

Human Rights and Development

Towards Mutual Reinforcement

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The Properties of Gender Equality

KERRY RITTICH

6.1 INTRODUCTION

It has long been observed that there is a gross disparity between men and women in the control of property.¹ Because women's lack of property is a fact about the world, and in many places women lack rights to property as a matter of cultural or juridical norms as well, equality in land rights holds a central place in the narrative of gender empowerment.² Indeed, important exceptions aside,³ the idea that rights to land are critical to gender equality at this point seems obvious, even banal, rather than seriously contested.

The importance of gender equality in land is accepted not only from the standpoint of human rights; it is also becoming conventional wisdom within mainstream development debates. Because of a confluence of events in the field of development in the last few years—the move to 'socialize' the development agenda,⁴ an important, if tentative, merger of the goals of development and human rights,⁵ the recognition that gender equality is

¹ 'While women represent half the global population and one-third of the labor force, they receive only one-tenth of world income and own less than one percent of world property. . . . Report to the UN Commission on the Status of Women, cited in Robin Morgan, 'Introduction: Planetary Feminism: The Politics of the 21st Century', Robin Morgan, ed., *Sisterhood is Global: The International Women's Movement Anthology* (Garden City, NY: Anchor Books, 1984) 1.

² Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981, Article 16 (h); United Nations Fourth World Conference on Women, Declaration and Platform for Action (Beijing Platform), 15 September 1995, 35 I.L.M. 401 (1996), c. IV, a; U.N.G.A., Report of the Ad Hoc Committee of the Whole of the Twenty-third Special Session of the General Assembly (Beijing + 5), A/S-23/10/Rev.1 (Suppl. No. 3), 10 June 2000, para. 8.

³ See for example the reservations to the Beijing Platform, above n. 2, in respect of women's inheritance rights.

⁴ James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework (A Discussion Draft)* (Washington D.C.: World Bank, 1999).

⁵ Amartya Sen, *Development as Freedom* (New York: Anchor, 1999).

'good for development',⁶ and the increasing references to gender equality in development agendas as a result⁷—it is no longer a struggle, at least at the normative level, to make the case for gender equality in rights to property in general and rights to land in particular.

To date, concerns have centered primarily around norms which limit or exclude women from access to land. In both development and human rights literature, customary and religious law, social norms, and/or inadequate or discriminatory formal laws are typically characterized as 'the problem' for women; transforming such norms and ensuring the formal equality of women to hold property is 'the answer'.⁸

There are clearly ongoing concerns around entitlements to land for women.⁹ The pursuit of gender empowerment without attention to the distribution of land is an enterprise that is fatally hobbled from the outset as, for a large percentage of the world's population, real assets come primarily in the form of entitlements to land. However, it would be a mistake either to assume that formal equality exhausts the issues of interest around property rights and gender empowerment or to conclude that ensuring gender equality in respect of land rights is simply a matter of transforming social norms, enforcing the law, or compelling outlier states to bring their legal regimes into conformity with current human rights and development norms.

Instead we need to consider the nature of property regimes as well. The growing attention given to gender equality, human rights, and the social dimension of development and globalization has been accompanied by an increasing preoccupation with good governance, the rule of law, and legal and institutional reforms that promote economic growth. A central part of this legal-institutional reform project is the commitment to a particular type of property regime. This regime is one in which property entitlements are secured through formalization of title; entitlements are consolidated and individualized; ownership is largely privatized; and regulation is minimized or eliminated. The aim of these reforms is to enhance the value of land as an asset and, by creating markets in land and facilitating the transfer of both

⁶ World Bank, *Engendering Development: Through Gender Equality in Rights, Resources and Voice* (Washington D.C.: World Bank, 2001).

⁷ World Bank, *World Development Report 2002: Building Institutions for Markets* (New York: Oxford, 2001); World Bank, *World Development Report 2003: Sustainable Development in a Dynamic World* (Washington D.C.: World Bank, 2002).

⁸ See generally, World Bank, *Engendering Development*, above n. 6. The World Bank's policy research report on gender and development identifies equality in land rights as one of the four areas in which legal reforms are required to ensure gender equality.

⁹ See for example Florence Butegeva, 'Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-level Action', in Abdulahi A. An-Na'im, ed., *Cultural Transformation and Human Rights in Africa* (London and New York: Zed Books, 2002) 108.

land titles and interests in land, increase the overall levels of productivity and commercial use of land, thereby spurring greater economic growth.¹⁰

It is now recognized that the wider constellation of institutional and regulatory reforms of which these property regimes are a part is profoundly important for gender equality and human rights. Indeed, it lies at the center of a host of distributive justice concerns in the global economy.¹¹ This chapter seeks to link these observations to the agenda for land reform, and to suggest that the commitment to transforming property regimes so that they better conform to the ideals of formalization, individualization, and commercial exploitation poses a distinct set of risks and challenges for women. The effects are certain to vary from context to context. However, because of the far-reaching effects of these regimes, it is unsafe to assume that gender equality is achievable simply by ensuring the formal legal equality of men and women.

There are two sets of problems, one focused on the effects of property regimes themselves, and the other on the larger vision of development in which such property regimes are embedded. Paradoxically, efforts to promote security of tenure through the formalization of title may both improve the status of women and go hand in glove with dispossessing women of property. Among other things, it depends on who gets title and what interests get recognized in the process of formalization.

Happily, there may be efficiency benefits to a better allocation of entitlements: a more equal distribution of land may contribute to future growth¹² and a more equal allocation of land and other resources between men and women may be especially good for growth.¹³ However, the distributive concerns do not stop at this point. The consolidation of interests and the individualization of title may also function to limit or exclude the claims of those other than the title holder, many of whom, as a consequence of gender norms, we should expect to be women. In addition, women face a particular set of risks and disadvantages in market transactions and labor markets, a result of which may be that more intense commercialization of land exacerbates gender inequality. Ultimately, all of these effects may be

¹⁰ References to the benefits of such regimes are legion in development literature. For a recent effort to re-articulate the theoretical bases of such regimes, see World Bank, *Land Policies for Growth and Poverty Reduction* (New York: Oxford University Press, 2003).

¹¹ Gerry Helleiner, 'Markets, Politics and Globalization: Can the Global Economy be Civilized', United Nations Conference on Trade and Development (UNCTAD) 10th Raul Prebisch Lecture, Palais des Nations, Geneva, 11 December 2000; J. Garthi, 'Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', *5 Buffalo Human Rights Law Review* 107 (1999). Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003).

¹² World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10, 18–20.

¹³ World Bank, *Engendering Development*, above n. 6, 11.

equally, or even more, important to the question of gender equality than whether men and women have equal formal legal rights to land. Thus, the status of women is a function not only of formally equal entitlements to land, but of the 'gendered properties' of different property regimes, the ways that they affect participation in the market, and the vision of development in which they play such a central role.

