MCH91-113-1-5

Aisee,
This is part of the internal report to Ford I mentioned, which makes some attempt to conceptualise on the linkages between land rights/human rights/equity. Roger

As noted above, much time has been spent on background research and analytical work, examining different approaches to land rights issues. An academic and policy literature survey has covered such items as agrarian law; international human rights instruments and procedures; literature from the FAO's agrarian reform division, development law service and forestry division; World Bank and Asian Development Bank documents; regional and country studies on land tenure and agrarian policy; and the specialised literature on indigenous rights, pastoral and social forestry issues. I have come across only a few thematic studies on land rights as such, mainly from Africa. However, much policy literature on social forestry and resource management in Asia deals extensively with the issue.

3. DISCIPLINARY APPROACHES

Land rights is very obviously an inter-disciplinary issue. It concerns at the least agrarian and human rights lawyers, economists, anthropologists, and environmental specialists. While the disciplines will inevitably overlap, the entry point of the various academic and professional disciplines tends to be different.

A legal approach involves identifying the claims of particular groups or individuals to the land, usually to specific land areas, and then working for the protection of these claims through the requisite law enforcement machinery. The reference point can be to international or national law. In most developing countries, there tend to be many ambiguities in national law concerning land rights. Civil law generally provides strong protection for private landowners, while constitutional or agrarian reform law often provides for the social function of property. The latter poses a challenge for the rights recognised under civil law, and places limitations on the exercise of private property rights. Thus legal work on land rights must involve policy research on competing legal claims to the land, and the means to address asuch underlying conflicts, as well as advocacy to address specific land claims. I have come across some policy research by lawyers, by notably in Latin America and Southern Africa, which challenges prevailing national notions of land rights by reference to the principles of international human rights law. This is of particular importance when many of the rural poor are landless workers, tenants of traditional occupiers with no existing legal claims to the land.

International human rights law seems at present only to be of practical value for addressing the land rights of indigenous and tribal peoples. At the national level, it is important to distinguish between countries where the rights of indigenous peoples to <u>specific</u> lands are recognised in substantive law; countries where the ancestral rights of indigenous peoples are

recognised generally in constitutional law but have not been further regulated; and countries where indigenous peoples can have in legal recourse to support land claims. Much of Latin America falls within the first category, India and the Philippines in the second, and Indonesia very definitely in the third. But important work is now being conducted by legal scholars and activists in the latter group of countries, seeking legislative and administrative changes in order to address the issues of customary land rights in national law and practice.

For both academic and policy-oriented work on land tenure and rural development, the predominant discipline tends to be economics. Economists are concerned with the implications of land tenure arrangements for agricultural production and productivity, for rural employment promotion and labour absorption in agriculture. Unlike lawyers, their conceptual starting point may not be the nature of existing legal or customary rights to the land, but rather the system of land rights that is most appropriate for projected models of social and economic development. This is not to say that the question of legal rights to the land is inherently less important for them. In fact most economists place a high premium on secure land tenure, and clear recognition of land rights for cultivators, as a precondition for investment, credit use, and overall efficiency of production. In recent years, such concerns have caused economists (eg. from the World Bank) to place a strong emphasis on land registration, and the promotion of individual titling arrangements, in rural development programmes throughout Africa, Asia and Latin America. But economic approaches will very likely challenge the existing land rights arrangements, and subordinate the question of rights over specific lands to broader economic and social concerns.

At present, there is a vigorous debate among economists concerning the relative merits of common property and individual land ownership systems. This is an issue of particular importance in Africa, where recent research by the World Bank has used the links between land rights and agricultural development to provide a conceptual framework for land rights analysis. The basic argument is that efficiency ultimately requires formal recognition of individual land rights, providing the necessary security for increased agricultural production. Such arguments have been widely contested on economic and social grounds in other academic and policy literature. But economic arguments of this kind have been widely used by national governments and international donor agencies to justify changes in land law and policy, with an increased emphasis on freehold individual rather than customary collective rights of land ownership.

