

Comments from Theo van Banning, specialist in human rights law, on the land policy guidelines. Essentially focusing on including human rights law in policies on land.

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The need to focus more on human rights law. Comments on the EU Land policy guidelines.

The EU Land Policy Guidelines contain useful materials to support land policies and land reform. I can agree with many guidelines included such as the long-term process approach and the need for careful crafting of rules and tools. There is however one element that is not included in the guidelines and which should in my opinion get more and a different focus in the document: the role of the law, more specifically human rights law.

My recommendation can best be illustrated with the case decided by the European Court of Human Rights in Straatsburg about land reform in Germany. The case was decided on the 22nd of January 2004, just four days before the date of the EU report. The European Court decided that land reform in Germany had neglected the rights of a specific group of persons who had rights to land, and which as a result of the land reform measures had suffered unreasonably. They should therefore be compensated. It is estimated that the ruling affects some 70.000 individuals and families in Germany and might, alone in the state of Sachsen Anhalt, cost the German government above USD 120 mln. in compensation.

If a well-developed state like Germany, with a widely admired legal system, can negatively affect, through land reform, so many citizens to such an extent, how is the situation in countries with less developed legal systems? In virtually all large-scale land tenure reform programs, multiple interests are involved. Reforms can only be implemented successfully if all individual interests are taken into account. That presupposes a focus on humans; on persons; even more than a focus on land. Comprehensive approaches have to be found. The guideline promotes an important element, a participatory approach. But basically no individual should be affected unreasonably by land reform programs. Reform programs must be comprehensive and inclusive.

The World Bank did not deal with human rights aspects of land. That is understandable. The Rights to property is not recognized at the universal level. However the European Convention protects the right to property. The European Court of Human Rights has produced more than 30 judgments on land issues and has come up with remarkable results. In virtually all cases the Court found states violating human rights law. There is therefore an urgent need to take note of what comes out of the European Court (and the Inter-American Court for that matter). Member States of the Union have to respect in their policy documents the European Convention. The European Commission, as the

executive arm of the Union, shall also respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. A paper as the EU land policy guidelines cannot therefore afford not to discuss the human rights elements.

Several elements seem important from a human rights perspective.

1- Much more focus on the effective functioning of justice, of the courts.

If a state cannot guarantee land rights after the land reform, the reform is of limited use. The security needed for more effective land use, which is the aim of the land reform, can only be realized by effective protection by independent courts. If someone cannot protect his land with the law, only power may prevail. I miss any reference to the role of justice. The European Court has time and again pointed to the need of effective remedies; of adequate and timely justice.

2- As said before a land reform process has to take all individual interests into account. Land reform is not only about land and about improving land productivity. It should focus above all on improving the interests of women and men. Land reform can be seen as an instrument in providing women and men with such private property as meets the essential needs of decent living and helps to maintain the dignity of those individuals.

3- Assuming that the role of the individual is central, it is likely that the role of the government is often better a complementary one. Let the individual decide and let the government stimulate and/or discourage. The government possesses a large variety of instruments to stimulate reform. Thereby taxes and subsidies, disincentives and incentives should be seen as integral elements. A complementary role is preferable above a decisive, top down, often redistributive role of the government. I find in the document the role of taxes discussed too much in isolation. They should always be part of the various instruments of government to promote reform.

4- The central role of the individual does not absolve the government from taking measures. One may assume from a human rights perspective that there is a government obligation to stimulate such reform measures as are needed to provide as many individuals as possible with the minimum assets to live in dignity. Paragraph 2.2. does formulate it well but might include a sentence pointing to an obligation of governments to tackle land issues as part of its obligations to promote and protect the dignity of its population.

5- The text in paragraph 5.3 on titling deserves full support. The guideline implicates that legal texts and legal documents are not always the solution. Titling does certainly not always provide the solution. The European Court has more than once judged that the national law and the application of titling requirements was not in conformity with human rights law.

6- Paragraph 5.7.5 and paragraph 5.7.9. may give however the impression that doubts may be raised as to the importance of good, consistent, accessible and foreseeable law. Such doubts are not justified and the document should avoid such impression.

7- Many land policy experts maintain that the situation in Africa or other developing states is different from the situation in Europe. That position is doubtful. The African Charter on Human and People's rights protects property rights, just like the Inter-

American Convention. The Inter-American Court has clearly applied the same rules as the European Court in a case against Nicaragua.

Success with your guidelines

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