6.2 PROPERTY AND HUMAN RIGHTS UNDER GLOBALIZATION

It can no longer simply be assumed that what is good for growth is good for human rights in general or for particular constituencies such as women or indigenous groups. Indeed, an important part of the critique of the first generation development agenda was predicated upon the conflict between the canonical set of 'Washington consensus' principles, rules, and policies and aspirations for greater social justice.¹⁴

As human rights have emerged as the universal language of social justice,¹⁵ so they have become the main counter-discourse to globalization. Concerns about disempowerment, disenfranchisement, and dispossession in the context of market reforms and global economic integration are typically expressed in terms of human rights. The social deficit of globalization is almost invariably described as a lack of attention to human rights, and human rights principles are advanced as at least part of the solution to demands for greater empowerment and distributive justice in the global economy.¹⁶

The actual and potential risks to human rights, gender equality, and economic, social, and cultural rights in particular, under conditions of what

¹⁴ G. Cornia, R. Jolly, and F. Stewart, *Adjustment with a Human Face* (New York: UNICEF/Claarendon, 1987); 'Washington consensus' stabilization policies have also been heavily criticized by economists for their impact on domestic capital formation, domestic financial intermediation, and industrial structure in developing economies. These critiques are not principally concerned with the distributional consequences of the stabilization policies but with macroeconomic and microeconomic effects. See, e.g., Lance Taylor and Ute Pieper, 'The Revival of the Liberal Creed: The IMF, The World Bank and Inequality in a Globalized Economy' in D. Baker, G. Epstein, and R. Pollin, eds, *Globalization and Progressive Economic Policy* (Cambridge, U.K.: Cambridge University Press, 1998): 37–64.

¹⁵ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell, 1998) Introduction.

¹⁶ United Nations, Committee on Economic, Social and Cultural Rights (CESCR), 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights', statement adopted by the CESCR on 4 May 2001, E/C.12/2001/10. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/518e885b89822c9c1256a4c004df048?OpenDocument>.

Stiglitz has termed 'market fundamentalism',¹⁷ have now been well documented. A range of policies and strategies associated with contemporary 'good governance' norms—structural adjustment programs, privatization, 'deregulation', and the emphasis placed on efficiency and fiscal austerity—have all been identified as potential threats to human rights or as actual violations of human rights.¹⁸

Yet despite their centrality to the 'good governance' project, contemporary property reforms have not appeared on the radar of the human rights community. Disputes over the reach of intellectual property rights¹⁹ and conflicts with indigenous rights aside, securing property rights is more commonly accepted as simply part and parcel of respect for human rights. Linkages between human rights and property rights are proliferating everywhere. For example, the reformed development agenda of the World Bank puts property rights on par with human rights.²⁰ Following de Soto,²¹ a recent International Labour Organization (ILO) report on the social dimensions of globalization identifies the formalization of property rights as a critical component of poverty reduction and social progress in developing states.²² The right to property is itself now identified as basic to the idea of development as freedom.²³

The powerful arguments about the relationship between property rights and economic growth,²⁴ and the associated assumption that growth is the precondition to social progress and the realization of social and economic rights, make it easy to conclude that the protection of property rights is something to which social justice activists and the human rights community should be uncritically committed. This conclusion should give us pause.

¹⁷ Joseph E. Stiglitz, *Globalization and its Discontents* (New York: Norton, 2002) Ch. 1.

¹⁸ United Nations Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 'Statement on Globalization and Economic, Social and Cultural Rights', Geneva, 11 May 1998, available at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView?dc44375895aa10c8025668f003>.

¹⁹ World Trade Organization, *Doha WTO Ministerial 2001: Ministerial Declaration*, 20 November 2001, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

²⁰ Wolfensohn, *A Proposal for a Comprehensive Development Framework (A Discussion Draft)*, above n. 4.

²¹ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

²² ILO, *A Fair Globalization: Creating Opportunities for All*, Final Report, World Commission on the Social Dimensions of Globalization, 24 February 2004, available at: <http://www.ilo.org/public/english/wcsdg/index.htm>, para. 256.

²³ Sen, *Development as Freedom*, above n. 5.

²⁴ Ibrahim Shinata, 'Law, Development and the Role of the World Bank', *Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms* (The Hague: Kluwer, 1997); World Bank, *Doing Business in 2004: Understanding Regulation* (Washington D.C.: World Bank, 2004).

The heightened emphasis on the protection of property is institutionally and politically related to the current character of development thinking and to the shifting perceptions about appropriate roles and functions of different social institutions. It is a marker of the influence of financial markets and the international financial institutions on the development of policy and regulatory priorities at the national and international levels. It is also a reflection of the important role assigned to private actors in the advancement of social, economic, and political goals and the effort to contain the reach of the state. For example, a recent World Bank report on the links between legal regimes and economic growth contends that, while governments generally do 'too much', the one area in which they fail to do enough is the protection of property rights.²⁵ In other words, the prominence of property reflects much more than simply a set of empirical observations about the connection between property rights and growth. Rather, it is linked to a host of deeply contested debates about the organization of economic, social, and political life, and the role envisaged for property rights in development should be thought of as part of a broader effort to promote more entrepreneurial societies.

The enhanced importance of both the distribution of property and property regimes is also a structural outcome of reforms in another sense. The 'deregulation' of markets, whether they are markets in land, labor, or anything else, does not leave a legal vacuum but rather a regime in which transactions are structured largely by property, contract, and other private rights. The privatization of assets changes not only the locus of title but typically the distribution of assets and the class of beneficiaries within societies as well. Reducing the redistributive and risk-spreading activities of the state leaves individuals and households more dependent on their own assets, making access to property of greater importance.

There is no necessary conflict between the protection of property rights and greater social justice; property reform may indeed be an essential ingredient of social justice. However, despite claims to the contrary, the protection of private property does not necessarily enhance either the general level of social welfare or the extent of social justice. It is worth recalling that fierce social and political struggles are often played out in and around property rights. For example, property norms are well-known instruments of conquest,²⁶ and demands for land reform are often central to social protest and revolutions. Property reforms have strengthened the power of the commercial class and at the expense of the agrarian;²⁷ they have been invoked to defeat legislative efforts to enhance worker rights;²⁸ and they are currently

²⁵ World Bank, *Doing Business in 2004: Understanding Regulation*, above n. 24.

²⁶ *Johnson v. M'Intosh* 21 US 543, 5 L.Ed. 681, 8 Wheat. 543 (1823).

²⁷ E. P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London: Allen Lane, 1975).

²⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

the locus of struggle over control of biological resources between indigenous communities in the developing world and pharmaceutical companies.²⁹ The disposition of property and the status of property rights have been critical in transitions from colonial to post-colonial rule and apartheid to post-apartheid states. This is reflected in the Declaration on the Right to Development, which asserts the sovereignty of peoples over their natural resources and the right of states to formulate development policies to the benefit of all, and emphasizes the importance of distributive justice.³⁰ As these scenarios disclose, the critical questions are not simply whether property rights should be protected, but rather what those rights should be, who should possess them, to what extent, and to what effect in any given context.

To date, property rights have attracted the attention of women's rights and human rights scholars largely because of concerns about discrimination in entitlements to land. The argument is that, here as in other contexts, it is important to both widen the inquiry and flip the lens. Given the centrality of property reforms and the claims that formalization of title is not only good for growth but now good for the poor as well, it is critical to scrutinize the gendered effects—the effects on women's human rights—of the drive to formalize property rights in land, consolidate title in a single owner who possesses the power to conclusively dispose of the interests at stake, promote the creation of markets in land in order to link local with global markets, and encourage the use of land as security and collateral for other economic ventures.

6.3 PROPERTY IN DEVELOPMENT

Reforms to property rights now center around three types of transformation: formalization, individualization, and commodification.

