before communism, considerable amounts of land in state farms came from expropriation during the early years of the communist regime. Although heirs of expropriated citizens generally had a right to claim land, some expropriated citizens vanished during the years of communism, some were forced to re-allocate (often to less attractive parts of the USSR), resulting in a situation that there were no identifiable heirs. Not every country wanted yet to dismantle the state farms and only focused on de-collectivization of land of the collective farms. Most of the land of state farms was often not (yet) distributed which was justified as a reason to safeguard continuous agricultural production, and to continue state farms for seed improvement and agricultural research, but later in time also substantial parts of the land of state farm was de-collectivized as well.

Smaller sources of farm land to be distributed were parts of land formerly not counted as arable land that were brought under cultivation, while also some of the administrative ‘hidden’ land could be used for this purpose. It will be clear that bringing land under cultivation that is less suitable for farming because of bad soil quality only marginally contributed to agricultural production. Many farm managers tried to distribute this land
first in the privatization process to ‘increase’ production on the remaining part of the large farm. However, the very first farmers to apply for their own farms were often insiders (overseers, farm management staff, agricultural experts etc.) who could make their claims to the best lands, leaving the lesser quality lands for the ignorant members of farm.

4.9 CONSTRAINTS FOR CREATING SUCCESSFUL PRIVATE FARMS

Soviet agriculture used large farms and the mechanization of the farms aimed at large scale farming. Much of the equipment that was still available in the farms for distribution - although much of it was not in good shape because of lack of proper maintenance and spare parts - was only suitable for large fields and could not effectively be used on the smaller new farms. Large caterpillar type tractors sitting idle in sheds and farmers using horses and even oxen to pull the plough through their small fields could be seen everywhere. Donkeys carrying produce and horse charts were in the 1990s a familiar sight - and a real traffic hazard after dark - on the rural roads of many former communist countries.

In the newly developed legislation on rights to land it was often stated that to protect rights to land against third parties, registration of the title proving documents was required. However the establishment of institutional provisions for the registration took generally more time, because of scarcely available resources, than originally anticipated. There is often a misfit in synchronization in carrying out a massive land reform project and establishing a massive land registration institution in a country. The first activity is highly political in particular when a considerable number of the population finds its livelihood in agriculture. Land reform can provide political gain when it works out well. A land registration project does not do much in satisfying or convincing an electorate. Establishment of an operational land registration system is always a trade off between costs and accessibility. It should be as cheap as possible, while on the other hand it should be available for everyone providing data on land at low-cost, within easy reach (requiring a relatively short distance to the offices because often travel possibilities are rather limited in rural areas of post communist countries), and quick response times to establish a perception of land tenure security.

The result of this misfit in synchronization is that the population is tempted to use informal methods of transfer of real property and this in turn complicates the establishment of a proper land registration system. Moreover, the costs involved and sometimes the time consuming travel to an office and the waiting for all the procedures to be completed in the offices
shies away people from the formal procedures of the land registration process. In some regions informal transactions of rights to land were customary before communism so people returned to that practice. There also is an almost universal reluctance to inform authorities voluntarily about one’s doings. This makes registration of transactions in land a subject that is approached with much reservation by the rural population.

All these factors hamper the development of a land market while on the other hand an operational land market must be in place to enable farmers a widespread use of agricultural credit using their land as collateral. Until a new market-oriented land registration and (agricultural) credit system is put in place, few farms are likely to be successfully broken up, since it will be impossible for the new owners to purchase the products they need to operate their farms. Without a source of agricultural credit and worked-out mechanisms for land mortgages, farmers will have no way to raise money for production costs. In many countries of the former USSR it is difficult to find the investment capital to reshape the countryside into a patchwork of smaller private farms or build the housing, the roads, and the other infrastructure needed after the redistribution of land. The existing infrastructure is adapted to large scale farming with few access roads and a centralized concentrated residential area. It seems that the need for adaptation of the infrastructure are often at least partly ignored or overlooked by those supporting the de-collectivization and it makes rural privatization much more difficult than its urban counterpart. Restitution regulations have thus produced a degree of uncertainty, upheaval, and tension that in some rural areas became nearly as disruptive as that of the original collectivization process itself.

An important negative factor in the whole process is also the mistrust and the fear for a repetition of history among the rural population. Many of the more well-to-do farmers or ‘kulaks’ were in the early days of communism in their country declared enemies of the people or the state and were deported, imprisoned, or simply vanished from the face of the earth. This enabled the state to expropriate their farms and to establish large state farms. Under Stalin’s rule the fear to be labeled a ‘kulak’ was so tense that after independence several farmers confessed to foreign experts that they were very reluctant to start their own private farms in fear of what could happen to them would they become ‘kulaks’. This fear was a serious issue among farm employees in Russia in the early 1990s and an impediment in the land reform projects to establish individual private farms. In other new republics farmers were sometimes so hesitant to start farming on their own as private individual farmers that only various new legal forms of cooperative farming, albeit on a (much) smaller scale than previously in Soviet times, came to life supported by relevant laws and regulations to regulate cooperative farming.
The disappointing effects of land reform and in general the economic hardship that befell most people in economies in transition took away the new spirit of changes and challenge among citizens in the early years of the 1990s. Some openly asked for a return of communism: ‘A time in which everyone had economically enough’. Others complain that it is a hard time and that there is struggle to survive. There are even people saying that nothing has changed at all, except that you may now say so!

4.10 THE ACTUAL PROCESS OF DE-COLLECTIVIZATION

At the start of the de-collectivization process two types of activities can be distinguished. First the existing farms should continue their production as much as possible and secondly the land must be distributed initially perhaps on a theoretical basis - for example by issuing land shares on paper - before actually being split up in smaller units. Often two types of official commissions were formed to guide these two different processes; the liquidation and the land (distribution) commission. A liquidation commission could manage from one up to five or six farms, while the land (distribution) commission often was assigned to a pre-determined administrative territory like all the land of a municipality. The latter commissions were in Bulgaria referred to as Municipal Land Commissions.

Figure 4.1 Terraced fields with recognizable former boundaries
As discussed earlier, during communist time, agricultural land was preferably used as large fields suitable for large-scale farming. It changed the topography and the infrastructure of the rural regions. But in several countries there are areas where combining small fields into larger ones was not efficient and effective even when these fields belonged to one large farm (see figure 4.1).

This is the case for example on hilly slopes where terrace shaped fields for meadows, vineyards and orchards can be found. The terrace like structure of the fields has been preserved under communist rule (See Figure 4.1). In these areas the land can almost be given back in a straightforward way on the bases of claims by the former owners. Here it is difficult to reduce the amount of land to be restituted. Generally a reduction taken from the already small fields will lead to very irregular new fields that are difficult to till resulting in significant under production and inefficiency in farming. For this reason there is often no reduction in land in these areas and restitution is relatively easy because many of the original parcels still exist or can be easily re-established.

Figure 4.2  Landscape with restorable former boundaries
In other areas the flow of existing rivers and the course of existing roads have formed natural boundaries. In these areas it is sometimes possible to restore the old boundaries without too much problems (See figure 4.2). This method also can be used in areas where reliable original cadastral maps are available from before the time of cooperative farming. To create access to the newly formed fields access roads are planned which may cause a small reduction in the amount of restituted land.

The land is restituted on the bases of claims supported by documents (if any) or by oral declarations and by pointing out via still present older people. Sometimes old cadastral documents and maps could be used to support claims for restitution.

In various countries, rights to land were transferred by notarial deeds before communist times. Owners of rights were provided with these deeds and also most of these deeds were registered in the regional courts. The problem is that not every transaction had been registered in this way. In some areas it was too difficult to reach a notary and in smaller communities people did also rely on bills, written declarations and even oral transactions, leaving the restituting authorities without formal sources. Resulting occasionally in some questionable new situations or using arbitrary solutions, the authorities assigned to restitution normally found a way to restitute ownership in these areas also without too many problems.

4.11 INSTITUTIONAL FRAMEWORK FOR RESTITUTION

Restitution of agricultural land is generally undertaken by a special agency and the process varies from country to country. In Bulgaria restitution of agricultural land is the responsibility of the Department of Land Reform under the Law on Ownership and Use of Farming Land enacted in 1991 and the Regulations under the Act, with subsequent amendments.

At the implementation (March 1991) of the Law on Land Reform (the Law on the Use of Farm Land), so called Municipal Land Commissions were created, one in each municipality. The municipal land commissions divided their area in territories belonging to settlements. Bulgaria has over 250 municipalities and more than 4800 settlements. The processing of claims for restitution is being done on a systematic basis using the territory belonging to a settlement as the unit of managing the work and contracting work to (semi-)private companies. It was originally envisaged that the bulk of the agricultural land would be privatized by the end of 1994, but even without formal titling and registration of the new land titles this target has proved to be too optimistic (See Figure 4.3).

The processing of claims for land was made the responsibility of Municipal Land Commissions and that was not an easy task. The submitted claims may be supported by documents, oral declarations or other proof. On
that base the municipal land commission decides which claims are rightful and should be honored.

| **Parliament** | adapts a Law on ‘Restructuring of the Agricultural Production’ which creates or recognizes the following legal entities: |
| **Department of Land Reform** | (at the Ministry of Agriculture). A department lead by a high level official is directly responsible to the Minister. Its main tasks are: Responsible for the Land Reform activities in the country; land re-distribution, land registration, land valuation and institutional strengthening. (But other Ministries often are historically charged with the actual execution of some of these activities while the department of land reform only has the task of overseeing and coordinating the activities) |
| **Municipal Land Commissions** | Nominated officials representing the legal, surveying and registration professions in the commission. Charged with the redistribution of arable land in each municipality; generally the actual redistribution is carried out per settlement. Each municipality consists of several settlements. |
| **Liquidation Commissions** | Often part of the old farm management but in a specific role The liquidation commissions are charged with the interim management of the large farms during the restitution process to continue agricultural production, maintaining that production as much as possible at the pre-redistribution level, while at the same time preparing to distribute land and farm assets in cooperation with the municipal land commissions. |
| **Acceptance Commissions** | Consist of representatives of the ministries involved in the land reform processes. Charged with approving the re-distribution plans |
| **Geokontrol** | An agency of the Department of Land Reform to manage the distribution and leasing of modern instruments for surveying and mapping purchased as part of the European Union donor support program. |
| **Contractors** | Private and semi-government firms contracted by the Department of Land Reform to carry out the actual redistribution process. Designing re-allocation plans, demarcation of boundaries of plots of land to be restituted, preparing data for the Municipal Land Commissions in hard copy and in a standardized electronic format. |

**Figure 4.3 Main participants in Land Reform in Bulgaria**

The technical activities for the de-collectivization are undertaken by some 700 companies contracted from the private and public sectors. Almost
every land surveyor in Bulgaria saw his chance in starting a company and many new companies became available for the job although some of them had little or no experience. The contracts are administered by the Municipal Land Commissions, the Department of Land Reform and specially constituted Acceptance Commissions. The municipal land commissions are staffed as good as possible with the limited resources that the Government has available, but the separation of technical activities between the municipal land commissions and the contractors has proved difficult in some areas, partially because of the wide disparity of salaries between the private and government sector. This has led to there being few surveyors, and fewer lawyers working in the municipal land commissions. Some surveyors worked partly as member of a municipal land commission and at the same time managed their own company to be contracted by a neighboring land commission. There would have been considerable merit in a program within which much of the work of the municipal land commissions had been carried out by selected contractors. The contractors would then have responsibility for all of the technical work, and the municipal land commissions would act in a management capacity. Figure 4.4 summarizes land reform activities with specific focus on the tasks of the municipal land commissions as it has been carried out in Bulgaria in general.

A complicating factor in several countries is the requirement that land is given back to former right holders or their heirs in the same state as at the time of the collectivization. This requirement turned out to be difficult to implement in some situations. I have personally witnessed a discussion among members of a municipal commission along the shore of the Black Sea about the re-adjudication of some specific pieces of land along the shore. This land originally had been meadow land used for grazing and hay making. During communist times some of the land had been converted into a camping area for the youth of communist party members. With some needed modernization it now could simply be converted into an attractive seaside camping, something that prospective new owners would gladly try to undertake. Could the commission re-adjudicate the land as it was now, or should they do some senseless demolishing of buildings and infrastructure? The rule to re-adjudicate the land ‘as it was’ required from the commission the latter, while distributing the land ‘as is’ would probably be unfair for other prospective owners along the seashore. Everyone knew that the value of the land with the buildings suited for camping had increased compared to the other fields on the sea shore. Could the commission charge for the works that had been performed on the land during the communist times, and how much to charge in that case? It was decided, of course, to re-adjudicate the
1. Law and regulations on Restitution of Farmland; create Department of Land Reform

2. (Re-)Determination of municipal and settlement boundaries to allocate farmland to municipalities and settlements

3. Appointing Municipal Land Commissions and charge these with:
   3.1. Determining the three land categories (existing old boundaries, restorable boundaries and reallocation areas) in each settlement
   3.2. Collecting and investigating of land claims and determining what types of arable land were present and in what state this land has been before collectivization in each settlement
   3.3. Approval of land claims
   3.4. Discussing and attempting to solve disputed claims
   3.5. Referring unsolved and still disputed claims to courts for appeal
   3.6. Selecting of contractors
   3.7. Contracting re-allocation activities to contractors per settlement
   3.8. Reviewing reallocation designs and developing compensation schemes
   3.9. Presenting the redistribution plan to acceptance commission
   3.10 Publishing of the proposed plan of redistribution of land and presenting the compensation scheme to the public
   3.11 Reviewing complaints and propose alternative solutions
   3.12 Referring any unsolved and persistent complaints to courts for appeal
   3.13 Distributing land titles to new owners of rights to land
   3.14 Compiling land records of redistributed land
   3.15 Maintaining land records in cooperation with local notaries

Figure 4.4 Main activities in the land reform process in Bulgaria
land ‘as is’ but with no land market it was difficult to come to an agreement about what compensation should be paid by the prospective new owners of rights to that land. The same often occurred when other improvements had been carried out on land like irrigation works, improving the drainage, and erecting farm buildings on the land.

This requirement of re-adjudicating the land ‘as it was’, forced municipal land commissions to divide the land into areas according to the categories used during the time of collectivization. For example land had to be categorized as agricultural land, meadow land, orchards, vineyards, and wasteland. So after deciding which land belongs to which settlement, the next step of the municipal land commission is to indicate which lands could be judged as belonging to which of the mentioned categories.

The next step for the municipal land commissions is to decide which pieces of land are to be in the earlier mentioned areas of existing old boundaries, restorable old boundaries and reallocation plans. This can become a series of rather complex decisions of which some are of an arbitrary nature. For instance the indication of restorable old boundary areas is a matter of local knowledge and sometimes even bold persistence by the commission.

Now the actual work in the field has to start. In areas with existing boundaries or restorable old boundaries the amount of work to be done is different from that in areas where reallocation plans are needed. The fieldwork is contracted to private or (semi-)governmental contractors. Often contractors would perform their job per settlement, in order to keep the work manageable, which means that for every settlement a separate contract is issued. Each contract has to be approved by an Acceptance Commissions in which the relevant Ministries responsible for the various disciplines involved in land restitution and land registration are represented.

In the meantime the municipal commission has assembled all the claims and has decided upon the rightfulness of the claims. On the vast area of a former cooperative farm, the contractor starts with making a reallocation plan. This is a plan showing all the pieces of land together with the infrastructure needed to give necessary access to all the newly designed fields. On this plan approval of the former owners is asked. If there is disagreement that can not be settled by the municipal land commissions, the case is brought into court. This is a long, time consuming matter which in fact stops all progress on the land reform in that area for the time being. It will be clear that municipal land commissions try to avoid such court procedures by developing all kinds of methods to satisfy the claimants. Here lays the origin of many local colored solutions designed by municipal land commissions and to discuss them is one of the attractive elements in the work of expatriate consultants.

Normally on the vast lands of the former large farms, more land is
claimed than there is actually available. One of the reasons for this is the practice of starting cooperative farms at first on the most fertile agriculture lands. The original title holders of these fields got in exchange for their excellent fields which they had to submit to the cooperative, parcels of minor quality sometimes left unused or deserted by - at that time - inhabitants of towns. These parcels still were quite reasonable to farm. Where this happened nowadays claimants appear with original ownership documents, but there are also claimants appearing with documents issued by the cooperatives to farmers that had to change their land. So it can happen that different people arrive each with their set of documents supporting the claim for the same piece of land. For municipal land commissions these are difficult matters to settle. It is difficult to deprive farmers from land that they worked for over forty years, while on the other hand a fair process of re-adjudication dictate to distribute the land to the original right holders even if that are people living in towns who never bothered about the land. Of course, the previous only applies in countries where urban dwellers were made eligible to be re-adjudicated farm land.

Creative land commissions came up with several ideas to solve these and other complicated matters as best as possible and often the new right holders were so pleased with their accepted claims to land that the solutions offered by the commissions were accepted. A problem in this respect was the composition of the municipal land commissions. As mentioned before, it was not always easy to find people sufficiently able to perform the tasks of commission member, also because it is important to avoid every impression of partiality by commission members.

4.12 DATA ON RESTITUTED LAND

In Bulgaria, as well as in many other countries, municipal land commissions were provided with PC's to speed up the administrative work using a standardized nationwide software package with financial help of foreign donor funding. The result of this effort is a uniform set of documents issued by each municipal land commission if land is given back to the former owners or their heirs. The municipal land commission decision on restitution, with the plan (‘sketch’) and certificate of entering into possession can be taken by the owners of newly restituted land to a notary to obtain a notarial deed, though the restitution documents are themselves legally sufficient to prove title. They form the new base or root of title for agricultural land and would be sufficient for issuing of absolute titles under a registration of title system if timely legal action had been taken to have an appropriate law approved. Some notaries have stated that they cannot accept the municipal land commission decisions without further investigation,
though this is most likely more a matter of seeking additional income than a conscious conflict with legal regulations. Land restitution and subsequent registration can only be effective if the decision taken by the municipal land commission is final, whatever the faults in the restitution process.

It is therefore unfortunate that in most of the former communist countries a law on land registration was not in place before the start of the issuing of final documents. The earlier mentioned misfit in synchronization between land reform and land registration projects is felt here. Progress on a new law on the cadastre or the Land Registration is slow in almost every new Republic. An ongoing discussion about the choice of a registration system to be established is one of the delaying factors. In the context of the past, a kind of notarial deeds system to be used for registration seems most likely to give continuation to any existing practice of using notaries. But some legislators advocate strongly a Torrens-like system of title registration because of its direct revelation of the owner of the rights to land. Most of the expatriate experts have been trying to convince the governments of the nations they were assigned to that a decision on this matter is very urgent with the number of re-adjudicated farmers increasing. Also the necessary support for the development of a market economy with a land market based on suitable documented land transactions was mentioned several times. Another matter that needed substantial attention is the establishment of inter-ministerial cooperation on land related data. In an environment with increasing digital data on land available, definitions and classification are essential. Coordination also can prevent duplication of maintenance of data and can avoid contradictory information to be supplied by the various governmental institutions. But given the fact that most of the new ministries are faced with developing tasks in a new democratic society, there is understandable reluctance to abort a potential field on a matter with so much political influence as controlling data on land.

In Bulgaria, the documentation provided by municipal land commissions to new holders of rights to land is generally very complete. The contracted companies to work on restitution submit the final data on restituted land, both text and graphic, in digital form to the Municipal Land Commissions. Bulgaria is not an exception other countries used the same requirements, although, sometimes I have seen examples of less complete sets of documents being produced. Because of the completeness of the provided documentation it was proposed to keep the information and update it, as far as possible by the Bulgarian municipal land commissions, to reflect the changes in parcels and ownership that occur in the land after restitution, until a system of national land registration is instituted, and to use the data to prepare notarial deeds. In most cases it turned out to be too much of a task to carry out effectively, due to the marginal staffing of municipal land commissions and the general lack of funding which made a continuous
activity by municipal land commissions after completing the land reform project in the area impossible. As a result of a decision by the municipal land commissions, fortunately, each owner is provided with a deed and a small ‘map’ of the newly acquired parcel. This ‘map’ is produced by the contractor performing the reallocation plan. Even with a failing system of updating the changes in land tenure following land reform, the very basis of a system of land registration is in place and can be used to set up such a system in the near future.

An often occurring negative matter is the fact that the provided ‘maps’ show only the new situation of the parcels as projected by the contractor. Many of the boundaries shown on land reallocation plans and the provided ‘maps’ are not being set out on the ground, partly because the parcels are (still) included in cooperatives that continue agricultural production for the time being under the management of liquidation commissions. It is also common practice during the restitution process of agricultural land that boundaries set out on the ground are not surveyed afterwards nor that adequate checks are made to prove the positions as set out. Also, boundaries may develop over time between neighbors that differ from the designed boundaries as originally set out. Despite such shortcomings, the parcel mapping produced by the contractors will at worst provide index maps to the parcels, and at best, provide the best evidence of where the boundary was intended to be in the absence of undisputed evidence on the ground.

In this respect, I quickly learned that the procedure followed in Bulgaria provided for very reasonable mapping of the newly designed fields. In other countries I met situations where the mapping was much poorer, but nevertheless required by the regulations. In one of these countries the land distributing officials had to fall back to very simple sketches of the plots, taken from large scale topographic maps and further completed with penciled lines taken from rough field notes. These very small ‘drawings’ were then enlarged using a standard office photocopying machine. Such sketches did show the projected field outlines in thick rough lines but in a very poor attempt from a cartographic point of view. This practice inspired one of my fellow team mates in that particular project to suggest printing on the sketches that: ‘Every resemblance with reality is a pure coincidence’.

4.13 LAND REGISTRATION/CADASTRE AND MARKET ECONOMY

Using the expression ‘Cadastre’ in Eastern Europe can sometimes cause misunderstanding. In communist times, most of the countries used an extensive system of data to plan and monitor agriculture production. This system was designed to support the 5 year economic planning and it
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provided the government on different levels with agricultural information. Ownership of land was not registered in this 'cadastre.' Ownership was anyhow regarded as a thing of the pre-communist past. Generally ownership documents were in the past registered at regional courts on the bases of a personal index system, only indexing the name of the vendor. Some of these 'cadastral' registers were destroyed during communist times and if still existent most of them are not complete. Thus municipal land commissions have to base their decisions for re-adjudication on all sorts of evidence and often on affidavits. Nevertheless, despite the shortcomings and problems, land reform projects were undertaken with much enthusiasm and everywhere in the former communist countries progress was reported and could be observed.

But progress monitoring is a relative matter and it was always difficult to get a clear picture of the actual situation of the progress of land reform. Statistics tend to be biased by variation in interpretation. According to the most reliable sources half way the 1990s over 30% of the claimed agricultural land had been restituted completely documented and described in many of the former communist countries of Central Europe. Although this figure seems rather small, it has to be born in mind that many unexpected problems had to be overcome at the start of the process of land reform. Of the remaining 70% of claimed land more than half had been given back in the mid 1990s, in temporarily possession awaiting the completion of the formal procedure. But as stated, numbers can differ because of interpretation of what might be called 'completed restitution.' Some officials would prefer to talk about 'completely restituted' when claims for land have resulted in a positive response from the investigation authority and a document mentioning the right to a parcel of land has been handed to the new owner of rights. Such an interpretation implies that as soon as a potential new owner of rights knows the amount of land and where it can approximately be located, restitution is done, irrespective of any formal registration and a demarcation on the ground. By approaching land reform in this way the door is left wide-open for later disputes between neighboring farmers, for conflicts about rights of way, and later reclaiming of some land for necessary access roads or other public works by authorities.

Over time the land of the former large farms was distributed among the population and a mix of new agricultural production units emerged. A mix of small private individual peasant farms and cooperatives of farmers were created. In the new cooperatives new owners of rights to land joined the redistributed land into larger units (although substantially smaller than the cooperatives of the communist times). Some farms of which the owners were living in urban areas hired workers to perform the tasks on the farm. In some cases this latter option benefited those farmers whose farm was too small to produce enough to survive. By working on the farm of someone else
and leaving part of the work on their own farm to be carried out by family members, they could make ends meet.

It is important to note here again that farmers getting land as a result of re-distribution of large farms are often faced with the lack of funds to buy seed-materials, fertilizers and materials. The assets of the rural population are mostly only in their rights to land and nothing else. So there are seldom funds upfront available to do the necessary investments for a future successful harvest. Moreover, most available agriculture machinery is designed for large scale farming and is almost useless on the small plots that most farmers will call their own.

For this and other reasons agricultural employees in many areas were hesitant to start farming on their own as private individual farmer. The conciliatory solution was to make it legally possible for farmers to start smaller cooperative farms as already mentioned above. Almost all former communist countries governments developed legislation to make small cooperative farms to accommodate hesitant farmers. Often the management of the new smaller farms took over the responsibilities of the liquidation councils and continued agricultural production on a smaller scale. It is no surprise that some of the same people were chosen as board members of these smaller cooperative than the ones managing the old farms. But now the farms are private farms with an elected board and voting procedures for the members and thus land is privatized according to the statistics but de facto very little has changed. An advantage is that the old managers know their way in the bureaucratic procedures and they often could use their old relations to secure assets and products for the new cooperative farm because so far few of the old governmental structures changed.

A serious constraint for the development of a land market in most of the former communist countries is the effect of fear of speculation with agricultural land. To avoid land speculation, many newly created land laws contained a provision creating a moratorium on transfers of rights to agricultural land. A typical example of such a provision reads:

1. An owner of a land plot or a land user may transfer the rights he or she holds to a land plot fully or partially to other individual or legal entity without any permission of state agencies subject to limitations established in paragraph 2 of this point, unless otherwise provided by this Code, other legislative acts of the Republic, or conditions of allocation of a land plot.

2. The owner of the land plot of agricultural designation may not perform purchase and sale of the land plot of agricultural designation for 5 years from the moment of acquiring the right of ownership.

The principal argument in favor of a moratorium on land transactions is that it enables new owners to understand the implications of land ownership
so that they will not sell prematurely, in conditions of distress or ignorance. It is expected that a moratorium will minimize one of the most feared consequences of a free and open land market: the accumulation of land in the hands of a few rich people. This is a little naïve however, because it can not be denied that in the absence of a land market, land still can easily end up in the hands of a few rich people. It is one of the consequences of private individual ownership of rights to land. Administrative allocation rules can actually be bent to the interests of a privileged elite more easily than the market can, because administrative rules are inherently less transparent than free and open markets are. There are sufficient examples of concentrations of rights to land owned by a few people in new republics. Influential people have managed to obtain large amounts of agricultural land from regional administrative bodies or village governments. It is one of the merits of an operational public register of data on land, that such concentrations can be revealed with relative ease. Unfortunately, public accessible registers of data on land seldom exists in an adequate operational form soon after the re-distribution process. An operational land registration is generally operational many years after a land reform project is complete hampering the monitoring of concentrations of ownership rights to land.

4.14 OPPORTUNITIES TO ESTABLISH A LAND REGISTRATION

At the time of completion of the land reform project there is an avalanche of new original data on agricultural land available at the municipal land commissions. In many countries not only written documentation but also maps prepared by contractors during the distribution and/or re-adjudication process are present showing the location of the new parcels. It is obvious that it is important to maintain and update all these data on land even without a formal system for land registration in place. Some commissions saw this need and acted accordingly by requesting – but without being able to actually enforce it – that farmers report subsequent changes in ownership of rights to land to the municipal land commission as long as this institution is active in the region. To prevent the already present valuable data from loosing its value by not updating it, sometimes temporary systems are proposed to keep the available data on farmland up to date. But often these systems miss a legal basis and updating can only happen with voluntary cooperation of owners of rights. Although there are sometimes old (communist) laws on a cadastre, the old land registration systems are cumbersome and are not suitable for this new era any more. Without a firm new legal structure the temporary solutions are weak and mostly depending on the authority of the municipal land commissions to convince people of
registering changes in ownership of rights to land and of the cooperation between notaries and municipal land commissions in the various regions.