Anthropologists have an important role to play, in studying customary patterns of land use and ownership. Academic and policy studies concerning the land use patterns of indigenous and tribal

peoples, nomads, pastoralists and other shifting cultivators tend largely to be the terrain of social anthropologists. Their approach is to conduct field studies of traditional systems of land and resource use, and often to argue first for the maintenance and protection of such traditional systems, and second for legal arrangements that will reconcile customary and statutory land laws. For anthropologists, land rights as customary rights are seen to exist independent of national and codified law. But the need for codified law is in most cases recognised, in order to stem encroachment and to avert disruption of their traditional lifestyles. The policy implications are often 'that national law must recognise special rights for these population groups, based on examination and understanding of customary law.

Anthropologists, apart from playing a major role in the identification of indigenous and tribal land rights, have figured prominently in the common property debate. In Africa for example, a number of anthropological studies have examined the interaction between customary and statutory systems of land tenure. They often point to the inappropriateness of "national" land law policies, which tend to rely too heavily on European land codes without giving adequate consideration to indigenous tenure systems. The policy implications are that tenure reforms which have resulted in the creation of competing land tenure systems should be abandoned, and policies designed for eliminating the present ambiguities, based on a healthy respect for indigenous land tenure precepts.

Finally, the land rights issue has been addressed from an environmental standpoint. This is of particular importance for social forestry programmes. In the context of widespread deforestation and environmental concerns, there has been growing attention to appropriate land and tree tenure arrangements for suitable resource management. There is a strong reaction against centralised arrangements, in which tenure and discretionary powers are vested exclusively in state corporations, and in which the lack of security for traditional forest dwellers is seen as a serious impediment. In this context, land rights and tenurial options have been widely discussed in the literature of the FAO, the World Bank, and a growing number of non-governmental organisations. Here, the overall objective may not be to address land rights as such. But it is widely recognised that resource managemt programmes must adapt to traditional systems of indigenous tenure, if they are to meet their environmental objectives. This is a further aspect of the resurgence of interest in common property. As observed in a recent World Bank paper on the subject, the development community has gradually come to realise that it will not be successful in addressing resource degradation at the local level, for as long as the very nature of property and authority systems over natural resources are seriously misunderstood in policy formulation and in the

design of donor assistance programmes.

From this standpoint, the need for legal measures to safeguard the land and resource rights has been highlighted in a recent assessment of the Ford Foundation's social forestry programmeas (Keepers of the Forest: Land Management Alternatives in South East Asia). It is observed that, while some planners, development workers and foresters are beginning to consider decentralised forest management, the political will and capacity to begin transferring authority to forest villages remains limited. The legal aspects of transferring management authority to forest commmunities still require much attention. Legal mechanisms need to be designed to protect community interests while providing participants with incentives to achieve national objectives. Thus, legal agreements with forest dwellers should include use rights to an area sufficiently large to sustain the proposed production system, under the management of an appropriate social organisation. And more applied research, including diagnostic studies, is required to better understand the legal and social ramifications of the management transition. Mutually acceptable procedures for deciding dispites and distributing revenues will need to be formulated. Community members will also require a greater knowledge of their legal rights and responsibilities and how to protect them through the judicial system.

There are some similar appraisals in a Ford Foundation Program Statement, Joint Management for Forest Lands: Experiences from South Asia. Again it is observed that a major reason for the failure of forestry programmes appears to be the lack of attention to tenure issues and conflicts over usufruct and protection rights of rural forest communities. Thus largely similar recommendations are made for developing legal mechanisms to empower local communities, and involve them in local resource management through appropriate stewardship contracts.

4. CREATING, RESTORING AND PROTECTING LAND RIGHTS

One of the difficulties in this project so far has been identifying the nature of the multiple claims that can be made to and over the land by different groups, and examining the available strategies for addressing these claims. The initial approach has been an ambitious one, perhaps too ambitious. I have tried to consider the different claims that can be made, under different legal instruments and machinery, for separate groups of the rural poor. I have felt it important to see whether indigenous and tribal peoples, pastoralists and other traditional occupiers do or do not have legal claims that can be pursued through the legal and administrative machinery. I have also examined the inherent ambiguities in national legal systems,

weighing the claims of existing landowners against those of tenants and the landless. I have tried to assess when and whether a rights perspective is useful for addressing agrarian reform policies and programmes.

