

# IMMOVABLE PROPERTY REGISTRATION SYSTEMS: HOPES AND FEARS

by

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## 1. PROPERTY RIGHTS AND THE ECONOMY

The term “Immovable Property” includes parcels of land, and all things connected permanently to the land, such as houses, apartment buildings, factories, stores, etc., and which can be “owned” by the state or by private individuals or companies. An immovable property is defined as any bounded area of land or building or piece of a building with a single type of ownership. “Movable Property,” “Personal Property,” and such terms refer to objects which can be owned, but which move or can be carried from one place to another, such as livestock, automobiles, factory machinery, clothes, furniture, etc.

Rights which people hold to immovable property include<sup>1</sup>:

- The right to use the immovable property,
- the right to get economic benefits from it,
- the right to subdivide into smaller parcels or units,
- the right to transfer any of the above rights to another person.

Private ownership means that a person holds or “owns” rights protected by the State’s laws and police powers or by the customs and norms of the people. The State may retain certain rights to private property, such as:

- the right to acquire private immovable property for public purposes,
- the right to acquire ownership when the private owner dies and has no heirs,
- the taxation of the owners of private property,
- the right to forbid private owners to build on certain immovable property, and to regulate the type of buildings which do get constructed,
- the right to deprive private owners of certain uses of the immovable property, such as the application of toxic pesticides or the creation of a rubbish dump,
- the expropriation of private owners who do not use the property to satisfy legally defined social functions.

In a market economy, owners of rights to immovable property exchange them through a property market. Immovable property cannot be physically handed over to new owner. Thus, when it is bought and sold, leased, mortgaged, and inherited, information about the property and about the old and new owners is exchanged, not the property itself. Recording, displaying and updating information about ownership and other rights to immovable properties are the activities of an IPRS.

For market exchanges of immovable property to take place, the right of the sellers to sell has to be proven; i.e., there must be strong evidence (legally valid information) that they *own that exchange right*. This proof of ownership is one major function of an IPRS. Where “buyers” can easily identify “owners,” exchanges occur relatively easily. Through such exchanges owners can transform their immovable property assets into money or some other asset. Similarly, buyers can acquire immovable property for investment purposes, thereby stimulating economic growth.

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<sup>1</sup> Raleigh Barlowe, 1977. Who Owns Your Land? Extension Bulletin, no. E-1101., East Lansing: Cooperative Extension Service, Michigan State University.

A second function is the system's ability to provide security of ownership, through laws that protect the rights of owners. This provides incentives to owners to make long term investments—such as improving their housing, conserving the soil, planting trees, constructing buildings—leading to sustainable development throughout the economy.

There are other benefits from registration systems, such as the provision of information in order to facilitate environmental protection as well as investments in water, telephone and electrical networks, sewage systems, and roads.

## **2. OPTIONS FOR AN IPRS IN A MARKET ECONOMY**

There are four main systems<sup>2</sup> for recording rights to immovable property in a market context:

1. *Private, but oral agreements to transfer*, with evidence concerning ownership provided by witnesses, used in traditional societies with few linkages to capital markets;
2. *Private, but written agreements*, with evidence concerning ownership provided by written deeds, plus witnesses, typically seen in countries that use notaries for devising these agreements and archiving them in their private archives, as in Ecuador and other Latin American countries;
3. *Publicly accessible archives of recorded deeds*, based on the written documentation of transactions (deeds), organized in temporal order, and indexed by the names of the participants, usually recorded and bound for future reference for the public by a state institution or a state chartered privately operated registry. This is the system used in countries such as the United States and in some European countries (France, southern Italy, Spain). True ownership is established through the tracing of a chain of transactions, summarized in a title abstract showing the basis of the present claim of ownership.
4. *Publicly maintained, immovable property based title registration system*, which we label as an Immovable Property Registration System (IPRS). In such a system a registry contains legal information about rights to each parcel of land, and each parcel is described by comprehensive map. The register is similar to a title abstract in the sense of providing a summary of the rights held to the immovable property. Such a title registration system is common in Europe (United Kingdom, Nordic countries, Netherlands, Austria, German and others), although the registration of rights function is typically handled through the courts and the parcel identification function is a separate cadastral agency, both governmental services. There is a new trend in title registration toward establishing autonomous entities operating under public supervision but much like private businesses with a public service mandate.