During communist time transfers of land were not important and hardly any trade in land existed, resulting in an absence of a market value for land. Without market value to estimate a reasonable price for land to be purchased or sold was difficult. This also implies that during the first years after independence the use as collateral is difficult. In particular directly after land reform it was uncertain what the market value of land actually would be. Add to this the informal status of the documents issued by municipal land commissions, which were not easily accepted as legal proof of ownership and it is clear that acceptance by banks, to give mortgages to new owners on the land remains a matter of concern. This, of course, also hampered the development of a land market. Because of the absence of market values and the high interest rates generally applicable in former communist countries it is almost impossible to develop some loaning system for farmers.

Nevertheless, it is sufficiently known that farms have to bear costs upfront long before any harvest can provide resources within the farm. Many farmers struggled with the limited capacity to purchase seeds and other necessary agricultural materials. Besides, all experts visiting the new republics could hardly miss the dilapidated state most of the farm equipment was in, while it was also clear that as a whole the equipment designed for large scale farming was hard to utilize anyway on the much smaller plots of land. It is the more remarkable that in general so little has been achieved in setting up easy accessible credit possibilities for new farmers and other assistance program for loans, while at the other hand in almost each separate land reform project millions of dollars have been spent to privatize the land in the obvious expectation that land reform as such would boost the local economy.

4.15 LAND REFORM; ALMOST DONE?

‘One of the researchers of the Land Tenure Center in Madison Wisconsin, Peter Bloch\textsuperscript{10}, wrote in 2000:

\footnotesize

We have completed our land and agrarian reforms.’ This was said by the Minister of Agriculture of a Central Asian Republic to two of my colleagues when they arrived in the capital of that republic in February 1995 to initiate a study of the progress of the reforms. The Minister was wrong. He was confident that the welter of legislation enacted in 1994 and early 1995 would suffice, but it has not: a compendium of important reform laws, decrees and regulations compiled by his own ministry earlier this year shows that of the 64 pieces of legislation governing the reforms only 23 were in existence at the time. Peter Bloch continues with foresight based on experience: ‘We have completed our
land and agrarian reforms.’ This will probably be said by the President or the Prime Minister of the same republic in early 2001 when the decision is made to abolish the Centers for Land and Agrarian Reform, the Ministry of Agriculture unit responsible for implementation of the reform program. The President or Prime Minister will be correct, in a narrow sense. Virtually all the land is owned by new types of enterprises, whether individual or collective, and agricultural production is essentially a private activity; if anything the State provides too few services to farmers. Most of the issues of non-land property and debts have been settled although not without dissatisfaction among the beneficiaries.

Optimism in statements by top officials about land reform progress is symptomatic for the situation in many former communist countries. The government in this country had introduced a series of land reform measures aimed at transforming its farm sector into a mix of collectively and individually-owned farm enterprises already in 1991, however, the principal constraint was having not enough land. A straightforward distribution would result in only one-third of a hectare of cultivable land per person, and less than one-fourth hectare of irrigated land, which in the semi-arid conditions of most of this country is the only land on which annual crops can be grown reliably. A typical family of five would have barely one hectare of irrigated land, hardly enough to produce sufficient wheat to meet subsistence needs and much less to produce a surplus for sale. Because of the land constraint, this country could not adopt the strategy followed by other transition countries such as Albania and Armenia: abolition of the state and collective farms dividing all the land into individual family farms. However, restructuring the large farm system was high on the agenda of government and many farmers while it was also urged on by international financial donors.

And so, knowing that there were severe constraints looming at the horizon of land reform, the land reform program began with the passage of the Law on Peasant Farms in February, 1991. According to this Law on Peasant Farms, land was granted to individuals in either rent or lifetime inheritable tenure. Employees of state farms, collective farms, and agricultural cooperatives who chose to leave the collective were allocated land parcels from the so-called ‘common lands’ of their farm enterprise. Simultaneously, a presidential decree was issued outlining the reform program from 1991-93. Two months later the Law on Land Reform was passed outlining the main objective of the decree; the establishment of a Special Land Fund comprised of unutilized or underutilized lands for the creation of peasant farms, agricultural cooperatives and associations of peasant farms. These early peasant farms were typically established by specialists; accountants, agronomists and veterinarians who had been working in the administration of the state and collective farms.

Over 10,000 so-called peasant farms covering 3.3 million hectares of
total land, one-half of which was arable, had been created by the start of 1994. Peasant farm enterprises were given a number of concessions including access to farm inputs though the state supply network, low interest state credit and a two-year exemption from all taxes. This, coupled with the low cost of farm machinery at the time, enabled many early peasant farmers to have real independence from the old state or collective farm. The number of new farm units and the progress of the project explain much of the optimism that led the minister to declare that the land reform was almost done. Nevertheless he was too optimistic and the only consolation I can give is that he was not alone. I have heard many top officials given the same assurance to the citizens at a time that only the administrative activities to distribute the land had been more or less completed. Often surveying of the new fields, collecting all the new data on land and what is crucial for a rudimentary land market; a land registration system to protect the newly acquired rights to land and to facilitate dealings with land (in particular mortgages, since a moratorium often limited transfers) had not been established yet.

I was personally involved in starting the activities to establish a land registration in the country where the minister was quoted as saying in 1995 that the land reform was almost done. The land reform only consisted of distribution of land and not yet land data registration. Until 2000 registration of rights to land was done in the traditional way, leaving many disputed land claims unsettled and thus not fit for a land market to evolve.

In this respect it can be mentioned that in Bulgaria, impressive progress could be made with land reform that started in 1991, but until today the land registration activities, an important part of the land reform project, when the aim is a developing land market, are only yet almost complete. Final institutional measurements have been taken to complete the establishment of land registration offices and to make them really operational. Nevertheless, the land restitution program has been successfully completed some years ago. Now that implementation of the other component of the land reform program is almost complete this chapter about land reform in former communist countries can be concluded for Bulgaria at least with the title of this paragraph with an exclamation mark: Land reform, almost done….! For other post communist countries such a conclusion can not yet always be made. For a large country like Russia, one can doubt if a change of the magnitude of land reform will ever be ‘finished.’

4.16 PRIVATIZATION IN HINDSIGHT

Having been engaged in privatization related activities on most of my assignments abroad, I noticed that privatization was believed to be the wonder drug and that hardly anyone ever questioned privatization.
Privatization of farmland in former communist countries can be seen as one of the many privatization efforts of the last decennium of the previous century when privatization had become almost a doctrine for economic development after being introduced one and a half decade before as a novelty among politicians. Over 100 countries, on every continent, have privatized state owned firms and companies during the last two decades alone. This process was carried out while evidence was mounting that privatized firms outperformed state owned firms, and arguments were gathered and explanations were given and presented to convince politicians and the population of the correctness of the assumption that privatization was good for the economy.

With respect to farms, I have personally observed that privatized farms did (much) better than state owned farms, but I also often wondered if this was because the most entrepreneurial farmers dared to start private individual farms. The same people who given the possibilities would always outperform others. There is sufficient evidence that the early privatized farms in post communist countries operated initially under unprecedented favorable conditions. The first private individual farmers were generally the core of the former farm management experienced and knowing their way in the bureaucratic maze of governmental subsidies, supplies, and marketing channels.

Knowing this one can hardly be surprised that the first experiences with the rapid and dramatic privatization program of farm land were encouraging. But it is true that since the 1995 several of the privatization projects hampered and came to a standstill as far as making a substantial contribution to the development of the national economy. On the one hand there was only a weak banking structure that did not allow for easy use of land as collateral for loans. Interest rates were sometimes skyrocketing. On the other hand there was no regulation for an enforcement mechanism in the capital markets, which allowed illegal actions. The bankruptcy framework was weak and the process lengthy, making it vague and confusing for people to know what was really going on.

I have seen mortgage rates with land as collateral for periods of only two year maximum, with interest rates around 70 to 80 % annually. I have been affected myself by banks going all of a sudden bankrupt. This all did not assist people to build up trust in the banking system. Most governments were stripped for cash by position changing officials who used the little funds that remained for their own offices or service vehicles. I know it sounds hard to believe but in one country the Ministry of Agriculture had its telephone lines cut off for almost a month, because the last cash available at the ministry had been used to provide a new incoming minister with a new car. I have worked in a World Bank funded project, where the team of expatriate advisors and experts put their own money together to keep the office equipment working.
and the telephone and internet lines open because the bank used by the World Bank in the country was unable to meet its obligations to repay the money that was once deposited there.

I like to conclude this chapter with some of the critique that John Nellis\textsuperscript{11} gives on privatization in ‘Time to Rethink Privatization’. Unlike the focus in this book, his focus is on a general privatization program for all kinds of economic activities (not only agriculture). And thus summarizing Nellis in my own words, it can be concluded that: In far too many privatization transactions, in far too many transition countries mass and rapid privatization has turned over mediocre assets to large numbers of people who have neither the skills nor the financial resources to run them well. (There is manipulation by insiders [ahead] of official schemes). Mostly this occurs where the post transition state structures are weak and fractured. Both governments and outside donors are to blame because often they expected incentives for shareholders to control managerial behavior and performance. Competitive policies and institutional safeguards could follow at a later date. The prime assumption was that to build capitalism one needed capitalists, lots of them, and fast. But capitalism is revealed to require much more than private property; it functions because of the widespread acceptance and enforcement in an economy of fundamental rules and safeguards that make outcomes of exchange secure, predictable and of reasonably widespread benefit. In an institutional vacuum the chances are high that no one is interested in maintaining the long-run health of the assets. Too many people become interested mainly in extracting rents, selling licenses, permissions and protection to the firm rather than enforcing policy. Faced with many voiceless shareholders it is not worthwhile to promote shareholder value. It is easier to lobby the state for assistance, or to strip the assets and walk away. Most of the institutions to control that are too embryonic to constitute much in the way.

Nevertheless, all scholars remain convinced that when carried out correctly, privatization is the right course of action for transitional economies. There are no real alternatives for a country to get on track toward a market economy. Most of the privatization at the level of smaller individual firms and enterprises (including farm units) yields benefits that would not have occurred without privatization. The evident long-term course of action is to support measures enhancing will and capacity. Nonetheless, the reasonable short-term course of action is to go ahead with case-by-case privatization in cooperation with the international assistance community, but at a well guided and manageable speed with sufficient supportive side measures in place or timely developed.
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NOTES CHAPTER 4

1 An account of this practice for Bulgaria was given in December 1993 by Georgieva Dondcheva, chairperson of a liquidation commission (a commission to dismantle the collective farm) in Slavovice.

2 Tribute must be paid here to communism. In all countries that have been part of the USSR, illiteracy rates have dropped impressively and nowadays, the average illiteracy rate in all countries of the former Soviet Union even is lower than the rate in several so-called ‘developed’ countries. However, often ignored in analysis of the situation in the Soviet Union, education creates a danger to communism with its rigid bureaucratic and inflexible system of production and allocation of goods. Educated people demand that they have influence on matters of government and that there is relative freedom of what can be called the basic human rights. The more educated the citizens, the more vocal they become. History shows that generally the core of resistance against any regime with dictatorial tendencies starts in Universities and Circles of Artists.


4 As stated in the story of Janis and Vaiva, several farmers were selected to start their own individual farms in 1987-88 in various countries of the USSR under Gorbachev’s perestroika program. However, with the overthrow of communism only a few years later, this created enormous problems when land had to be restituted, because the new farmers understandably resisted submission of their often good and improved plots of land to be re-adjudicated or distributed to others.

5 Maslow, Abraham (1962) ‘Toward a Psychology of Being’

6 Poor translations from Russian often cause trouble here. In Russian, any economic enterprise, whether farm or factory, is a ‘khoziaistvo.’ Agriculture is ‘selsko khoziaistvo.’ But farms are often called simply ‘khoziaistva,’’ which is literally rendered as ‘enterprise,’’ confusing the distinction between farm and factory. In addition, as in English, the term ‘peasant farm’ (krest’ianskoe khoziaistvo) carries the connotation of backward, subsistence farming. So supporters of the reform resurrected a pre-revolutionary linguistic borrowing. They adopted the term ‘farmer’s farm’ (fermerskoe khoziaistvo) based on the English ‘farmer,’ to describe a large, modern, market-oriented but family-owned and operated farm. According to Vladimir Bashmachnikov, censors would not permit the use of ‘fermerskoe khoziaistvo’ in the press until late 1990, further confusing the issue. Despite its name, the ‘Peasant Farm’ was intended to imitate the American-style, family-run, market farm. (VonAtta, 1994)
In other former Soviet countries different circumstances dictated that other routes had to be followed. When in a country the emphasis was on distribution of shares, the procedure for re-structuring of agricultural production showed a general pattern that can be summarized as done in the following scheme. It is a typical example of farm restructuring as used in Russia after communism to establish new autonomous profit centers for agricultural production. The model is taken from “Changing Land Relations and Farming Structures in Formerly Socialist Countries” by Zvi Lerman. It is the third of contributions in “Agricultural Landownership in Transitional Economies” edited by Gene Wunderlich in 1995 (p. 69).

A Model of Farm Restructuring:

Preparatory Work
- Inventory of land and assets
- Preparation of eligibility lists
- Calculation of land and asset shares
- Approval of distribution plan by General Assembly

Stage 1: Distribution of Shares
- Distribution of share certificates to eligible individuals
- Acquainting shareholders with their rights and options

Stage 2: Creating New Enterprises
- Identification of technologically independent subdivisions of existing farm
- Regrouping of shareholders through negotiation, registration of enterprises
- Concluding contracts between shareholders joining the various enterprises

Stage 3: Auctions
- Division of land and assets into lots
- Submission of bids for land and asset lots
- Physical distribution of land and assets through an auction

Stage 4: Transfer of Property Rights
- Physical transfer of land and assets
- Issuance of title

I owe this remark to my team mate Edwin Hyde, an Australian surveyor and cadastral expert.

In Bulgaria the new smaller cooperatives were called ‘Orsov’ farms. Due to an
amendment of the Land Use Law of the Member of Parliament Orsov, it was made possible to form New Orsov cooperative farms. With foresight this has been made possible from the very beginning of the land reform process in 1991 in a Central Asian republic where the law opted for so-called family peasant farms and in 1992 the possibility was opened for registration of legal entities as associations of peasant farms; voluntary associations formed by typically all the residents and covering the territory of former large-scale farm, but in some instances two or three associations were formed on the rump of the former enterprise. Former management structures tended to survive the change in these farms and remained almost in tact (see also the paragraph ‘Land reform, almost done?’)

10 Peter C. Bloch; Land Reform in Kyrgyzstan: Almost Done, What Next? Land Tenure Center and Department of Forest Ecology and Management, University of Wisconsin-Madison

CHAPTER 5

RAPID RESULTS AND POSTPONED PROBLEMS OR THOROUGH RESEARCH AND SUSTAINED SOLUTIONS?

5.1 LAND TENURE AND LAND REFORM

Every month thousands of people buy and sell rights to land. Unless it will be their first possession of real property this is not a big deal. It happens all over the world. But as a first it can be a very exiting experience, my first home, my new land, a second home in a resort area. These are all examples of individual land tenure change. Contradictory to this individual tenure change is the collective change of land tenure. Land reform is always associated with a large-scale collective change of land tenure. It is a deliberate act to change an existing land tenure system and/or existing land tenure custom. And although this is a gross generalization, for better understanding, land reform can be approached as appearing in four main general variants.

One of the variants is often carried out as a technical reshuffling of rights to land, with due compensation for any losses and charges for any benefits that befall the new right holders. This kind of land reform can be implemented voluntarily at the request of all participants, or it can be forced upon the participants by government according to new or existing laws and specific regulations. The variant often involves re-allocation of farmland and/or creation of larger refugee areas for wildlife or nature reserves. It can also be applied when large changes in an existing infrastructure affect the daily routine of people living in the area such as farmers in their access to agricultural land. The latter type of land reform is more and more practiced when it is expected that the infrastructure changes will affect people in a non-equal and thus unfair way. Three other variants of these changes are accompanied by legal changes with a considerable impact on the existing social relationships among people.

Most land reform projects carried out in the sixties and seventies of the
previous century were initiated because of a distorted distribution of land among the population. These land reform projects were started because only a few people had access to most of the (agricultural) land while most people had very little or no access to (agricultural) land at all. It was often a politically motivated land reform to gain votes from the rural population or to satisfy pressure from abroad to improve the livelihood of the (rural) population. This type of land reform requires strong political leadership and long-term dedication to be successful, because land is taken from influential individuals (often the ones that are closely related to the governing people) and the land rights are distributed among the poor. And although the sixties and seventies saw many of such land reforms all over the world it certainly was not a new phenomenon. Such land reforms have been practiced since people started to settle more or less permanently and began to grow crops and fruits. The impact of this type of land reform on society is high; especially for the previously disadvantaged people it has enormous consequences. It changes the lives of many because of the new opportunities it provides to land-less or land-poor people to take responsibility for the livelihood of their families in a new challenging way.

The last two decades of the previous century saw in transitional economies another type of land reform. This third variant of land reform is accompanied by a legal change that allows private individual ownership of rights to land to replace the state or collective ownership of such rights. This type of land reform also has a significant impact on the social relationships among the population. Such a land reform creates two sub-variants, i.e. a sub-variant where distribution of rights to land that were state- or collectively owned are distributed among the population, and a sub-variant where re-adjudication of rights to land is implemented next to distribution of rights to land among non-previous right holders. Again in a gross-generalization the farther East from the Atlantic Ocean, the less re-adjudication is practiced in this variant of land reform. That is because countries more to the east seldom knew private individual ownership before collectivization of real property took place.

The fourth variant of land reform accompanied by legal change is land reform aimed at ‘modernizing’ land tenure systems that are seen as backward, incomprehensible by central government officers, and/or hampering economic development. Two sub-variants can be distinguished here, one that deals with the adaptation of customary tenure into statutory land tenure to make the understanding of land tenure more accessible to everyone in the nation, the other sub-variant dealing primarily with the adaptation of land used as a common pool resource, to be able to apply more of the supposed benefits of economic laws on these commonly held rights to land. The four variants of land reform projects are illustrated in figure 5.1. on the next page.
Land reform projects have met mixed successes. More and more research emerges on land reform and this shows that there are several pitfalls and misunderstandings associated with land reform. This essay will briefly review recent research findings, will summarize most of the pitfalls, and will show several of the problems occurring during land reform projects. In scheme the four variants of land reform can be captured like shown in figure 5.1:

<table>
<thead>
<tr>
<th>Land tenure change:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual private land tenure change</td>
</tr>
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**Variant 1**
- Collective land tenure change
- Voluntary or government imposed land tenure change based on existing laws and regulations

**Variant 2**
- Re-distribution of (agricultural) land among the population in more equitable ways
- De-collectivization of former state or collectively owned land

**Variant 3**
- Distribution of rights to land
- Distribution and re-allocation of rights to land
- ‘Modernizing’ existing land tenure to adapt it more to ‘western style’ land tenure

**Variant 4**
- Conversion of customary land tenure into statutory law
- Re-distribution of rights to land used as common pool resource

**Figure 5.1 Variants of land tenure change projects**

The change of an existing land tenure system cannot be done overnight. To be successful changing of land tenure requires careful research and planning of measures that will gradually implement the change. Nevertheless, certain circumstances make time a crucial element given the expectations of the results of land reform. The available time to carry out a land reform project is limited by policy makers and donors. On the other
hand sufficient time is required for the population, the biggest and most important players in the land tenure ‘game’, to become acquainted and familiar with the new rules in land tenure. Apart from time limitations, limited resources and economic forces play an important role. This means that in each land reform project a compromise must be found. Thus careful balancing of factors that might influence the successful completion of such a project should be mandatory. Sound decisions prior to the start of any land reform project can contribute greatly to its success. However, most land reform projects start without such necessary considerations because of political pressure, tight time schedules and bureaucratic hurdles that must be taken before the project can actually take off. Projects carried out with donor funding and assistance by foreign experts are not always successful; A 1985 World Bank study of longer lasting impacts of 25 agricultural improvement projects showed in project completion audits that all projects seemed successful, but after 5 to 10 years more than half had not sustained initially-introduced benefits. A 1986 assessment of 212 USAID projects showed that 11% had a strong probability of being sustained after U.S. assistance ended and 25% had poor prospects for sustainability (USAII) Program Evaluation Discussion Paper no, 24).

5.2 THE ECONOMIC GROWTH PARADIGM AND THE FOOD SECURITY PARADIGM

Private individual ownership is a key element in market economies the world over. This is the case in particular for private individual ownership of rights to land because rights to land--the term ‘land’ being used in the sense of including all real property--provide the possibility for private decision-making and this generally encourages investments. In a market economy private individual ownership of rights to land is the usual form of land tenure since market economies depend heavily on private initiatives and mobilization of private investments. When the various markets in market economies are functioning well, rights to land can be transferred easily to the most ambitious bidder. Theoretically such land will reach its highest value because the highest bidder will normally be the most efficient user in economic terms. Besides, land with private individual tenure can be used (and it is widely used) as collateral and to provide individuals with funds. This highest value theory is referred to as the economic growth paradigm.

If there is reason to believe that an existing tenure system puts a constraint on the free development of forces of the market economy, interventions in existing land tenure systems can be justified by the economic growth paradigm. But it must be clear, also, that there should be
reason to believe that a free market economy is about to become a reality thus implying that most conditions for the development of such a market structure have been met. When in doubt about such circumstances, a straightforward push toward a market economy may not achieve the desired results and could lead to disappointment among the population and a setback for the society as a whole. Fresh memories of the experience in many former communist countries show that at least some suspicion in respect to favorable circumstances to establish a market economy is often justified.

Another important motivator for intervention in existing land tenure systems is to increase food security. In this food security paradigm the leading thought is that more equitable access to agricultural land will result in providing landless or land-poor peasants with more land to increase agricultural production. This goal for land tenure change might result in positive effects when the farmers realize sufficient support to expand and improve agricultural production. But here, also, some conditions have to be met. Lack of agricultural credit possibilities, insufficient supply of agricultural machinery fitted for small scale farming, and both the lack of a physical and an agricultural market infrastructure hamper any attempt to improve agriculture production.

5.3 LAND TENURE CHANGE IN POST COMMUNIST COUNTRIES

Former communist countries have been a focal point for land reform projects. A society functioning as a command economy came to be seen as the main constraint to achieving economic development in the 1980s. For this reason almost all former communist countries have embraced programs to change the planned economy into a market economy. Both the economic growth and the food security paradigm supported the yearning for land reform projects.

That markets in transitional economies do not yet function well is often cited as the cause for failure of the economic growth paradigm. The population in general has trouble adapting rapidly to drastically changed circumstances. The process of adaptation requires more time than anticipated. Besides, the general state of the national budget in fledgling economies, persistent bureaucratic procedures, lack of (agricultural) market information and difficulties with acquiring (agricultural) credit at reasonable rates have a strong negative effect on any development of the economy. Nevertheless land reform has been promoted by all international donor organizations.

However, that is not the only cause for the increasing attention to land
reform programs. In many so called lesser developed countries land reform projects—albeit commonly on a smaller scale—have been carried out where existing land tenure systems are seen as a constraint for a healthy economic development. Generally the existing land tenure regime consists of a mixture of customary rules and is often exercised on common land. There might be confusion here, customary land tenure is different from communal land tenure, but in the literature these terms are sometimes deceitfully used as synonyms. Customary land tenure is often exercised on common land and that is where the confusion starts. But customary land tenure also occurs in societies where private individual ownership of land is the norm. Let me give an example to clarify the confusion of the various terms. In one of the countries—where individual private rights to land were the dominant land tenure feature—I came upon the custom that old people might give their land to those who took care of them, rather than to kin whom the law would recognize as heirs. Because it was a widespread custom in the area, many people did not bother to legalize succession after death, seeing no reason to do so. Particularly in communist countries at that time people did not own any rights to land to inherit so why register your legacy? Caretakers were often family of the deceased but not the first in line for an inheritance. The result is that one could encounter quarrels among siblings and cousins over an estate that might have been transmitted through intervening generations without its division being legalized. Customary understandings among heirs may well clash with provisions of the law, yet those whose preferences would have clarified the matter have died intestate.

This customary land tenure system is seldom documented and modern centralists see it as backward and not fit to serve the demands of modern society. Customary tenure forms are dictated by rules, which are defined and changed by a local community ‘without help from the legislator.’ Land held under a customary tenure regime for which there is no state-sanctioned, title-identifying ownership, may be viewed as being less securely held than land for which a legally recognized title exists. But there is no automatic equivalence of formal title and ownership security, especially when a customary regime of ownership has proved its usefulness and adequacy for the management of ownership matters over a period of years or even centuries. (David Stanfield in Rural Land Titling and Registration in Latin-America and the Caribbean: Implications for Rural Development Programs LTC publication University of Wisconsin, Madison, 1990 p.2)

When large tracts of common land are present the negative image of Hardin’s essay2 – ‘The tragedy of the commons’ - still resounds in the minds of the land reform advocates. This creates enough reason for a re-configuration in which the land tenure system is brought more in line with land tenure systems ‘western’ style. Land reform has become the panacea to be applied in cases where access to land by private individual persons is
limited by a land tenure regime or by land tenure institutions that do not correspond with the western style principle of private individual ownership. As a result, large donor sponsored projects have been carried out in almost all transitional economies and various, small scale, donor sponsored projects have been started in rural areas mainly inhabited by indigenous people where traditional non-western land tenure was dominant. The latter type of projects was generally characterized by a zest to find the best way to ‘translate’ the indigenous land tenure system into statutory law. The justification being equal rights and sharing the benefits of western style land tenure in a more market oriented society for the whole population.

In former communist countries, now in transition, laws were adapted to (re-) introduce individual private ownership of rights to land and to provide sufficient security of land tenure in the hope of continuing or even expanding domestic food production by incentives for agricultural production. Note that the expression (re-) introduction has been used intentionally in this context. In some new independent republics in Central and Eastern Europe private individual ownership of rights to land was dominant in land tenure before communism was introduced following WWII. Most of these countries, by recognizing the rights of former owners and their heirs, choose a form of re-adjudication -albeit often with restrictions and conditions -of rights to land (including urban real property). In most of the countries in transition in West and Central Asia, privately owned rights to land was a rarity before communist rule was introduced. As far as it occurred these private rights had been expropriated already in the 1920s, hardly anyone now alive has recollection of private individual ownership of rights to land. In these countries the new laws ordered a general distribution of rights to land among the population without re-adjudication. Land reform in former communist countries thus comes in two different modalities, re-adjudication and distribution of rights to land. But it should be mentioned here that re-adjudication is seldom carried out straightforward. First of all the society has changed during the communist rule and one cannot simply re-adjudicate people in their rights to land because the fields of forty years ago may not exist anymore. This may sound strange, but land in rural areas is not as fixed in place as it is in urban areas. The flow of a river can change thus making some fields larger and other fields smaller; urbanization itself may claim rural land for building purposes, thus it does not always make sense to re-adjudicate a farmer with some town quarter without compensation. Furthermore, maps and documents may have been lost or are vague. Affidavits are difficult if topographical features have been replaced, removed or vanished and so on. In ‘The Elasticity of Land’ Katherine Verdery gives a vivid description of all kinds of problems re-adjudicators encounter in this respect.
All the attempts to achieve economic growth by land tenure reform are
dominated by the belief in the economic growth paradigm. But as mentioned
before, the food security paradigm has played a role as well, although
perhaps less outspokenly. Most of the transitional economies, although they
have seen impressive industrialization programs under communism,
remained basically rural economies in which many people made a living in
agriculture. Domestic food production became a priority after the declared
independence from Moscow because traditional export possibilities
disappeared and imports often became too costly. Moreover the new national
boundaries of newly formed republics did not comply with the economic
infrastructure and communication lines that existed in the larger federal units
under the rule of the USSR. Traditional transportation routes were cut off by
new boundaries and energy sources (both natural resources and industrial
plants) suddenly became foreign resources. Neighboring new republics had
difficulty negotiating for supplies due to suppressed ethnic differences,
boundary conflicts, and land claims. Suddenly a route to an important
seaport became partly a foreign road with duties charged for transit. With
newly established national boundaries access to important resources and
markets was cut off, and imports had to arrive via neighboring countries that
again levied duties on transit traffic. Inevitably many of the large scale land
reform projects in transitional economies became dominated by the desire
for speedy solutions for an economy in jeopardy.