This has been an empirical task, examining the historical evolution of land tenure systems, and identifying the major historical periods and political circumstances in which conflicts have occurred. Above all, the aim has been to identify some major traditions for recognising and allocating agrarian property, whether under statutory national law or customary arrangements.

This largely historical approach has been important for a number of reasons. In all developing regions, there are some overlapping and conflicting claims to land ownership, use and possession. In simplified version, the major conflicts tend to be between (a) persons who can claim individual rights to specific land areas currently possessed, based on written title the validity of which has been recognised under statutory law (b) persons or groups who can make a historical legal claim to the land which they do not actually possess, basing their claims <u>either</u> on law which remains technically in force, <u>or</u> on past legislation which may have been superseded (the legitimacy of later law being questioned by the land claimants (c) persons or groups who can make claim to specific lands which they currently possess either in whole or in part, referring to customary arrangements and practices, even though their rights to the land are not recognised under existing national law (d) persons who can lay claim under agrarian and agrarian reform legislation to specific lands which have been worked but never owned by them, and to which legal title has been vested in another persons, as for example under "land for the tiller" provisions (e) landless persons or groups who can make a general claim to the land, under the provisions of agrarian reform law which may recognise the general rights of all need persons to agricultural land (f) landless persons or groups who may make a moral claim to the land, on the basis of need and entitlement, even though such claims may in no way be recognised under past or present national law.

Doubtless other types of claim could be added, but these six categories can serve as a conceptual starting point. Some categories point to some commonalities and differences, between sopecific and general claims on the one hand and between historically based claims and need-based entitlements on the other. Though there are some inevitable overlaps, the distinctions seem to be important ones.

I am hoping that this empirical approach will lead to some general criteria, for addressing land rights concerns. It will most likely point to the limitations of legal advocacy, as a

strategy for addressing land claims other than those of indigenous and tribal peoples, and in some cases tenant farmers. But peasant activists and their support groups throughout the world are concerned to find a mechanism for addressing questions of land distribution and access as an issue of human rights and social justice, in an increasingly difficult policy environment. I shall be addressing these questions where land reform is now very much on the policy agenda (including the Philippines and Zimbabwe, and to a leser extent Brazil) and where the Ford Foundation itself has included wider land reform issues in its programme activities. I have yet to decide how much priority to accord to this issue in the working paper.

4. HUMAN RIGHTS AND DEVELOPMENT: SOME POLICY ISSUES

I have tried to examine how the question of land rights may be addressed within human rights and development discourse. This is important for a subsequent discussion of possible strategies.

The parameters of human rights and development approaches will always be difficult ones to define and distinguish. They inevitably overlap, and perhaps nowhere more so than in an area such as land rights. It seems no accident that the programmes of the Ford Foundation itself in the land rights area fall within the area of human rights and social justice on the one hand, and rural poverty and resources on the other. Legal advocacy and education to protect the rights of vulnerable groups over their traditional lands is closely related to objectives of better resource management and sustainable development.

Within the United Nations, recent trends have served to eradicate some traditional distinctions. There has been a concern to proclaim the indivisibility of all human rights; the equal impotance of civil and political rights on the one hand, and economic, social and cultural rights on the other. At the same time there is a tendency to define the very concept of development in the language of human rights. An example is the UN Declaration on the Right to Development, adopted by the General Assembly in 1986, which defined the right to development as an "inalienable right by virtue of which every human being and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised". At this level, the definitions of human rights and development can be so tautological as to become almost sterile.

Among human rights lawyers, it has been commonplace the two sets of rights provided for in the different UN Covenants. Civil and political rights are seen as natural rights pertaining to the individual, which are "negative" in that they are negated by repressive (usually state) action. Economic , social and cultural

rights are often seen as collective rights pertaining to the community as a whole, which are "positive" in that their adequate realisation can only be ensured through positive state action. The rights to education, shelter, health care, and social security fall within this latter category. The different supervisory machinery for the two sets of rights tends to support this view.

