

rity.³⁷⁹ Social policy, deeply rooted in Latin American legislation, is still an important factor, especially among the historically disadvantaged.

Creation of individual ownership signifies the elimination of both group rights and many use rights held by others. This creation places the new owner in a position of power in relation to other community members. For example, in Kenya, this process usually designates the husband as the owner of the land, eliminating protections that wives had previously enjoyed under indigenous systems.³⁸⁰ As land becomes a commodity, it can be taken from the families despite the fact that women and children continue to do a large part of the agricultural labor.³⁸¹ For these groups, privatization of tenure actually creates tenure insecurity.

The development community has much experience with African countries seeking to renovate indigenous land tenure systems using modern legal concepts. In English-speaking West Africa, particularly in Nigeria and Ghana, the courts developed a common law of "family land" out of a variety of tribal lineage-ownership systems.³⁸² Judges seeking to recognize such a system generally relied on analogies to the English concepts of joint ownership and ownership in common.³⁸³ Courts permitted transactions in family land with the consent of all interested family members.³⁸⁴ This required a clear definition of the "family." Even if the definition had been unambiguous in application, as a practical matter it was difficult to obtain the necessary signatures. Consequently, the trust, a Western legal concept, was adopted.³⁸⁵ Under the trust, several persons would be registered as trustees for the lineage, clan, or other group.³⁸⁶ This model was introduced in western Nigeria in 1959 and adopted in Kenya in 1968.³⁸⁷

In a project studying lowland, forest-dwelling indigenous people in Brazil, the World Bank found that "land regularization in and of itself will not be sufficient to protect indigenous peoples' land secu-

³⁷⁹ See, e.g., John A. Humbach, *Law and a New Land Ethic*, J. LAND TRUST ALLIANCE 13-15, 24 (Fall 1990).

³⁸⁰ See Bruce, African Experience, *supra* note 8.

³⁸¹ See *id.*

³⁸² See *id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ See Bruce, African Experience, *supra* note 8.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

riety. . . . Thus, even in those projects where large amounts of land were set aside, indigenous people remained vulnerable to the destruction of their resource base and their cultural integrity."³⁸⁸

Formal land markets with commercial titles may present difficulties for indigenous populations. For example, purchasing property, the most common method of land acquisition, creates problems for lowland South American Indians, who are subsistence producers and not yet fully integrated into the market economy.³⁸⁹ Similarly, indigenous populations' notions of occupancy and ownership may differ from those under formal law.³⁹⁰

The majority of indigenous and tribal groups in Latin America were dispossessed of their land long before the agrarian reforms.³⁹¹ Many are now landless rural workers, tenants, or farmers on lands often too small to satisfy their minimum subsistence needs.³⁹² Agrarian reform laws and programs, often established in the 1960s and 1970s, aimed to assist the communal arrangements of indigenous peasant agriculture.³⁹³ These efforts, however, have received little support over the past two decades and redistribution of land has generally ended.³⁹⁴ For these individuals, any steps to promote equality of land rights with the rest of the national population may be an advancement.³⁹⁵

If property is freely transferable, a consolidation of landholdings is possible. If it does not create efficiency, and, thus, an automatic economic benefit, this consolidation may not occur. The grant of freehold interests allows the market to determine ownership. If the market functions properly, therefore, property will flow to its most productive use. Generally, large estates are not necessarily more productive than small estates. Thus, it may be unlikely that large

³⁸⁸ Alaka Wali & Shelton Davis, *Land Regularization in Special Ameriindian Components of Bank-Funded Projects in the LAC Region*, 1991 WORLD BANK: LATIN AM. & CARIBBEAN REGION ENV'T DIVISION at ii.

³⁸⁹ *Id.*

³⁹⁰ *Id.* Many lowland South American indigenous groups perceive themselves as "occupying" large areas of land, but do not claim to be "owners" of the land in the sense that they do not claim exclusive use. *See id.* In contrast, colonists may view occupation as an entitlement to exclusive use in conformity with formal law. *See id.*

³⁹¹ Plant, *supra* note 11, at 1-2.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* For the indigenous communities still occupying traditional lands, legislation could recognize and protect these rights if greater security for these peoples is a policy objective. Plant, *supra* note 11, at 1-2.

landholders will automatically consolidate property,³⁹⁶ even though the governments would be legally allowing this possibility.