And thus, immediately after independence from Moscow, many former
communist countries in Central Europe started the process of privatization of
real property. Pre-communist regulations were revitalized, some imported
from western societies; local commissions, often assisted by international
donor-funded projects and expatriate experts, developed ambitious schedules
for the process. The desire for speed resulted in quick re-adjudication and
distribution of urban properties and agricultural land of former state and
cooperative farms. Although not all potential farmer owners were ready to
manage their own farms, most of them succeeded in starting their own
agricultural production units. They met most of the earlier mentioned and
often unexpected difficulties such as lack of market information, no proper
infrastructure and little or no credit facilities. Statistical data show that after
some years of decline agricultural production in general has reached levels
similar to or above the level of the last years before independence and
production has increased steadily in recent years.

For land reform projects in countries in transition in former communist
Asia much of the same pattern was followed. They imported western style
institutions for land tenure, more or less adapted to local circumstances,
depending on the wisdom and perseverance of the expatriate advisors and
the budget for a project. The desire for speed did not allow for much time to
study the specific requirements in land tenure of particular regions. A new
land tenure system with all the necessary institutions for its functioning in society had to be established as soon as possible. There was also a limited budget and unfortunately a ‘one model fits all approach’ was the best many western advisors could come up with bearing in mind the need for a quick fix and limited resources. Most expatriate advisors are experts in their own native, western style land tenure system and it is not surprising that several new land tenure systems in countries in transition resemble those of western societies. A single expert would now and then be honest in his or her professional ethics by warning politicians of a new independent state that the imported legislation and regulations would need frequent and regular amendment. Experts stated that the new land tenure regime with its many alien elements and aspects might not appeal to the population and might need gradual adjustment to local concepts and customs by regular adaptations to the new legislation. Besides, what is exactly private individual ownership of rights to land for a population with a lifetime experience of only state ownership of rights to land? Is it really possible to exercise flexibility in imposing a new land tenure regime? Is it really possible to avoid the pressure to accept typical western style private individual ownership land tenure systems that seem to do so well in those capitalist oriented societies?

5.4 A NEW APPROACH TO RIGHTS TO COMMON LAND

In environmental and ecological studies, the commons are an important theme. If a large number of people have access to a resource – often referred to as ‘common pool resource’ – it might be endangered by overuse. Each user should exercise self-restraint in using it. But this is difficult to do when knowing that if other users do not limit their use, chances are, that the resource is lost forever and you have missed out on the short-term benefits. The earlier mentioned essay by Hardin on the commons in 1968 clearly painted this picture by presuming open and equal access to the common pool resource by everyone belonging to the community or clan.

However, in reality the situation is often quite different from what Hardin suggests. Research has shown that for agricultural land some kinsmen or some people of the community enjoy individual private and exclusive use rights for a limited period of time, almost similar to the enjoyment of private individual ownership rights in western societies. But in general there are almost always a number of social restrictions for the use of land of a common pool resource.

While ‘western’ people tend to see land primarily as a means for private benefit by exploiting it, many traditional indigenous - often communal - land
tenure systems focus on its functioning to establish social security. In most modern societies, property is dominantly approached at the level of use and exploitation in the field of private law. Because of the all-present and strong relationship between ownership of rights to land and power, the legitimate authority to control, allocate and exploit property is one of the most salient elements of power through which people can be subordinated at all levels of socio-political organization.

Private individual ownership of land in a more or less capitalist society provides all the elements that are commonly seen as necessary for economic growth. Such an oversimplified approach overlooks the existing social relationships and cultural values in a given society and jumps to conclusions to justify the import of western style institutions although these will be alien to the local people. Such an emphasis on imported rules undermines the existing social relations. In this way land tenure reform projects in dominantly indigenous areas of lesser developed countries must be approached differently from land tenure reform projects in transitional economies. Several donors are so accustomed to the land tenure reform in those transitional economies that there might be a tendency to use similar project terms of reference in other regions of the world. Sometimes in developing countries also a quick fix is necessary to solve urgent problems of land rights, but more often speed is neither necessary nor desirable. In most cases a sustainable solution for the protection of rights to lands requires the gradual establishment of an idiosyncratic institution, which can only be accomplished by a process-oriented project approach. Such an approach has to determine the nature of customary rights to land, and the discrepancies that might appear between the region specific rights to land and requirements of economic development. In many donor funded projects this approach is not viable because of the desire for a speedy project completion, limited availability of resources, and little possibilities to develop a specific regional solution for securing rights to land.

Nevertheless, there is growing recognition for and interest in a solution that appeals more to the perception of the population and that could provide a more lasting solution to support economic development in several regions. Perhaps such a solution will result in a slower economic growth, but the growth might well be more durable and widespread. For such an approach local participation with emphasis on equality of local and expatriate expertise is essential to ‘translate’ customary rights into formal legislation; although this will most likely consume more time to clarify the project targets and to balance the inputs of foreign (expatriate) experts and local experts. Of course, there will be challenges to find suitable solutions for economic questions like those connected with using land as collateral and as a sound basis for investment. But these questions and the proposed solutions might have a more universal character and might be applied in
many other projects as well. The situation can be even more challenging when not only customary rights to land must be incorporated in the new system of rights to land, but also when there is a significant presence of land rights that approach land as a common pool resource. The additional complication stems from the fact that common-pool resources like community pastures, community forests, river beds and banks, village ponds, watershed drainages, village wastelands and dumping grounds and threshing grounds provide a group of people with coequal use rights, especially rights that exclude use of those resources by other people. Moreover, sometimes private croplands (designated to individual households) can be used as common-pool resource during non-crop season. The collective body of villagers decides on rotational crops, on grazing and the restriction of certain animals during certain periods of time etc. The material for planting, fertilizing, fencing etc, are mobilized through obligatory contributions of cash or kind by users and from the auction of products and dung.

Recently more and more attention has been paid to communal property regimes and their significance to some of the problems that, only in a poor way, can be addressed by private property regimes. Hoekema (in ‘Texts on legal pluralism and development’, p.51) argues: ‘The notion that only individual western style ownership provides enough individual security to promote an economic take off has been substituted by the opposite notion: only communal tenure (in areas where it still holds) provides enough security.’

Because of its less exploitative and more socially oriented nature, the practice of communal rights to land has come to be seen as a possible solution for problems of depletion of resources. It is a sometimes hotly debated issue and there still is confusion about how to understand communal rights to land. Modern languages are often not capable of capturing all the elements of communal land rights and recent research shows that communal land rights do vary from region to region showing significant differences between the individuals that can use a common pool resource. Within communal land rights, individuals can have exclusive use rights for part of the common pool resource for a specific time period.

David Stanfield, while writing about the situation of land titling and registration in Latin-America and the Caribbean, notes (1990 page ix): ‘The effectiveness of customary means for protecting rights of ownership have been underestimated while the advantages of the formal Cadastral Land Information Systems have been overly praised. The means for improving security of ownership are not limited to improving or extending the laws of property and the capacities of public agencies to define or defend ownership claims. Functioning customary systems exist in many parts of Latin America
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and the Caribbean for defining property rights, usually without a formal legal basis but with the support and respect of the local community. These customary systems are cheap to operate, are accessible to local people, and are socially and economically advantageous. Moreover, the holders of customary titles may prefer these systems.’ Different researchers confirm this view also for other regions in the world.

The biggest challenge facing advocates of communal land rights on land is the assumed lesser suitability of such land to be used as collateral in a market economy. While individually owned, clearly titled, and easily identified parcels of land are widely accepted as basis for collateral, communal land hardly attracts moneylenders; thus the perception that common land is less attractive for economic development. The bottom line however must be that it will be possible to build a system of communal land rights that is capable of recognizing individual proprietorship - albeit perhaps not ownership in its ‘absolute’ sense - and marketability of land. Too easily the option has been ignored to establish a land rights system that above all provides for social security and social objectives rather than focusing on economic development and growth. My personal experience is that in transitional economies the temptation to jumpstart the establishment of individual private land ownership can hardly be resisted, with all the pitfalls that come with importing alien juridical concepts. I would however, strongly recommend to develop a land tenure system in which many of the elements of the original tenure system stemming from before communism are preserved and taken into consideration while designing the new land tenure regime. Even if this implies the re-enactment of communal ownership land tenure, because it is my belief that in certain stages of development a specific role can be adjudged to communal ownership.

5.5 DEVELOPMENT OF LAND TENURE SYSTEMS

Land tenure systems have developed in a more or less autonomous way in the various nations, based on the historical, cultural, sometimes religious, and always language specific way and the regulations were laid down in the (legal) terminology specific to each country. It shows a certain degree of contempt or disdain to describe such a land tenure system in another language. Each translation is an act of violation creating misunderstanding and confusion. It is well known that legal tradition and legal terminology differs among the common law countries and sometimes causes problems of mutual misunderstanding. How much more difficult is it when ‘translating’ legal concepts from a traditionally common-law country into a new system for a traditionally civil law country? Nevertheless, this procedure has been followed in several Eastern-European countries. Even more risky is the use
of English - as the ‘lingua franca’ - to describe land tenure systems that must be operational in non common law countries, because certain civil law principles used throughout the land tenure regulations do not easily translate in English. Those studying comparative analysis of land tenure systems in English could easily miss pivotal differences or similarities among land tenure systems because of approximate descriptions of legal principles. Common law terms are not always well understood by persons educated in a civil law environment which makes comparative studies of land tenure regimes over the respective borders of common law and civil law countries complicated.

For a land registration system to provide optimum protection of rights to land it should provide a high level of perceived land tenure security for the population of a country. Zevenbergen (Jacob (Jaap) A. Zevenbergen, Systems of Land Registration - Aspects and Effects; Ph.D. thesis; Publications on Geodesy 51, NCG Delft, the Netherlands 2002 p.120-121) has published the result of his research. He investigated how the technical, legal, and organizational aspects of a land registration system affect its level of providing legal security. The interrelation of these aspects determines the level of legal protection. Zevenbergen does not mention land tenure security perception as a goal of land registration in his research (he uses ‘trustworthiness’), but it can be presumed that there is a high degree of similarity between providing legal protection – trustworthiness - and the perception of land tenure security.

Most of the technical aspects are determined by technological development in the field of land surveying and information and communication technology (ICT), database technology, storage and retrieval of data on land, and cartography and mapping. The presence of a technical infrastructure supporting this kind of technical provisions to manage a land administration highly depends on the level of local knowledge among professionals and the technology available in the field of land administration in a certain country.

Legal aspects in respect to land registration are complex and cover a wide area of legislation and regulation. All regulations that deal with the relation between a person and land, the legislation about registration and liability, protection, possession, acquiring, contracting, mortgaging, bankruptcy, and transfers of rights to land is part of this aspect. It is important to realize that there is a difference in approach between legal experts and sociologists as far as regulations are concerned. Legal experts have a tendency to approach land tenure from the point of view of the State. By attempting to see like the state, they emphasize primarily a centralized land tenure solution that provides as much as possible equal rights for all citizens. Sociologists however, put emphasis on the grass-roots consideration
of a society accepting a justification of local and regional differences within land tenure. The sociological and anthropological approach toward land tenure solutions has had remarkably little emphasis in most land reform projects so far.

The organizational aspect of any given land registration system comprises of the result of a co-operation in healthy competition among all the government organizations, private practitioners, and private organizations.

In lesser-developed countries as well as in countries in transition the organizational aspects may be the bottleneck for the well functioning of a national land registration system. It is a requirement that there is honesty and competence in public administration, but generally there is a certain level of endemic corruption and an insufficient degree of competence for modern management in the public administration caused by nepotism and politically motivated nominations among official positions, disregarding competence.

In the earlier mentioned research by Zevenbergen three aspects dominate the institutional arrangements of a land registration system; the technical, legal, and organizational aspects. He concludes from sampling several existing land administration systems that ‘flaws in technical or legal aspects can be overcome when the other two aspects are well taken care of, flaws regarding organizational aspects will quickly render the land registration inadequate’. In other words if there is a high level of organizational efficiency and effectiveness (honesty and competence) and the technical aspect of the land registration system is well developed, a flaw in the legal aspect might be reasonably compensated for by strength in the other two aspects. It is known that in many lesser-developed countries the legal situation in respect to land registration may be confusing, caused by a mixture of customary rules and formal law. But the hypothesis expressed by Zevenbergen supports the expectation that a strong technical and organizational framework for the land registration system could compensate for legal flaws and make the land registration function in an acceptable way. To test this hypothesis one could think of developing a land tenure system both serving the needs of economic development and honoring some of the merits of customary land tenure. Even with a less than perfect legal base--and this might well be the case if one wants to incorporate elements of customary law into formal state law--such a system could function well in daily practice according to the empirical evidence collected by Zevenbergen.

5.6 DANGER OF LIMITED-DIMENSIONAL APPROACHES

Descriptions of land tenure systems are often performed by using a comprehensive and simplified concept. Nothing is wrong with the use of
succinct concepts but such an approach should always clearly be kept in
perspective. Otherwise it carries the danger that one ends up in a situation of
comparing only caricatures of reality. To better understand land tenure and
land registration systems it is widely accepted to look at those systems in
contrasting simplifications. In many textbooks about the subject one can find
contrasting categories like communal tenure versus individual tenure,
absolute tenure rights versus dependent tenure rights, positive versus
negative registration systems, registration systems for legal protection or for
tax purposes, title or deeds registrations, and so on. Even without giving
additional judgments about one system being ‘better’ than another, the
impression might be given that every land tenure or land registration system
is easily categorized in this way. But there is a lot more to it. The multi-
facetted appearances of land tenure regimes and land registration systems
around the world bear witness of that. Any land tenure regime and land
registration system should be approached as a system in its totality and be
considered as part of a complex structure regulating the social relationships
among citizens in a given society. It should always be born in mind that each
land tenure system is a unique idiosyncratic system.

Most experts in the field of land administration systems are well aware
of the use of oversimplification, especially when they are describing the
distinguishable differences like title versus deeds registrations, positive and
negative registration systems or registration systems for tax purposes versus
systems to increase land tenure security. These differences can be described
in technical terms avoiding most of the pitfalls of language and conceptual
misinterpretations. However, there is an area where conceptual and language
barriers have a much larger impact and where oversimplification can remain
much longer undiscovered even by reasonable cautious observers. Careful
research sometimes reveals that by comparing individual and communal
ownership oversimplification can result in comparing complete caricatures.
One of the main problems in comparisons is that although we might have
categorization, no system in practice is a theoretical ‘clean’ system fitting
exactly the category.

John Bruce, an expert in the field of customary tenure, warns that
individual ownership tenure systems involve aspects of state ownership and
common property as well, and communal tenure systems incorporate strong
lineage and individual rights to land. He stresses that one needs to compare
systems, and in prescribing reforms, the role the several tenures are playing
in each must be clearly understood. Oversimplification tends to spell out the
systems only as contrasting modalities and neglect underlying similarities in
the systems being contrasted. It is also important to avoid postulating ‘ideal’
tenures, individual or communal, and after a careful consideration of pros
and cons, selecting one of the ideal tenures as the one a particular project
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should resemble. Bruce states that often the prescriptions that result are ideological rather than based in felt needs. Most of the failures in tenure reform stem from that approach; they have been over-ambitious, weakly implemented, and have resulted in incomplete conversions and normative confusion.

There is a remarkable difference between descriptions of land tenure in western type economies and those of customary land tenure systems. There are numerous books and reports about land tenure in western societies showing similarities and differences. So the similarities and differences are well known and often described in terms suggesting a negative or positive judgement about a specific type of land tenure. However, such a differentiating and detailed description often seems lost when describing forms of common tenure as the most usual land tenure system in lesser developed countries and areas. These systems are often approached in a ‘one description fits all’ style. Common land tenure can only be used as a rough generalization, but it certainly does not imply that under such systems all individuals share most of the features of common tenure in a similar way.

There should be no doubt that common tenure as exercised today carries as many variations as private individual ownership in market economies, but its variety cannot easily be captured in the legal and regulatory languages that we have developed in western societies. And so the richness of common tenure appearances is at best overlooked or ignored. Language, when being the vehicle of transmission of thoughts, tends to oversimplify common tenure, and at least one can warn any reader for oversimplification. Be aware that common tenure is as diversified as western style land tenure, but that ordinary language fails to describe its variations in a proper fashion. This ambiguity often creates an unintentional imbalance between the description of common land tenure with its institutions and western style land tenure and its institutions.

Once again I like to underline that in many jurisdictions where individual ownership is the most common form of tenure, common property in various forms and customary land tenure aspects can be encountered. The evidence of common property is sometimes captured in statutory law, but it also can exist because of the social conventions in a society.

5.7 INDIVIDUAL OWNERSHIP

Emotionally, individual ownership involves a strong sense of individual proprietorship, a sense that this land is ‘mine’ and that I have the right to exclude others. A minimal definition of individual ownership means simply the right to exercise exclusive control. It is important to realize that under many, probably most communal tenure systems there is a strong sense of
In literature today the term ‘individual ownership’ is often used for individual ownership as it exists in Western market economies, and legally this means the right to possess, use and alienate. The right to sell has become part of the definition. But we know that even in Western systems of individual ownership, especially in rural areas, the tendency to regard land as a family and lineage asset remains strong. ‘Keeping the farm in the family’ is a concern of farm families even under individual ownership systems, and loss of the family farm is a tragedy.

Individual ownership does not confer total independence upon the land user. This is one of the myths of ‘absolute ownership.’ Ownership is never absolute. The user is still subject to a wide variety of community-imposed obligations. He or she may not use the land to injure adjoining landholders. He or she may be required to maintain a certain distance between buildings and the road. He or she may be required to maintain a public sidewalk or right of way across the land. He or she may not keep chickens or pigs or open a shop if these activities are forbidden by zoning laws. He or she must allow the county or municipality to run electric lines across the land and sewers under the land. He or she must allow access to public employees carrying out duties such as ensuring compliance with construction codes or inspecting for environmental violations, and he or she must sell the land to the government if it is required for a public purpose.

In many societies there is also custom to have private limitations on the absoluteness of rights to land. They can be found in copies of deeds or land titles in cadastres and land registries the world over. I noticed one of such far stretching limitations in a copy of an English land title. In that land title it was contracted that; ‘The garden ground of the premises shall at all times be kept in neat and proper order and condition and shall not be converted to any use whatsoever. Nothing shall be done or permitted on the premises, which may be a nuisance or annoyance to the adjoining houses or the neighbourhood’

The seeming ‘absoluteness’ of private ownership is in part a trick of legal conceptualization; the property right seems absolute because these restrictions are not part of property law, but part of the ‘regulatory’ powers of the community.

As noted earlier, in market economies private individual ownership usually plays a central role, largely because it enlarges the possibilities for private decision-making and encourages investments. It will usually be the tenure for industrial, residential, and commercial land use because market economies depend heavily upon private initiative and mobilization of private investment funds in these sectors. Individual ownership increases incentives for investment by giving the owner fuller access to the profits from
investment in the land and by allowing the owner to obtain access to investment funds by using the land as security for a loan. Land is marketable, and this facilitates access to land by those with funds to invest. Group investment in land is carried out through the pooling of funds in corporations, which in their dealings in land are ‘legal persons’ and are treated by the law with regard to ownership and dealings in land in much the same manner as natural persons.

These generalizations about economic empowerment by individual ownership will usually hold true in well-developed market economies but they are less reliable in transitional economies where market forces generally are not (yet) well developed and markets sometimes are (still) highly imperfect. Anticipated incentives may or may not materialize, or if they do materialize, the landholder may not be able to act on them, for instance due to lack of access to credit. Assessment of these factors can and should affect policy decisions about strategies and priorities on strengthening individual tenure.

As mentioned before, individual tenure rarely exists alone within a tenure system. It may be the dominant feature of land tenure but it is almost always mixed with traces of state, common, and customary land tenure. When one speaks of a country as having an individual ownership tenure system, one really means only that individual ownership is a central concept and plays a major role in the mix of tenures. But there will also be common property and state property in various forms. In some states in the USA there is more land under state ownership than under individual ownership. This is because it is accepted and recognized that land has not only a role in economic development, but land performs other important functions regarding social security, conservation and aesthetic values.

5.8 COMMUNAL OWNERSHIP

The terminology used to describe communal tenure can result in confusion and leaves much to be desired. The general tendency to use interchangeable terms shows that on closer examination such terms might have quite different connotations. That is where the confusion comes from. Common tenure or communal tenure is exercised on common land. But customary tenure is based on customs rather than on statutory or formal law and this type of tenure appears both in communal as well as in private individual land tenure regimes. However, since customary tenure is regularly encountered in combination with a dominant appearance of common land it is sometimes used as a similarity of communal tenure. Both the terms customary and communal tenure suggest relatively static institutions, not changing over time; but research has shown that communal tenure - as well as customary
tenure does evolve regularly and especially communal tenure sometimes changes rapidly influenced by outside developments that affect the local community. The term ‘informal’ is often used where rules are unwritten, but it seems incongruous to apply the term to some communal systems that, even though unwritten, are nonetheless quite formal and complex. The term ‘community-based’ (Lynch 1992) is attractive because it specifies a local nature of such systems, both in regard to the geographical extent of their application and the source of their legitimacy, and the term allows them to be contrasted to the ‘national’ tenure system. But there are communal tenures that are state-imposed and not community-based in any real sense, such as tenure within peasant associations in Ethiopia and land tenure in rural China during the commune period.

‘Communal’ can be used properly in the land tenure literature for a variety of situations:

• where a resource is used by virtually anyone, a situation better characterized as ‘open access’;
• the unusual situation where land is utilized collectively, with production actually organized and carried out by a community or descent group;
• where land is utilized co-extensively and simultaneously or serially by members of a defined group of users and/or owners, as with a grazing commons (the ‘common property’ situation); and
• where there are social institutions, which allocate and reallocate common land among households, as they consider necessary.

Tenure systems which have some or all of these elements are often described as ‘communal,’ though they may in fact include land which is perpetual individual and family property. Some observers have long raised the question about how ‘communal’ communal land tenure systems really are.

White argues:

It is unfortunate that this misleading expression--communal land tenure--so often continues to be used as a blanket definition of African land tenure, implying that every individual has equal rights in every piece of a tribe’s land. Applied to grazing areas in Northern Rhodesia in the provinces so far studied one may to some extent speak of communal rights in grazing since anyone may graze his cattle on any land not claimed for individual use; but it must be qualified by the observation that these communal grazing rights are not vested in a whole group collectively, for where land is short as among the Tonga or the Mambwe, individuals can bring pieces of communal grazing land under their personal control for arable purposes by the usual process of starting to cultivate
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it. The communal grazing areas are not vested in any authority, which preserves them from encroachment in this way.

In so far as rights over arable land are concerned these are essentially individual--acquired by the individual, enjoyed by him, and disposed of by him. Rights of individuals over arable land cannot possibly be described as communal tenure without a complete distortion of the facts. Much of the confusion here no doubt springs from contrasting English ideas of land ownership with the conditions found in the most undeveloped systems of shifting cultivation, where a man exercised rights over a piece of land for only a brief period, and when it was exhausted, passed on to open up another piece of vacant land. Under such conditions land was presumably seldom inherited and only infrequently transferred. An individual enjoyed rights in respect to a piece of land but only of an ephemeral nature in that they were soon transferred to another piece of land. But with the stabilization of agriculture or with the scarcity of land in a given area or with the emergence of cash cropping putting an economic value on land, or some combination of all three, the permanence of a man’s land rights developed quickly. In areas where land is valuable for these reasons, it is regularly transferred or inherited, and rarely abandoned. Hence in some places land once acquired does not revert to the common pool to be taken up by someone else, but passes directly from one to another without any intervening authority. At this stage individual rights of a continuing permanent nature are strongly developed; whilst it may be inappropriate to refer to such tenure by any English term which is liable to contain unsuitable implications, it is certainly necessary to avoid the use of the expression communal tenure. It would seem preferable to call such cases individual tenure, accompanying the expression by such definition as may be necessary of the existing rights. Individual tenure of this type occurs in all the provinces of Northern Rhodesia so far studied.

Other researchers of land tenure have stressed the role of colonial policies in undermining household land rights and stressing community (chiefly) controls, for reasons of colonial policy. We need to, therefore, evaluate carefully assertions that such controls are ‘indigenous’. Martin Chanock describes the colonial construction of communal tenure in 1991 in ‘Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure’. (Law in Colonial Africa, ed. by Kristin Mann and Richard Roberts, at pp. 63 and 66. London: James Currey):

Early administrators approached Africa with certain basics in mind. These were the broad evolution of human societies from status to contract; the contrast between individualism and communalism; and, even among the anthropologically minded, a contrast between rational and irrational economic behavior. An essential part of this picture was the model of land tenure, the basic features of which were that land was held in some form of communal tenure and could not be sold by individuals, and that all had a more or less equal right to land… Iliffe remarks that rural capitalism was seen ‘not only as socially and politically dangerous, but somehow improper for Africans like guitars or
three piece suits’ (Iliffe 1983:137). The framework of suspicion and of tight control over rural entrepreneurs meant condemning their desire to increase their landholdings as unnatural and greedy, in a sense economically right, but not customary and therefore not legitimate. Gradually a picture of a customary economic world was built up according to which institutions in the realm of custom, like landholding, were judged. Even customary institutions that did not fit this picture were judged illegitimate…

Against this background of notions of African economic behavior, and the powers of chiefs, the colonial legal system etched its version of the customary land law, a version essentially necessitated by the need to validate early land alienations. The summoning into existence of the customary regime was hugely convenient, for to treat indigenous rights as if they were the equivalent of rights recognized in English law would have created a plethora of embarrassing problems. And to treat Africans as people who had not ‘evolved’ the institution of private property in land not only gave vastly greater scope to the state, but it also functioned as a powerful ideological criticism of African societies. Individual title could be thought of as a distant goal of policy, while in the meantime the colonial regimes would handle land in the best interests of the population. Attempts to assert individual rights could gain no recognition because they were by definition not legal…

The term ‘communal land tenure’ indicates the presence of a communal dimension in land management, but the nature of the ‘communal’ dimension varies from one system to another. In some communal tenure systems it is little more than a residual of a common origin of land rights and a vague sense of responsibility to the community for stewardship in land use; in others it is a forceful reality that conditions land use on community consent.

The balance between communal land uses and the tenures that go with them will vary considerably depending on the nature of the land resource and livelihood. In regions where cattle herding is the principal livelihood, common property in pastures may predominate. In agricultural systems, common property will be quite narrow and specific, often with timely limited exclusive use rights for (small) plots of land to grow crops. After the harvest the plot becomes ‘communal’ again and anyone of the community may use it as grazing land or to collect plants and fruits still present. It must be mentioned here that some scholars prefer the use of common property resource instead of common property underlining the function of the common property; to secure a livelihood.

In some developed agricultural systems, residential and farmland is increasingly held individually and acquired by inheritance. The ‘community’ as a whole, for example, the village, will usually have little by way of rights to dispose of this land. But there is a narrower community, the lineage, whose living members may have claims on the individual landholder.
5.9 INDIVIDUAL AND COMMUNAL TENURE SYSTEMS

In examining the possibilities for the implementation of a new land tenure regime John Bruce states that it is necessary to compare systems with systems: communal tenure systems, with their various tenures, with systems of tenure dominated by individual ownership but incorporating other tenures as well. In his paper Bruce deals with this comparison in the following way:

In both cases we are dealing with multi-tenure systems in which, partly in response to the different purposes to which the land is to be put, there are some areas of land held and used individually and subject to individual rights, and other areas of land held by groups and subject to group rights.

The fundamental difference is that in a communal tenure system, individual property rights are seen as derivative from the property rights of a community, be it the village or the lineage or some other group, and the community can, by the exercise of those rights, limit in important ways the rights of individual landholders. The state may or may not assert that it has a property interest in the land as well; if the state claims a superior land right, then this is not truly a communal ownership system but rather an administratively delegated tenure, and often quite insecure.

In an individual property system, property rights of groups do not condition property rights of individuals to any important extent; individual rights are limited by the state, not through an overreaching property right held by the state but by regulatory powers conferred on the state to protect the public interest. The state has its own land.