Land rights do not fit into the above typology. In fact, land is fundamentally different from anything else to which a human right can be claimed. It is a necessarily finite commodity, access to which can be intimately related to human survival. Food, health and educational services, and even housing, may be poorly distributed, and may reflect an inequitable allocation of existing resources. But in theory, whatever the existing inequalities, there is no reason why these facilities may not be progressively expanded to bring about substantial improvements for all the human race. The amount of land will always remain the same. Persons who own a specific land parcel, with title duly registered in civil law, may be considered to have a civil right to the land. Persons who are utterly dependent on land access for survival, and who have no alternative means of subsistence, must be considered to have an ecnomic and social right to the land in general.

It makes sense to talk of a universal right to food, housing, health care education, and even to employment, whether or not that right is realised in practice at the present time. In a welfare state, there is an implicit assumption that the govrnment itself, through fiscal and other means, will assume the responsibility for providing at least these minimum needs required for human existence. It makes no sense to talk of a universal right to the land. In most industrialised countries it is a matter of no concern to the general populace if one individual or agri-business company owns and controls ten or twenty thousand hectares of prime agricultural land. Land concentration is only a major policy issue for the small farmers affected by it, and for the urban dwellers who may resent the loss of traditional walking areas. For the most part, land access is a question of leisure rather than livelihood.

In most developing countries the connection between the right to land, and the right to food and livelihood, is inevitably more direct. There are few if any welfare provisions on which the rural and urban landless can depend. The majority of the population continues to live in rural areas, and the prospects for employment in the urban sector are exceedingly limited. Thus access to the land, either as cultivators or as waged labourers, is essential for economic survival.

There is a further point. It is much easier to articulate a land right as a legal right in the developed countries where land

rights is not a policy concern, simply because the legal basis of land ownership is not subject to challenge. This is far more difficult in most developing countries, because of ambiguities in law and social policy. The provisions of civil law, which usually provide for firm recognition of private land ownership, can be in conflict with other law that provides for the social function of property, and places limitations on the exercise of private land ownership. Thus it is difficult to determine whether land rights issues at all, and certainly which land rights issues and claims, should be addressed from a human rights perspective.

The concerns of development actors are very broadly speaking with growth, efficiency and equity. Early postwar development models were widely criticised for their exaggerated emphasis on growth, at the expense of equity. It was accepted that growth-oriented policies would lead to significant expulsion of rural labour, but assumed that the labour surplus would be absorbed in the urban industrial and commercial agricultural sectors. This has long changed. In most official development rhetoric, there is a general acceptance that rural development programmes must specifically target the rural poor, and must address distributional and equity considerations. Problems of rural landlessness and rural unemployment, and of land concentration, are highlighted in the policy documents of all major development and donor agencies. The World Bank, FAO and similar agencies all generally accept the need for fairer land distribution, the protection of tenants, and programmes to address the severe and growing problems of landlessness. An example is the Peasants' Charter (adopted at the FAO's World Congress on Agrarian Reform and Rural Development-WCARRD) in 1979, representing the combined views of some 145 member states. This calls for equitable and participatory models of rural development, tenure protection, and measures to arrest the trend towards more concentrated land ownership. Yet the FAO's ten-year assessment of its WCARRD programme, issued in 1989, was an altogether bleak one. Land reform programmes had come to a halt almost everywhere, there were growing inequities and new patterns of land concentration, and landlessness at persistently higher levels. In Latin America in particular the FAO's assessment highlighted the widespread eviction of farmers from tenanted lands, often as a preventive measure to prevent tenants claiming their legal rights to more secure tenure, as well as the widespread dispossession of indigenous peoples from disputed lands.

In this context, the FAO itself has highlighted the importance of institutional legality in rural development strategies. It observed generally that access to justice by the rural poor is usually minimal and the system is liable to operate against them. A new strategy should "aim at simplifying procedures and decentralising the administration of justice to the community. Of special importance in establishing a new legal framework is the enactment and effective enforcement of

legislation protecting the rural poor, such as labour legislation, legislation protecting peasant and indigenous land rights, legislation facilitating and promoting peasant and rural worker unionisation and organisation, and social secrity legislation for the rural poor".