6.3.1 Formalization

The importance of formalization lies in the key role that certainty of entitlement and security of tenure play in promoting the most efficient use of land.³¹ The basic argument is that property holders will under-invest in their property to the extent that they cannot be certain of reaping the rewards, and

²⁹ World Trade Organization, *Doha WTO Ministerial 2001: Ministerial Declaration*, 20 November 2001, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

³⁰ G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

³¹ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10, 8.

growth will suffer as a result.³² In addition, there are considerable benefits to formalization because of savings on transaction costs. Finally, formalization is necessary to 'modernize' the economy and to enable producers to branch out beyond local markets and participate in the global economy.³³

According to its proponents, formalization of title can be especially beneficial to the poor, for the reason that the poor generally lack access to capital other than land. Formalization thus serves to transform land into an active resource that can be used for economic development.³⁴ Formalization may also have collateral benefits, such as increasing the available resources of central and local governments by increasing property tax revenues.³⁵

6.3.2 Individualization

Individualizing property rights is advocated on the basis of the 'tragedy of the commons'. The argument is that optimal property use will invariably suffer when it is under common control, while '[i]ndividual assignment of property rights is the arrangement that provides the greatest incentives for efficient resource use'.³⁶ For similar reasons, the privatization of land is assumed to be beneficial, while the nationalization of land is presumptively bad.³⁷

The basic efficiency argument is accompanied by a dynamic analysis which holds that property rights tend to become more precise as land values rise while control becomes both more important and more contested. Individual title, too, becomes more functional in the course of development: while there are instances in which collective rights are the best way to deal with externalities, these tend to decline with modernization.³⁸ The merits of individualization also provide a set of arguments against the regulation of land. Like multiple interests, regulation can function as a 'clog' on title, slowing transactions, impeding transferability, and generally reducing the efficient use of property.

However important, the arguments for individual title and unimpeded control are not exhausted by economic concerns: there are political and

³² See Karen O. Mason and Helene M. Carisson, 'The Development Impact of Gender Equality in Land Rights', in this volume, Chapter 7.

³³ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10, 24.

³⁴ de Soto, above n. 21.

³⁵ Inter-American Development Bank (IDB), Loan Agreement with the Government of Belize, Land Management Program, (BL-0017), executive summary on file with the author.

³⁶ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10, 24 citing Robert Ellickson, 'Property in Land', 102 *Yale Law Journal* 1315 (1993). For a consideration of this argument in the context of transition, see Michael Heller, 'The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets', 11 *Harvard Law Review* 621 (1998).

³⁷ *Id.* at 4-5.

³⁸ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10. These ideas have a fairly established pedigree in development economics.

institutional concerns as well. At the heart of this claim is a particular image about the inherent nature of property rights: property rights confer a Blackstonian sphere of unfettered control and dominion upon the right holder.³⁹ While encroachments may be justified for compelling economic reasons, the baseline assumption is that property rights confer total, rather than fractional, ownership and control. Except with respect to the property rights of shareholders to a corporation, the burden of proof lies upon those who wish to argue for restraints on this control. This burden is intensified in the context of development for at least two reasons. One is the association of regulation with government failure and corruption.⁴⁰ The other is the argument, especially salient in the context of post-communist economies, that property rights function to insulate the individual from the predations of the state.

6.3.3 Commodification

An important reason for both the formalization and individualization of title is to enhance the commercial value of land. Once formal title is secure and the number of interest holders reduced, ideally to one, land can be used more effectively to promote growth in a variety of ways. It can be alienated outright or rented to those who may use it more productively. It also becomes transformed from a 'dead asset' into something that can be used as collateral for loans, whether to access equipment or enable investments to enhance the value of the land itself or as security for other economic enterprises.⁴¹ These processes, in turn, can be expected to reduce the demand for agricultural labor and increase the available labor supply for other ventures. Thus, the particular purposes for which property rights are introduced—hooking local markets up to global markets and facilitating transactions—come to determine the nature of the rights themselves.

6.4 PROPERTY AND GENDER EQUALITY

Gender theorists and activists have enumerated a number of ways that standard approaches to property in development thinking might pose problems for women, undermining rather than enhancing their status and empowerment. The perils of property reforms are well documented in the

³⁹ William Blackstone, *Commentaries on the Laws of England* (Chicago and London: University of Chicago Press, 2002); Joe Singer, 'The Reliance Interest in Property', 40 *Stanford Law Review* 6:1 (1988).

⁴⁰ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10.

⁴¹ de Soto, above n. 21.

post-communist economies too: dramatic concentrations of wealth⁴² and the impoverishment of large sectors of society resulted from privatization efforts gone awry. It would be a mistake to assume that these problems lie in the past, now remedied by greater attention to institutions and gender equality. Rather, institutionalization itself can be the problem. For this reason, attention to who holds title to property is crucial. Land reforms that fail to require either joint titling or special rights for women may undermine the status of women. Similarly, reliance upon market mechanisms may deprive women of access to land that they would otherwise have under customary law.⁴³

These types of property regimes may generate systematic disadvantages for women and actually increase the degree of inequality between men and women, for a number of reasons, such as gendered differences in the ownership and control of property, the presence of plural legal systems, the gendered distribution of paid and unpaid work, and the differences in men and women's capacity to both participate in markets and derive economic benefit from that participation. However, whether disadvantages are generated may depend on the presence or absence of a host of other legal and social entitlements and institutions, and on the wide variety of ways in which property claims are adjudicated or otherwise disposed of. In other words, calculating the effects of transformations in property regimes for women requires much more than simply projecting a set of economic effects of property rights in the abstract; it requires an assessment of the wider institutional matrix in which they operate.

This is no easy task. Because the relationship between property regimes and social and economic outcomes is contingent, there is no single property regime that can be safely associated with gender empowerment or the protection or advancement of human rights across context and time. Yet while it is impossible to specify *ex ante* a set of property entitlements that is unequivocally associated with the promotion of gender equality, it may be possible to say quite a lot about what structure of entitlements might exacerbate or mitigate gender inequality in a given context, and why. And it is possible to say still more about why the property regime now promoted as the precondition of economic integration and growth, without more, might systematically work against the interests of women, or some groups of women, even if it appeared to be efficient in the aggregate in the sense of generating greater measurable market returns. However, the reasons for which it fails to improve the status of women also say a great deal about why it might not actually be efficient either, certainly in the medium to long term. The short answer is that, while there has been intense interest in the potential

⁴² Adrian Levy and Cathy Scott-Clark, 'He won, Russia lost', *The Guardian* (Manchester, UK), 9 May 2004.

⁴³ World Bank, *Engendering Development*, above n. 6, 120–122.

benefits of such regimes, there has been a distinct failure to tally, and sometimes even to recognize, the total costs that are typically involved in moving from one regime to another. What follows is an effort to say more about what might actually be at stake in the processes of formalization, individualization, and commodification.