Individual tenure systems insulate private economic actors and their land against state action. The regulatory approach to controlling land use is subject to stringent procedural and fairness requirements. The fact that land is a marketable commodity and has its full economic value recognized by the market, when coupled with the requirement of full compensation for land takings, means that the state is practically limited in its ability to adjust distribution of land. Land as a marketable commodity will tend to move to those with the means to invest. Tenure is secure against the arbitrary action of others, but not secure against economic pressures to sell. In an economy that relies on private investment as the engine for economic growth, these characteristics can help promote investment and economic growth. Indeed, this is the raison d’être of individual ownership. The community or other groups owning land as common property and the state as landowner have similar incentives because they are treated legally, much like private owners.

The limitation of individual ownership is that it is quite singularly focused on development incentives, and other societal objectives may be shortchanged. Individual ownership systems are officially indifferent to the distribution of the land; they are willing to let markets decide that and let the chips fall where they may. Left to itself, it will often neglect societal objectives such as equity, conversation values, and aesthetic values. That’s when the state must exercise its regulatory powers.
Communal tenure on the other hand allows direct use of the community’s property rights to achieve societal objectives other than growth. It is historically more focused on tenure security as social security rather than the security of tenure as that degree of independence that allows land to be mortgaged and sold. In communal systems, access to land is commonly a right of membership in the group, a right based on descent that cannot easily be lost. Access is guaranteed, and though the guarantee does not always work, the concept is fundamental to communal systems. Distribution is more easily controlled. Communal systems, because they do emphasize social security, can insulate against the uncertainties of market economies as they expand and contract and are especially important in the absence of other social security mechanisms, such as unemployment compensation and retirement programs. Communal systems are preferred to state-managed systems because, while they are certainly not proof against corruption, they do locate decision making more locally and make decision-makers more vulnerable to community concerns. One must be careful here, however. Sometimes ‘communal’ solutions are in fact veiled attempts by the state to maintain state control over land, with the abuses that entails. The appropriate roles for the state and its functionaries is rather one of ensuring the integrity of decision-making at local level, and of assisting community members whose rights have been abused by communal-level decision-makers.

An often cited constraint within communal systems is that they are usually less suitable in encouraging investment and development. Because the community exercises significant control over the individual’s land by virtue of its own property right, individuals (depending on the nature of the control) may be more constrained in their choices. To the extent that the community withholds full rights of individual ownership, incentives are diluted. The community through its leadership makes decisions that affect incentives, and being human, these are not always wise decisions. Sometimes community jealousy of successful individuals can actually penalize enterprise. Accumulation of land by an entrepreneur, or even an efficient producer, may engender a reaction to limit his or her landholding.

Although slightly adapted to this document the above text it is almost exact how John Bruce writes it his paper on pages 6 -7.

5.10 EVOLUTIONARY THEORY OF LAND RIGHTS

Recent literature on land tenure systems shows rising sympathy for communal and customary land tenure. Under pressure of indigenous demands, as a reaction on the threat of over-exploitation, or out of uneasiness with the inequality in benefiting from different land tenure systems, increased interest in indigenous land tenure can be observed. As soon as pressure on land availability leads to mismanagement and
irresponsible use of land, two different approaches to (partly) eliminate this negative effect are possible. One is the doctrine of the misfit between embodied tenure systems and the requirement of agricultural production growth. A drastic alteration of customary land rights is necessary to enable growth in agricultural production. The other doctrine follows the theory that indigenous tenure systems under the changing social and market conditions can and will significantly change and even more smoothly with support from authorities where useful to formalize and consolidate private property rights. 

Jean-Phillippe Platteau in ‘The evolutionary theory of Land Rights” that the evolutionary approach can be considered the dominant framework of analysis used by mainstream economists to assess the land tenure situation in developing countries, and to make predictions about its evolution. The central theme of this theory is similar to the second doctrine mentioned above, namely that under the joint impact of increasing population pressure and market integration, land rights spontaneously evolve towards rising individualization and that this evolution eventually leads right-holders to press for the creation of duly formalized private property rights. According to Platteau, this is a demand to which the State will have an incentive to respond with land reform programs. However, he argues, most of the beneficial effects usually ascribed to such a reform are grossly over-estimated and that, given its high cost, it is generally advisable to look for more appropriate solutions that rely on existing informal mechanisms at community level. This might be a bit confusing. In my opinion the Western concept of land tenure with its individual exclusive rights to land is undoubtedly favoring economic development, but it also can lead to depriving people of the enjoyment of free access to land and a denial of the communal roots of land tenure. I would like to search for a more incremental and perhaps open-ended approach in which co-equal feelings that are so clearly depicted in the biblical stories about human origin can be honored. Such a system does not automatically have to end in individual exclusive rights to land but could well stop at a stage where individual rights are recognized without denying all access to the land by all others.

The evolutionary approach is closer to African realities than the first doctrine. A clear policy implication is that the State needs to implement a land titling program with a view on formalizing private property rights once land has become so scarce as to make it a source of acute competition. But one can wonder if formalization of land rights is an inevitable outcome of growing land scarcity and to what extend it leads to higher growth of agricultural output, as the theory assumes and how does it affect security of access to land for the mass of land tillers?

The starting point of the evolutionary theory is recognition of the inner limitations of communal land ownership. Preservation of communal rights makes sense as long as gains of change are small compared to the costs of
establishing and enforcing private property rights. But reform is needed as soon as there are harmful effects by pressure on land availability with mismanagement and overexploitation of the increasingly valuable resource. The first doctrine has a rather static view on development of land rights and thus it requires drastic changes because there is no automatic adaptation towards the new situation. However, Platteau observes in Sub-Saharan Africa the other way. Land tenure is not static but dynamic; commercialization of agriculture and growing population have given way to meaningful changes in customary land tenure and individualization of land tenure (implying a reduction of community controls). During colonial times and even before that time in highly populated areas, the exclusivity and appropriation of family rights emerged already. Youngsters have emancipated themselves albeit slowly from the elders’ authority. Sales were at first sanctioned only between members of the group and later even without consent to outsiders etc. This all happened within customary tenure systems and John Bruce once remarked that the customary rights can best be thought of as systems in which individual rights are maturing.

The evolutionary theory of evolving land rights describes how rapid population growth and increased commercialization of agriculture ignite a sequence of effects that eventually result not only in efficient land allocation and high rates of capital accumulation in agriculture but also in budgetary savings, social peace and political stability. Under population pressure land becomes scarce and owners of rights to land feel increasingly uncertain. The number of disputes on matters of access to land multiplies because holders of rights to land assert individualized rights to given plots and limit the rights of others to graze. Because they try to prevent traditional prerogatives of others the number of conflicts increases. With the appreciation of land, the increased value of land justifies the perception of people to obtain specific rights to land and it also makes costs of disputation worthwhile. Litigation at the same time causes loses in rural economy, social unrest spreads and social costs of expansion trends are costly. The expected response by the government is to have administrative reforms which sooner or later will result in formal registration of private land rights or land titling. Such an establishment of legally protected rights to land gives rise to two kinds of beneficial effects, a static and a dynamic one. The static effect is that land will end up in the hands of more dynamic agents and will be consolidated in larger holdings with efficient cropping methods. The dynamic effect is an increased willingness to invest because of the incentive of reaping, and investment by potential (outside) entrepreneurs is encouraged. The result is easier access to capital for investment by holders of rights to land. The natural result of both is also an increase in moneylenders and landless people. More inequity will occur and rights to land will change hands
through foreclosure and transfers. There is one more set of effects. A reduction in the number of disputes over rights to land will save public expenditures and by better data on rights to land the government will have a good tool to levy land taxes.

The evolutionary theory of land rights assumes a (not always smooth) mechanism for land rights to evolve in an efficient fashion. The government is expected to provide appropriate institutional innovation to support the evolutionary process inter-alia by providing a reasonably cheap and accessible system of registration of rights to land.

Platteau warns for an optimistic expectation of the evolutionary theory. He argues that only a few African countries have currently individualized land titling programs at a large scale following the static doctrine and not the evolutionary doctrine. Many post colonial governments in Africa avoided capitalist routes and kept land as state owned land while granting long term lease rights (usually non-transferable) to individuals under the condition that land is brought under cultivation. In Kenya land was titled prematurely following almost the static doctrine. Positive effects failed because two central conditions are not fulfilled in present day Africa. First new technical packages must be available to create attractive investment, and secondly considerations of efficiency and equity must be separable. If they are not due to transaction costs changes in tenure rules towards formal property rights might entail significant efficiency losses reducing the benefits of land titling reforms. In Africa legitimization problems cause most likely new transaction costs making the land markets malfunction. If land titling is unlikely to enhance land tenure security for large segments of the population the demand for titling might be far less widespread as assumed. In such cases the expected evolutionary process gets stuck before land titling is carried out.

A major critique is the empirical evidence showing that registration can create rather than reduce uncertainty, because there are always losers in the process of improving land tenure security. Losers are most likely women, pastoralists, hunter-gatherers and people that are seen in the community as outcasts. The usufruct often used by these groups may become difficult to continue. Several groups of people face uncertainties and this is particularly true for women. The land is generally registered in the name of the compound head and it depends on him what is going to happen next. Increasing land sales tend to exclude women and even when they acquire title to land it might be difficult to get it sanctioned or protected.

Another danger is growing inequity. In a social context dominated by huge differences in education levels and by differential access to the state administration, there is always the fear that the adjudication/registration process will be manipulated by the elite to its advantage. Original occupants of land may have difficulties defining their (customary) rights to land under
such circumstances. Bureaucrats and land surveyors dominate land allocation procedures while the mass of the people are unaware of the new provisions. So titling procedures can have a disastrous effect on vulnerable sections of the population at a time when their survival depends on their access to land. Violation of traditional norms might create resentment among original land users. The point is that, if property has no social legitimacy, it is no property because it lacks the basic ingredient of property, recognition by others. In many African countries cadastral records are incomplete and there is lack of diligent record-keeping of changes in ownership of rights to land and in recording land data in general. A land registration program is cumbersome and weighing heavily on the government of poor countries, making it almost unrealistic to expect them to keep valid records. It is not sufficient however to conclude that discrepancies between records and reality from administrative failures are the only negative factor. It is also demand factors that contribute to limited success. If new laws and regulations do not succeed in gaining popular understanding or acceptance, individuals continue to transfer land according to local customs. If the title shown on the record is increasingly at variance with actual use and possession, considerable confusion is the result. The conflicts rising out of this confusion can often not be solved by (cheaper) local authorities but require litigation for official courts costing so much money that only the rich holders of rights to land can afford the procedures.

One final remark about the evolutionary theory is my personal thought that this evolutionary process should not be expected to always automatically end in the typical ‘western’ style land tenure with individualized land titles providing for individual exclusiveness. It is in my opinion possible to find a final situation that still recognized some ‘sharing’ of the enjoyment of the land. But it would fit in a new paradigm that will require substantial research because such a new paradigm for land tenure is as yet is not clear to me.

5.11 ADDITIONAL MEASURES FOR SUSTAINABLE SOLUTIONS

Almost everywhere land reform projects have performed disappointingly. The rush to establish private individual ownership of land without sufficient time to study and to gain knowledge of the local circumstances certainly is to blame for this. Thus land tenure change did not bring the much-anticipated economic growth in a similar expeditious way as the import of a foreign legal framework and donor assisted land reform projects once suggested. The replacement of indigenous land tenure by western style land tenure
suited for a market economy and a capitalistic system of credit and loans failed to convince in many documented cases.

The strongest conclusion that can be drawn is that often there is no quick solution possible. Where a change of the existing land tenure is the goal the key to success is often ignored. There is no attention to the question of how to achieve a perception of land tenure security. A perception of land tenure security is not measurable directly. It is possible only to measure its’ effects and then again only over time, time that is seldom made available to really measure the effect in donor assisted project implementation. For countries in transition speedy implementation is often a political and financial must. It will be difficult to adopt another much slower pace in land reform in countries in transition, but this is not the case where traditional indigenous land tenure systems are changed. To be successful here, it is necessary to pay much more attention to the concepts and possibilities of the current common land tenure practices and to investigate how these tenure practices could eventually be embedded in a more market oriented land tenure system without jeopardizing the economic significance of land to be used as collateral for credit. It is more or less using the evolutionary theory of land rights while at the same time employing of a steering mechanism to honor also the economic significance of (part-time?) individual exclusive access to land to develop its economic potential. This will require an incremental approach toward land tenure change providing for ample time to study the current system and to open up new possibilities respecting communal land tenure. One of the main elements of such an approach will be the full participation of the indigenous people themselves in the changes that are proposed and in the design of the processes to be followed.

There is no bleu-print or desktop solution for any sustainable land tenure change. Any change in land tenure to increase land tenure security is, in fact, a well-meant attempt. But some precautions can be taken in order to increase the success of such projects.

As mentioned before, land tenure security perception is the key element in reaching a sustainable land tenure regime. But perceptions are not directly measurable. It is only possible to see the effect of increased land tenure security by checking other indicators. Indicators that are often easily available in national statistics (see for several examples ‘Property Regimes in Transition’), but always showing only the effect of land tenure security change over time.

The growing interest in claims on land by displaced indigenous population groups to restore their rights to land and the mixed success of many land reform projects in countries in transition show that there is a lack of understanding of all the elements that contribute to the perception of land tenure security. The elements which matter in respect to land tenure are numerous and differing in nature and origin. So far it seems that results from
most of the research of the last decades have failed to give corrective impulses to general policy prescriptions as used in land reform projects. An introduction into the perception of land tenure security can help to increase this understanding and it can be organized in several ways.

In focusing on customary land tenure, recent research shows that a sustainable solution for the recognition of customary rules in land tenure should be guided by three basic principles that root in anthropology and sociology of law. Firstly, new legislation should incorporate the cultural, sociological and agro-economic assessment of the existing land tenure situation. Secondly, new legislation should protect existing (customary) rights in land tenure while creating secure conditions that benefit both investors in and local users of resources to create incentives for new investment. Thirdly, the new legislation should encourage natural resource use in such a way that it ensures an equitable and sustainable economic development.

One of the strongest advocates for rethinking the issues of access, control and management of Africa’s common property is Okoth-Ogendo. More and more researchers share the view that one of the ways to achieve sustainable development in areas where customary land tenure governs most of the land is to increase the impact of customary tenure rules in the statutory legislation. Some of them go so far as to advocate customary land tenure as the leading element in national land policies and legal provisions.

Earlier I have shown that such a leading role for customary land tenure should be approached with care, to avoid that less desirable or even unwanted effects of customary tenure are (re-)introduced in society. Empirical evidence shows that most governments are rather quick to acknowledge the existence of customary practices but do have strong reservations in recognizing it in any formal sense. Nevertheless the only sustainable solution for a successful land reform program in areas having a common property regime, is a solution carrying unambiguous respect for and clear formal recognition of customary land tenure.

5.12 THE CHALLENGE: DESIGNING AN IDIOSYNCRATIC SYSTEM

The title of this chapter has some symbolism that might not have escaped several readers. Rapid result, postponed problems, or reliable research, and sustained solutions can be seen as an rr, pp, or rr, ss combination. Starting with the ‘R’ one can go back in the alphabet to ‘P’ by skipping the ‘Q’ of ‘Q’uestions. But by ignoring questions because of being too rapid aiming at results, there will be postponed problems. It is the ‘quick and dirty’ approach
well-known among expatriate consultants and it is often a preferred way of setting up a land reform project or a land tenure change project in order to provide quick answers even without the question really being investigated. Importing an alien legal system, importing models for institution building and expecting that the population will use such a system almost from the very start to its full potential often turns out to be a disappointment. A certain way forward is to go forward in the alphabet as well, from ‘R’ to ‘S’ in other words from ‘R’eliable research to ‘S’ustained solutions. As mentioned elsewhere, unfortunately there is seldom an opportunity to do reliable research in land reform projects. The result is quick fixes often under pressure of the local authorities because they want to secure agricultural production and prevent insurgencies of the rural population. The trade off is solutions that are not sustainable in the long run. Often a considerable amount of amendments and adaptations of the implemented rules and established institutions is needed to make the project effect lasting.

Jumping to project results ignores possibility to look for solutions which could have had much more effect already from the beginning when they are implemented incrementally and with proper preparation. It is regrettable that the desired speed for project result does not stimulate reliable research into alternative possibilities. Lack of incentives to study alternatives in turn makes them an unknown field or at least a lesser known field for most of the expatriate experts working on land reform project implementation all over the world.

The bottom line conclusion of the previous paragraphs is that it must be possible to build a communal system that gives ample room for individual proprietorship and even marketability of land. Approached from the other side one might be able to design an individual ownership system that addresses, through provision for common property and state property and through the regulation of land use, most of the concerns about social security and societal objectives other than investment and growth. In a capital intensive market economy, individual ownership conditioned in all the ways specified earlier might be the best solution. But still there should be important roles for common property within private ownership systems. In transitional situations or in areas with special roles in development there is often an appropriate role for communal ownership, when properly conceived. But the experience in converting indigenous communal systems to private ownership systems suggests that it is a task to be tackled carefully and gradually.

This suggests according to Bruce a process-oriented approach, one that helps local stakeholders think through the tenure system they want and need, within certain broad constitutional parameters. But there is a need for some ‘economic’ questions to be asked and to be discussed with local people in terms that they can understand. For example it is important to ask, in terms
of each major land use category (residential, commercial, agricultural, pastoral, and industrial): What are the needs for investment and development in economic activities connected with this land use category and, realistically, where can we expect that investment to come from? How can tenure incentives be used to encourage investments? What social security role is this category of land use playing, and is that role to be maintained? Are there alternative efficient social security mechanisms?

In addition, one must look at the communal area and ask, what is the development strategy for this area? This is a slightly broader question, subsuming the two proposed above, but the adequacy of any land tenure solution can only be assessed in light of such a strategy. The different communal areas are so differently resourced and situated that it seems unlikely that there is anything as a uniform answer to this question, and this mandates openness to somewhat different tenure solutions for different areas. ‘A uniform national system of tenure’ has little value in and of itself, and diversity should be respected.

Finally, where a change in land tenure is needed, it should not be assumed that this could simply be legislated. Tenure reform is a far more ambitious process than that, and it is very awkward when it fails. When this happens, tenure security is undermined rather than enhanced. Serious consideration should be given to evolutionary approaches, utilizing mechanisms of customary and common law, as opposed to simply prescribing new tenure systems. There is no reason to understate the difficulty of some of the decisions required. The challenge is to balance obvious social ‘goods’: for example, provision of social insulation against openness to investment. There may well be trade-offs. But attentiveness to local concerns will often be the best guide through those difficult choices.
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NOTES CHAPTER 5

1 ‘Land’ is used in this article in the same sense as the term ‘land’ is used in Land Registration and Land Information Systems thus including all real property.

‘Picture a pasture open to all. It is expected that each herdsman will try to keep as many cattle as possible on the commons. As a rational being each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, ‘What is the utility to me of adding one more animal to my herd?’ The rational herdsman concludes that the only sensible course for him to pursue is to add another animal … and another; and another. But this is the conclusion reached by each and every herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system, which compels him to increase his herd, without limit in a world that is limited. Ruin is the destination towards which all men rush, each pursuing his own interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all ...’

3 Following the start of the communist regime, agricultural land was either expropriated and became state owned or was brought into large farming co-operatives in which the ownership of land was initially formally continued. However, gradually the management of the large co-operative farm behaved more and more as the owner of the rights to land and changed the size and topography of fields without consent of the (former) owners making them right holders on paper only. Most of them lost interest in their rights to land and they became farm employees. Over time the difference between state farms and co-operative farms also vanished because they increasingly used the same bureaucratic channels for planning, marketing, and for farm supplies. Re-adjudication made some of the farm employees suddenly owners of rights to land. This also happened to people who had left farming and had become urban dwellers with no interest in farming and no ties to land anymore. In most cases re-adjudication was tied to regulations limiting the maximum size for creating land holdings per family, to set aside some land for those farm employees that would be left without land after re-adjudication, because they did not have any claims to land.

4 Sometimes recent national statistics on agricultural production reveal also a gradual shift from traditional crops to different crops that are obviously a result of the introduction of the market economy where the supply is determined dominantly by demand.

CHAPTER 6

LAND TENURE SECURITY IN A UNITED EUROPE

6.1 INCREASED INSECURITY?

This chapter, ‘Land Tenure Security in a United Europe,’ draws attention to land tenure security problems that might occur when land markets in the various member states gradually open up to citizens of a growing European Union. The increase in member states and thus increasing number of different land tenure regimes will result in increased confusion among people on land tenure security issues.

The diffusiveness of the land registration systems for non-insiders has already opened possibilities for scrupulous agents and an increase in fraud in land transactions can be expected. Another increasing problem will be the enormous variation in public rights, regulations and rules limiting the free enjoyment and exploitation of rights to land currently existing in the member states. There is little public information for citizens in this respect. It is often complicated and difficult to collect correct data on such limitations for lay people who are not familiar with the specific bureaucratic procedures in a particular country.

Title insurance, as practiced in the USA, might be a good tool to assist citizens of the EU safeguarding their interests in rights to land in an expanding European Union. Title insurance in the USA by private industry is offered to reduce or eliminate the material consequences of loss or limitation of rights (like freehold, leasehold, turbary, piscary, mining, farming, and even simple enjoyment rights) on land against the payment of a premium as in other insurance programs.

Title insurance was ‘invented’ by a group of lawyers in Philadelphia (PA) as a result of a decision by the Pennsylvania Supreme Court (Watson v. Muirhead 57 Pa. 161). As Robert Haines (1980) explains: The founders of title insurance created a vehicle which would indemnify the purchaser from losses on account of the defects in liens or encumbrances upon a title or interest being acquired, without the necessity of showing a fault or neglect whatsoever on the part of the indemnitor or of those acting for such purchaser. Almost everywhere in the United States one will find offices of
title insurance companies (sometimes called ‘title-plants’) specializing in tracking the chain of ownership of a parcel of land and insuring the title.

It is clear that once the ownership of a parcel of land known as 31 Eighth Avenue has been traced back to the original owner of a larger parcel of land of which 31 Eighth Avenue was part, it most likely tells some of the history of 33 Eighth Avenue and 29 Eighth Avenue. In keeping records of searches, a data bank can be developed making future searches simpler. By offering insurance of title for one parcel, for example, 31 Eighth Avenue, it is relatively easy to offer insurance for all the neighboring land, in this case, for the parcels numbered 29 – 33 (or even 1 – 55) along Eighth Avenue. The combination of searches and keeping records of searches in the past gave way to the development of title companies where purchasers of land can insure their ‘title.’

Title insurance has become a characteristic feature of real estate transactions in the United States. In many parts of the country title insurance companies do own and operate private sets of indexes to public records and even complete sets of the copies of records. In the USA it is not uncommon, within the office of the recorder, for several land title (insurance) companies to have their own cubicles for the benefit of the searchers that the land title companies employ. In some courthouses these cubicles are in the same room (commonly referred to as the vaults) where also all the land records are kept.

In Europe the certainty on rights to land is generally granted to individuals and legal entities by appropriate legislation and further supported by institutional arrangements. However, the various states operate different cadastres and/or land registries and this may cause confusion in cross border transfers of rights to land. With the increase of the number of member states, confusion might increase, as well, because of the increased diversity of regulations that govern land tenure. Unfortunately it must be expected that imposters will use this confusion and that deceit and fraud will occur increasingly in the expanding European Union in regard to transactions with real property when no additional provisions are offered than the ones currently provided to improve land tenure security.

Similarly to the situation in the USA, the institute of title insurance is not meant to replace any of the currently existing governmental institutions for protection of rights to land, but it will merely offer the customer additional security of any investment in rights to land.

6.2 SECOND HOME OR PIE IN THE SKY?

It was an ordinary middle-class home in the suburbs of a Northern German town that Barbara and Walter purchased over 35 years ago. They had raised their children here and they enjoyed the neighborhood. They also loved to go
South on vacation and they had done so for several years, actually since their children were on their own. Their children had households on their own now they were all married and having started families. Last year they had spent another vacation in the South of Europe and during one of the trips from their holiday resort, they had seen some houses for sale. They were small, but very suitable to live in for a vacation, perhaps even for a longer period during the cold season in their hometown. Of course there would be the problem with the language. But during their stay in the resort they had met with several countrymen who lived in the area almost permanently and they all spoke mainly German. So, they argued that it should not be too difficult to also live in this area for part of the year to enjoy the warmth and sunshine that they missed during the cold winter season up North.

All the time during their return trip to their hometown they discussed the possibility of buying a second home. Walter confessed to Barbara that he had set up a savings account and that would have cash at hand for at least a substantial part of the purchase price if they were to decide to purchase their holiday home. As if it was pre-destined, a few weeks following their return there was an ad in the newspaper showing second homes for sale in the area they always visited. After consulting with Barbara, Walter decided to make a phone call the next day to the number mentioned in the ad.

The next morning, feeling a little nervous Walter called the number, but he was put quickly at ease when a fluently-speaking German lady answered the phone. Yes, they had some perfect second homes for sale in the area, but boy did they go fast! There was a lot of interest among people from Northern Europe. Walter became a little anxious and wanted to know what he would have to do to secure his chance to become the owner of rights to the real property advertised. The lady asked him about his purchase power and the cash that he had available. It was explained to him that mortgages were no problem but the more cash you had the lower the interest rates could become on the remaining funding for the difference between his cash payment and the purchase price plus all the costs involved. The best thing Walter could do was to arrange for someone to go to the holiday site again and organize the purchase of the house in person with the agent. Yes, the lady would be there to assist with language problems and, of course, a notary would be involved also apart from the real estate agent. The lady reminded him that with the developing integration in the European Union more and more people from up North would consider buying a second home in the South of Europe and that the prices of land and real estate would rapidly increase in the coming years. But they had specially priced these homes low in order to sell them fast; ‘For the determined buyers’, as the lady told him. She ended the telephone conversation but not before urging Walter not to wait too long with his decision making. ‘We will not be able to reserve a house for you for a long time with all the pressure from the other prospective buyers’ was her
Walter and Barbara discussed their chance ‘of a lifetime’ and decided that they both would go again to Southern Europe to secure their dream of a holiday home abroad as soon as next week. Walter arranged to cash his savings in the next days and with a bundle of money they once again made the trip to the South, feeling both a little nervous and also lucky that they had this golden opportunity.

When they arrived at the office of the real estate agent there was indeed a translator available although some one else than the one Walter had spoken to. Together the next afternoon they would visit a home Walter and Barbara selected from a series of photos that the agent showed them that morning. Eager to know what they had selected, they just drove to the house already that afternoon. There was no ‘for sale’ sign to be seen, but they easily could identify the house that they had seen that morning on the photos. While passing the house they saw that an elderly woman was collecting laundry from a clothes line that crossed the backyard. So, the house was most likely not empty yet, and they concluded that is perhaps why there was not a ‘for sale’ sign out.

The next afternoon they went to the house that they had selected the day before and that indeed appeared to be inhabited, it was fully furnished and in the sink there were some dirty dishes from lunch, although the lady they had seen the previous day was nowhere to be seen today. The agent showed them around and they became more and more enthusiastic about the cozy little place. After the visit they decided that they would buy that place and they asked the agent to diligently prepare everything for the sale in order for them to return home as soon as possible. Although Walter was almost eligible for retirement, he still worked full-time and his vacation would run out if he stayed away too long. In order to speed up the process the agent took them to the office of a notary to make an appointment for the transfer of the rights to land. The notary was present himself and showed them on request the original deed of the house. It all looked very trustworthy. The agent promised to keep ahead of things and within two days they received from the agent official looking papers. That same day the agent came to visit them to ask them about the cash of which they had spoken. The agent could arrange a meeting at the notary office to officially sign the papers for the transfer of the rights to land and the mortgage for the remaining sum of money, but that would take at least a month depending on the vacating of the house by the current user. Instead they could sign preliminary papers to avoid another trip south in such a short period of time and then the agent would handle all the matters for the transfer. Walter and Barbara wanted to know when they would be able to take possession of the house and the agent told them that it was best not to rush such matters because that was not the custom in this country. That evening Barbara told Walter that she was a little nervous about
leaving everything to the agent while being in Germany and Walter also felt some reluctance, but what about his job? The next morning the agent came by again and told them that to ensure the safety of the transaction he would organize a paper signing at the notary office tomorrow. That gave both Walter and Barbara some peace of mind although the agent had asked them to bring the cash to be handed over at the notary office. The next day they all met again at the office of the notary. Unfortunately, as the agent explained, he had not been able to contract the translator due to the short term notice, but since both Walter and Barbara had met both the agent and the notary before they trusted them even without a precise translation of the papers to be signed in their own language. As receipt for the money transfer they got the official notarial deed in which was stated that the money had been handed over to the agent. It was explained to them that the original owner would vacate the house within two months from now, and that they then could take possession. The key would be available at the agent’s office; ‘Rather then send it to you by mail, because it might get lost.’