The conclusion that consolidation of landholdings is unlikely depends on the assumption that the market is functioning properly and small landholders can take better advantage of economies of scale. This assumption, however, may not be accurate. Latin American small landholders may have less capacity to absorb risk and less access to capital than do persons holding larger estates. These factors, if present, might cause consolidation to occur.

Individualization of tenure can negatively impact the rights of women. Under traditional forms of ownership, all members of a given community have an interest in the land held collectively.³⁹⁷ In Kenya, individualization of tenure has led, in some cases, to the dispossession of women, with all property rights passing to the men.³⁹⁸ As property rights change, rural women, in particular, acquire special needs.³⁹⁹

Property law liberalization might be one element of a broader program for democratization of the political economy. Liberalization in itself, however, is unlikely to be the sole instrument for social reorganization. Reform also might be linked to changes in the banking sector to provide greater participation in the political economy.⁴⁰⁰

2. Trade and Investment

While most Latin American countries have addressed trade barrier issues in the input, capital, and foreign trade markets, the land market remains the most imperfect economic market. Activation of

³⁹⁶ Ecuador is moving away from the *latifundio* via the market. See generally Carlos Camacho, *Evaluación del Proceso de Cambio en la Tenencia de la Tierra en la Sierra Norte y Central (1964-1991)*, in 1991 INSTITUTO DE ESTRATEGIAS AGROPECUARIAS.

³⁹⁷ Joy K. Green, *Evaluating the Impact of Consolidation of Holdings, Individualization of Tenure, and Registration of Title: Lessons from Kenya*, 1987 U. WIS. (MADISON) LAND TENURE CENTER.

³⁹⁸ *Id.* In those cases, the women in the greatest danger were widows, those without off-farm income and those who had borne only daughters. *Id.*

³⁹⁹ For example, women may need greater access to collateral if governments intend to make commercial credit available to them. One study found that, in Zimbabwe, women were denied access to credit because they lacked control over assets. See generally Ruvimbo Chimedza, *Savings Clubs: The Mobilization of Rural Finances in Zimbabwe*, in 1984 INT'L LAB. ORGANIZATION.

⁴⁰⁰ The development of banks specifically capable of dealing with small-scale agriculture is a possibility.

land markets often is still recommended to provide land access for the historically disadvantaged, to relieve pressures on fragile lands, to enhance agricultural productivity and to promote a sustainable environmental policy.

Traditionally, land reform has been used where market mechanisms fail to allocate land resources effectively on account of trade barriers.⁴⁰¹ In contrast, activation of land markets works within the market structure by removing or avoiding these barriers, rather than seeking a reallocation of resources through the political process. The issue, then, becomes what steps are necessary to achieve an effective land market.

There is a growing body of case study data and new theoretical literature addressing the functioning of land markets.⁴⁰² The three major constraints to the formal land market are: (1) insufficient demand due to small-scale farmers' lack of equity to purchase land, as well as high transfer costs, (2) insufficient supply of land at prices affordable to small-scale farmers, and (3) government administration, including legal, fiscal, and bureaucratic red tape, and lack of adequate registries.⁴⁰³

Latin America really has two land markets: a formal market, characterized by recorded titles and lower utilization rates; and an informal market, characterized by undocumented landholdings, usually held by the historically disadvantaged. Often, economic development policy aims to integrate the markets, providing the historically disadvantaged with access to land from the formal market.⁴⁰⁴

USAID/Guatemala's *Fundación del Centavo* (FUNDACEN) project highlighted at least two problems in land markets and land purchase programs, in addition to the registry and title marketability difficul-

⁴⁰¹ DORNER, *supra* note 8, at 75.

⁴⁰² See generally Shearer, *supra* note 11.

⁴⁰³ DORNER, *supra* note 8, at 77.

⁴⁰⁴ Tools used to integrate the markets include land taxation, land and mortgage banks, titling and *cadastre* systems (linked via a multipurpose land information system, or MPLIS), extension and education, land purchase programs, elimination of subsidies for cattle and capital equipment, land-for-infrastructure programs, and other policy instruments. See generally Michael Carter & Dina Mesbah, *Economic Theory of Land Markets and Its Implications for the Land Access of the Rural Poor*, 1990 U. WIS. (MADISON) LAND TENURE CENTER. Elimination of restrictions on land and titling, by itself, probably will not lead to land market activation. They will, however, be more likely to succeed if they form part of a more comprehensive approach to the land market problems which involve other policy instruments. See generally Randy Stringer, *Farmland Transfers and the Role of Land Banks in Latin America*, 1989 U. WIS. (MADISON) LAND TENURE CENTER; J. David Stanfield, *Rural Land Market Implications of Titling and Registration Programs in the Latin America and Caribbean Region* (1991) (unpublished manuscript, on file with author).