Whatever the motivation, efficiency-enhancing measures like titling systematically generate distributive outcomes and effects that tend to be persistently underplayed, if not ignored outright.⁴⁴ The basic argument is that the benefits of reforms, whether to property rights or other rules, cannot be untethered from these distributive effects. Women may experience both benefit and harm from reforms to property. However, we are well past the point in experiments with legal and institutional reform at which it is possible to simply assert, as either a theoretical or empirical claim, that the institution of property rights amounts to progress per se, or that 'in the long run' we will be better off. This is particularly true if egalitarian and distributive concerns rank highly in the social welfare calculus. There are repeated instances, both contemporary and historical, in which the transformation of property rights has been associated with income polarization, significant declines in welfare, and/or outright dispossession.⁴⁵ At minimum, we need to investigate how and why this might occur in the course of development and market reform. By now, we should also *expect* the process of redistribution to occur. In investigating these issues, the real question in any event is not 'property, good or bad', but rather the structure of property rights and the manner in which they are allocated.

6.5 RETHINKING THE PROPERTY NARRATIVE

However persuasive from within the discipline of economics,⁴⁶ from the standpoint of law the conventional arguments for the formalization, individualization, and commodification of property seem incomplete at best, and seriously misleading at worst. Although a comprehensive analysis is not possible here, because it is so central both to the logic of development *and* to understanding the potential for ongoing, even increased, gender equality, it seems important to at least briefly sketch an alternative account of the operation and effects of property regimes. A number of general observations about the account of property given in development thinking can be made.

⁴⁴ For a more sustained exploration of this argument, see Kerry Rittich, *Recharacterizing Restructuring: Law, Gender and Distribution in Market Reform* (The Hague: Kluwer, 2002).

⁴⁵ Katherine Verdery, *The Vanishing Hectare: Property and Value in Postsocialist Transylvania* (Ithaca, NY: Cornell University Press, 2003); Rittich, *Recharacterizing Restructuring: Law, Gender and Distribution in Market Reform*, above n. 44.

⁴⁶ I am leaving aside here any internal economic critiques of such property regimes.

One is the functionalist, evolutionary view that is taken of the transformation of property rights; another is the orientation towards efficiency to the exclusion of other concerns and effects; yet a third is the belief in the efficacy of formal rights.

Reading mainstream economic accounts, one would think that the transformation of property can be accounted for by efficiency concerns and that property rights induce both a defined set of responses from economic actors and a defined set of legal conclusions from adjudicators. However, even passing familiarity with property laws in market societies confirms that property rights vary significantly both among societies and within societies over time, and that even formally similar regimes seem to be associated with very different economic outcomes. Definitions of property rights are affected as much by social and political conflict as by economic progress. Efficiency criteria often seem marginal to judges in the disposition of property claims; sometimes they are totally eclipsed. In short, from the inside of law, property rights seem both conceptually and mechanically quite different.

6.5.1 Realist and Post-Realist Ideas about Property

Property is conventionally described in post-realist legal analysis⁴⁷ as a bundle of infinitely divisible rights that can be combined, recombined, and allocated in a number of ways.⁴⁸ Whatever the merits of secure property rights, the *structure* of property rights is not something that can be simply assumed. Nor can it be determined by invoking the importance of property alone: it is the very question to be answered.⁴⁹ And however appealing the prospect of unfettered control from an efficiency standpoint, the property rights of owners cannot be absolute without defeating a host of other interests and values.⁵⁰

One reason is that property is in essence a set of relations among people in respect of things tangible and intangible: to put it another way, property has a social, rather than a merely economic, function.⁵¹ Although property

rights are often figured as a counterweight to state or local power in development literature,⁵² the scope of property rights is a public, not private, matter: where rights are formalized, property amounts to a delegation of sovereignty from the state and a decision about the extent and nature of control to which owners are entitled vis-à-vis non-owners.⁵³ Because property rights often confer a significant amount of control over the lives of others,⁵⁴ determinations about their character and reach are inherently political, in the sense that they concern the allocation of resources and power among different social groups. Property rights do not merely protect wealth or reduce the costs of transactions; they also *produce* wealth. The assertion, that as property becomes more valuable it attracts more legal protection, does not capture either the process or the interests at stake. Legal regimes both enhance and impair the value of property; property may not even *exist* except as an effect of law. For example, it is the law which produces almost all of the value of new pharmaceutical products. By securing their exclusive entitlement to produce the product, the law confers enormous leverage on patent holders in setting price levels and capturing future profits. Moreover, property rights produce a particular *distribution* of wealth: they not only create value, but determine who can draw on the value that is created and by how much. Where access to property is crucial for survival, well-being, or even simply status, this means that property rights impose costs and burdens on others.⁵⁵ This is why the manner in which property rights are structured powerfully influences the distribution of gains in the market.

There are multiple possible ways of configuring property regimes in market societies. Property rights can be divided up in many ways, and they are routinely rather than exceptionally regulated in a variety of ways. Entitlements may be allocated to multiple interest holders internally through property law doctrine notwithstanding that title is vested in a single owner. The common law, for example, can effect a separation between legal and beneficial ownership through trust instruments and allocate entitlements across time through the creation of life and other estates. The scope and

⁴⁷ For a survey of the literature of the realist tradition in American legal thought, see William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, *American Legal Realism* (New York: Oxford, 1993).

⁴⁸ Thomas C. Grey, 'The Disintegration of Property', in J. Roland Pennock and John W. Chapman, *Property: Nomos XXII* (New York: New York University Press, 1980) 69.

⁴⁹ Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* 809 (1935); Singer, 'The Reliance Interest in Property', above n. 39, 637-641.

⁵⁰ Joe Singer, *Entitlements: The Paradoxes of Property* (New Haven and London: Yale University Press, 2000).

⁵¹ Greg Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago and London: University of Chicago Press, 1997).

⁵² See for example World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10.

⁵³ Morris Cohen, 'Property and Sovereignty', 23 *Cornell Law Quarterly* 8 (1927).

⁵⁴ C. B. Macpherson, *Property: Mainstream and Critical Positions: a Reader* (Toronto: University of Toronto Press, 1978) Introduction; Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; Max Weber, 'Freedom and Coercion', in M. Rheinstein, ed., *Max Weber on Law in Economy and Society*, trans. E. Shils and M. Rheinstein (Cambridge, MA: Harvard University Press, 1954) 188-189.

⁵⁵ W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* 28 (1913).

operation of property entitlements are also inevitably affected by the nature of other legal entitlements. While the resulting structure of property rights may be complex, there is nothing mysterious about the reason for the complexity: there are simply myriad individual and social interests at stake which are expressed and ratified through the medium of property law. The point of rehearsing these facts is simply to emphasize that development discourse and policy tends to deploy a radically compressed range of property regimes that operate, or that might potentially operate, within market-based societies.

Developing and transitional states are frequently advised to simplify ownership structures and reduce the degree of regulation, whether because of the absence of developed legal systems, the presence of corruption, or the possibility of regulatory capture. However, these arguments seem less persuasive once it is recognized that customary property rights, too, can be very complex,⁵⁶ and that developing states are typically under simultaneous pressure to adopt other economic laws that are relatively complicated and expensive to administer. But the more important point is simply that the trade-offs and losses involved in simplifying and deregulating property regimes may be very high. Whatever the concerns about the capacity of the state or the local administration, it is not possible, without damage, to simply dismiss the functions that such institutions perform. For example, land regulation may be efficiency-enhancing even in conventional terms, because of some imperfection in land markets themselves; in the alternative, it may preclude uses that, while efficient from the standpoint of the owner, impair either future use or other valuable ends. This is well recognized in theory, even if it tends not to be reflected in legal reform prescriptions. Property regimes are incredibly complex social institutions that are ultimately inseparable from the welfare, power, and resources of particular groups. Decisions about property rights amount to fundamental decisions about social ordering; they both make and reflect those decisions. Disruptions to entrenched property rights can thus amount to disruptions to the social order. While this does not in and of itself tell us whether changes to particular property regimes are likely to be beneficial, it does put us on notice that the transformation of property regimes entails something much broader than the mere promotion of efficiency and growth. At minimum, it suggests that potential dislocations to potentially wide networks of people who depend in some way on access to land must be taken seriously. This in turn suggests that the rejection of the 'one-size-fits-all' approach, now standard in other areas of development thinking, should apply to property rules and regimes too.