As societies grow larger and more complex, these latter two systems tend to replace the less formal systems. Moreover, in more complex societies, comprehensive maps of parcels and properties are common, which provide legal descriptions of the location and shape of parcels of immovable property.

## **3. LOGIC OF THE IPRS**

In the creation of IPRS's, five basic principles are usually followed, at least theoretically:

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<sup>2</sup> See David Stanfield and Eric Gilbert, 1995. "Immovable Property Registration A discussion of systems of immovable property registration and their application.", Land Tenure Center, University of Wisconsin-Madison.

1. “mirror” principle, that is, the information about immovable property (as required by law) which is contained in the Registration Offices should be a reflection of what really exists. To achieve this goal, information about interests in the properties is collected by field teams from existing and recently produced decisions about the privatization of these rights. Field teams also verify the boundaries of the properties. All such information is put on display in the local villages and neighborhoods for 90 days, during which time any errors are corrected.
2. “curtain” principle, that is, the property registers should show information about ownership and other interests that does not require further verification. The field work and documentation produced is checked for accuracy, and the essential information is recorded on the kartelas.
3. “certainty” principle, that is, there is a guarantee that the information in the kartelas is correct in that if someone is damaged by incorrect information in the IPRS, he/she can be compensated by the State.
4. “accessibility<sup>3</sup>” principle, that is, the costs of access to the Registration Offices should be minimized so that any person regardless of their wealth or location, can have easy access to the registration system. The Registration Offices are often located in regional or sub-regional centers so that geographically they are accessible to the people. Costs of transactions are supposed to be minimized by allowing any transaction to be carried out at the Registration Office, thereby minimizing legal, notary, and surveying fees.
5. “comprehensive” principle, that is, all immovable property, privately and publicly owned, urban and rural is contained in the IPRS. The documents showing ownership and other rights are used to register rights to all types of immovable property. Governmental agencies which are responsible for publicly owned immovable properties are identified.

#### **4. REFLECTIONS ON THE INTERNATIONAL EXPERIENCES WITH IPRS**

Several transition countries in E. Europe and formed from former Soviet Union have adopted IPRS's – Albania, Kyrgyzstan, Georgia, Moldova, Belarus, among others. Evidence is accumulating from countries which have adopted the parcel based, title registration approach, as to how things are working. All is not well.

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<sup>3</sup> Dale, Peter and John McLaughlin, 1999. Land Administration, Oxford University Press, N.Y., identify the first three principles mentioned, as did T.B.F. Ruoff, An Englishman Looks at the Torrens System, The Law Book Company of Australasia, 1957, p. 8. The Albanian experience showed the importance of “accessibility” and “comprehensiveness”, at least in the transition situation. One tendency in some transition countries, also observed in Albania during the design of the IPRS, has been the inclination to centralize of IRPS administration, modeled on the centralized administrative structures of the previous regimes. With the dissolution of the state's command structures, the narrow waist of the “hour-glass” administrative system from before has to be widened and thickened by organizations which function close to the population and accessible to the public (See Richard Rose, 1995. “Russia as an Hour-Glass Society: A Constitution without Citizens”, East European Constitutional Review, Vol 4, No. 3, pp. 34-42). As for “comprehensiveness”, one of the difficulties of many title registration systems is the exclusion of certain types of land, such as state owned properties, or properties outside of urban areas. This exclusion has usually been due to budget limitations for the incorporation of properties into the title registration system. In most transition countries donor assistance has been sufficient to aim toward creating a comprehensive IPRS.

#### **4.1 REGISTRATION OFFICE STAFF – UNTRAINED AND NOT PROFESSIONAL**

Due to low salaries and political pressures, the nomination of Registration Office staff, including the Registrars, often results in an unprepared and non-professional staff. The qualifications of staff may be written to a high standard, but in practice there is little training and appointments often owe more to political and personal contacts than to knowledge and capacities. Of course there are important exceptions to this trend, with many Registrars and staff being seriously committed to their new professions. But there are too many of the other examples to be sanguine about the quality and professionalism of staff throughout the IPRS.