For other regions, some similar observations have been made in the academic literature on rural development. An example is Robert Chambers's Rural Development: Putting the Last First (1983). Chambers observes that law enforcement is a neglected mode of intervention, and has considerable potential for benefiting the poor in South Asia. Land reform in India is cited as an example, in that effective land reform would be the single most effective measure for alleviating rural poverty in that country, and there are land reform laws regulating ceilings and terms of tenure on the statutes of all the Indian states. Chambers emphasises the institutional framework, stressing the need for a rural legal department to ensure rigorous enforcement of existing laws when they favour the poor. He concludes that legal aid for the rural poor has a history of isolated successes, but in most places is a "gap crying out to be filled".

A concern with the role of law and its enforcement in rural development is one obvious example of the way in which the worlds of human rights and development converge. At the local level, with the proliferation of grass-roots organisations working for structural change in rural communities, the distinction is almost meaningless. Such organisations very often blend programmes of material assistance, aimed at the improvement of physical conditions, with legal and educational programmes aimed at enhancing awareness of legal rights and improving access to law enforcment machinery. International donor agencies that work with these ngo's would find it similarly difficult to compartmentalise their work. There are policy decisions to be taken, as to whether to fund any aspect of human rights work, whether to emphasise legal education and services, whether to work with activist pressure groups, whether to prioritise the needs of landless rural workers and other vulnerable groups, whether to work for agrarian reform. But once such decisions have been taken, the promotion and protection of human rights forms an integral component of programmes for rural poverty alleviation.

In the official development and donor agencies, whether bilateral or multilateral, the worlds remain quite far apart. Attempts by international human rights groups to influence the policies of such agencies have often focused on broad human rights issues, which may be of little relevance to the project at hand. A more acceptable approach has been to identify the concerns of specific relevance to projects, in much the same way that environmental impact assessments are conducted at the project level. Both the Word Bank and the Asian Development Bank (ADB) have been developing internal guidelines for social

analysis of their projects. The need for environmental impact assessments is now officially accepted, by both the development banks and UNDP. Both ADB and the World Bank are now extending these guidelines to include the land and resource rights of indigenous and tribal peoples, paying due attention to new international law in this area. The Danish 'international development agency DANIDA, in a new publication on Human Rights in Danish Development Cooperation, has stressed the need to intergate human rights considerations at the project level, by identifying the relevant aspects in various project types, such as labour rights in an industrial project, or land rights in certain agricultural projects. This is partly to ensure that the project activities do not violate or neglect the rights of affected groups or individuals; and partly to ensure that the projects contribute as far as possible to enhancement of human rights (through educational and training programmes, or through legal assistance to particularly vulnerable groups). DANIDA observes that this question has not as yet been the subject of much attention in the United Nations or in other international aid organisations , and that there are thus no brtoadly accepted guidelines from which to start. But it refers to recent endeavours by the ILO, which has made a concerted effort to integrate human rights standards with its development efforts through reference to the ILO's own standard setting Conventions.

This is one way of approaching land rights in development policy. The ILO has certainly taken a lead in this area, and its internal guidelines could be of much use to other development agencies. Apart from its new Indigenous and Tribal Peoples Convention, which addresses land rights directly, the ILO has a number of other instruments on tenants, sharecroppers and rural workers' participation in economic development. However, unless project level appraisals are to be limited to empirical surveys of the existing land tenure situation, it will be difficult to conduct such assessments without an overall appraisal of land rights issues.

5. STRATEGIES FOR A LAND RIGHTS PROGRAMME; ISSUES AND OPTIONS

Half way through this project, it would be premature to formulate detailed proposals. I have yet to complete the field visits, and have barely commenced the mapping survey of existing international institutions. So far I have been more concerned to identify what the main issues are, than to examine how to address them through either policy-oriented research or a more activist approach.

As many of the field consultations have been with the Ford Foundation's own grantees, I can begin with a brief assessment of the main strategies utilised, and the problems encountered.