The next day Walter and Barbara took to the road again to travel back home with the knowledge that within two months they would own a house in the South.

After two months of planning how to furnish the house, but without a word from the agent or the notary, Walter and Barbara returned and found someone painting the outside of the house and a new family residing in it. The office of the real estate agent was closed and obviously deserted for some time already. When they tried the office of the notary, an assistant explained to them in poor German that they could not possibly be the new owners of the house. The family residing in it now had been earlier in registering their notarial deed at the official registration office, making it impossible for the notary to register their deed. But the real estate agent certainly had reimbursed the paid money to them already as the notary office had instructed him to do, had he not? Oh my, what a shame. The assistant could not tell them where the agent was at the moment, they had not seen him around town lately.

To make a long story short, Barbara and Walter had been mislead and deceived. Without sufficient knowledge of the process of transferring rights to land they had trusted the ‘officials’ handling the matter in the foreign country.

Walter and Barbara are not alone in their experience. There are more examples of people who trusted the system of transfers of right to land because it is so reliable and familiar in their own country. Stories can be told of new purchasers confronted with recent zoning laws that considerably limit the enjoyment of their homes abroad. People who found out that they had not bought the house they expected but the far less attractive next door house and so on. People who intended to continue a small business in an existing
shop, finding out that some new regulations made that illegal, and so on. With an expanding European Union and increasing transactions over the former borders of member states, the cases given here can easily increase.

Fortunately most real estate agents are trustworthy and people can rely on transactions of rights in land in an expanding European Union, but for a real peace of mind, considering the introduction of a system of title insurance, as an extra safeguard, might be interesting as I will show in the next paragraphs.

6.3 REGISTRATION OF RIGHTS TO LAND

In the legislation of all countries of the EU on the European continent individual ownership of rights to land is recognized. Individuals holding rights to land can be private persons, legal entities and the government. In general, governmental agencies or institutions closely supervised by governments of the member states collect and provide data on land and data on right holders to land to the public.

But there are considerable differences in the legal significance of rights to land in Europe. Britain uses a system whereby every titleholder - be it freehold or leasehold - is a tenant of the crown, a result of the absolute sovereign title-ship on land. Most Western European countries on the Continent use Roman law as basis for rights to land resulting in ‘absolute’ ownership of rights to land. In other parts of Europe slightly different systems may be encountered.

Several readers will perhaps not be aware of the fact that using the English language (or rather the American version of it) as the lingua franca for this book, carries the risk of misunderstandings when talking about rights to land as prevalent in Continental Europe and in many other places in the world. Land law in Continental Europe is based on the concept of ‘dominion’ of Roman law. Continental jurisdictions approach ownership as resting in a thing of which land in the physical sense is a good example. Having the right of ownership to land gives someone an absolute title and provides him or her the possibility to enter into agreements and contracts with others to give them permission to use the land in various ways, agreements which bind the parties person to person but which do not burden the land with rights of ownership other than those vesting in the owner who initiates the agreement. The right of ownership of land is thus attached to the land itself. Such a concept differs from what is used in common law countries with Anglo-American jurisprudence. In common law, for example, the basic principles of the land law are ruled by the doctrine of tenure and the doctrine of estates.

Thus, using the English language as lingua franca, can introduce the
linguistic problem of the term property in a legal context. Someone has rights of property over land because that person is the holder of ownership rights to that particular piece of land. The holder of ownership rights can use the land, enjoy it, and dispose (although with land actual disposal is impossible) of it. I exercise care in using the term ownership of land but rather use rights to land and avoid the use of property rights in land. The purpose of this book is to cover the concept of land tenure as experienced in various settings around the world, but in doing so I might make fine-tuned lawyers squirm when using terms that do only marginally reflect the full scope and meaning of the legal thoughts I want to convey as far as land tenure security is concerned. Choosing a more or less universal relevance throughout human communities and to avoid the differences which spring from local customs and local juridical systems is a trade off. It must be remarked that in the concept of common law no subject can have full ownership rights to land, the subject merely has an estate in land, giving him, or her, the right to hold it exclusively for some period of time. In Anglo-American law someone owns an interest or estate in the land. Ownership is in the rights and not in the object of the rights. In day to day practice holding rights to land may not differ in a considerable way as to the effect and the authority it gives to the holder of the rights to land but the legal system in England can have different effects in the ‘small print’ of legal significance with continental Europe.

To summarize the main differences in land tenure security, one could say that such security in customary systems is seen as safeguarding one’s relationship with the community or clan. Land tenure security in a customary tenure regime is expressed in the relationship between people (kinship, member of the clan or of the community). In Anglo-American jurisprudence land tenure security is a matter of having ownership of rights to land, the right being the object of ownership, and in tenure systems based on Roman law, land tenure security focuses on ownership of the object itself the object being the land. Mentioning these differences is to make the reader aware of variations that may exist in the legal interpretation although the use of one language – that has the proper words for common law concepts – may very well conceal finer nuances that come with purchase and sale of rights to land when exercised in wider contexts than the one of a specific country. But it is beyond the scope of this book to go into much more detail. However, there is another feature of rights to land that must be mentioned in this respect.

In the modern world the power to decide and do with a commodity has got substantial economic meaning. For land it is important to know what the extent is of the rights by a person holding such rights to land. What is the land unit or parcel (a term used in most cadastral systems) to which someone holds any right? Is it possible to define the concept of the proprietary land unit as an identifiable, *sui generis*, unit recognizable in the jurisdictions of
Europe without too much misunderstanding? Reduced to simplicity the proprietary land unit can be defined as an area of land used as a single entity with vested rights of property, to use, to dispose and to alienate. A proprietary land unit theoretically comprises of the soil and all that is affixed thereto on the surface and beneath. Property rights in land can penetrate ‘ad inferos’ but how deep is down? It is the law that has to specify this. The law also must define ‘ad caelum’ - to the heavens above. This principle is also referred to as the ‘carrot’ theory, when not further specified the rights reach to the centre of the earth and way into the universe above the proprietary unit. But misunderstanding is already possible in the plane of the surface of the unit.

Frequently, what the uninformed person would take to be the boundary of a proprietary land unit is not the boundary at all. A hedge, a ditch, a roadside, and a river bank, are examples of physical features commonly mistaken as boundary markers. I agree with Denman that ‘The boundaries of any proprietary land unit are set by the reach of the property rights over the land.’ In Continental European countries the boundaries of the proprietary land unit are determined at the moment of a conveyance of land. They are generally well documented by activities in the field and recorded via surveys by qualified surveyors. But when the proprietary land unit is transferred as a whole, surveys are not always carried out and in such cases the possibility that a physical feature is mistakenly regarded as the boundary can and does occur. Most of England uses the concept of the ‘general boundary,’ meaning that the boundary of a proprietary land unit does not run along the river bank, as the layman might suppose but ‘usque ad media acqua;’ not along the roadside hedge as would appear obvious, but ‘usque ad media via.’ Simply said, the boundary is within the physical feature. The size and shape of a proprietary land unit, although fully apparent to the eye, cannot be known unless and until the reach of the property rights of which the unit is in part composed is explained and pointed out by a survey of the records and/or actual surveys in the field.

‘Land is the source of all material wealth’, is the opening statement of a well-known reference work for land law and registration. Without land human existence would be impossible. Land ownership has been a very important aspect in the history of mankind. In unsophisticated societies many years ago, people had problems with land ownership. And still today we encounter - in our eyes primitive - people who do not know the concept of landownership. Often indigenous appreciation of land is different. In their view land is a community good - mother of humanity - and in no case a tradable item. The notion that one can enforce rights on a piece of land - something that cannot be moved or hidden - is hard to understand for these people.

As opposed to ‘movable’ goods, such as a watch, a bottle of wine or a
video recorder, one cannot prove title on real estate by taking it into possession, and it is impossible to move or hide land. One cannot pocket rights to land. Land is immovable property or in the English terminology, land is real property and movable goods are personal property. When the material ownership of land evolved, the governments of that time realized that land use or ownership of rights to land could be used as a basis to levy taxes or part of a harvest and become a source of revenue. This is the reason that most of the land registrations presently found in Continental Europe serve the purpose of taxation on the basis of ownership or use of land (here again Britain is an exception, because there was never established a land registration specifically for the purpose of levying of land taxes). It was, perhaps, never intended that these registrations would be used for any other purpose, for instance legal proof in the case of a dispute between two landowners as to who could claim rights on a particular piece of land. It was not until society recognized the importance of legal security on the ownership and use of land that the registrations, already in existence for fiscal purposes, were adapted to also serve as legal documents of proof. Legal protection of rights to land was generally provided by registers kept in governmental offices where also the mortgages were registered. With the development of technology, the requirements to maintain proper land registration increased. A modern land registration has both alpha-numeric and geographical data on land recorded. Especially the provision of geographical data can make a land registration a costly affair. The funding for the registration comes from fees levied on the registrants, but also from the government. The funding by the government is justified by reasoning that the government benefits enormously from a well organized data bank on land. Making the fees too high might keep away potential users, resulting in informal transactions in land and an obsolete - because incomplete and inaccurate and thus unreliable - registration of data on land. Besides, the government needs accurate data on land for governing properly. In this respect it is interesting to note that decisions by the government in 85 per cent of the cases have some relationship with land. Thus, although the costs of maintaining and updating the registered data on land was basically something the users had to pay for, the government had a stake in proper registration as well because of, inter alia, avoidance of disputes and litigation, while adequate public provision of data on land also played a mayor role in the development of a land market and better governance. It did not take long before some governments realized it to be inefficient to have two independent offices that kept data on land, one for the purpose of legal protection of rights to land and one for levying of land taxes, and besides that data on land are also increasingly in demand to assist governments with physical planning and regional development resulting in several additional limited registrations of land data. However, a frequent problem was that the
various registrations belonged to different governmental departments. Legal protection of rights to land was seen as the primary task of the department of Justice, while tax levying of course was the task of the department of Finance, and providing authorities with physical planning and development schemes is the responsibility of yet another department. Anyway, currently in most of the European countries the various registration authorities are required to start exchanging data on land to prevent double maintenance, with preferably one agency responsible for the integrity of the land data. In some cases an integration of registrations into one central organization for land data occurred.

With regard to land registration, two different types of interest in land data can be distinguished. These two types are closely related with the two levels of authority for taking decisions about the use of land. In any government executives devise plans for regional and national purposes and for this activity they rely heavily on the availability of up-to-date land data. There is an increasing need for land data at various levels of government in a modern society. But the cost of collecting and recording data in the interest of governmental activities should be kept separated from the cost that private individuals pay for collection and recording of land data while seeking protection of their rights to land. There is a tendency to have most or even all the financial burden to be carried by the private individuals and seldom there is a system of real sharing the cost of registration on a pro rata basis by all of the stakeholders.

6.4 FOUR TYPES OF LAND REGISTRATION

The different political and cultural backgrounds in Europe have lead to a multitude in land registration concepts and the regulations and legal effects derived from it. Apart from differences in the traditional function of the land registration, often easily identifiable in the current system, one can find significant differences in the timing of legal transfer of rights and duties regarding publication in the different systems currently used. In an attempt to classify and structure the different systems used in the world today, a classification of four types can be used. Three of these types can be found in Europe. These are:

- Land registration with a negative effect based on deeds
- Land registration with a positive effect based on deeds
- Land registration based on title registration with a positive effect.

The fourth type is not found in Europe but can be described as:
- Land registration based on title registration with a negative effect.
The registration system in France, Belgium and the Netherlands introduced by Napoleon, at the beginning of the nineteenth century, is based on presenting deeds showing transfer(s) of rights to land at a registration office. Copying the data out of the deed into public registers shows that parties mentioned in the data had the intention to convey rights to land, but the registration itself does not give proof of the legality of this transaction. But if all legal requirements are fulfilled a transaction has taken place, and thus the registers have a so-called negative effect. The registration serves a quick transfer, since no interference by government officials is required when all documents presented show that parties acted in compliance with the law. The negative effect means that the deeds describe an intention of the parties involved but that the registered facts can be overruled by another legal or third party right. In France, for example, it is obligatory to have the deed made by a notary and the involvement of this government appointed official (making the notary on the Continent of Europe different from his name-sharing English or American colleague) guarantees that deed is carefully prepared. Mistakes seldom occur and the obligatory check of previous transfers of rights and data on right holders (the so-called chain of title) by officials before a deed is made up, make the land registration in France (and Belgium and the Netherlands) to be a very reliable one.

The situation in Denmark is that the records in the national land registry are the only juridical proof of ownership and cannot be overruled, giving this registration the so-called positive effect. Contradictory to the situation mentioned above for France, the Danish government wants the public to be able to rely on the contents of the registered land data and the registered legal facts. The other Scandinavian countries have established similar systems for the protection of rights to land.

England and Wales operate a land registration system that also has positive effect. The data recorded in Her Majesty’s Land Registration Offices reflect the actual legal situation. An owner of rights to land in England (and Wales) receives a land title document after the office has investigated and processed the application to become the legitimate (new) holder of rights to land.

In Germany land registration is handled by the 'Katasteramt' which operates under a negative effect. For the registration of the legal rights, however, the government operates a 'Grundbuchamt' registering the rights on property with a positive effect. Through exchange of data the positive effect of the 'Grundbuchamt' can be queried by the negative effect of the 'Katasteramt'.

In Spain a lawyer will generally prepare the deed of transfer of rights to land. He is responsible to check if all permits are available if it concerns a residence under construction and so on. A preliminary deed of transfer can be prepared to be inscribed in the ‘Ecritura’. A notary is involved in the deed
of transfer which has to be presented for copying of the data on land at the land registration office (the Registro de Propiedad). But the time necessary to complete the copying of the data at the registration office can stretch from three months to, in some cases, over a year. In the meantime there is little tenure security. The system in Spain does not prove ownership of rights to land. It is similar to the systems in France, Belgium and the Netherlands.

In Portugal, an impressive improvement of the registration system has started in the 1990s. Greece is the black sheep with regard to land registration among the European member states of before 2004. Only around the capital and some larger cities there is a kind of registration of land data offering some protection against the loss of rights to land. Both in Greece and Portugal the land registration systems are based on the negative system. It must be noted here that there are regions in both countries where the registration is not complete (yet) or as in the case of Greece land registration is in several regions non-existent.

6.5 CRITERIA FOR LAND REGISTRATION TO PROTECT RIGHTS TO LAND

Any documentation about land can qualify as a land administration. Land administration is a wide term encompassing all types of recording of data on land, but what makes such a recording of data on land a land registration system? In most western societies the existing land registration system is the result of a historical development based on cultural and sometimes religious values of that society. Land registrations have a legal basis which, of course, is expressed in the native language of the society. Already that makes it difficult to exactly define what the contents of a land registration system should be because every translation is a violation. Legal concepts and cultural values cannot be translated without jeopardizing their precise content. There certainly is not a blueprint for a universally applicable land registration system. A land registration is at its minimum the recording in a register of the ownership of real rights – legally recognized interests – to land. Currently modern land registration systems are computerized, parcel-based, and up-to-date land information systems containing a record of interests in land (e.g. rights, restrictions and responsibilities). They usually include a geometric description of land parcels linked to other records describing the nature of the interests, ownership or control of those interests, and often the value of the parcel and its improvements.

Scholars have developed a set of rules or requirements that can be recognized all over the world and that make systematically recording of land data a land registration system. But there is not a standard list of requirements that can be used as the blueprint to recognize a land
registration system. Although they are strongly intertwined, some of the requirements are a kind of principles that define the minimum contents of the data sets, some are more or less goals to be fulfilled by the registration system and some are the expected results of a land registration system.

A statement on the cadastre of the Federation Internationale des Geometres (FIG) shows the difficulty in translating terms as cadastre and land registration bearing in mind that some countries do have land registration systems, but no cadastre. The definition given of a cadastre is: ‘A parcel-based and up-to-date land information system containing a record of interests in land.’ For a land registration the same statement gives the following definition: ‘The official recording of legally recognized interests in land and usually part of a cadastral system.’ The difference suggests that a cadastre might contain more data on land (also non-legally recognized interests?), which may not have an official character. Anyway, since a land registration is clearly defined as part of a cadastral system the criteria for a cadastral system can apply also to a land registration system. ‘While success may be a relative term, there are a number of well-recognized criteria for measuring the actual or potential success of a cadastre. These criteria include:

- **Security**: The system should be secure such that a land market can operate effectively and efficiently. Financial institutions should be willing to mortgage land quickly and there should be certainty of ownership and parcel identification. The system should also be physically secure with arrangements in place for duplicate storage of records in case of disaster and controls to ensure that unauthorized persons cannot damage or change information.

- **Clarity and Simplicity**: To be effective the system should be clear and simple to understand and to use. Complex forms, procedures, and regulations will slow the system down and may discourage use of the system. Simplicity is also important in ensuring that costs are minimized, access is fair, and the system is maintained.

- **Timeliness**: The system should provide up-to-date information in a timely fashion. The system should also be complete; that is all parcels should be included in the system.

- **Fairness**: In development and in operation, the Cadastre should be both fair and be perceived as being fair. As much as possible, the Cadastre should be seen as an objective system separated from political processes, such as land reforms, even though it may be part of a land reform program. Fairness also includes providing equitable access to the system through, for example, decentralized offices, simple procedures, and reasonable fees.

- **Accessibility**: Within the constraints of cultural sensitivities, legal and privacy issues, the system should be capable of providing
efficient and effective access to the registered data on land for all users.

- **Cost**: The system should be low cost or operated in such a way that costs can be recovered fairly and without unduly burdening users. Development costs, such as the cost of the adjudication and initial survey, should not have to be absorbed entirely by initial users. Low cost does not preclude the use of new information technologies, as long as the technology and its use are appropriate.

- **Sustainability**: There must be mechanisms in place to ensure that the system is maintained over time.

This includes procedures for completing the Cadastre in a reasonable time frame and for keeping information up-to-date. Sustainability implies that the organizational and management arrangements, the procedures and technologies, and the required educational and professional levels are appropriate for the particular jurisdiction.

In some literature about land registration (see for example Rowton Simpson in 'Land Law and Registration' who calls the criteria 'principles' p.22) another list of criteria for the operational success of a land registration is used. These criteria are often found in documents – in English – referring mainly to positive types of land registrations:

- **The mirror criterion**, which provides that the register of title is a mirror, which reflects accurately and completely and beyond all argument the current facts that are material to title. With certain inevitable exceptions – like overriding interests – the title is free from all adverse burdens, rights and qualifications unless they are mentioned in the register.

- **The curtain criterion**, which provides that the register is the sole source of information for proposing purchasers who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain. (Some knowledge of English land law is needed for a proper understanding of this criterion, and of course we must not forget that inspection of the land is always necessary, as is an inquiry of local and other public authorities with regard to such matters as planning proposals)

- **The insurance criterion**, which is that, if through human frailty (in the Registry), the mirror fails to give an absolutely correct reflection of the title and a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one.

A land registration has to fulfill certain principles. Experts on land
registration matters developed these principles over the years and they can be summarized as follows (See for example the summary of Henssen p7):

- Booking principle: A change in real rights on an immovable property, especially by transfer, is not legally effectuated until the change or the intended transfer of the right to land is booked or registered in the land register.
- Publicity principle. The legal registers are open for public inspection and also that the published facts can be upheld as being more or less correct by third parties in good faith, so that they can be protected by law.
- Specialty principle: In the land registration system the subject and object must unambiguously be identified.
- Consent principle: The legal entity booked as holder of the rights to land and described in the register must give consent for a change of the recording in the land register.

It should be noted here that the principle of publicity is interpreted differently in various countries. The same holds for some countries for the other principles (the change of a right to land is not dependent on its actual registration as, for example, is the case in Belgium and France) but in most countries registration offers protection against claims by third parties. As far as the publicity principle is concerned, various countries have made a trade-off between full publicity of the recorded land data and the protection of privacy resulting in different applications of this principle among existing (and, in my opinion, nevertheless successful operational) land registration systems.

It is not my intention here to give qualification to the existing land registration systems in the various member states of the European Union. It will be clear from the text that the systems do vary and that there are qualitative differences, but these are largely the result of a particular view point. By comparing some of the aspects of the existing land registration systems, as is done in the following pages, these differences may be more tangible. But the differences and illustrations of the operation of systems are not given as judgment of the quality of a system, only to underline why title insurance may well be a useful institute for the European Union. No system can be qualified best in abstract, but it should always be considered within the context of the society in which it is supposed to function. That having been stated, it will nevertheless be clear that introducing an extra layer of land tenure security by title insurance can improve the perception of that security.
6.6 COMPREHENSIVE COMPARISON BETWEEN POSITIVE AND NEGATIVE SYSTEMS

It is obvious that both the systems, whether it is the negative system or the positive system of land registration, have their merits (and their disadvantages). A few of the main considerations can be summarized here. The merit of a positive system is that the public can rely on the recorded data. The government takes responsibility for the registered facts. But this is also a weakness. If someone with less noble intentions succeeds in fraudulently getting data in the register showing something else than the truthful facts, he or she nevertheless is protected and can claim the rights shown by the recorded data. The record in the registers vests title to the holder of the document issued as a result of registration. It gives legal effect to ownership, even if the register is wrong as a result of mistake or fraud. But anyone checking the register can rely on it and will know for sure the true state of the land. A wronged owner would be compensated from an insurance fund. For this reason most positive registration systems have an indemnity fund for which often the users pay a small extra fee. Conceptually, a positive or title registration is simpler and more secure than a negative land registration system.

Another possible set back of a government guaranteed system of land rights registration is that it might make the procedure of conveying of rights to land a lengthy one when government officials feel the need to more closely examine the data as presented to them by the parties involved. If the parcel of land is already known and identified per se in the registration system, the process of issuing a new title can be substantially shorter.

But indeed, the difference between positive and negative land registration systems is reflected in the authority of the registrar. In a positive system or title registration, the registrar generally has considerable judicial powers. In a negative system such an involvement of any official is unwanted and unnecessary. It makes the conveyance of land a simple matter between the parties involved and is quick in its result. As soon as the legal requirements are fulfilled, the rights to land are conveyed, that is to say as long as the previous owner possessed the right to land that was just conveyed. In most countries with a negative system there is aversion to government interference in a private transaction. The rejection of the official involvement can perhaps be better understood after reading the South African Deeds Registries Act (section 99) of 1937:

Not only must he register such documents as are capable of registration, but he must, in the exercise of his discretion, refuse to register deeds or documents tendered to him for registration which either do not comply with law in respect of their form or contents, or are incapable of registration at all, or to the
registration whereof any valid objection exists. The nature of his function indicates that he must exercise certain discretion, and he is not merely a ministerial officer. He may reject deeds; he may require proof in support of any matter required to be done; he may amend errors.

In a negative registration system, the role of the registrar is generally a passive one. The registrar has to check the documents presented for registration on completeness in the sense that all the required data for proper registration are in the documents. He is not allowed to change the contents of the documents and there are strict limitations for refusal of registration. Only when data necessary for recording are missing or are clearly incorrect, the registrar may refuse registration of the contents of the document. In that case the document is often returned to the parties initiating the transfer or dealing of the land. However, where the documents presented comply with the legal requirements, the registrar is obliged to accept them for registration.

In several countries deeds are the most common documents for dealing with land. Confusion may arise here because often deeds registration is used similar to a negative system of registration, but deeds can be and are often used in both systems of registration, the positive and the negative ones. It is the register itself that determines the legal effect and not the documents used for registration.

Deeds are legal documentary evidence of a transaction between two parties. Deeds may also deal with matters other than immovable or real property. Deeds only provide evidence of a conveyance to the two parties concerned. Drawing of a deed is an administrative activity generally carried out by an independent professional according to the will of the parties involved in the transfer of rights.

An advantage of a deeds system is that a deed reflects the will of the parties without the interference of a third authority. In Continental Europe the professional who prepares the deed normally is a notary. In several countries the law requires the assistance of a notary in drawing the deed in order to confirm the identity of the parties, and to facilitate compliance with the law by including the minimum data in the deed (object identifier, date of the transfer, the name(s) of the seller and the name(s) of the buyer etc.) in order to be admitted for registration. But fundamentally, the role of the notary is that of an advisor and assistant. Not the notary, but the parties involved decide what the contents of the deed will be.

The idea behind registration of deeds, which originated in the middle ages, is that copies – authorized by the notary and/or the registrar – of the original deed can be placed in registers that can be examined by anyone who wishes to do so. In theory, this prevents double-dealing as a later prospective purchaser can verify that a deed of transfer for the same land from the intending vendor has not already been registered. To be effective, all dispositions of property need to be recorded in the registers. Since originally
notaries – as authorized experts – commonly drew up the deeds, the notary office was the place to go for information about rights to land.

The consequence of a negative system, such as used in France, Belgium, and The Netherlands, is that with every transaction the validity of previous transactions has to be checked. Validation asserts the rights of the current landowner with greater certainty. The registration will have to construct a so-called title-chain of previous acts concerning that piece of land. In this way it can establish whether the seller has any rights to sell. Particularly before computerization of land registration systems based on the recording of (the contents of) deeds, it could be a difficult matter to examine all the previous deeds in order to construct the title chain, proving the ownership of rights of the seller. As the registers grew in size, it became more and more difficult and time consuming to make conclusive searches of the registers. In most cases, a new registry book was made each time an existing book became full, and sometimes also at the beginning of each year.

The registry books or registers often contained only an inscription of an abstract of the contents of the deed, but with clear reference to the original deed as stored in the archives. As mentioned before, to be effectively operational, these original documents need to be part of the registry that is open – sometimes under certain conditions or limitations – for inspection by the public. Nowadays with computers, indexes are used to facilitate searches of the registers. Normally, an index of vendors is kept, sometimes completed by an index of buyers. In doing so, it establishes a registration of deeds system based on persons names. If a proposed vendor’s name does not exist in the index, then it is assumed that the vendor has not already sold the land for which the intending vendor holds the deed. It should be noted here that when a person sells land, in whole or in part, he/she might retain the old deed. The system is complicated by duplication of names, the fact that a person may own several pieces of land, and that it is still necessary to open the registers to read the deed. As more and more transactions take place, more deeds in the registers become redundant, no longer current, but are still kept in the registers.

It is important not to over estimate the differences between the positive and negative systems in practice. Rowton Simpson (p.19) argues:

It is usual to think of registration of deeds and registration of title as two quite separate and distinct systems which are mutually exclusive. This is misleading. Each is not a single system, but rather is composed of different alternatives, and the combined alternatives form a continuum. The major variable in this continuum is the affirmation made by the State of the existence of ownership of interests. Other differences among the different forms of systems, such as the arrangements for indexing the records, and control of descriptions, plans and surveys not inherent, and are often the results of change.
One of the most challenging issues with rights to land is that many legislators want to follow as best as possible what society has sanctioned already in practice. Rights to land can change by adverse possession or even by a change in circumstances. Adverse possession is also called ‘prescription.’ This is a way to acquire rights to land by possession over a long period of time. The society is most at ‘rest’ when the legal situation is in line with the supposed situation as experienced in practice on the ground by the parties involved. The possession should be open and without permission of the original owner of the rights to the land. Furthermore, during that time, the possessor must have acted as if he/she were the owner of the rights to that piece of land.