#### **4.2 FROM FACILITATION FEES TO FALSE DOCUMENTS IN THE REGISTRATION OFFICES**

The monopoly power of the Registration Offices to accept documents for registration of transactions gives rise to the temptation to reject or delay applications until “facilitation fees” are paid. The counterbalancing pressures from the Notaries to pressure the rapid registration of transactions have not materialized, in large part due to the fear by the Notaries that if they openly criticize a Registrar, future applications for registration will be delayed or rejected. The Registrars’ powers are substantial.

Facilitation fees are in themselves not damaging to the operations of the Registration Offices, except that once such a system is installed in the normal operating procedures, those who pay the fees expect services which can be more than just rapid turn around, but can evolve into accepting fraudulent documents into the registry. Moreover, such fees often grow in amount, until they become quite excessive. Thirdly, the payment of such fees creates the image of the Registration Office as being corrupt in the public mind, which when combined with what people see as excessive fees drives people to conduct transactions informally, outside of the formal Registration Office.

#### **4.3 PASSIVE NOTARIES**

Notaries function in most countries by asking the parties to transactions to bring them documents from the Registrars and from the Civil Registry. Based on these documents, the Notaries prepare the transaction documents. Such a procedure works well in European countries where the professionalism of the Registration Office staff is highly regulated and predictable. Where such professionalism is not the case, the passiveness of the Notaries is not helpful. Under such conditions the Notaries would do a better job if they or their representatives actually went to the Registration Offices and did a title search, to verify that the owner according to the Registrar has a strong title to the property, based in valid transactions in the past. Since Notaries do not operate in this way, there is little improvement of the strength of the title shown on the property registers.

#### **4.4 INITIAL REGISTRATION FEES AND DEGRADATION OF RECORDS**

For the creation of the IPRS, many countries have been able to launch projects to systematically bring properties (registers, maps, documents) into the Registration Offices in a national program of initial registration. These projects are often subsidized by international donors, so that the Registrars do not earn fees from this activity. However, such projects do not magically produce all properties in an instance, but often require several years to produce their products. In the meantime, for the land markets to function, there must be procedures for the sporadic initial registration of immovable properties. These procedures typically produce fees for the Registrars, facilitation or normal, and income for the IPRS and staff. A frequent reaction is for the Registration Office staff

to state that the subsidized, systematic registration efforts are not of sufficient quality and to require transactions based on such information to be investigated, or to require new initial registration, and produce fees. The result is public distrust in the records produced by the projects, and the duplication of initial registration efforts. If this re-registration occurs, the result may not be damaging in the long term to the integrity of the registry. However, the tendency is for every transaction to be treated as another initial registration, which means that the IPRS will gradually devolve into a deeds registry without the advantages of a parcel based, title registration system.

#### **4.5 TECHNICAL DEGRADATION**

The systematic initial registration projects typically work with information technologies, while the operations of many Registration Offices are done manually with paper maps and paper registers. The procedures are largely ignored for updating and using the digital data bases produced by the projects. The result is the gradual departure of the physical records from the digital ones, which means that the shift to a digital, IT based registration office will be impossible without substantial investments in the future. Today's investments by projects in IT are being lost. A particular danger is that the parcel index maps, the cadastral plans, are plotted onto paper at scales which are difficult to manage manually when there are subdivisions which result in parcels too small to see on the maps. Since the digital files are not being updated, new paper maps and more appropriate scales cannot be plotted.

#### **4.6 INFORMAL TRANSACTIONS**

People vote their opinions of governmental institutions by how much they interact with them. In the cases of the IPRS in the region, there appears to be a growing trend for people to conduct transactions outside of the Registration Offices, that is, informally. In economic terms, the transaction costs are too high—standing in line and being subject to rude staff, having to make several trips to the Registration Office, and paying of high facilitation fees. Also by conducting a formal registration the parties to a transaction are typically forced to pay transaction taxes.

Even these costs might be acceptable to more people, if there was a widespread high value placed on registration of transactions due to the protection of rights provided by the Registration Offices. Since the notions of private ownership are new and not widely understood, and since the functions of the Registration Offices as protecting rights of private ownership are not widely believed, people are more inclined to engage in informal transactions than incur the costs of formality.