⁵⁶ See for example Sally Falk Moore, *Law as Process: An Anthropological Approach* (London; Boston: Routledge & K. Paul, 1978).

6.6 PROPERTY IN DEVELOPMENT REVISITED

This brief review of the mechanics of property rights in action suggests a number of insights, all of which may be relevant to the question of property reforms and to the matter of gender empowerment.

- We are always *in medias res*: there is never any system of 'non-allocation' of property rights, even if those rights are incompletely specified under formal or customary law.
- Formalization is unlikely to merely record pre-existing interests. Rather, providing greater security, certainty, and predictability, whatever the underlying motivation, will necessarily alter the existing distribution of property rights.
- Because property rights operate in a relational fashion and because they normally empower the owner to exclude, to say that property provides security is to say both too little and too much: they are simultaneously a source of security and insecurity. Thus, advocating the security of property rights does not answer the critical question: security for whom?
- The different elements of property reforms—formalization, individualization, and commodification—are not in any way entailed by each other. Rather, they are distinct and separable. Nor do the benefits of formalization necessarily justify the individualization of title or intensified efforts to commodify land. The costs and benefits of each element need to be considered independently and in context.
- It is unsafe to simply equate formalization with the creation of legal certainty. Because property rights function as a conclusion rather than a premise,⁵⁷ property disputes can be decided in a variety of ways. Judges face a range of choices in the process of adjudicating claims. The decisions they reach may both affect the power and position of the claimants and modify, strengthen, or subvert the property right itself.
- Property rights will inevitably operate differently and generate different effects in different contexts. Formal property rights inevitably function in tandem with other normative orders, ranging from customary law to informal social and cultural norms, including gender norms.⁵⁸ This fundamental insight about legal pluralism is curiously absent, or at least under-explored, in much mainstream development literature. However, it, too, complicates the claim that property rights engender certainty and security in fundamental ways. The presence of social or cultural norms about the proper uses of property, for example, may affect the way that

⁵⁷ Cohen, 'Transcendental Nonsense and the Functional Approach', above n. 49, 809.

⁵⁸ Moore, *Law as Process: An Anthropological Approach*, above n. 56.

property disputes are decided, notwithstanding the structure of formal entitlements.⁵⁹ This suggests that where there are multiple interests at stake, decisions about the disposition of property are unlikely to be completely governed by efficiency even where property rights are formalized.

- Because property rights in action include the total complex of norms and decisions in operation, it is unrealistic to simply transplant legal regimes from one context to another with the expectation that they will produce roughly similar results. Even if the idea is to generate a set of economic effects and outcomes, there is unlikely to be any single, 'right' regime that will do so in a predictable way.
- The relationship between property rights and growth is complicated rather than straightforward; generating economic growth almost certainly involves much more than instituting the right set of legal incentives.⁶⁰ How should we account for the fact that growth may be robust, notwithstanding relatively uncertain property rights?⁶¹ Or that, as a historical matter, growth has been associated with instability and disruption to established property rights, as well as certainty and stability of entitlements?⁶²
- The protection of property rights is in no way incompatible with regulation; notwithstanding the arguments in favour of unfettered control, property is typically regulated in myriad ways in market societies. The regulation of property (and contract) may actually preserve the viability of markets and preserve the physical, social, and human capital that enables them to function in the long term.⁶³
- It is also unsafe to assume that intensified market activity in land is always welfare enhancing. Countries experiencing the transition from communism and planned economies are good examples. Processes such as

⁵⁹ Celestine I. Nyamu, 'Gender, Culture and Property Relations in a Pluralistic Social Setting', SJD dissertation, on file at the Harvard Law School library, 2001; Celestine I. Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries?' 41 *Harvard International Law Journal* 381 (2000); Lesiye Amede Obiora, 'Remapping the Domain of Property in Africa', 12 *University of Florida Journal of Law and Public Policy* 57 (2000).

⁶⁰ Verdery, *The Vanishing Hectare: Property and Value in Postsocialist Transylvania*, above n. 45.

⁶¹ Matthew C. Stephenson, 'A Trojan Horse Behind Chinese Walls: Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the Peoples' Republic of China', CID Working Paper no. 47, Center for International Development, Harvard University, 2000.

⁶² Frank Upham, 'Mythmaking in the Rule of Law Orthodoxy', Working Paper no. 30, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, September 2002.

⁶³ This is an old insight about market economics. See Karl Polanyi, *The Great Transformation* (Boston: Beacon, 1957).

privatization and commercialization may be 'captured' by local or external elites, leading to the dispossession and impoverishment of substantial numbers of local people.⁶⁴

- It has long been recognized that property holding can be a form of risk management or insurance against economic misfortune.⁶⁵ This is especially true in the absence of markets for particular goods or services or in states or regions without extensive, or any, social insurance or income protection. Where access to land is a crucial social resource, preserving life and livelihood, it is unsafe to assume that particular property arrangements are 'inefficient' in the sense of failing to serve any overriding or rational economic interest, even where they impede the easy transferability of land interests on the market. As paradoxical as it may seem, facilitating markets in land may require the concurrent implementation of new legal institutions to provide insurance, protection, and resources that would otherwise be unavailable.
- It has long been observed that the degree of bargaining power that parties have in the course of market transactions is intimately connected to the distribution of property; to put it another way, actual freedom of contract is subject to the distribution of property.⁶⁶ Thus, any claims about the benefits of greater market participation for groups such as women are inseparable from the manner in which property is distributed. However, it also means that the general claims about the benefits of commercializing and commodifying land are inseparable from how land and land entitlements are distributed.

6.6.1 Property and Gender Equality

With these insights in mind, we can see that mere formal equality of property rights under the law is unlikely to ensure gender equality. Paradoxically, the wholesale effort to commodify or commercialize land may be just as likely to contribute to inequality between men and women. Without more, women face a number of inherent risks in any shift to a regime of property rights configured along the lines described above.

⁶⁴ Verdery, *The Vanishing Hectare: Property and Value in Postsocialist Transylvania*, above n. 45.

⁶⁵ Donald McCloskey, 'The Persistence of English Common Fields', in William N. Parker and Eric L. Jones, eds, *European Peasants and their Markets: Essays in Agrarian Economic History* (Princeton, N.J.: Princeton University Press, 1975) 73.

⁶⁶ Robert Hale, 'Coercion and Distribution in a Supposedly Neutral State', above n. 54; C. B. Macpherson, *Property: Mainstream and Critical Positions*, above n. 54, 'Introduction', 'Weber', and 'Marx'.