The principle of constructive adverse possession or prescription varies from country to country. Each legal system provides its own rules for constructive adverse possession, but generally spoken, one who exercises dominion over land acquires the status of a possessor. Under the doctrine of constructive adverse possession a claimant may acquire title by adverse possession if it is claimed in good faith after the prescription period (the minimum time that land must be held to acquire it by prescription). With regard to the period of adverse possession of title on real estate we can also note differences between the countries in Europe. The Netherlands for instance uses a 30-year period where Great Britain acknowledges rights of title after 7 years.

A change in circumstances occurs when the possessor of rights to land passes away. The rights to land will then generally pass on ‘automatically’ to the heirs. A similar automatism can be encountered with mortgages. After paying off the debt the mortgage actually ceases to exist, but seldom parties involved will take the burden to undo the mortgage in the registration. For this reason some countries have a limited time for mortgages to be registered. If the mortgage still exists and has not been paid off, the registration has to be renewed.

6.7 MOMENT OF TRANSFER OF RIGHTS TO LAND

Not only the types of registration are different in European countries, the moment at which rights transfer occurs varies as well. Firstly, there are cases when physical activity by one party involved in a transfer of rights to land is impossible. An example is the case mentioned above where a predecessor of rights has passed away. Another example is that of marriage or divorce. The private right situation regarding real estate can change but the changes are not registered. The terms on which marriages have their effect on ownership of rights to land can vary considerably in Europe.

Noting, and acting upon, the above mentioned differences, is, however,
not enough. The time at which the actual registration of a deed or a title occurs is not necessarily the same as the time at which legally the rights to land are transferred in European countries, and the time elapsed between the two moments varies as well. In The Netherlands publication is one of the conditions to arrive at a legally binding transfer of rights of real estate. In France the moment of agreement between two parties - which may be a verbal agreement - is the time from which the agreement is legally binding. The registration of the transfer, which is also compulsory but not a condition of legality, can be taken care of later. In Belgium there is not even a requirement of publication of the transfer of rights to land and even verbal mortgages are possible as a result. In all three countries there is, nevertheless, one and the same rule; only registered rights to land can be successfully and legally defended against third parties.

The cadastres in these three examples are all based on the same root; the Napoleonic cadastre. Imagine the multitude of differences between registrations derived from other models. All these differences in the moment of title transfer can easily lead to considerable confusion when parties from different European states are dealing with each other in respect of the transfer of rights to land. The previous made remark about less truthful agents is here most noticeable. In some cases potential sellers have used these differences to their own advantage. Ignorant buyers of real estate were later confronted with older verbal agreements that had full legal implications.

Another, not unimportant, point is that in the different national land registries the conditions regarding changes to size of property or additions to a piece of land (legally or not) vary. In Germany and Denmark it is only possible to change ownership on a piece of land, or part of it, after a surveyor – recognized by the government - has measured and registered it as a separate entry into the registry. In the Netherlands it is possible to transfer rights on parts of registered plots before surveying. Until surveyance, which can happen years later, for third parties it might be difficult to simply retrieve the legal right holder from the registration system, making claims to these pieces of land sometimes uncertain.

Of all the EU states from before 2004, Greece has by far the weakest registration system. Although currently, projects are underway to improve the situation, it will take several years before a reliable land registration is operational in Greece. In the static society characteristic for many regions in Greece, this has not been felt as a problem, but it might evolve into one when citizens from other EU-states become attracted by the tranquil and parochial nature of rural Greece. It must be noted here also that Spain and Portugal, until recently, did not have a land registration system that could provide legal protection of rights to land covering the whole of the country. In such member states it might be difficult to obtain sufficient data on land
to assist in land transactions. In several of the more remote areas in Europe registration of transactions in land is seen as a waste of time and money. The community itself knows what goes on and all inhabitants of the village are aware of any transaction in land, so why bother about registration? With regions having a very new registration system, or not yet having any operational system, and areas that still prefer a community approach to transfers of rights to land, meaning no use for registration of such rights, it is easy to lose confidence in transfers of rights to land not covered by some form of insurance. This is even more so with respect to public limitations on the free enjoyment of rights to land.

6.8 SECURITY OF RIGHTS TO LAND OFFERED BY THE GOVERNMENT

It can be concluded that the rights to land of private individuals and the security offered on them by the government is in many cases not more than an indication of rights. Moreover, sometimes the official registration will contain information regarding private rights and no information regarding free- or leasehold. In this respect there is quite a variety of registrations in Europe. The same goes for the formal moment of transfer of rights to land.

Another difference among the various states in the European Union is the level of publicity of recorded land data. Land registrations in the various countries are not all open to the public. Germany, France and Italy only provide registered data on land to ‘interested’ parties being those who can prove to have an interest in knowing the data on a particular piece of land. It is interesting to note that not all countries mention the purchase price in their registered data.

All registration systems record the basic data like the unit of land involved (using the cadastral or any other unique identification, right holder(s), type of rights and their extent, the legal moment of a transfer of rights to land, mortgage(s), and most of the easements, liens and other limitations derived from the contract as made up between the two parties. Most registrations also provide a geographical description of the land unit to the public. But there are differences among the systems with regard to the sets of additional data on land that are registered and available to the public.

The right of a national government to exercise jurisdiction over all lands and natural resources located within the boundaries of the state in which they operate is widely acknowledged. This is what legitimates the authority of a government to promulgate regulations that apply to the activities of owners of rights to land and users of land in their state. Governments can often assert far-reaching claims to the ownership of superior rights to land in the form of declaring it public property by virtue of conquest, exercising royal
prerogatives, purchase (e.g. the acquisition of Alaska by the United States of America) or inheritance (e.g. Canada’s inheritance of British Crown lands), succession (e.g. Indonesia’s claims to lands once owned by the Netherlands in the East Indies as a process of decolonization), or some combination of these claims. In most countries claims to public property are quite extensive.

Similar to the right to declare land public property, a government can regulate the use of land that has not been declared public property. This is another important limitation on rights to land, and knowledge of such regulations can be of crucial importance for a potential purchaser of rights to land. Governments use land laws to regulate the use, the purpose, and the exploitation of land not only for social reasons but also out of political considerations. However, this category of public limitations on rights to land is not always easy to retrieve by the public from the recorded data on land by governments. In particular the recording of public right limitations is different and only a few registrations record all or most of those, while several registration systems hardly record any of them. This makes it increasingly difficult to find out about planned projects by the government to change the zoning, the use and the other limitations ensuring a full enjoyment of all the rights to a specific plot of land. It is important to mention here a conclusion of a study about the openness of public law systems in a number of EU countries stating that: ‘The absolute ownership of real estate is, and will be increasingly restricted by public law.’

In The Netherlands the ‘RAVI’ - a commission to provide information regarding real estate - has adopted the study and has concluded that the knowledge of restrictions in public law are insufficiently known in the Netherlands compared to neighboring countries. This, however, does not imply that other modern societies provide full disclosure of the public limitations on the use and exploitation of land. In Belgium and France openness of public limitations is virtually total at a national level, but on regional and local level it is difficult to trace restrictions. Openness is difficult, but not impossible when sufficient knowledge of the local situation is applied by well-trained and informed specialists in the field of land data recording and registration. A title insurance agent will certainly use such specialists to protect the interest of the firm while providing title insurance. Regardless of the openness of the system, the extent to which public law influences and restricts the private title situation regarding real estate varies considerably across Europe.

The result is diffuse and can easily cause confusion for outsiders not familiar with a particular registration system. With the planned expansion of the EU, the differences between the registration systems will grow and this will make complete clarification of all these matters affecting the enjoyment of rights to land more complicated in the near future.
6.9 TITLE INSURANCE

Most people have several forms of insurance. At least people are familiar with insurance coverage on cars, on medical expenses and increasingly also one’s life. But what is title insurance? What does it mean to insure a title? What kind of title is insured and what are the risks that make title insurance worthwhile to consider? Title insurance companies in the USA have successfully answered these questions and provide insurance coverage for most of the titles to land issued in the USA.

Land has always been considered one of the most valuable assets of people. It is such a basic form of wealth that in modern societies many special laws have been enacted to protect ownership and other rights to land (land in the sense of real property, so including the buildings on land). Whenever one buys rights to land, the person who is selling these rights has extremely strong and protected rights, and so do his or her family and heirs. There also may be others who have a stake in the rights to the land to be purchased. A governmental body still seeking payment of land taxes, a contractor with still some bills to be paid for improvements made on the land or the building(s), governmental agencies seeking the enactment of regulations requiring the owner of rights to land to clean up existing (newly declared or recently discovered) environmental hazards that are in the ground of the land within a certain period of time, or other individuals who have claims against the land. Anyone having such a claim is, in a sense, a co-owner of the rights to the land. The land can be sold to a new owner without proper notice to these ‘co-owners’. And the new owner may know nothing about such a claim at the time of the purchase. But that does not matter. Such claims on land are attached to the land and remain attached to it whether the new owner of the rights that land is aware of it or not.

Nevertheless, nobody wants to purchase rights to land to receive a ‘clouted’ title. Everyone wants to have a clear title, but this means that one has to be informed about any of these claims against the land to be purchased before buying the rights to that land. And it also means that one wants to be protected against any undiscovered claims that may arise in the future to threaten the title and the possession of the land. Most buyers would like to go further than this, they also want to be aware of any pending legislation that might limit the full enjoyment of the land in the (near) future. It is even important for perspective buyers to know of plans and deliberations underway by local governments at the time of the purchase to avoid surprising developments, zoning regulations or infrastructural projects in the near future. It might well be that a potential buyer of a particular plot of land will abstain from the purchase when it is revealed to him or her that the local government is planning a new highway exit that will lead traffic on
the now very quiet road in front of the land to be purchased. Someone excited about a new yard behind the prospective house may forego the purchase when he or she is informed that within two years the city dump will be relocated to just behind the back fence of the yard.

Most people living in a certain area will be aware of such developments, but is it equally reasonable to suggest that these people will know of such developments in the resort area they just visited to inspect a potential summer home purchase? How does one know about all the possible limitations of current and future full enjoyment of the rights to land to be purchased?

The first step is an inspection of the public records if these are available, and in the EU this is as yet not always the case. Although it might not always be an easy accessible source of data on land, it nevertheless will provide the first source of information. Some of the matters that a title search in public records can reveal are the taxes payable and paid, do others have rights to the land, is there a pending case of inheritance that might affect the title, is there a possible limitation on the free enjoyment of the rights to land, are there undisclosed heirs or other claimants (from a divorce for example). If there is a defect in the title that shows up from a research of the records a title insurance company will report them and assist in clearing them up. The next step is the coverage of defects that do not show up by a research in the records. Protection against loss from claims on land undiscoverable by examination of public records is the second part of protection provided by title insurance. The title to the land could be threatened for example by such circumstances as forgery, confusion due to similar names or errors in the record.

The most interesting assurance of title insurance is that it leaves the search for possible defects and threats against the full enjoyment of rights to land in the hands of professional specialists. In general they will be locally recruited with full knowledge of the local customs and political developments, and they will be able to assess any possible limitations of the enjoyment of the rights to land in the future as well.

Title insurance is supplied by private industry, not the state. The growth of the title insurance industry in the past 100 years, especially in North America, is credited to the benefits that both insured and insurer derive from title insurance. No governmental interference or support has been spent on title insurance, nor can the growth be attributed to monopoly positions held (there are over 160 land title ‘plants’ in the USA and Canada) by the title insurance companies. The companies use the existing government land registries to carry out their work. In the USA these registries are open to the public and any individual can enter and consult the records. The concept of title insurance in North America exists in conjunction with the possibility to search through the records oneself and thus establish the validity of existing
titles on property. In the vaults of a North American registry one can find individuals as well as representatives of title insurance companies. This should also be the case in Europe.

A title insurance company can compete with the registries in the supply of information regarding titles on real estate, especially because they concentrate only on title chaining and title insurance. All other aspects of land registration, necessary and a nuisance to governments, can be left out. The title insurance company seeks maximum efficiency in registration using modern information technology. Governments will often have difficulties with an investment in information technology because of political and social constraints but also because of the system they have to operate has evolved over many centuries.

Although title insurance is a dominant feature of land transactions in the USA, it is important to mention that it is always possible to examine documents which establish property rights directly from public records. Some states in the USA require title insurance as a legal imperative, but most of them do not. Examination of the registers in the USA is a surprisingly easy matter. The level of government where property registration takes place is the county. Each county has its own vaults in which the registers on property – as well as the other registers – are kept. Although some states still use a cumbersome old-fashioned system of storage and retrieval, it is not hard to understand (albeit time consuming to use) and the registers are public in an almost remarkable way. Every working day the registers are open for inspection by everyone who wishes to do so. It is a real help-your-self system with no hurdles or even fees to pay. So it is very well possible to trust one’s own judgment by examining the documentation available in the registration offices. In every county seat (the administrative ‘capital’ of the county) in the USA one will easily find the office of the recorder or the land vault where public inspection of all the records on land are available free of charge between 9.00 AM and 5.00 PM on working days.

In 1992 a start was made with to open up the EU’s internal borders. As a result there is freer movement of people, goods, services, information and capital. The national rules and institutions for land registration will, for the time being, remain as they currently exist, integration or synchronization will only be slight, if at all, for the time being and the foreseeable future. Laws regulating transfer of rights to land will also remain different from country to country. Regulation and integration takes a long time. As an example of a national case, it has taken the Dutch agency of the Cadastre and Public Registers almost 40 years to complete a national formalization process. In 1957 a commission was installed to study the desirability of legal regulations of the cadastre’s activities. Not until 1982 was a proposal presented to parliament and it was 1989 before both houses of parliament
accepted it. The new law came into effect in 1992 in the Netherlands.

Title insurance is completely independent of the system of land registration which it operates under. When title insurance was first introduced in the USA the situation there was comparable with what can be observed nowadays in the European Union, and possibly other future 'affiliated' European countries. The East of the USA knew British law, where in the South, especially Louisiana, French Law ruled and hence a Napoleonic cadastre existed. In the Mid-West the registration of land and rights were some type of terra-incognita comparable with the relatively poor areas in Southern and Eastern Europe. The obvious advantage of the material security on property transactions offered by title insurance, even in complex, or for laymen, vague situations, has stimulated the growth of it in the USA. The ability to secure oneself against financial losses in property transactions facilitates for many the decision to do so. Title insurance can be extended, if so wished, to provide protection of the insured against confiscation or changes in local planning conditions. It must be clear that an insurer is in a much stronger position to justify claims against neglectful government action than individuals claiming compensation for their loss of certain rights. Even in countries such a Britain where it is possible for individuals to take the registry to court and claim compensation for loss of rights in case of negligence of the registry, a title insurance company will be in a stronger position.

In the expanding European Union title insurance has potential. Individual EU citizens wishing to purchase property in the sunny and warm areas of the Mediterranean or Baltic Sea area can be offered an increased confidence and peace of mind in such transactions. Material indemnity against loss of recently acquired rights to land can become a popular application of title insurance. Unfortunate circumstances of fraudulent real estate agents, unknown inheritance rights, public law restrictions on use or purpose, and restrictions from other bodies may be avoided with title insurance. Also small investors or legal entities (businesses) wishing to expand into Eastern Europe or take the EU challenge may have a need for increased security on their transactions with rights to land. It is clear that the rights these individuals wish to secure are the freehold and leasehold type rights. In both cases, however, it will be obvious that the insurer is in a much stronger position to claim against governments or companies in the case of a 'disappointment' than geographically dispersed and lay individuals.

Another advantage of title insurance is that adequate documentation is held regarding the insured pieces of land, so that a reference can be made to these should the official government documentation (if it exists in the first place) be insufficient. Especially in cases where official documents can 'disappear' or can, temporarily, not be found, title insurance can offer a great deal of certainty and peace of mind.
The question remains will title insurance grow fast enough to reach a scale at which it becomes feasible for private firms to issue policies? The insurers will compete with the security offered by the official registrations of the government. In some countries title insurance can give a level of land tenure security that so far could not be offered by the government. In some other countries title insurance companies will have to offer a package that outperforms the - often free, or provided at marginal cost - benefits the governmental registries offer on aspects such as quick availability and up-to-date data on land, easiness of access, greater peace of mind and all this at a reasonable price.

A possible breakthrough for title insurance can be found in the area of (second) mortgages. Differences that currently exist in the countries of the European Union regarding interest rates and monetary stocks will, as can be seen since the opening of borders in 1992, lead to increased capital movement. The material security that title insurance can offer to mortgage holders, or issuers, will certainly appeal to them. Close co-operation with real estate agents might be the best option to popularize title insurance among citizens of the European Union. It is not too bold to expect that when title insurance is introduced in Europe it will stimulate the growth and economic development of financially backward areas. It must certainly be investigated if, for this very reason, European Union grants or subsidies can be obtained in setting up title insurance systems, knowing that the EU provides significant financial incentives for starting up or improving a land registration system for increased legal protection of rights to land. The underlying thought of such support is to improve land tenure security in the expectation that this will lead to economic development. Title insurance will certainly assist in such a development.

In the USA it is generally acknowledged by researchers that the substantial growth of the property market on Puerto Rico in the 1950's was financed with mortgages from New York. This development relied for a major part on the existence of title insurance, which despite the very bureaucratic situation of the land registration in Puerto Rico, offered adequate security of rights for institutional investors. Similar developments, again supported by title insurance, have taken place in Canada. The land registration in Canada differs strongly from state to state and even within states differences can cause major headaches for non-resident investors. Place Victoria in Montreal, Salford Investments Housing Development in Toronto and the Saskatoon Mall in Saskatchewan are mentioned as examples of developments that would have been impossible without the added security offered by title insurance. It is obvious that in Europe, which knows a much wider variety of land registration systems than Canada, title insurance can actively support and stimulate investments for development and facilitate a Union-wide further development of the land market. Moreover it is certain
that in regions in Europe where traditionally the land registration and cadastral systems are not yet fully developed title insurance will incite economic growth, in turn supporting the further development of state controlled systems for registration of rights to land.

6.10 TITLE INSURANCE AND EXISTING LAND REGISTRATIONS

Title insurance is a concern of private enterprise. Private enterprise will establish its conception and ensure its maintenance. It can be compared to a regular insurance system whereby premiums are paid. The height of the premium can vary depending on the intended risks, but the insurer can also offer standard title insurance packages. In most of the USA title insurance does not provide coverage against possible future limitations of the full enjoyments of rights to land, but it is possible to insure against such losses (often with a ceiling of compensation in money that can be negotiated at the time of closing the insurance contract). Title insurance is, in no way, intended to replace the national land registries held by the state, nor is it a replacement of the juridical assurance with which land and property transactions are secured, in most countries. No such developments are recognizable in the USA. Existing institutions on the real estate market have nothing to fear from title insurance companies. In fact the title insurance companies can secure part of the work these institutions carry out and possibly, but for a much smaller part, assist these institutions through the records kept by the title insurance company.

To illustrate the peaceful co-existence of the land data recording institutions and title insurance activities, it is probably worth noting the great openness under which the official land registrations in the USA operate. I already mentioned that anyone can visit a land registry to look around and collect information regarding anyone's property. Most registrations are opened daily from 8 am to 5 pm. In every registration it is possible to photocopy the documents held in the registration for a modest price per copy (0.25 US$ at this time) and even money changing machines are available to customers in the registration. Land registries are situated in each county. It makes the public records on land held by the government easy accessible, especially in a country that is so automobile oriented as the USA. The physical distance between the registered rights on a piece of land and the actual location on the ground of the land is, especially in American terms small. The fact that, despite these facilitating factors, title insurance has become big business is only proof for it's market potential elsewhere in the world.
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NOTES CHAPTER 6

1 In English law the doctrine of tenures and the doctrine of estates provide the basic principles of the law of real property. Contradictory to land law in Continental Europe, the concept of property in rights over land and not in land itself is fundamental to English law and the early lawyers were adamant that the king, of whom all estates were derived was never the owner of the land but merely the paramount seigneur over every acre.


3 ‘Western societies’, because for example in many countries in transition a real historical development of the land registration system is non-existent, because the current operational ‘western’ style land registration systems have been imported recently.


5 ‘Intended’, because in a negative system of land registration legally only the intention of the parties involved to convey rights to land is recorded. The registration does not provide proof of ownership of the registered rights to land (although with a modern computerized system of land registration it is sufficiently safe to rely on the registered data in a negative land registration system).

6 I know about an area where most houses in the 1960s and 1970s were heated with heating oil furnaces. Most people had a large oil tank buried somewhere in the yard, being filled by an oil company once or twice a year. At one point in time it became easier and cheaper to heat the homes with natural gas. Several house owners changed to natural gas for heating and most of the existing oil tanks were just left as they were or filled with sand. Over the years it was discovered that some of these tanks started leaking contaminating the soil and the water in the ground. Municipalities passed legislation to require owners of the land to remove the old oil tanks and, although a small program of financial assistance was started, most of the costs involved were for the owner of the land.

7 In this respect the many millions of Euros used to assist Eastern European countries under the PHARE (Poland Hungary Assistance for Reform of the Economy) project with setting up an improved land registration or cadastre system can be mentioned. Initially this program was limited to the two states Poland and Hungary mentioned in the PHARE name, but it became an Eastern-Europe wide funding program during the 1990s.
CHAPTER 7

MEASURES AND LAND TENURE SECURITY

7.1 MEASURES

The eleventh Surah (Hūd: 84-85) of the Koran says:

...O my people! Serve Allah, you have no god other than He, and do not give short measure and weight: surely I see you in prosperity and surely I fear for you the punishment of an all-encompassing day. And, O my people! Give full measure and weight fairly, and defraud not men their things, and do not act corruptly in the land, making mischief;

And the eighty-third Surah (Mutaffin: 1-6) of the Koran reads as follows:

Woe to the defrauders, Who, when they take by measure (of their dues) from men, take it fully. But when they measure out to others, or weigh out to them, they are deficient. Do not these think that they shall be raised again, For the mighty day, The day on which men shall stand before the Lord of the worlds?

Such a warning is not limited to the Koran; similar words can be found in the Bible. Obviously, the ways of men are wicked. It seems that humans need the assistance of God to warn those who cheat with measures and weights. Some scientists believe that in a perfect world there is no need for measures, measures are associated with cheating. Only in an imperfect world where scarcity and mistrust rule, where labor and exchange are the fate of humankind do we need measures. And since no one would in honesty argue that our world is perfect, we have to use measures to ensure a fair exchange for the fruit of our labor for making a livelihood. Thus measures are more than a creation of society, they create society. For extensive trading in goods with people not from the same region a standard measure of length or volume is essential. For security in trade standard measures and weights and for security in land tenure a standard measure of length, are indispensable. But in most of Europe local measures were the custom until the end of the 18th century.
During the period of manorialism in Europe there was very limited trading between communities. In the local society of a manor, measures and weights were a matter of trust and only had local value. The measure was inseparable from the object measured and the customs of the community which performed the measurement. Local people were responsible for their local measurements. The hodgepodge of measures – different in each community – made real sense to the peasants, the artisans and shopkeepers who used them every day. Although manorialism vanished in Western Europe in the 1200s, measures remained community bound. A town’s measure for the length of fabric, for instance, might derive from an iron fathom mortised into the wall of the town hall. The area’s bakers used a measure for the weight of bread derived from a master pound in the guildhall of the bakers. The districts’ volume for grain might come from a master bushel secured in the lord’s house in the Lord’s demesne. The volume for beer would most likely derive from a master barrel stored in the cellar of the local monastery. It was the obligation of the local lords, guild-masters and abbots to enforce such standards, ensuring that exchanges made were fair. As the historian Kula points out, these anthropometric measures could differ from community to community also because they were based on local customs. Even when the same measure for a bushel was used, the custom in one community required that it must be measured with the grain heaped high in the bushel, while in another community custom dictated that it would be leveled off; still in another the bushel had to be struck to settle the contents. Since most taxes were paid in kind the measures were of great concern for the people and they clung to their local customs. Quantity in the Middle Ages was bound to ritual and custom. A merchant selling cloth could extend the cloth from his nose to his outstretched arm, with a complementary thumb’s worth thrown in ‘for good measure.’

After the conquest of Britain by the Normans, William the Conquerer ordered the British Isles to be described and recorded in order to levy taxes. This famous ancient land register has come to be known under the title the ‘Domesday Book,’ referring to the Day of Doom, the day on which final judgment over the earth will take place, perhaps a fitting title for a set of records used to levy taxes. It dates back to the end of the 11th century (1086-1088). The Domesday Book, also called Doomsday Book is a two-volume census to assess the economic facts of the kingdom enabling William to levy taxes. It can be found in the Record Office in London (along Chancery Lane). It contains records of the ownership and value of all lands at the time of the survey and also at their bestowal. At the time of Edward the Confessor the value of crops, cattle, etc, was included along with the social status of the owners. The interesting fact about the Domesday Book is that it took only a few years in preparation. This was not only due to the skills of William, but also to the basic material already available in Britain. The complete
Domesday Book is in fact a compilation of smaller books each made up on the bases of the so-called ‘hundred.’ A hundred is a settlement - a manor - consisting of approximately a hundred peasant households supporting the household of the lord of the manor.

William did not always trust the collected data and he could send a couple of collectors from other regions, unfamiliar with the region, to double check the collected data in the registration. These smaller books – the already existing source for the Domesday Book - were the so-called ‘Danegeld’ books. They were kept in almost all of the British coastal regions and formed a kind of collective protection against regular invasions of Danish raiders on the coasts of Britain. Farmers in the coastal areas contributed a part of their crop as a kind of insurance. Anytime a party of Danish raiders appeared on the coast, the farmers paid them off from the ‘insurance’ supplies resulting from their part in the harvests.

To ensure a fair contribution, each farmer was obliged to contribute ‘Dane-geld’ in a measure corresponding with the size of his lands and thus with the possible harvest. For this purpose the so-called Dane-geld books were established in which the property of the various farmers was written down. It will be clear that this readily available data were a great help in setting up the registration of the Domesday Book.

For the measure of the area of land the Domesday Book uses the ‘hide,’ which scholars believe is the area that a peasant can plow with a span of oxen in a certain period of time (generally a day). The Romans used a similar measure in their centuria. Obviously, this measure varies in area with the quality of the soil and the topography of the fields. In fertile areas without rocks and with rather flat fields a reconstructed hide measures approx 120 current acres (the ‘acre’ being introduced originally also by the Normans as the ‘carucate’ - coming from caruca = plough - and carucate later degenerated to acre).

The city hall in Leiden (in the Netherlands) - in the late Middle Ages a town well known for its fine ‘laken’ (linen) - displays very distinctively a mortised regional measure of the ‘el’ (ell or yard) used for a fair measuring of this important product of the town. It is displayed next to some steps leading to a small platform on which once the wooden pillory stood where those who cheated with the measure could publicly be displayed as punishment. The ‘el’ has a human origin; it is about the distance from the elbow to the top of the outstretched thumb. In other regions the el could be measured from the elbow to the tip of the outstretched middle finger and sometimes from the elbow to the knuckles fingers closed. The length of the el could thus differ from approximately 38 to about 55 centimeters (14 to about 21.5 inches); and hence the origin of ‘el’; elbow.

Like the British hide many measures in use in Europe from Russia to Spain from the early Middle Ages until the introduction of the metric system.
reflected the quantity of labor a person could do in a certain period of time and in all measures the relation of man to land prevailed. For cultivable areas there were two types of measures; one based primarily on labor and one based primarily on the fertility of the land (but also again indirectly linked to labor). Similar to Britain a popular measure for land was the one derived from the labor-time for plowing. In Germany the unit of area capable of being plowed in a single day was named ‘Morgenland’, in Catalonia it was called a ‘journal’, in Russia ‘obzha’, and in Italy the name was ‘giornata’. Another measure based on agricultural labor used was derived from the harvest a farmer could collect in one day. The measure based on the fertility of the land was derived from the ‘setier,’ the amount of seed required. But the latter also had a relation with labor, because sowing was mainly done by hand and the seed is cast by every other step. An experienced sower would take smaller or larger steps depending on the quality of the soil.

Coal in one region in France was measured in a ‘charge’ (load) equal to one-twelfth of a miner’s daily output. Arable land was measured by the ‘homme’ (man) to designate the measure one peasant could harvest in one day. The latter measure was rather inadequate since the typical weather pattern in a year could greatly influence the harvest, so in fact the measure expressed by seed needed for a field was more accurate even according to today’s standards.