For various reasons, particularly in areas of countries where there is a high demand for land for housing, as people migrate to the cities in response to an often bleak rural economy, people acquire rights to land informally. They then build what they can, quickly, and dare the authorities to evict them, giving rise to the shanty towns or even more substantial informal settlements seen surrounding many cities. The extent of informal possession of land and informal transactions is a measure of the failure of the legal framework and the administration of the IPRS, as well as the failure of regulations governing the taxation, subdivision and development of land often linked in the public's mind with the IPRS.

The parcel based, title registration systems being introduced in most transition countries are in danger of degenerating. In countries where the IPRS appears to be developing normally, it is often dependent on transitory strong leadership and strong public education and strong discipline by notaries. If such leadership weakens and people see a degradation developing, it will be hard even

in these relatively successful countries (such as Kyrgyzstan) to avoid a downward viscous cycle which other countries are already witnessing.

#### **4.7 ABSENCE OF COMPENSATION FOR DAMAGES DUE TO ERRORS IN IPRS INFORMATION**

For the IPRS to provide security to owners and to clients who use the IPRS information for transactions, it is normally the case that a mechanism exists for the compensation to users of the IPRS for damages that they suffer from errors in that information. Conditions in transition countries do not permit the creation and operation of such a mechanism. The possibilities of collusion between Registrars and clients to arrange a “damage” and the lack of a fund and procedures for meeting compensation demands preclude this feature of the theoretical IPRS.

### **5. REASSESSMENT OF OPTIONS**

Faced with these difficulties, what is to be done?

The theory of the IPRS is quite attractive, but the reality of conditions and trends forces a re-thinking of what is being done to create such systems. Several ideas could be explored to modify the structure and procedures of the IPRS to salvage something of the investments already made:

- 1) Recognize that modern IPRS requires administrative integrity that does not exist yet in many transition countries. There is no functioning warranty fund or procedure that can be invoked for compensation in the instances of false information in the Registries producing injury to parties to transactions. The Registration Office offers limited certainty to the people interested in transactions.
  - Strong efforts should be made to introduce procedures for doing title searches for all transactions for a period of years until the IPRS becomes more entrenched as a professional and respected institution. For example, require that title investigations be done to search for defects in title, back in time at least 10 years. Investors and potential buyers should investigate the roots of title and satisfy themselves that title has no defects, or if they detect defects, they must decide whether to risk the transaction.
  - Publish periodically all transactions that occur, so that everyone can see what is happening with transactions. Such a measure would discourage the “hidden” transactions that occur from time to time in some Registration Offices, which are done outside of the normal procedures and are of questionable legality.
- 2) Discourage informal, un-registered transactions
  - Introduce “significant” immovable property tax to be paid by the registered owners (*inter alia*, to provide incentives for sellers to be sure that transactions are registered). Such a tax should be developed first for urban and peri-urban properties, since the market value of such properties is known and higher than for rural properties, and people can see what their properties are worth in comparison with the tax that they would pay.
  - As the property tax is introduced, gradually eliminate or greatly reduce the transaction tax, one of the major cost factors which drives people away from the formal IRPS.
- 3) Encourage Registrars and their staff to serve the public:
  - Elect Registrars every two years, without party affiliation, to make them accountable to the local population, but without being subject to local political pressures.

- Oblige the Registration Offices to become gradually self sufficient in terms of their operational and investment budgets, by finding ways to attract people to bring their transactions for registration. A first step is to make the Registration Offices “client” oriented, with the philosophy that such offices exist to serve their clients’ needs. Simply paying higher salaries to staff will not be sufficient. Moreover, particularly in a context where staff have become accustomed to charging “facilitation fees”, a strong program for instilling an “ethic” of a new profession of Registrars is needed, perhaps requiring of such people a satisfactory completion of a serious training program (e.g., in Turkey, to be a candidate for Registrar, a person has to be a graduate of a technical school specializing in that profession).
  - A supervisory body should be created for overseeing each Registrar and the Chief Registrar in the IPRS, composed of people from government and the private sector who are interested in the proper functioning of the IPRS, such as bankers, notaries, construction company owners, brokers, valuers, local land use planners and surveyors. Such a supervisory body should have the ability to select the Chief Registrar. This Board should also be empowered to review and modify budgets prepared by the Chief Registrar, including fees for services. It should also have the ability to conduct “procedures audits” of any Registration Office at any time, and to take disciplinary action against employees in cases of improper behavior.
- 4) Modify the legal and public expectations of the IPRS concerning the “mirror”, “curtain” and “certainty” principles:
- People should understand that there is no guarantee or assumption that the information in the Registry necessarily reflects reality—the “mirror” principle is weak at best.
  - People interested in a property must do an investigation of title, i.e, there is no “curtain” principle.
  - The public should know that administrative defects require them to investigate title and that there is no other guarantee of title—there is no “certainty” principle that the State guarantee of title is effective.
- 5) Public education about the IPRS should have a very high priority in any project or program to create the institutions of a properly function immovable property market.