ties.⁴⁰⁵ First, there is a general lack of start-up capital for nongovernmental organization (NGO) projects like FUNDACEN.⁴⁰⁶ Second, local NGOs are more likely to already possess knowledge of soil quality and use, roads and markets that larger organizations like FUNDACEN could only acquire at great cost.⁴⁰⁷ For this reason, local NGOs may provide the preferred organizational structure and level for future land-purchase programs.

Rental programs with options to purchase, documented by USAID/El Salvador and the University of Wisconsin (Madison) Land Tenure Center, and temporary, reversible foreclosure mechanisms, documented by USAID/Dominican Republic and the Land Tenure Center, are examples of highly successful land bank programs.⁴⁰⁸ In both cases, the USAID mission has been able to use private sector initiative to implement the program, with nearly one hundred percent collection rates and little or no collection costs.⁴⁰⁹ As long as program users pay, the programs become sustainable in the long term without continued donor financial support.

Elimination of restrictions on property ownership and barriers to trade may not always produce the desired outcome. For instance, in Kenya, the privatization of tenure to promote land markets did not appear to result in purchases of "economically viable" properties.⁴¹⁰ Instead, sellers sold only a portion of their property, retaining the other part as security against landlessness.⁴¹¹ Many purchasers bought land as an investment: to be used as security for loans, to be farmed under tenancy, to be held for speculative purposes, or to provide for the eventual needs of the buyer's children.⁴¹² Most purchases have been made by persons with nonagricultural sources of income, rather than by successful farmers hoping to expand their holdings.⁴¹³ While

⁴⁰⁵ FUNDACEN is the "Fundación del Centavo," or the Penny Foundation. For a general discussion, see Elizabeth G. Dunn, *The FUNDACEN Experience: Factors for Success and Failure in a Guatemalan Land Purchase-Sale Program*, 1992 U. WIS. (MADISON) LAND TENURE CENTER 107.

⁴⁰⁶ *Id.*

⁴⁰⁷ *See id.*

⁴⁰⁸ John Strasma, *Making Land Banks Viable: Two Successful Approaches to Collecting Loans Made to Small Farmers in Central America and the Caribbean* (Dec. 1990) (unpublished manuscript, on file with the author) [hereinafter Strasma, *Viable*]. New land bank programs have begun in Costa Rica (Decree No. 20574, G.O. 910805, July 8, 1991) and Panama (Law 22, Aug. 5, 1991 (Pan.)).

⁴⁰⁹ *See* Strasma, *Viable*, *supra* note 408.

⁴¹⁰ *See* Bruce, *African Experience*, *supra* note 8, at 19.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

this practice might benefit the macro-economy in terms of rewarding productivity, providing retirement homes and retreats for urban citizens, or giving risk diversification for traditional nonfarmers, it may have a negative impact on local farmers.

In the case of Kenya, the landholders were not economically secure even though restrictions on their property ownership were removed.⁴¹⁴ The benefits of liberalization in the land market, therefore, have not materialized.⁴¹⁵ Thus, the liberalization of property rights must be an element in a broader strategy to promote economic development and opportunities, especially among vulnerable groups.

3. The Environment

The "stakeholder interest" literature is relevant to the changes occurring in these four countries.⁴¹⁶ Land titling provides incentives to individual landowners to engage in environmentally- and agriculturally-sound practices.⁴¹⁷ Furthermore, people with tenure security may depend less on reserves, and thus may be more willing to plant trees and other long-term crops.⁴¹⁸ Conversely, if landholders lose security in land ownership, they lose an incentive to plant trees.⁴¹⁹ This may be especially true on agrarian reform land, where owners cannot freely transfer their property without government authorization.

The recent changes in land rights in the four countries examined convert agrarian reform beneficiaries into fee owners of property. These changes give the beneficiaries a stronger interest in preserving and defending their land. The expected result, therefore, may be land use which is more environmentally-friendly.

⁴¹⁴ *Id.*

⁴¹⁵ Bruce, African Experience, *supra* note 8, at 19.