6.6.1.1 Formalization and Individualization

Where women gain formal title to land, one obvious possibility is an improvement in their social and economic position. Apart from the benefits that accrue from ownership alone, title to land may also improve women's labor market position; as gender scholars have observed, land ownership may affect the reserve price of labor.⁶⁷ Asset ownership and income in the market also appears to improve women's bargaining position within the household. Analyses of the household as a locus of co-operation and conflict,⁶⁸ one affected deeply by the gendered balance of power, make the idea that household members are simply happily engaged in welfare-maximizing activities the benefits of which will be altruistically shared among them decidedly unpersuasive. However, even if women have equal rights to land, gender equality is by no means assured simply by the move to formalize title. One reason is that the merits of formalization and individualization of title are typically promoted independently of the question of land distribution; to put it starkly, it would be a mistake to equate the protection of property rights with the 'right to property' for any particular group. Because land distribution is inherently political (and often seen as 'cultural' too, especially where women are concerned), it is often avoided in the context of reforms, no matter how pressing it might be to development objectives. But where questions of distribution are put to one side and title goes to men rather than women, the detriments are obvious: women may end up worse off. The more general point is that formalization may simply further empower those who are already powerful.

It is also important to recognize that cultural norms and other normative orders continue to operate, notwithstanding the formalization of title. Nor does formalization necessarily push such norms in a more 'progressive' direction. Rather formalization, especially when accompanied by the ideology of individualization, may function to enhance the position of men, permitting them to claim more than they would otherwise receive under customary law.⁶⁹ Another reason for caution is the distinction between ownership and control. Even where women have title to land or other assets, it may be unsafe to equate ownership with effective control, especially if there are cross-cutting norms and obligations that impede the exercise of control. Conversely, women may have obligations (obligations of labor, for example) in respect of land that they do not own. This phenomenon raises important

⁶⁷ Bina Agarwal, *A Field of One's Own: Gender and land rights in South Asia* (Cambridge, UK: Cambridge University Press, 1994).

⁶⁸ Sen, *Development as Freedom*, above n. 5; Agarwal, *A Field of One's Own: Gender and land rights in South Asia*, above n. 67.

⁶⁹ Nyamu, 'Gender, Culture and Property Relations in a Pluralistic Social Setting' above n. 59.

questions: might the superior productivity of family-run farms,⁷⁰ for example, reflect men's capacity to command the unpaid work of women?⁷¹

Moreover, even where women benefit from the formalization of title they may be disadvantaged by the individualization of property interests or the efforts to commodify land. Formalization need not entail the elimination of customary entitlements; there is no reason, at least in theory, that myriad different interests might not be formalized in the titling process or recognized in the course of adjudication. For example, common law judges can and do use devices such as constructive trusts to recognize both customary norms and the economic contribution of women to property held in the name of their husbands or partners.⁷² However, in practice formalization often serves to wipe out customary entitlements, many of which are held by women. Indeed, by relying upon and recirculating absolutist claims about the nature of property rights, the current ideology about property reform may encourage such outcomes.

It is well known that women are much less likely to be recognized as the formal heads of households; it is also recognized that presumptions of male headship have often operated in tandem with formalization to facilitate the elimination of women's entitlements.⁷³ Particularly where title is vested in husbands or fathers alone, titling provides increased opportunities to alienate land and to deprive others of access and resources. Thus, a basic risk is simple dispossession in the process of titling.

What is important is that this is not merely accidental nor even undesirable, in current development logic. Part of the *point* of individualizing title is to reduce or eliminate the number of recognized interests so as to facilitate the transfer of title and interests. However, given the gendered division of labor, women are very likely to lose not simply property rights in the abstract: they are likely to have material investments, in time and labor if not money, that may be eliminated in the eyes of the law in the process of formalization/individualization.

6.6.1.2 Commodification

For a variety of reasons, men appear to be much more likely than women to benefit from markets in land: they have also often been the main beneficiaries

⁷⁰ Klaus Deininger and Gershon Feder, 'Land Institutions and Land Markets', Policy Research Working Paper 2014, World Bank, Development Research Group, Rural Development, November 1998.

⁷¹ Ambreena Manji, 'Remortgaging Women's Lives: the World Bank's Land Agenda in Africa', 11 *Feminist Legal Studies* 139 (2003).

⁷² This has been an important device in common law in jurisdictions such as Australia and Canada; see for example *Petkus v. Becker* [1980] 2 S.C.R. 834. It has also been used in Kenya; for a discussion see Nyamu, 'Gender, Culture and Property Relations in a Pluralistic Social Setting', above n. 59.

⁷³ Nyamu, 'Gender, Culture and Property Relations in a Pluralistic Social Setting', above n. 59.

of the transformations of land use, such as cash cropping, associated with integration into global markets. Thus, in the absence of countervailing and compensatory reforms, there is reason to think that the commodification of land may exacerbate rather than ameliorate gender inequality. Among the adverse effects of land commodification for women that have been documented to date are: loss of traditional entitlements to land use; loss of access to communal lands; increased labor contributions to crops whose proceeds are controlled by men; greater difficulty in discharging traditional (and persisting) obligations to provide for the subsistence and other needs of dependents; and increased engagement in and reliance upon marginal self-employment or wage labor on terrible terms.⁷⁴ Even apart from these concerns, the benefits of commodification may also be overstated in ways that matter to women in particular. Where produce is marketed rather than consumed, for example, an increase in economic activity is registered, even though it may not reflect any actual increase in output and may even coincide with a decrease in welfare for some parts of the population.⁷⁵

Yet the implications of commodification extend beyond these concerns. The move to transform the uses of property is linked to a particular path of economic progress and transformation, one in which both men and women spend less time in agricultural and other subsistence activities and are ever more intensively and productively employed in an expanding range of market activities. Here it becomes important to recognize that women are situated differently than men in their ability to take advantage of market opportunities. Although social norms may play a role, this is a structural as well as cultural matter. Since market participation is the projected future, the route to both development and gender equality,⁷⁶ it is crucial to try to understand the factors and processes that might affect women's capacity to participate in markets. Once property reforms are seen as part of a larger process to create a more mobile, productive labor force, it becomes particularly important to take account of the gendered operation of labor markets.

One thing to take into consideration is that, in virtually every society, non-market obligations fall much more heavily on women than on men. This has the effect of limiting women's work options, typically by constraining women's mobility and reducing the time that can be devoted to the pursuit of market opportunities. To make this observation is not to say that women are not active participants in markets or are not important economic producers; the opposite is true. But it may not be the case that women are the ones capturing the cutting edge opportunities to participate in global market activities, particularly where information and trust circulate within gendered

⁷⁴ Agarwal, *A Field of One's Own: Gender and land rights in South Asia*, above n. 67.

⁷⁵ The *locus classicus* on this is M. Waring, *If Women Counted: A New Feminist Economics* (San Francisco: Harper and Row, 1988).