The result of all or some of these measures will be that the cost of transactions represented in fees will probably increase over what they are today. The cost of title investigation services and the Supervisory Board will be additions to costs of present procedures. But the modified IPRS will improve the probability that transactions will be conducted transparently and according to law. A modified IPRS will also increase the expectation that the evidence of ownership and other rights to immovable properties contained in the Registration Offices is valuable and useful for present and potential owners. With the elimination of the transaction tax, the total cost of transactions should actually decrease over what the total cost is today.

A more radical approach may be needed in some cases, where the degradation of the IPRS has proceeded so far that it is difficult to envision how marginal reforms can succeed. One alternative which could be considered is to transfer the transaction registration functions to the lowest level of local government where officials are elected. Perhaps the registration functions can be combined with the land tax administration at the local level, where there is a land tax, and where the proceeds

from that tax at least partially remain with the local government unit for financing schools and local infrastructure.

In other situations, where there is no functioning land tax, the local government unit can still be interested in maintaining accurate property records to serve the needs of the local population and of the local government unit.

Such local registration services could be combined with other “registration” functions at the local level, such as births and deaths, marriages, and building permits. This model has been widely used in some States in the US since the initial colonization period. By grouping these functions in a single office, costs can be reduced and information sharing be facilitated to identify and document transactions as they occur.

It seems clear that serious adjustments to the IPRS model or a more radical re-structuring of the registration function need to be explored in many countries.

## **6. IPRS PROFESSIONALS AND PROPERTY RIGHTS ADMINISTRATION**

Property rights in land are critically important to the proper functioning of societies. Stability and certainty of property ownership and associate rights form the foundation of financial and political security. The successful administration of property rights manages to balance the three competing imperatives of providing access to land by the disadvantaged, improving security by which land is held, and protecting land and water resources.

Changing and conflicting definitions of property rights in nations in crisis form a fertile ground for the roots of terror and war to sprout into violence and destruction. Property rights issues emerge in response to rapid population growth, urbanization, distorted expansion of market economies, feeble democratization, and environmental crises as water shortages and land degradation spiral out of control. Policies and programs to deal with the property rights expressions of these trends often focus on a single element in the puzzle, when only a broader strategy can be successful.

Property rights administration institutions have to find ways to balance the often-competing demands of three policy imperatives:

Where market oriented economies are weak or just emerging, one imperative of land administration is: *make the exercise of land rights more secure*, by improving formal titles and the tradability through such efforts as the massive privatization programs of the former socialist countries and the titling, registry-cadastre modernization, and land market programs of nearly all market-oriented countries. These efforts support the goal of economic efficiency of use of land and buildings and the linking of capital to these assets through mortgage markets. Political movements deriving from concerns with the environment and from the demands of disadvantaged frequently challenge these programs.