⁴¹⁶ See, e.g., Benjamin L. Crosby, *Stakeholder Analysis: A Vital Tool for Strategic Managers*, TECH. NOTES, Vol. 2 (USAID Implementing Policy Change Project) Mar. 1992, at 1.

⁴¹⁷ See William C. Thiesenhusen, *Implications of the Rural Land Tenure System for the Environmental Debate: Three Scenarios*, 26 J. DEVELOPING AREAS 1, 21-23 (1991). For Haiti, see generally, PETER C. BLOCH ET AL., LAND TENURE ISSUES IN RURAL HAITI (1988).

⁴¹⁸ John W. Bruce & Louise Fortmann, *Agroforestry: Proprietary Dimensions* (1989) (unpublished manuscript, on file with author). For African forestry, fuelwood, and resource conservation projects, see John W. Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Sahara Africa*, 1992 U. WIS. (MADISON) LAND TENURE CENTER [hereinafter Bruce, *Africa*].

⁴¹⁹ See generally POLICY TAXONOMY AND ANALYSIS OF POLICIES AFFECTING NATURAL RESOURCES AND THE ENVIRONMENT (Agency Int'l Dev., Bureau of Sci. & Tech. eds., 1990) [hereinafter POLICY TAXONOMY].

Still, Latin American government-sponsored colonization and agrarian reform programs often directly conflict with natural resource conservation objectives.⁴²⁰ These reform programs often require property owners to use, or risk losing, their land. As a result, property owners often deforest their land to satisfy the utilization requirement.⁴²¹

Perhaps most importantly, by creating marketable titles, governments may promote land markets within existing land supplies, rather than extend their agricultural frontiers into forested areas.⁴²² Governments also may examine the repeal of restrictions on leasing and mortgaging, restraints that chill the market for land.⁴²³ From a legal standpoint, making land titles marketable is a prerequisite for an active, formal market in real estate. This, in turn, may remove incentives for deforestation. It also may allow individuals to purchase land where agriculture is appropriate, not only where the government wants the beneficiaries to be placed.⁴²⁴

Nevertheless, no tenure system, not even one which provides for registered freehold interests, can totally safeguard against destructive land use. For example, farmers sometimes may need to maximize short-term production in order to survive, despite long-term resource costs.⁴²⁵ Further, no tenure system can completely ensure against the breakdown of communal tenure arrangements if there is overpopulation or poor technical support.⁴²⁶

Security of access and tenure to forested areas—whether by a formal concession system, usufruct rights, or ownership interests—will encourage land use in a more commercially- and environmentally-sustainable manner. Normalization of tenure in forested areas may lead to increased investment in long-term, sustainable forestry

⁴²⁰ See *id.* at 55.

⁴²¹ See generally GEORGE JOHNSTON ET AL., U.S. AGENCY INT'L DEV., *THE GREEN BOOK* (draft 1992) [hereinafter *GREEN BOOK*]. See also Theresa Bradley et al., *Costa Rica National Resource Policy Inventory 6* (1990) (unpublished manuscript, on file with the Agency for International Development). Under its new law, Honduras has made forestry an accepted land use. See *Ley para la Modernización y el Desarrollo del Sector Agrícola*, art. 51(b) D.O. 31-92 (1992) (Hond.). Such a policy removes the incentive to cut trees in order to guard against having the land taken away.

⁴²² See *POLICY TAXONOMY*, *supra* note 419.

⁴²³ See *GREEN BOOK*, *supra* note 421.

⁴²⁴ For example, in Costa Rica, the government has sometimes placed beneficiaries on land unsuitable for agriculture. See Bradley, *supra* note 421.

⁴²⁵ See Bruce, *Africa*, *supra* note 418, at ix.

⁴²⁶ See JOHNSTON, *supra* note 377, at 5. Notably, formal government ownership has not led to environmental management or sustainable resource use. *Id.*

practice, resulting in higher valued land usage and increased planting of trees.

CONCLUSIONS AND RECOMMENDATIONS FOR IMPROVING LEGISLATIVE REFORMS

A review of the experiences in Nicaragua, Peru, Mexico and Honduras suggests that the time has come in Latin America to graduate from past land reforms and enter the market. In market economies, the landless may be treated as potential small-scale farmers rather than as permanent political beneficiaries, dependent on underfunded government agencies.⁴²⁷ Removal of restrictions on agrarian properties, however, may present complications. For instance, women, poor people and indigenous groups have special needs. Further, the government may have to balance the desires of the private sector, the needs of the historically disadvantaged and the goals of a sustainable environmental policy.