⁷⁶ World Bank, *Engendering Development*, above n. 6.

sub-communities. Will women remain in small-scale, traditional sectors, while men capture the gains in the new?⁷⁷

Another reason is that bargaining power, both in households and in labor markets, is linked to alternatives and exit options.⁷⁸ If either formalization or individualization of title has the effect of reducing both women's entitlements and property holdings, we should expect women to fare less well in the market too. The ability to use land as security is, in theory, beneficial to both women and to men. At first glance, it may seem *more* important to women than men, as lack of access to credit may limit women's capacity to engage in productive activity in the market. But women may also be more at risk from the use of land as security. Imagine, for example, that, once title is formalized, land is now used as collateral for some new economic venture. Who will labor to pay the debt? Will women necessarily benefit from the economic venture supported by the loan? Past experience with microcredit finance⁷⁹ and export production encouraging cash cropping suggests perhaps not. What if the venture fails? Foreclosure on the land is the likely outcome, with the loss of probably the only real source of economic security. The risk of loss may be relatively high, particularly where ventures are to any degree speculative. There are similar, if not greater, risks with efforts to promote the alienation of land outright.

Earlier privatization experiments resemble the land reform agenda in that they subscribed to similar hopes about the welfare-enhancing properties of new markets, and made similar assumptions about the desire and capacity of individuals to participate in markets and maximize their economic returns. However, 'taking advantage' of the market needs to be understood in both its positive and negative senses; there are both dangers and opportunities, and we now know that the capacity of individuals to benefit from both legal transformations and markets varies enormously. More sophisticated, well-positioned, or unscrupulous parties can be expected to move quickly to seize the opportunities presented by legal transformations such as titling. A tremendous redistribution of entitlements in a short time frame can accompany property reforms, some of which can have very long-term consequences. For example, assets may be captured by outsiders or domestic elites, while others are dispossessed.⁸⁰ These are serious concerns; in the wake of accumulating experience with reforms, it is unsafe to assume that these are collateral

⁷⁷ World Bank, *Engendering Development*, above n. 6, 187, 223.

⁷⁸ A. Sen, 'Gender and Co-operative Conflict' in I. Tinker, ed., *Persistent Inequalities: Women and World Development* (New York: Oxford University Press, 1990); Bina Agarwal, 'Bargaining' and Gender Relations: Within and Beyond the Household', 3(1) *Feminist Economics* 1 (1997).

⁷⁹ Toni Williams, 'Requiem for Microcredit? The Demise of a Romantic Ideal', 19 *Banking and Finance Law Review* 145 (2003).

⁸⁰ Research indicates that the creation of markets in land through titling in Honduras led to the dispossession of indigenous people from 70% of their traditional lands in the space of 10 years. Liza Grandia, 'Fronteras de Progreso o Desarrollo de Pobreza? Dinámicas

problems that are outweighed by the potential benefits of regime change as a whole. Rather, given the potential losses to individuals, households, and local economies, it seems important to ask what contingency plans are in place. What would constitute adequate protection? And are there reasons that the loss of land might bite deeper for women than men? For example, ongoing obligations of care for others make the consequences both more serious for women and the wider community, while more limited options in the labor market mean that the loss of land is more likely to lead to poverty for women than for men.

While the answers will vary from context to context, it seems clear that the effort to push people from subsistence labor into wage labor or simply into more productive market opportunities needs more attention if gender inequality is not to be exacerbated. The emergence of new labor markets almost invariably produces a range of gender-specific problems, and occupational segregation is endemic everywhere. It will almost certainly induce the continued dislocation of people from rural to urban areas. Apart from the capacity of urban markets to absorb this labor, something that cannot be assumed, rural-urban migration often implies the dissolution of households, the disruption to household income, and a greater workload for women. Once these costs are accounted for, how does the cost/benefit calculation come out? What might be needed to redress these concerns?

What about the regulation of land use once land is commercialized? Environmental degradation is a pressing concern, especially when transformation of land use is at issue, as land may be rendered effectively unusable for its original purposes. In light of these well-documented problems, is it responsible, even from a purely economic standpoint, to promote more intensified commercial use of land without adequate regulation in place? Can the presumption against the regulation of land be simply reduced to the question of government capacity or failure?⁸¹ Where capacity to adequately regulate land use really is a problem, might it change the assessment of whether more intense commercialization is a good thing in the first place?

6.7 CONTESTING PROPERTY REGIMES

The foregoing questions do not mean that property rights in land should not be formalized or transformed, or that new, more productive commercial uses of land should not be pursued. However, they do indicate why the efforts to

Fronterizas de la Migración Q'eqchi' a las Tierras Bajas de Petén, Izabal, y Belice en el Contexto de Globalización Corporativa', Centro Universitario de el Petén, CUDEP, Universidad de San Carlos, Guatemala, 6 March 2004, paper on file with the author.

⁸¹ World Bank, *Land Policies for Growth and Poverty Reduction*, above n. 10.

strengthen property rights, without more and in the context of weakened state regulation, may well generate greater gender inequality as well as a host of other social problems.

If the aim is to promote the transferability of interests in land, a range of rules and policies beyond simple privatization need to be implemented simultaneously if the furtherance of gender equality and other social objectives is to be taken seriously. Unless the only metric is their functionality in the context of global markets, the merits of property regimes cannot be determined at the abstract level. The question is not merely land rights, but their place in the larger regulatory scheme, their connection to different development trajectories, and their interaction with other normative orders, including human rights. In order to assess their relation to gender empowerment, we need to ask who is likely to benefit under these schemes and why. If the egalitarian and distributive concerns seem compelling, we should be prepared to either reconsider the regimes themselves or institute compensatory rules and mechanisms to address these concerns.

There are numerous human rights principles that might be invoked to counter property reforms that have an adverse effect on the empowerment of women.⁸² Arguably, the right to equality and non-discrimination contained in the international covenants and conventions provides a basis upon which to contest any regulatory strategy which has the effect, if not the purpose, of impairing the relative status of women.⁸³ Depending on the circumstances, such rights might also be invoked to advance property regimes that differ from the current regulatory ideal. Because access to economic resources influences so many things—from social and family status to educational opportunities, political participation, and market opportunities—the structure of property reforms is likely to intersect with the full range of women's human rights concerns at numerous points. And since women are critical to the well-being of so many communities, the de facto linchpin in the achievement of social and economic rights, the possible lines of interest and connection between property regimes and human rights are virtually limitless.

What should be stressed is that no single conception of property or set of institutional reforms in respect of land can be associated with gender empowerment, either negatively or positively; rather, their relationship may be more contingent than we normally suppose. Figuring out the relationship between property regimes and gender empowerment is not a simple task: as

⁸² Robert Wai, 'Countering, Branding, Dealing: Using Social Rights in and around the International Trade Regime', 14 *European Journal of International Law* 35 (2003).

⁸³ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, Articles 2, 26; International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976, Articles 2, 3.

the discussion has indicated, there are a wide variety of factors that can complicate the calculus. However, the complexities of land reform suggest that some of the conventional assumptions in the field of human rights need to be revisited. For example, although cultural norms that discriminate against equal land rights for women are typically the object of concern from the standpoint of human rights,⁸⁴ such assumptions may be part of the problem rather than the solution in the context of current property reforms. Customary property rights may be fluid and/or disputed, cultural and formal norms may be overlapping rather than distinct,⁸⁵ and the formalization of title, even when accompanied by gender equality norms, may leave women worse off. When the vagaries of adjudication are taken into consideration too, it becomes progressively more problematic to assume that culture rather than formal law is the problem.