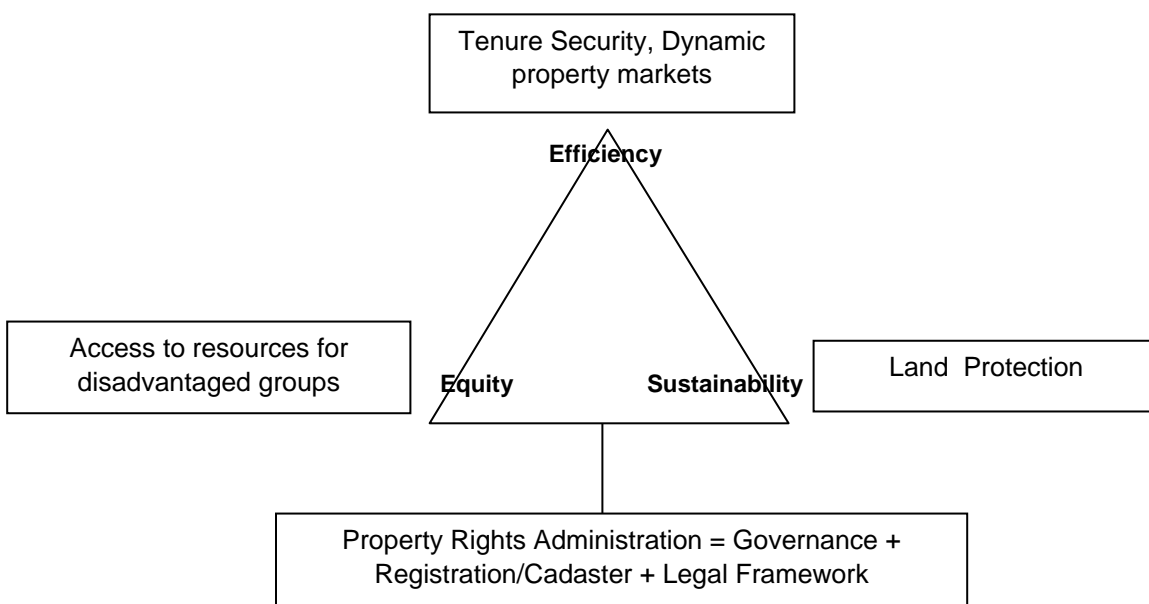
Where the land and water resources are degraded or are being dangerously degraded, a second land policy imperative is to *improve the environmental management and protection of land resources*. Improving environmental conditions through restrictions on the use of the land resources, however, has often run into ethnic conflicts at the local level and the economic interests pressuring for more exploitative uses of the land. The fundamental task is to help populations work out agreements over

natural resource exploitation which are sustainable through a mixture of community resource management, alternative income sources, enforcement mechanisms and conflict resolution techniques. Such programs often restrict the rights of land owners, limiting the scope of their “ownership”. Such programs also often restrict the access of disadvantaged and privileged groups to land and water resources.

Where the gap between rich and poor, or between one ethnic group and another, or between patriarchal social structures and those desiring greater gender equity, the third imperative is to improve the access to land by disadvantaged groups (the poor, women in some regions, ethnic groups, refugees). Agrarian reforms and land banks have been used to shift the management of land from “latifundistas”) to peasant farmers. Affordable housing program are directed toward the poor. Women’s rights in land are secured through education and legal programs. Such programs tend to support the goal of social equity in land management. However, this trend has encountered strong resistance from the ethnic and economic groups that could be obliged to share some of their privileges with the disadvantaged groups to be favored. Also, where political opposition to asset redistribution is strong, opening up forests and other fragile eco-systems for human settlement in order to provide access to land for the landless is very tempting, and in conflict with conservation programs.

Balancing these imperatives is mediated by the capacities of local and central government and civil society for defining and resolving property rights issues, the availability of information about land use and property rights and the legal framework (formal and informal) that brings some predictability into the ways people react to the implementation of the often competing property right’s imperatives. See Figure 1.

**Figure 1. Triangle of imperatives in property rights administration**



The foundation of property rights administration is comprised of three elements:

- 1) the capacity to govern, to incorporate diverse interests in dialogue and design of programs to resolve priority issues,
- 2) the availability of suitable information about the capabilities and use land and the holders of rights to the land, and
- 3) the legal framework, the rules which the society devises to handle the competing property rights imperatives, including formal expression of these rules in laws and regulations, as well as the customs which people devise about the exercise of property rights and the responsibilities of the holders of these rights.

This trio of policy imperatives revolving around property rights creates compelling new challenges for land administration institutions at the national and local levels to mediate among the diverse interests in land. The nature of the challenge varies from place to place.

A stable balancing of property right's imperatives in particular places at specific times that leads to prosperity – whether in Latin America, the US or Europe, or in any one of hundreds of countries across the globe – is fundamental to the global economic and political system.

*The broad question which requires the active attention of the IPRS professionals is: how can countries effectively re-orient property rights administration institutions to achieve broad goals of economic development, social equity and environmentally sustainable development under the pressure of competing agendas and policy imperatives to property rights in land?*