While the ‘hide’ was a popular measure for the land surfaces in Britain, many other regions in Europe used measures with an anthropometric meaning derived from human needs and human interests. The already mentioned ‘Leidsche el’ was taken from the human body. Although the ‘pied’ (the foot) did not directly reflect the size of the king’s foot it came close to the average length of the human foot. Abstract surface areas were alien in those days, after all, a peasant whose plot of land was physically smaller than his neighbor’s five-bushel plot, but which took six bushels to sow because it was on a gentle slope and had fertile soil, might well have found that ‘six bushels’ expressed his stake in the land far more vividly than an abstract measure of the surface area. As Ken Alder (p.130) points out:

Moreover, these measures did not simply express the value of the land, they guided work rules and set customary limits on the labor a landlord might extract. Thus when a foreman hired four peasants to pick a vineyard of eight journées (days, HD), the laborers knew not to settle for less than two days’ wages each; nor would they do the work with only three peasants on their gang.

The anthropometric measures were the outcome of centuries of protracted negotiations among artisans, peasants, traders, and lords. Their value had been ritualized and fixed as a result of bargaining power of members of the local community. They provided security to the locals and in a sense they also contributed to their perception of security of land tenure.
Each peasant knew how much he had to produce measured in the local standards to satisfy his lord and this guaranteed his or her access to land of which the lord held the ownership rights. Any attempt to substitute the traditional measurements could be seen as a threat to a social balance providing that security.

7.2 THE METRIC SYSTEM

An attempt to standardize measures on a national scale was one of the results of the French Revolution at the end of the 18th century by the French Academy of Sciences. In the days of the earliest kings of France all measures were equal, but by the end of the 18th century a hodgepodge of measures existed because of the manipulations with measures by the various noblemen that ‘reigned’ over their domains. Some ‘seigneurs’ increased, and others reduced measures because some wanted larger taxes from their vassals and others wished to attract new settlers to their lands. It was a source of everlasting disputes between the king and the seigneurs. Originally there have been some successes won by the Carolingian kings, but while the power of the regional rules and local feudal lords increased over time the pressure of the king for standardization of measures weakened. Numerous accounts can be found in French history of attempts by the king to end or at least diminish the diversity in weights and measures without much success. Until the French Revolution three quarters of Frenchmen were subject to the justice as meted out by a seigneur, and thus to the weights and measures of that seigneur. The French Revolution did away with the seigneurs and with the king, and so cleared the way for standardization, which in itself became more and more needed with the expansion of trade. Originally trade was a matter that dominantly took place within the borders of the traditional region of a feudal lord or seigneur. But by the middle of the 18th century trade between regions and nations became a normal activity, making it increasingly difficult to use local weights and measures.

During the past two centuries the metric system has gone into effect in almost every nation on earth except Great Britain, the United States, Myanmar, and Liberia. The metric system as we know it today was first introduced in France (following the French Revolution) in the 1790s. In an interesting account Ken Adler shows how two French intrepid astronomers in June 1792 set out to measure the exact distance of the meridian from Dunkirk to Barcelona in order to help define the meter as one ten-millionth of the distance between the Pole and the Equator. It was seen as critical that the new standard would have a natural basis. By being based on the size of the earth the new measure would be ‘natural’ because it was defined without reference to human interests. That was the reason for the French to look at a
fraction of the length of a meridian. Unfortunately they discovered that with
the tools they had available at that time, determining the length of a meridian
with the exactitude they considered essential for this task was not an easy
project and mistakes were almost unavoidable. Not only were mistakes
made, but it turned out that the earth itself did not have a constant shape as to
define the length of the meridian with the exactitude the professional
standard of the Academy required. The result of this is that the ‘meter’ is a
flawed measure because the premise that the French sector of the meridian
between Dunkirk and Barcelona as measured between 1792 – 1799 by the
two scientists (Delambre and Méchain) can not be considered representative
for the shape of the globe.

The scientists involved in measuring the meridian would be baffled to
find out today that it is difficult to determine the exact area of France. Using
some encyclopedias (and there are many more sources available) different
numbers are given for the area of France. The 1974 edition of the
Encyclopedia Britannica\textsuperscript{5} shows that the area of France is 543.998 km\textsuperscript{2},
obviously excluding Corsica. The Encyclopedia Americana\textsuperscript{6} however gives
the number of 547.026 km\textsuperscript{2} in it’s 1985 edition. The American Academic
Encyclopedia\textsuperscript{7} shows in edition 1993 that France has an area of 543.965 km\textsuperscript{2}
and the World Book Encyclopedia\textsuperscript{8} of 1999, gives a number of 551.500 km\textsuperscript{2}
but that is including Corsica for which (according to the same Encyclopedia)
8.680 km\textsuperscript{2} must be subtracted leaving the number 542.820 km\textsuperscript{2} as the area of
the mainland of France. The biggest difference between these measures is a
mere 4.206 km\textsuperscript{2} or more than 0.7% of the total area of France. One can
wonder what the scientists living at the end of the 18\textsuperscript{th} century would have
made of this. Are we, with all our technological advantages of today, still not
certain about the area of France? What kind of impression will this make on
citizens who are not aware of errors in measurement, of differences in
instruments, and disputes over the plane determining the average curvature
of the earth to which accurate measurements have to be related? What will
such different numbers contribute to their feeling of land tenure security?

Today most of us take the length of the meter\textsuperscript{9} for granted (even in those
countries that have not yet accepted the metric system), but it started as a
story of failure and error. The introduction of the metric system originally
failed despite arguments of French scientists who wanted to make exchanges
direct, rapid, and fair. The French Republic could not tolerate its citizens
earning their living by mystery. Only when exchanges would be based on a
system in which price (and not measurements) were the sole variable, clear
understanding between parties could be assumed. But the citizens were hard
to convince and the metric system did not succeed at first.

In 1813 Benjamin Constant\textsuperscript{10}, a French citizen, wrote:
One code of laws for all, one system of measures, one set of regulations...this is how we perceive today the perfection of social organization...uniformity is the great slogan. A pity, indeed, that it is not possible to raze all towns to the ground so as to be able to rebuild them on one and the same pattern, and to level mountains everywhere to a single preordained plain. Indeed, I am surprised at the absence, as yet, of a ukase ordering everybody to wear identical clothes, so that the sight of the Lord will encounter lack of order and offensive diversity.

The uniformity obviously alarmed Constant.

The government of the first French Empire (under Napoleon) had to reinstate the metric system with severe regulations again and it was not before 1840 that the metric system was widely accepted as the national standard in France. Ironically the metric system had already been obligatory in Holland, Belgium, and Luxembourg as a consequence of the French first Empire that stretched out into those countries in the early part of the 19th century. After Napoleon’s defeat the low countries feared a metrical chaos and although the people resented everything French, the new monarchy that was established in the Netherlands saw the advantages of the metric system and King William I of Orange ordered the decimal metric system obligatory throughout the low-countries by 1820. When Belgium separated from the Netherlands in 1830 it retained the metric system.

Interesting enough at the Crystal Palace Exhibition of 1851 in London judges complained that they could not decide upon a prizewinner in fairness because of the incommensurable weights and measures of the submissions. At the Paris World Fair in 1867 the French saw an opportunity to win the world over. Visitors could walk through a glass and iron pavilion and gawk at a diversity of measures in use around the world. The exhibitions guidebook pointed the visitors finally toward the metric standard and the obvious conclusion.

The advocates of the metric system in the last decade of the 18th century went much further than we go today. In trigonometry, most students today will work with a circle divided in 360 degrees. It is only in the geodetic profession that a circle division of 400 degrees is widely accepted and used. Being a geodesist myself I have to admit that a 400-degree circle with a 100 degree right angle significantly eases calculation in a time that we did not have pocket calculators or computers. By the way, all geodesists and other mathematicians around the world are familiar with the 400-degree circle and it’s right angles of 100-degrees.

The calendar created by the French scientists as a result of the metric system contained still twelve months but each month had thirty days divided in three ten-day weeks. The calendar creators however had to compromise with their proposal for a ten day week. Citizens thought a week of ten days rather on the longish side and as a compromise a midweek holiday (the quintidi) was proposed to ensure that the Revolutionary calendar and thus
the Revolution itself would be embraced by the population. But everywhere in the world the week has seven days although as interesting difference it can be noticed that most calendars in Europe start with the Monday and that calendars on the North American continent start generally with the Sunday. While the scientists in France were at it, they also developed a clock that gave a day ten hours, each hour divided into one hundred minutes. It is interesting to realize that the ten hour clock never made it in the world. It sounds trivial to state that as far as time measuring is concerned, reform attempts here also have lead to nothing new and came to a standstill. Worldwide we use 12 (or 24) hour clocks and the hours are divided into 60 minutes and 3600 seconds. Also the division of the globe has not become metric with, for example, meridians using the 360° division, or rather 180° to the East and 180° to the West counting from the ‘zero’ meridian that runs through Greenwich near London. As mentioned before we obviously live in an imperfect world.

7.3 LAND REGISTRATION IN THE USA

The discourse about whether or not to introduce a metric system can be illustrated by the interesting non-metric system of measurements used for land registration purposes still today (2004) in the land registration institutes of the USA.

First of all it must be mentioned that in the USA there is no nationwide unique parcel identification system in place. Most modern land registration offices around the world use a system of parcel unit identification that assigns a unique reference number to each unit to be registered. Not so in the USA. For references to location of parcels the majority of states use the Federal Rectangular System (FRS). After the declaration of independence the federal state found itself with vast tracts of undeveloped and hardly inhabited land. There were few monuments suitable for the usual surveys and it was determined to devise a system that would facilitate location of land parcels. A commission headed by Thomas Jefferson developed a plan for dividing the land in a series of rectangles, which Continental Congress approved in April 1785. In this system a chosen baseline and a principal meridian form the basis of the reference system. The initial point – varying from state to state to avoid too complicated referencing – is the point where these lines cross. Along the baseline the reference is made to 6-mile intervals known as ranges and along the meridian these 6-mile intervals are known as townships. The way in which references are made to these various base lines and meridians and the further division of the ‘squares’ in sections that are formed on the bases of the baseline and meridians is unique all over the USA.
HAMILTON COUNTY (20, 21, 22…; Section numbers)

<table>
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Figure 7.1 The ‘jump’ between Township 16 and Township 17

On purpose I have used ‘squares,’ because meridians converge towards the North, which means that the South to North boundaries of the ‘square’ converge as well. To maintain a more or less 36 square miles Range – Township system, corrections are made on standard distances along the meridian. The convergence of meridians is accounted for by ‘jumps’ in meridians at intervals of 24 miles. Thus such jumps in East/West direction can be found in all the 30 states using the FRS systems on the borderline
In Pursuit of Land Tenure Security

between Township 4 and Township 5, Township 8 and Township 9 …Township 16 and Township 17…etc. (See Figure 7.1)

In Figure 7.2 the bold lines indicate the principle meridian and the baseline. Townships are indicated with ‘T’ and Ranges with ‘R.’ The 6 x 6 mile squares are indicated as in the figure. The initial point is where T1N/R1E, T1S/R1E meet with T1N/R1W, T1S/R1W (The North is the top of the page as usual on maps).

It is remarkable that even today the reference to the FRS is often made in the registration, although, most of its initial usefulness is lost. With the increasing urbanization the FRS system becomes often too coarse to serve as a good indicator for the small parcels of land that are common in urban areas. Nevertheless, references to the FRS system are maintained as much as possible in reference to the location of the parcels.

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<td>R1E</td>
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**Figure 7.2   FRS (Federal Rectangular System)**

The FRS system is in use in 30 of the 50 states of the USA (and in provinces in Canada). There are 32 base lines and 35 principle meridians in the USA. The original colonial states (mainly on the East coast and New England, Hawaii, Virginia, Kentucky, and Texas) do not use the FRS system (Florida is the only Atlantic coast state using the FRS).

It is a little surprising that in the USA several states, even today, still
use a ‘metes and bounds’ system. This is – as the name implies – a system in which the description of the location of the parcel is given in a complex sequence of subsequent distances and their (compass) bearings. A typical metes and boundary description (as could be found in a deed in 1969) reads in part as follows:

Begin at the middle of a large white pine stump standing in the north side line of Joseph Willard’s land, run S 4° 01’ E 25 feet to a point; thence N 80° 18’ E 98 feet to a point; thence N 9° 42’ W a distance of 8 feet more or less to the south margin of East Pine Street near a white pine tree; thence Northwesterly along said street South margin 115 feet more or less; thence S 00°14’ East a distance of 64 feet, more or less to the beginning point the white pine stump.’

In Graphical form this description would represent a plot of land like this:

Such a description has the failing of a lack of permanency both as to the monument that identifies the initial place of beginning and as to those that mark the various courses. Destruction or removal of monuments will obviously make a re-survey of the property difficult, if not impossible. In many counties the metes and bounds system is combined with the FRS system making it a mixed description in which topographical features can appear. Some of these boundaries are hard to re-establish. A typical example (based on real description):

‘Commencing at the Northeast corner of Oakleigh Manor Subdivision, Unit Two (2), First Extension, thence run S 89°44’ W 29 feet to a point, thence S 80°18’ E a distance of 1208.3 feet to an iron pipe; thence run S 00° 8’ W a distance of 323.3 feet to a point; thence N 88° 30’ W a distance of 16.2 feet to a point, thence S 00° 14’ E a distance of 197 feet to an iron pipe, said point being the beginning of the land to be conveyed herein; from said point of the beginning, run S 4°01’E 25 feet to a point; thence N 80° 18’E 98 feet to a point; thence N 9° 42’ W a distance of 8 feet, more or less, to the South margin of South Pine Drive; thence Northwesterly along said South margin of said drive chord distance 115 feet more or less; thence South 00°14’ E a distance of 64 feet, more or less, to the beginning point and all of said property to be conveyed.
being located in Section 7, Township 7 South, Range 10 West, Franklin County, Tennessee.’

The FRS-system that has been made official in the USA in 1785 is an example of a unique location system. Congress passed an act in 1796 to divide the 6 x 6 mile squares referred to as Township and Range (as above in Franklin county) further into 36 Sections of 1 x 1 mile each (640 acres ~ 260 ha) numbered in a unique and uniform way. Section number 1 is always in the northeast corner of the Township/Range square, section 6 is always in the northwest corner and section 36 always in the southeast corner. Thus section 7 (mentioned in the above example from Tennessee) is the second square mile area ‘down’ from the northwestern tip of Township 6 South Range 10 West and bordering Township 7, Range 11 West. It shares its western border with section 12 of Township 7 South, Range 11 West and the eastern border with section 8 of Township 7 South, Range 10 West.

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Figure 7.3 Sections in the Federal Rectangular System

The section numbers can be found also in figure 7.1. The county boundary NE-tip in Figure 7.1 is obviously in Range 5 East between sections 10/15 and 15/14.

The unique section numbering system is given in Figure 7.3.3, which also shows the section numbers in one Township/Range square with the sections of bordering Township/Ranges (The 6 x 6 mile Township/Range square is indicated by the dotted line).
### Measures and Land Tenure Security

**A SECTION OF LAND, 640 ACRES (1 sq. mile)**

with possible subdivisions

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<th>1320 FT.</th>
<th>660 FT.</th>
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<tr>
<td>NW ¼ / SW ¼ / SW ¼</td>
<td>NE ½ / SE ¼ / SW ¼</td>
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<tr>
<td>20 ACRES</td>
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<th>1320 FT.</th>
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<td>[ A ]</td>
<td>[ B ]</td>
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<td>10 ACRES</td>
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| NW ¼ / SW ¼ / SW ¼ | NE ½ / SE ¼ / SW ¼ |
| 20 ACRES | 40 ACRES |

| NW ¼ / SW ¼ / SW ¼ | NE ½ / SE ¼ / SW ¼ |
| 20 ACRES | 40 ACRES |

| [ C ] | | |
| 1320 FT. | 660 FT. |

\[ [A] = W \frac{1}{2} / W \frac{1}{2} / NE \frac{1}{4} / SW \frac{1}{4} \quad [B] = E \frac{1}{2} / W \frac{1}{2} / NE \frac{1}{4} / SW \frac{1}{4} \quad [C] = SE \frac{1}{2} / SW \frac{1}{4} / SW \frac{1}{4} \]

**Figure 7.4 Fractions of a section of land**

In the year 1800 Congress provided for the subdivision of sections into smaller units of half sections by East-West lines dividing the sections in units of 320 acres and five years later by Act of February 11, 1805 Congress provided for the division of sections into quarter sections in square units of
160 acres each referred to as the NW ¼, NE ¼, SW ¼, and SE ¼. Such a quarter section could thus uniquely be described as the NW ¼ of section 17 of Township 3 North, Range 7 East in the State of Indiana. The FRS was a useful tool in granting land to settlers. Newly ‘discovered,’ conquered, or traded lands were divided in ranges and townships on the basis of the initial point. The typical size of a family farm under the Homestead Act in the ‘Mid-West’ is 160 acres. By using the FRS system of quarter sections no additional surveys were necessary. The identifiers for the Township, Range, Section and the ¼ corner of a Section uniquely describe the location of the new farms in the western USA. (Later the one-family farms further to the West – in particular in the more mountainous areas – were made larger than 160 acres).

Later in time and particularly in areas where land originally used for agricultural purposes was converted into urban land, in the growing villages and towns, the ¼ sections were further divided. This was made official with the decisions of the legislature in USA Congress acts of 1820 and 1832. The result is that one can encounter locations of property like NE ¼ of SW ¼ of Section 23 of Township 3 N, Range 6 West (40 acres) or W ½ of W ½ of SE ¼ (also 40 acres).

The sections can be further divided as, for example, W ½ of SW ¼, SE ¼ of SW ¼, of Section 12 of Township 1 S, Range 6 East, a property of 5 acres (~2 ha) and more elaborate descriptions for property units that are even smaller. The way the FRS system has developed over the years can best be illustrated by using figures 7.4 and 7.5. These figures have been taken from a brochure issued by a register of deeds in one of the counties in the USA. It gives a good insight in the ingenious way of using the fractions of a section of land together with the non-metric measurements still in use today in the USA.

Together with the non-metric measurements in use in the USA the system of describing the location of parcels of land in the USA appears to be complex and unsophisticated, regarding the vast amount of technology available for computerized registration and mapping on the American continent. One cannot escape the impression that the system of title insurance as provided by private insurance companies has diminished the urge to quickly modernize much of the land registration system in the USA. It is now a system that serves professionals and insiders and they seem to be satisfied with the system, perhaps also because it more or less protects their trade.
LONG MEASURE  SQUARE MEASURE

1 Mile - 80 chains 1 Sq. Mile - Reg. Section
- 320 rods - 640 acres
- 5280 feet 1 Acre - 10 sq. chains
- 160 sq. rods - 43,560 sq. ft.

1 Chain - 4 rods
- 66 feet An Acre is about 208¾ feet sq.
- 100 links An Acre is 8 rods wide by 20 rods long, or any area the
1 Rod - 5½ yards product of whose length by its
- 16½ feet width (in rods) is 160 or in
- 25 links chains is 10

1 Sq. Rd. - 30½ sq. yds.
1 Link - 0.66 feet - 272¼ sq. ft.
- 7 7/8 inches 1 Sq. ft. - 144 sq. ins.

Figure 7.5  Long and square measures in the USA

More then anything else this is, in my opinion, a good recommendation to use metric measures in recording data on land. But as mentioned before, such a complex system of expressing surface areas is also a protection of professional interests, taking away the incentive among professionals to seriously pursue measure reform and the conversion to a metric system.

7.4 ECONOMIC INTEREST

The economy of manorialism and the Middle Ages can be described as being a ‘just price’ economy in which basic needs were sold at a customary price set by the local communities at a level that most of the people in a particular community could afford. It was an age where bakers would not dare to charge more than a ‘just price’ for a loaf of bread for fear of angering the population. To preserve their livelihood with a rising price of flour simply resulted in making loaves a little smaller.

The workings of the economy dictated that local grain merchants could make a profit by buying grain at one measure and selling it for the same price at a lesser measure. This practice was not condemned since it was seen to encourage commerce. Monasteries could circumvent the Christian restriction against profits by buying beer in large barrels and then selling it
for the same price in smaller barrels. But increasing trade outside communities and even outside national borders required a more standardized system of measures to enable quick and reliable exchanges and transfers of goods and products. The diversity of weights and measures formed the backbone of the economy of the Middle Ages. Local measures reflected the balance of power within the communities. Outsiders often did not understand these measures, only locals did and this was one of the main advantages of local diversity. They kept outsiders out. Small town traders were protected from big-city merchants, or could assist them in entering the local market by charging a fee for the ‘translation’ of measures to local markets. The guilds took charge of their own measures to keep outsiders away by defining their own goods in a unique way similar to what can be witnessed today in the computer industry.

It will be clear that land lords who wanted to ‘improve’ the surface areas of land by hiring land surveyors to perform that job encountered hesitation. Surveyors were daunted by the challenge of transforming land into a factor of production expressible in square units. Although counter productive to their interests they tried to convince their employers to stick to the old customs of those who sow the land. The customary hodgepodge of measures were the realm of economic exchange.

An imperfect world has limited resources, and that makes weights and measures of interest to economists. Economists are professionally fascinated by scarce goods. As long as there is an abundance of something it is not really a matter of study for the science of economy. I remember that this interest was always illustrated with air. One professor used to tell us that air was everywhere present for free, and thus not of interest for economists. I do not believe that any professor today will use this example. Air, and clean air in particular, has its price, and we are willing to pay for it. It is of concern to economists nowadays. We pay for it by way of exhaust gas converters in our cars, by clean air filters in the chimneys and at the sources of production of contaminated air in our factories, by environmental programs and by political decisions aimed at cleaner air. These decisions do cost us (extra) money and thus effect and (re)determine our spending pattern, which results in interest by economists today.

Awareness of the environment has gained a lot of attention recently. There is hardly anyone left in the industrialized world not knowing something, or having a concern, about the environment. Environmental issues have dominated discussions in the United Nations, in FAO conferences and have guided the policies of international donor organizations during the last two decades. Global warming, global flooding and fear for growing intensity of the harmful influences of the sun on the human skin are among the factors that make people worry for the future of
this planet. Older than the concern for the environment is the concern about diseases that threaten our livelihood security.

Recently I heard an official of the World Bank make the statement that if we would spent half the money on developing better medicines against malaria, than what has been spent on the development of the 'Viagra' pills, many lives in less developed countries could be spared. Cynics would add that this would increase the food problem, but this is only true if we neglect the uneven distribution of funding for research as a whole. When asked why so much research money is spent on, for example, Viagra and not on a better cure for malaria, economists will answer that this is simply because the market for Viagra is much more profitable than the market for medicines providing a better cure for malaria. In other words; Viagra can be sold to rich people offering a high return on the research investment, while a better cure for malaria can hardly be bought by the too poor inhabitants of the malaria infected areas. There simply is no significant profitable market for a newly developed malaria pill. The Viagra example can be seen even more in the distribution and application of agricultural technology. There is an enormous biotechnology investment by the private sector, but private money is only invested if it can be recouped, with the protection of intellectual property. This raises issues and there are ethical questions. Poor peasants who have bred plants over generations get nothing out of a patent for which they supplied the basic ingredients, but they have to buy new improved seeds at unaffordable prices.

The recently increased concern for the environment makes people more aware of the dangers of expanding the size of lands to be used for agriculture. Images of rainforests threatened by bulldozers and chainsaws, almost bare washed slopes of former wooded mountains and rivers and lakes polluted by fertilizers and other chemicals are a common sight for most of us. We complain about raging wildfires that destroy our homes ignoring the fact that humans should perhaps not live there. Land that has achieved a natural balance over the centuries is claimed for our expanding needs. That land subsequently becomes out of natural balance by our urbanization and pollution, like the building of sky scrapers along the shores of popular beach resorts that often are hardly or not at all capable of carrying the burden of our waste and trash. But this is not the place to raise a kind of new Malthusian fear for overpopulation and food shortages.

The same World Bank official mentioned earlier claimed that India has increased prime food production from 7 million tons in 1961 to 197 million tons in 1990 using almost the same area for the agricultural crops, a result mainly achieved by using bio-engineered seeds and an increasing application of biotechnology in agriculture. This statement suggests that with biotechnology we have eliminated the danger of food insecurity for the many millions of people now actually facing it.
It may well be that bio-technology applied in agriculture will diminish the need for expanding our agricultural areas in the world, which in turn will better protect our fragile soils and unique habitats now present in the remainder of the rain forest and the forested slopes of mountains. If we make bio-technology products available to poor farmers at affordable prices, we can make it happen. This is a matter of economics, but sponsoring of biotechnology research on the condition that it will be made available to poor peasants at low prices is a better way of preserving our planet than an ongoing expansion of arable land. Together with improved land tenure security for poor peasants, this is an almost certain way to success and economic development without sacrificing the environmental fragile lands.

### 7.5 LANDED PROPERTY

Throughout history, land has always been connected with power and prosperity. The family that owned most of the land reigned in that country. As a reward for the rendering of extraordinary services to them, they provided servants with some land of their own. In turn these servants could start to act as landlords on their own giving some of this land to lower land lords to work the land and provide them with services. Land wielded power, and owning rights to land, was the best guarantee against poverty. The influence of land as a tool to exercise power changed drastically but very slowly with the industrial revolution. One of the features of the industrial revolution was that it vested the new industrialists with the same power and prosperity as held by the great landlords historically. These landlords had (and in some countries still have) problems accepting the new industrialists as their equals, but nowadays it is difficult to claim that land can be easily associated with power and prosperity as several land-poor, but relatively prosperous states like Singapore and Hong Kong prove.

Nevertheless, in less developed countries one should not underestimate this historical relationship between land and prosperity. In the majority of the less developed countries people do not have access to bank accounts, to a portfolio of shares and to stock markets. The main asset of the people, and especially of peasants in rural areas, is the land to which they hold some rights. Deliberately I avoid the word ownership here. Ownership of rights to land may in various countries differ from our legal comprehension and the notion of ‘ownership’ encountered abroad can often be quite different from our own concept.

The battle against rural poverty and food insecurity should be fought with powerful but simple weapons. If a peasant has access to sufficient land to support the farming household, the problem of food security diminishes. With sufficient support to apply agricultural technology, and with some luck
with the harvests, the peasant will be able to improve the standard of living for his household members. In many countries the distribution of land among farmers is far from equitable. Some large holders often possess most of the land, while many small holders struggle on too small plots of land of inferior quality for agriculture, to feed a household almost continuously suffering from starvation.

Galbraith\textsuperscript{13} states:

For socialists, property was and in some measure remains not only the decisive but the sole source of power...As long as it remains in private hands no others can possess power...In non-socialist doctrine, by contrast, private property is so important as a source of private power that it cannot wisely be concentrated in the hands of the government. ...But there remains the question of how extensively the state should intervene to get a wider distribution of property (and associated income) and thus of the power emanating therefrom.

Adam Smith had formulated his principle earlier:

The State exercises its political power to restrain the economic freedom of individuals or corporations who abuse such freedom for attaining private gains at the expense of others and social gains as in the case of violating property rights by monopolists. (Adam Smith, 1776 The Wealth of Nations, Random House Inc. 1937 edition)

Most scholars nowadays agree that there is no way of dealing with poverty, protection of the environment, or food security, without transforming agricultural production at the small holder level in developing countries. Fortunately we are on the cusp of a new revolution in the biological sciences. Now that we are getting into the manipulation of genes, all sorts of possibilities are opening up. The application of plants being more drought-resistant, more salt tolerant, more resistant to pests without pesticides opens enormous possibilities for smallholder farming. The danger, however, is the same as with the development of the Viagra pill. The privatization of biological research could hinder a widespread application of new agricultural technologies.