Moreover, there will be unavoidable conflicts, both within the framework of human rights and when other legal rights are at stake. In courts of human rights, indigenous groups have successfully invoked property rights against outsiders seeking to exploit the commercial potential of traditional lands.⁸⁶ However, both in courts of general jurisdiction and specialized trade and investment dispute tribunals, there are far more instances in which investors have invoked property rights to limit competing claims or exclude other concerns, many of which, such as labor or environmental rights, are germane to the concerns of the human rights community. Hence, human rights advocates arguing that taking 'all appropriate means' to progressively realize human rights requires a reconsideration of property rights should expect powerful and well-articulated response from those who argue that a straight line runs from property rights through economic growth to enhanced human welfare and human rights. Similarly, those arguing for an idea of non-discrimination and equality focused on effects rather than intent or form will run up against the opportunity models of equality⁸⁷ and other 'market-friendly' notions of human rights now so popular among the international financial and economic institutions.⁸⁸

Although they are foundational to liberal conceptions of freedom and rights,⁸⁹ and hence the origins of human rights, property rights have received much less direct consideration in the field of human rights than they have in

⁸⁴ See for example, CEDAW, Article 2 (f).

⁸⁵ Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization for Gender Hierarchy in Developing Countries?', above n. 59.

⁸⁶ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Series C, Case No. 79, Judgment of 31 August 2001.

⁸⁷ See, for example, World Bank, *Engendering Development*, above n. 6.

⁸⁸ Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 3 *European Journal of International Law* 435 (1997); Upendra Baxi, 'Voices of Suffering and the Future of Human Rights', 8 *Transnational Law and Contemporary Problems* 125, (1998).

⁸⁹ John Locke, *Second Treatise of Government* (Indianapolis, Ind.: Hackett Pub. Co., 1980);

the field of development. While justifications for current property reforms can be found in countless pieces of development literature, there is no analysis of property that is of equivalent depth, breadth, or prominence within human rights doctrine and literature. One reason is that the status and degree of protection that should be afforded to property rights have been highly contentious in the international order. Prior to 1989, no international agreement on such issues would have been possible, given that the geo-strategic divisions among states of the post-World War Two era also tracked deep differences in their internal economic organization. Much of the controversy over the New International Economic Order, too, concerned property, revolving around issues such as the status of natural resources and the degree of compensation to be paid in the course of nationalization and expropriation.⁹⁰ Although the protection of private property was a key issue in the social and political transformation of post-communist states,⁹¹ the nature and extent of property rights, especially those granted to investors, continue to generate conflict and resistance.⁹²

Property rights are protean. Rather than merely accept the argument that particular property regimes are essential to the protection of civil liberties, democratic freedom, and the promotion of social and economic rights, those in the human rights community need to approach these claims with a skeptical eye and develop a nuanced appreciation of the larger issues to which they are often connected. We might ask, for example, who is calling for such rights, in what context, and why? When do calls for the protection of property further the project of greater social or distributive justice, and when do they advance other interests? When are they signposts of governance regimes that have already been identified as problematic from the standpoint of human rights because, for example, they function as arguments against other forms of legal regulation or protection that might otherwise appear both desirable and available?

In addition, human rights scholars need to continue to draw attention to the actual distribution of assets. Although the promotion of property reforms is conventionally separated from this question, it is critical to insist upon the

⁹⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meier, 1979); Thomas W. Waide, 'A Requiem for the "New International Economic Order"—The Rise and Fall of Paradigms in International Economic Law', in N. Al-Nauimi and R. Meese, eds, *International Legal Issues Arising under the United Nations Decade of International Law* (Kluwer Law International, 1995) 1301.

⁹¹ G. Alexander and G. Skapska, 'Introduction', in G. Alexander and G. Skapska, eds, *A Fourth Way? Privatization, Property and the Emergence of the New Market Economies* (London: Routledge, 1994).

⁹² For a discussion of the concerns around investor protections granted under NAFTA and the general trend towards the 'constitutionalization' of investment protections, see David Schneiderman, 'Investment Rules and the New Constitutionalism', 25 *Law and Social Inquiry* 757 (2000).

connection between them in order to assess whether, and how much, the protection of property rights is likely to advance the human rights claim at stake.

If there is useful analytic territory that could be staked out in respect of property, an important part of it lies in resisting the advance of neo-formalist ideas about property rights. Against this tide, human rights scholars and others need to elucidate the range of available choices about property rights and to try to make as clear as possible what is at stake for particular groups and issues in the decisions that are made. In addition to demonstrating their impact on human rights concerns, it is also crucial for human rights advocates to contest the functionalist explanations that circulate in the realm of development policy about the nature of property rights. Whatever their role in enhancing efficiency, the idea that particular legal regimes can be reduced to, or explained by, efficiency considerations has long been challenged and discredited in legal thought.⁹³ This is particularly important as such instrumentalist ideas are powerfully entrenched, both discursively and institutionally, in the development agenda. The point is not merely of theoretical interest. What fall from view when functionalist explanations dominate the discussion of property rights are precisely the concerns most of interest through the lens of human rights: questions of power, conflict, equality, and disadvantage.

To reiterate, property rights are the question, not the answer. For the purposes of human rights, it is important to insist that neither the structure nor the content of property regimes can be assured in advance, and they cannot be divorced from the larger regulatory matrix of which they are a part. The status of property rights cannot be untethered from their distributive consequences, consequences which are in turn contingent upon myriad other norms and facts specific to each context.

No single conception of the right to property will suffice to either advance or protect all the interests that might be at stake in a human rights claim. Because property regimes are inseparable from the basic structure and character of societies that they regulate and help constitute, it is hard to imagine that any single conception would be desirable.

Because of the impact that property rights can have on a wide range of egalitarian and distributive objectives, human rights scholars need to become much better versed in the structure, history, and operation of property law in particular contexts, and the counter-arguments to current claims that might be available. While they may not be able to hope to match the resources that are currently devoted to establishing the centrality of property rights to development, there is much analysis in the common law tradition that human rights scholars could usefully recuperate to ensure that efforts to

⁹³ Robert Gordon, 'Critical Legal Histories', 36 *Stanford Law Journal* 57 (1984).

address complex problems of social ordering and social justice are not defeated by simplistic conceptions of property.

One such source is the realist and post-realist literature referred to earlier.⁹⁴ Another is the important emerging literature on the colonial antecedents of contemporary economic norms, practices, and institutions,⁹⁵ much of which is indispensable to understanding the context and reception of contemporary development and legal reform projects. As this analysis reveals, there are more and less useful approaches to unpacking property rights, especially where the issue is the relationship between property rights and wider questions of economic and social justice. Property rights need to be approached as relational constructs that both empower and disempower at the same time. The domains of sovereignty they create may provide protection or create risk; they can create both wealth and impoverishment simultaneously.

At the end of the day, many debates over property rights can be understood as proxies for struggles over the character and shape of social life. Sometimes property reforms will be congruent with human rights goals, sometimes they will be neutral with respect to those goals, and sometimes they will conflict with those goals. If there is an overemphasis on property rights in development, perhaps the problem in the field of human rights is the reverse. But whatever the position that advocates might stake out on any particular issue, the human rights community should take their rising significance in the field of development as a sign of their increasing relevance to the field of human rights as well.

⁹⁴ See Greg Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997); Singer, *Entitlements: The Paradoxes of Property*, above n. 50.

⁹⁵ Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *New York University Journal of International Law and Politics* 243 (2000); Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', 34 *New York University Journal of International Law and Politics* 513 (2002).