The removal of restrictions on agrarian property is a logical part of economic modernization. Indeed, removal is often regarded as a prerequisite to economic development. The mere elimination of restrictions, however, may not guarantee economic progress. While this measure may guarantee increased security of ownership, the following other factors may make investment less attractive: inappropriate banking policies, the lack of an effective property registry and *cadastre* system, the overall availability of credit and technical assistance,⁴²⁸ produce markets, and pricing of products. Thus, the elimination of ownership restrictions is merely one element of a broader development strategy for economic revitalization.

Transaction costs with group structures in land ownership have led to criticisms of agrarian reform laws and, in particular, of agrarian centers. A great deal of literature has focused on this problem of transaction costs in agrarian reform legislation, noting such difficulties as: the trouble of securing group consent to undertake land improvements, free-rider problems, and other problems associated

⁴²⁷ John D. Strasma & Rafael Celis, *Land Taxation, the Poor, and Sustainable Development*, in *POVERTY, NATURAL RESOURCES, AND PUBLIC POLICY IN CENTRAL AMERICA* 143 (Sheldon Annis ed., 1992).

⁴²⁸ Randy Stringer argues convincingly that establishing a land-financing system in Latin American countries may represent a viable institutional mechanism to assist some landless people in overcoming difficulties caused by land market imperfections. See Stringer, *supra* note 311, at 11; see also Randy Stringer, *A Profile of Land Markets in Honduras* (1989) (unpublished manuscript, on file with author).

with governmental bureaucracies. This Article does not extensively address these economic difficulties; instead, it legally analyzes these problems. Because of this legal emphasis, this study may appear biased against the new legislation in terms of its social and environmental impact.

In conclusion, in terms of policy guidance for Latin American governments and the foreign donor community, a number of issues emerge from the discussion of property rights liberalization. Any future property law modernization effort might consider the following operational guidelines taken from the experiences of Nicaragua, Peru, Mexico, and Honduras:

1. Restrictions on rights to mortgage should be reevaluated. No amount of foreign donor money, projects, or technical assistance can create asset-based, secure, private sector lending in agriculture as long as commercial lenders lack a reasonable assurance of repayment. Accordingly, access to collateral, now prohibited in most jurisdictions, must be granted.

Peru originally set a minimum holding limit of five hectares for a mortgage; subsequently, it has backed off this position. The market is in a better position than the government to determine the minimum size of property for a mortgage. As the experiences of the other three jurisdictions suggest, the lack of any minimum size limit may be desirable.

2. Reforms may also allow farmers to decide how they would like to hold property, rather than through governmental mandate specifying tenure form, such as individual ownership. If market principles are used and the goal is increased productivity, the market represented by the individual farmers—and not the government—is in the best position to determine whether collective or private ownership is most productive. In Mexico and Honduras, for example, governments provide for individual choice of form of ownership. Additionally, in Mexico, indigenous communities receive special protection, unless the communities themselves democratically decide to individualize their holdings.

3. Countries may consider the right to sell or transfer land freely. In Mexico, a maximum size on individual holdings discourages the return of large estates. Other steps may be undertaken to stimulate land activation and prevent consolidation of landholdings.

4. In Honduras, the government recognizes forestry as an appropriate land use in conformity with the social function of land. This recognition prevents deforestation from being a usage of the land simply to avoid expropriation.

Summary of Current Status of Agrarian Property Law

Country	Inheritance	Mortgages	Land usage rules	Property alienation	Size limits	Rental	Social function
Nicaragua	allowed	allowed	none; threat of loss of land if unused	freely transferable	limits remain	rental control	remains; new meaning?
Peru	allowed	allowed if greater than five hectares	none; threat of loss of land if unused	freely transferable	limits remain	no restrictions	land as an economic good, not a social good
Mexico	allowed, provided no <i>minifundios</i>	only for individual property; not <i>ejidal</i> land	unused land reverts to the state	individual property transferable/ <i>ejidal</i> land not freely transferable	limits remain	most restrictions removed on <i>ejidal</i> land	remains; application has changed
Honduras	allowed	allowed	owner must work the land	transferable only to qualified individuals until paid for	limits remain	no restrictions if not mortgaged	remains; application has changed