Combining the fact that the poorest people live in rural areas, and the fact that land in those areas may stand for the possibility of prosperity, the answer to the problems of the poor regions of the globe seems simple indeed; (Re-)distribute the land. This path has been followed and still is followed by many governments. As mentioned in an earlier chapter this is generally called "land reform," and this process of redistribution of land, has been practiced since centuries. But only during the last four decades, land reform got broad attention of donor agencies. Much support was offered to countries starting programs aimed at a more equitable apportioning of land among the population. With the often indispensable help of outside donors
and designed for the specific circumstances in each country, governments have provided small holders or landless people with plots of land sufficient in size and quality to feed their families and to harvest some crop for a market. But establishing a more equitable distribution of land is not enough. The equitable distribution must be accompanied by measures to protect rights to land in a formal way. Property rights in land represent a large portion of people's wealth. In the USA over 40% of family assets consist of land and in less developed countries this figure can be well over 90%. As long as these property rights are only "informal" there will be reluctance to invest intelligence and work in improving these assets.

Land registration bears the potential of assisting an economy to develop and to grow. It can enable a land market to develop. As long as the ownership of rights to land is not retrievable and cannot be easily proven or checked upon, the transfer of land is a most cumbersome process. Every time a piece of land changes hands questions about the contents of the rights to the land of the seller should be known and readily available to the buyer, without doubt or hidden surprises. Otherwise a land market will not develop. An official state run or state controlled land registration, providing data on land rights on request to the public is an essential requirement for the functioning of a land market.

Hernando DeSoto, Peruvian economist and activist has stated:

To be exchanged in expanded markets, property rights must be 'formalized' - in other words, embodied in universally obtainable, standardized instruments of exchange that are registered in a central system governed by legal rules. This affords holders indisputable proof of ownership, and protection from uncertainty and fraud. Property rights can then enter the marketplace in a form adapted to massive and frequent exchange, which facilitated the transfer of resources to their highest-valued use.

To be prosperous, property rights must enter the marketplace in a form adapted to massive and frequent exchange, which facilitates the transfer of resources to their highest-valued use. This is an economic law. Modern market economies generate growth because widespread, formal property rights permit massive, low-cost exchange, thus fostering specialization and greater productivity. Without formal property, a modern market economy can not exist. When it comes to land, property rights should be embodied in formalized titles. A piece of land without such a title to specify its ownership at low cost is extremely hard to market. Any trade of this land will require enormous effort to determine the following: Does the seller own the land and have the right to transfer it? What are the boundaries? Will those who enforce property rights accept the new owner as such? What is the effective means to exclude other claimants? If finding the answers is difficult, than there will be no exchange at all, or exchange will be restricted to closed circles of trading partners who trust one another.
Governments aiming to grow agricultural production and rural development need to pay attention to the behavior of individual farmers. This is the level where, in a market economy, basic decisions to use the land will be made. Why would farmers invest in their land and use capital for improving and increasing production? For the individual farmer security of land tenure is the most important element in his decision making for the use of land. To assist the farmer in making the decisions, it is important that there is credit, there is support to get modern technology in agriculture and there is a healthy market economy.

Security of land tenure is highly stimulated by a well functioning, easily accessible, state controlled land registration giving certainty of land titles and protection against violations of the ownership of rights to land. A modern land registration system is computerized and uses data from various sources to be as accurate and as complete as possible.

Land registration is also the way to provide a possibility for using rights to land as collateral for loans. These loans can then be used to improve agricultural production methods and the purchase of better seeds and plants. Interest in funding land reform activities by international donor organizations has been at a peak during the time that several of the former communist countries started programs of land reform after the political changes in the late 80s. There is widespread consensus that agricultural production on smaller family size farms per unit is higher than on large farms. Economists believe that the negative relationship between farm size and farm productivity is not the only important element. On the supply side, small size farms boost agricultural production and the creation of small farms also provides employment for excess rural labor. On the demand side, rural incomes may increase stimulating demand for industrial goods. But this is only true within limits. If people have to resettle, the results may be negative; new farmers have no loyalty to the new region and the most experienced farmers may not be able to use the full potential of their experience.

7.6 THE FINAL DECISION MAKER

In many projects aimed at implementing land reform one important level of decision-makers is often neglected. This level is the lowest decision making level; that of the individual farmer. An individual farmer will only make optimal use of the land to which he has got access, when he can be convinced of a long-term security of land tenure. Any activity aimed at providing small holders with more land does not automatically lead to higher yields in agricultural production, increased food security and more
environmental responsible stewardship for the land. Yet, this is what many governments want to achieve.

The authority granting the rights to the land should provide security of land tenure. A first note to be made here is that the level of security of land tenure is as strong as the authority granting it. This is one of the reasons that many land reforms in Africa have failed to succeed. Africa has been the scene for almost 80% of the world’s civil wars that occurred during the last two decades. Several African governments are entangled in political battles, 'liberation' armies roam the countryside and take what they can get, destroying the harvests and jeopardizing the security of land rights. Under such circumstances there is no land tenure security.

An additional requirement for security of land tenure is a reliable and well-maintained system of land registration. Some scholars even advocate this as strongly as a 'conditio sine qua non' for the existence of land tenure security. But land registration systems are expensive to develop and they need trained and dedicated staff to operate successfully. Moreover, land registration systems are institutional elements which must be embedded in the legal structure of the country and comply with the social, cultural, and sometimes the religious and customary traditions of the population. A land registration system must provide the essential data on land in an up to date form, be within easy reach for each citizen, and provide these services at a reasonable price. When the data are not up to date, are incomplete, or are expensive to obtain, the land registration system will fail to assist in providing land tenure security to the population.

It makes every land registration system a trade off between costs and benefits. Every expert assisting with land reform and land registration has to realize that the (economic) value of registration of land for the population is the contribution that registration gives to security of land tenure. In other words; the cost and efforts of performing the act of registration of land should at least be compensated by the protection that registration offers toward improved land tenure security. For many expatriate experts it is difficult to realize how a farmer will weigh the pros and cons of land registration. In several countries the apprehension of the ‘big brother is watching you,’ is still very present and forms a barrier for registration of land. When additionally, registration is cumbersome to perform and may involve travel to a nearby city and eventually considerable costs and perhaps taxation of the land, farmers may easily refrain from registration and return to trusting customary rules and habits.

Whatever propaganda is used to introduce a new system of land registration, whatever well-intended protection a government can assure of rights to land, it is the individual citizen who decides whether or not a government has created a sufficient level of land tenure security perception. Any consideration of improving the value of the land or the real property
will be based on that perception. Similarly the decision of whether or not to make use of the land in a productive and efficient way by a farmer is based on trust in long term access to land which requires the perception of a certain level of land tenure security. Each farmer has to put a considerable amount of resource and effort into the land before benefits can be reaped. The prospect of reaping such benefits must be earned by providing farmers with the perception of land tenure security.

7.7 PURSuing LAND TENURE SECURITY

Landed property has been in the hands of only a few people for a long time in our history. Free and open access to land has been denied to most of the people during the past centuries. Only recently dawned the thought that land is of such vital importance for all of the people on earth that it should be more accessible to everyone. The examples of sharing land for enjoyment by all people that currently exist in Sweden and Britain have been described elsewhere in this book. People enjoying shared access to land will quickly agree that it contributes to a relaxed and pleasant atmosphere. It lends a particular charm to the visit of a country when the land can be enjoyed freely without signs telling you that this land is ‘private property’ or even stronger that one has to keep out and that trespassers can be prosecuted. Fencing land to make it impossible for others to share in the bounty of nature because this land is for someone’s private enjoyment alone, is increasingly seen as an overstatement of privacy. Of course, there is a certain rule that one should obey the unwritten rules of privacy and this is also followed in the countries mentioned earlier. In Sweden, typically, homes and gardens obviously belonging to private homes are not to be intruded upon, but as soon as one is in the open, the general rule of open access precedes the privacy requirement and one can freely enjoy access to land while sharing it with others. In Britain the limitations of open access are more limited.

The exclusive enjoyment of landed property can only be safeguarded by the establishment of invisible lines, lines that have been measured by a surveyor and that have the legal status of representing the boundaries between what is mine and what is yours. To use the land for grazing the boundaries had to be marked with fences, hedges, wooden planks, stones or whatever other material could be found to keep the beasts in. Two examples of such ‘fences’ built with ‘natural’ means are shown in the figures 7.6 and 7.7.
Figure 7.6  Fence of stones (Lancashire, GB)\textsuperscript{14}

Figure 7.7  Fence of branches and small trunks
Originally land was almost always communally owned. Being a member of a community gave a person the right to use the land of the community. The modern idea that land is for the enjoyment of us all, does not imply that it cannot and must not be used as a factor of production and in particular agricultural production. In many autochthonous natural resource regimes, land is often allotted to be exclusively used by one (farming) family for a certain period of time in order for them to prepare the land, sow it and take in the crop at harvest time. But after harvest time it becomes common property again until the next planting season. Besides, it is often allowed that other members of the community graze a beast in the margin of the field all year round, of course, without damaging the crop.

Under the system of manorialism in Europe, rights to land became part of the exclusive possession of noblemen. As described in Chapter 2, paragraph 2.1, the lord held the rights to land which in turn he (in the patriarchal dominance of that time, seldom she) received from an overlord who was more powerful than he. On the land the lord had his peasants work to produce not only for themselves and their families but also to provide the necessary food and livestock for the lord’s house. The territories of the lord did not have to be overly protected or marked out against threats from within the manor. Here the Lord’s word was law. Of course that was different with disputes between different manors, but then again there was an overlord whose word was law.

Invisible lines to mark one’s territory became important with the development of private individual holding of rights to land. Private individual ownership gained significance in Europe from the 18th century onwards. As mentioned elsewhere in this book ownership of rights to land is sometimes difficult to prove, because the land can not be possessed in a literal sense, one cannot take the land or hide it. Since we live in an imperfect world, most people want to have more as a precaution for uncertain times or just to gain more influence in society. Having more land might give more power, and as long as there is a perception of ‘we have less land than our neighbors,’ land has been the cause of many conflicts. Imagine what would happen if we could make this world a world of ‘enough is sufficient’. Does that mean that the drive to have more and still more might be over?

Pondering about these questions makes one wonder what kind of society would evolve from an approach of enough is sufficient. Of course, there will always be a risk involved of losing what one has. In a world enough is sufficient, we might be safe against intruders or other persons who would threaten to take away our property when they, like us, would have enough.

But since we are human, John Spong argues that we thus by definition will be filled with chronic anxiety. Sigmund Freud called it ‘The trauma of self-consciousness.’ It makes humans different from any other form of life in
the natural world and this difference gives human beings a sense of dread. As a result humans want to create security around them to lessen their anxiety. And since land is essential for human life, striving to improve land tenure security is very human and has a high priority.

Losing land means potentially losing an important factor in livelihood security. Building safety by creating a world in which everyone perceives having enough is fundamental may be a step in the direction of land tenure security. But that will only take away the threat of losing one’s land to other humans, not against supernatural powers or simply natural disasters. Although in theory land is forever and cannot be destroyed there is individual perception regarding natural disasters.

Natural disasters cannot be eliminated and our possessions are vulnerable against the forces of nature. Natural causes still could affect our perception of land tenure security. But certainly when our neighbors and we would have enough, the pursuit of land tenure security would be placed in a different perspective.

Discussing the failure of communism, the remark has been made that people want more variation when their basic needs have been satisfied. There will always be a drive to distinguish oneself from others, how little and subtle that might be. The history of the rise and fall of communism has taught us that a centrally planned economy is hard to manage because of human fallibility. Although communism as such may be a useful solution for a peaceful society, things go wrong when the people responsible for implementing the system fail and tend to pursue their own agenda. Socialism may be a better option because that system has proven to be workable in a capitalist society with decision making by the price mechanism of supply and demand. When thinking about these matters I wonder whether or not we approach a new era in which our current imperfect world will be reshaped in a more equal and balanced society.

An imperfect world needs weights and measures to secure fair exchange of goods and services among people. We have to continue using weights and measures for the time being, as long as only some phenomena of a more perfect world are available to observe. The tale must be told over and over again of a land surveyor who eagerly sets out to measure the domain of mankind after this world has passed away. It shows that the land surveyor is about to discover his assignment being fruitless because humans are unable to measure that land of promise. It is non-measurable by humans because it is not anthropomorphic in nature and thus human measures of length cannot be applicable to its size. Moreover it is unimportant. In that imaginary land everyone will have more than enough.

Unfortunately, it is yet impossible for me to compose a paradigm that illustrates such a new order that will not require weights and measures to deal fairly with fellow humans. It is only possible for me to detect some
aspects of that new paradigm. Until someone can develop the new paradigm, land tenure security will be a just cause to pursue, and this book might help to understand this pursuit as experienced by various humans.
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Smith, Adam
NOTES ON CHAPTER 7

1 Mark 4:24 reads:

Pay attention to what you hear; the measure you give will be the measure you get and still more will be given to you.

2 To ensure their safety standards had to be preserved in a secure way. That is why they were immobilised and made of durable material.

3 In ‘Measures and Men’, Witold Kula describes how anthropometric measures expressed features of primary concern to those who worked the soil or produced goods.

4 Ken Adler describes the attempts to define the meter in the last decade of the 18th century in his book ‘The Measure of All Things’ and this book has been inspirational to some of the lines in this chapter.


8 World Book Encyclopedia; World Book Inc. Chicago 1999

9 Today the invariable meter is defined as the length equal to 1,650,763.73 wavelengths of the orange light emitted by the Krypton atom of mass 86 in vacuum.

10 Benjamin Constant in: ‘De l’Esprit de Coquête’ 1813, Paris; collection Le Jardin du Luxembourg, 1947 pp. 53-54

11 The ‘jump’ as shown here is a reproduction of the grid that can be found on a colored public map of Indianapolis distributed at the county surveyor’s office of Marion County, Indiana USA. This fragment shows the North-East corner borderline of the map. It is important to realize that the borders of this map are determined by county borders (which coincide with section borders) and not by the ‘full’ FRS grid. So is, for example, the border of the map fragment on the East side determined by Western border of Hancock county although this runs not on a ‘full’ Range border but two sections west from it resulting in section 34 respectively section 3 being the East border of the county mapped here. The same applies for the ‘top’ line of the map which is 2 miles South of the ‘full’ FRS grid line.

12 The schematic representation in figure 7.4 on page 219 - as well as figure 7.5 on page 221 - is based on a public brochure distributed at the office of the register of deeds in St. Clair County in Port Huron, Michigan USA.

13 John Kenneth Galbraith when talking about the sources of power recognizes property as one of the three sources of power in his book ‘The Anatomy of Power,’ 1983 and the quotes appear in the book on p. 47 and p. 87. In this book he also mentions that ‘The
theory of the Communists may be summed up in the single phrase: Abolition of private property.’ (Karl Marx and Friedrich Engels; ‘The Communist Manifesto’)

14 The two pictures on this page are handed to me by an army ‘buddy’ of mine, Mr. Paul Bakker from Ilkley, UK.

15 I owe this expression to John Selby Spong from his book ‘A New Christianity for a New World’ (p.38) published by Harper Collins in 2002. Bishop Spong argues that humans are the first creatures to realize that they are mortal (Animals do not have such thoughts). And he states that as the realization of mortality grew in humans, a dreadful sense of anxiety gripped them.
## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Access to land:</td>
<td>Ability to use land or another resource.</td>
</tr>
<tr>
<td>Adjudication:</td>
<td>The official ascertainment of rights in land</td>
</tr>
<tr>
<td>Anthropometric:</td>
<td>Derived from human needs and human interests</td>
</tr>
<tr>
<td>Autochthonous:</td>
<td>Native to the soil, aboriginal, indigenous. A term derived from ‘Autochthon’, meaning a human being sprung from the soil he or she inhabits. A ‘son (daughter) of the soil.’</td>
</tr>
<tr>
<td>Associations of peasant farms:</td>
<td>A category of farming enterprises devised to cope with the fact that peasant farmers often worked cooperatively (and typically under old management structures).</td>
</tr>
<tr>
<td>Cadastral System:</td>
<td>(Originally) A system intended to collect data on land with the purpose of levying land taxes. Nowadays the term is also used for a multi-functional system providing data on land and protection of rights to land.</td>
</tr>
<tr>
<td>Cadastre:</td>
<td>A land registration originally intended for the levying of land taxes. Nowadays the term is also used for land registration systems intended to protect rights to land.</td>
</tr>
<tr>
<td>Collectivism:</td>
<td>The socialistic theory of the collective ownership or control of all the means of production and especially of the land by the whole community or the State, i.e. the people collectively, for the benefit of the people as a whole.</td>
</tr>
<tr>
<td>Collectivization:</td>
<td>The act of bringing under the control of the State all the means of production and especially the land.</td>
</tr>
<tr>
<td>Command economy:</td>
<td>An economy in which not prices but (governmental) commands and directives determine production.</td>
</tr>
<tr>
<td>Common-pool resource:</td>
<td>Those resources (community pastures, community forests, village wastelands, watershed drainages, river or rivulet beds and banks, village ponds and their catchments, dumping grounds and threshing grounds) to which a group of people have a coequal use right, especially rights that exclude use of those resources by other people. Other authors use: A valued natural or man-made resource available to the people – not necessarily providing everyone with equal</td>
</tr>
</tbody>
</table>

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1 Note that ‘peasant’ in this context does not have the connotation of ‘backward’ or ‘subsistence’. It is used for individually operated farms as the result of poor translations and censorship.
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rights\(^2\) – of a specific community or clan - and subject to degradation as a result of the common use. The latter addition is only true when the community cannot exercise sufficient control or cannot sufficiently enforce regulatory rules).

Common property: A commons from which a community can exclude non-members and over which the community controls use.

Commons: Land or another natural resource used simultaneously or serially by the members of a community.

Communal tenure: A tenure regime that unlike individual tenure provides rights of use to everyone belonging to a clan, to a local community, or to a specific tribe.

Conveyance: Term used for the transfer of real rights to land (in England and Wales this term is used for transferring unregistered freehold land).

Customary tenure: Rules governing land tenure, which a local community defines and changes ‘without help from the formal legislator’ (It comprises of privileges, duties, and mutual obligations toward the common land and between the people belonging to a specific community.)

Dealing: A transfer of land (in England and Wales used for an application to the Registry affecting registered land, eg, an application to register a change of ownership).

De-collectivization: The act of taking out of the control of the State means of production and especially the land.

Deed: (Official) document prepared to state the will of parties involved in a conveyance (a transfer of rights of land). (Often a deed is prepared by a notary and than called a notary deed.)

Deeds registration: A misleading term! It generally indicates a land registration in which deeds are used as the most common documents to initiate changes in the ownership of real rights to land (but other documents or evidence of changes are accepted as well).

Domesday book: The record of the Great Inquisition or Survey of the lands of England, their extent, value, ownership, and liabilities made by order of William the Conqueror compiled in two years (1085-1086) it records the ownership and value of all lands at the time of the survey and also at their bestowal; the value of crops, cattle, etc, is also included along with the social status of the owners.

Dual legal system: Exists in a country where formal law and local customary rules or law both can determine protection of (property) rights.

\(^2\) For example; it is not uncommon that someone has an exclusive use right on a (small) part of the common-pool resource for a specific period of time and a specific purpose.
Dualism: See Pluralism.

Feudalism:
A relation based on the holding of land in feud between a superior lord and a vassal (feudary). It has two roots one based on honor where the vassal (warrior) pledges loyalty to the leader and the other based on land tenure when the leader (the lord) grants possession rights of land to a warrior in return for services. Property in the Middle Ages nearly always meant real estate, for land was the main source of wealth. A piece of land granted by a lord to a vassal was called a “fief” (Latin, feudum), and the vassal was entitled to the income from it so long as he discharged his feudal duties. The church also had large fiefs and was part of the feudal system. The vassal had to provide services and only nobleman and aristocratic warriors could be vassal in a ceremony called ‘homage’. The vassal got possession of the land but never ownership rights. Owners of rights to land could hand this right over to the lord in return for protection. Feudalism began to appear in Europe in the 700’s and vanished by the 1400’s. Contradictory to manorialism, feudalism is a political and military system. Manorialism is based on agricultural labor to be provided by the peasant.

Free-rider:
Someone who intentionally benefits from a common pool resource but one who does not – and has no intention – to contribute to the sustainable carrying capacity of the resource.

General boundary:
A boundary the precise line of which has not been determined.

Holding (verb):
Having control of land or another resource.

Holding (noun):
All the land held by a household or person in whatever tenure.

Immovable Property:
Legal term for land and all (semi-)permanent attachments to it.

Imported tenure system:
Tenure system copied from another country.

Indigenous:
Born or produced naturally in a land or region; native or belonging to the region or the soil.

Individual property:
Property held by a natural person or legal entity.

Inheritable use rights:
System of tenure under which use rights pass from a deceased owner to his or her heirs.

Institutions:
The established rules and customary relationships of a social organization or humanly devised structures that regulate social inter-actions.

Land information system:
A land data system containing both administrative and geographical data on land (and real property). Modern systems are generally computerized. In practice the system is in abbreviation referred to as a LIS.
Land reform: The attempt to change the tenure of land, generally in combination with redistribution of land.

Land registration: Recording in a register of the ownership of real rights to land. Currently modern land registration systems are computerized, parcel based, and up-to-date, land data banks, containing a record of all interests in land (e.g. rights, restrictions and responsibilities). They usually include a geometric description of land parcels linked to other records describing the nature of the interests, and ownership or control of those interests, and often the value of the parcel and its improvements.

Land tenure: The perceived right to hold land rather than the simple fact of holding land. Land tenure is concerned with the rights, restrictions, and responsibilities people have with respect to the land (FIG). More formal: Land tenure is the perceived institutional arrangement of rules, principles, procedures, and practices, whereby a society or community defines control over, access to, management of, exploitation of, and use of means of existence and production.

Land tenure security: The perceived certainty of having rights to land for a certain and well defined period of time. In a formal way, land tenure security is the perceived certainty of land tenure.

Land tenure system: The perception of all the types of real property tenure recognized by a national and/or local system of established rules and customary relationships in a social organization.

Legal pluralism: The simultaneous existence of multiple normative constructions of property rights in a social organization.

Lingua franca: A medium of communication between peoples of different languages. Derived from the Italian word for language – lingua – and Frankish – franca. (Original: A mixture of Italian with Provençal French, Spanish, Arabic, Greek and Turkish formerly spoken on the Eastern Mediterranean coast.)

Livelihood: Adequate stocks and flows of food and cash to meet basic needs

Local tenure system: Tenure system of local origin.

Manor: An estate (often part of a “fief”) of which the average size was probably about a thousand acres supporting some two or three hundred people. It had to be large enough to sustain its manorial community and to enable its lord to fulfill his feudal obligations, but it could not be so large as to be unmanageable as a farming unit. The productive heart of the manor consisted of the arable (plowable) fields, and more than half the estate was normally used for crops. To the peasants who worked on a particular
estate, the limits of the manor were the limits of their world. Ordinarily they were not allowed to leave the manor at all, and only rarely did they go beyond the nearest town or fair. In some areas peasants enjoyed the right of pilgrimage, once each year, to Christian shrines. But travel, even when permitted, was seldom undertaken because of its perils. Roads were poor, hostels few, and banditry widespread. Manorial estates ranged in size from a minimum of perhaps three hundred acres to a maximum of about three thousand.

**Manorialism:** The societal system based on the ‘manor’. It was the economic system in Europe from the end of the Roman Empire to the 1200’s. The name comes from ‘manerium’, Latin for a large estate controlled by a lord and worked by peasants. Peasants were bound to the soil. Unlike slaves they could not be sold apart from the land. In some parts of central and eastern Europe manorialism continued until the 1800’s.

**Movable Property:** All not immovable property

**Mortgage:** A contract by which a borrower commits land as security for a loan.

**Negative effect:** (Of the registration) exists when the document issued by the registrar only gives an indication that the person holding the document might be the legal possessor of the title.

**Notary deed:** Deed prepared by a notary (an official with legal authority).

**Notary:** An independent legally educated official, commonly appointed by the government to prepare deeds in accordance with the will of parties involved in transfers of rights (in Continental Europe). Outside Europe – and in Britain – the notary can have a different position and often is less a public servant, but a recognized specialist to confirm, for example, the identity of a person or to make up certain documents fit for recording.

**Parcel:** Land over which the same subject exercises the same real rights. Generally the parcel is also acquired as a unit under one title or in one transfer (depending on the land registration system).

**Peasant Farm:** An independent farming complex operated by a single family or operated by more than a single family in which case family members, relatives, and other individuals can jointly run the farming unit (Art. 2 of the Law of Peasant Farms of the Kyrgyz Republic).

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3 Note that ‘peasant’ in this context does not have the connotation of ‘backward’ or ‘subsistence’. It is used for individually operated farms as the result of poor translations and censorship.
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<td>Personal property</td>
<td>Property other than land (Anglo-American).</td>
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<tr>
<td>Plot</td>
<td>A part of a parcel used for a specific purpose.</td>
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<td>Pluralism</td>
<td>(Pluralistic legality) A set of values of political morality, discernible in (parts of) the national legal order and the main social institutions of a country. In it the presence of distinct social entities within the national boundaries is recognized, and for that reason the right to wield public authority and to entertain a proper legal order is given to these entities. (Also called Dualism).</td>
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<tr>
<td>Positive effect</td>
<td>(of the registration) Commonly given by law, which in that case explicitly states that the issuing authority certifies or guarantees the title of the holder of the document issued by the registrar (the governmental officer involved in the registration).</td>
</tr>
<tr>
<td>Property</td>
<td>A set of rights and responsibilities concerning a thing, often stated as rights in a thing, to show they are rights against everyone.</td>
</tr>
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<td>Property regime</td>
<td>A complex of rules, principles, and procedures that in a specific community or society regulate legitimate control over, access to, and conditions of use of the means of existence and of production (resources), as well as the acquisition and transfer of such resources.</td>
</tr>
<tr>
<td>Public register</td>
<td>A registration of (abstracts of) documents and land data used for evidence of the existence of, limitations on, and change of ownership of, rights to land that is open for examination of the legal status of land by the public.</td>
</tr>
<tr>
<td>Public property</td>
<td>Property held by any level of government</td>
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<tr>
<td>Re-adjudication</td>
<td>To come to a judicial decision about restitution by study and investigation.</td>
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<tr>
<td>Real rights</td>
<td>Rights that ‘follow’ the object.</td>
</tr>
<tr>
<td>Real Property</td>
<td>Immovable property (in Anglo-American law).</td>
</tr>
<tr>
<td>Regime</td>
<td>A complex of rules, principles and procedures that regulates legitimate control over, access to, and conditions of use of things.</td>
</tr>
<tr>
<td>Register</td>
<td>The official record(s) maintained by the governmental agency responsible for the registration of matters relating to the ownership of rights to land.</td>
</tr>
<tr>
<td>Registrar</td>
<td>The officer authorized by law to accept documents for registration. Under a positive system of registration this person has certain specific powers and is authorized to issue title certificates.</td>
</tr>
<tr>
<td>Registration of deeds</td>
<td>A land registration system in which deeds are used as the most common documents to initiate changes in the ownership of real rights to land (but other documents or evidence of changes are accepted as well).</td>
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<tr>
<td><strong>Glossary</strong></td>
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<tr>
<td><strong>Registration of title:</strong> A land registration system that directly reveals the owner of the rights to land (the one in whose hands the title to land is vested).</td>
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<tr>
<td><strong>Restitution:</strong> The act of restoring to the rightful owner something that has been taken away, lost, or surrendered.</td>
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<tr>
<td><strong>Security of tenure:</strong> Tenure held without risk of loss; in fact a complex matter to measure because it is the perception of the holder that determines the level of security.</td>
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<tr>
<td><strong>Sustainability:</strong> The maintenance or enhancement of the productivity of a resource on a long-term basis.</td>
<td></td>
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<tr>
<td><strong>Title:</strong> The evidence of a person’s right to property.</td>
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<tr>
<td><strong>Title insurance:</strong> Institutionalized system to insure a right to land against loss or defect.</td>
<td></td>
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<tr>
<td><strong>Title registration:</strong> A land registration system that confers a guarantee of the title by the issuing authority (generally the government).</td>
<td></td>
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<tr>
<td><strong>Tenure reform:</strong> The attempt to alter and so improve the rule of tenure.</td>
<td></td>
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<tr>
<td><strong>Title certificate:</strong> A document giving the holder title to land.</td>
<td></td>
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<td><strong>Transfer:</strong> A change of ownership of rights in land (see also Conveyance).</td>
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