

The Local Community: A Legal Mediator Between Private Property and the State?

The local community's legitimacy for local matters. The Example of Kalingalinga, Lusaka.

In Zambia, like in other colonies, the British introduced a distinction between "crown land" and "native reserve land". While in the latter land management and all the natural resources going with it, was left to "native authorities" according to the principle of indirect rule, the former was administered in keeping with British regulations. Areas which lend to commercial farming, sites of copper mines and the prospective urban areas were declared crown land to be subdivided and subsequently sold (freehold) or let (leasehold). After independence, many of the farmers departed, leaving their property vacated. Hence squatting on abandoned parcels was easy and widespread, especially on the farms surrounding the built-up urban areas. However, in juridical terms it remained an illegal possession always threatened by eviction.

This was the situation when, in 1969, the World Bank initiated one of its very first Upgrading Schemes. In anticipation the Zambian State introduced a solution to the problem of illegal settling by creating a kind of dwelling right on a 30 years lease issued to those people who were not able to buy the land for their house. This was accomplished by the State's seizure of squatter areas from the legal owners (through purchase or confiscation in the course of the policy of nationalisation), subdividing it into parcels and letting these in the form of "occupancy licences". This title would be granted to a house identified by aerial photography and the habitant family as verified by terrestrial survey, leaving the boundaries of the surrounding plots to the arrangement between the respective neighbours.

The concept was introduced in the area of the World Bank Upgrading Scheme. It proved to be apt to hand out land in a cost-saving manner. But it did not live up to the expectations for two reasons. First, the juridical machinery turned out to be incapable to issue appropriately simple documents and translate the aerial survey into a townplanning document. Second, by insisting on a centralized procedure, the office in charge soon became overwhelmed by the sheer number of cases.

This was the situation, when the German GTZ was asked to assist in upgrading another settlement initially excluded from the World Bank Scheme for its reputation of unruliness. The subsequent GTZ-Kalingalinga Community Upgrading Project, having identified the problems mentioned, started by disconnecting the juridical procedure from the internal process of self-organisation by drawing a line round the settlement declaring it a "territory and community in the state of transformation". A ward council became installed which was granted authority to handle the matters of the local community. A small team of municipal civil servants became assigned to the ward so that a kind of local autonomy could be exercised effectively. After a few sessions, the ward council had understood its function at the interface of external finance and technical advice there and of internal material contributions and social affairs here. In a process of circular causation the members of the community and the council came to understand themselves as a "WE". (1)

The most crucial question was to identify who was a member of the community and beneficiary. A definition was established which involved the neighbourhoods of the compound. Each 25 households/houses certified on a piece of paper that they were residents of this very neighbourhood, called "section", and authorized a "section leader" to speak for them. Through this casual but formal procedure a) each and every beneficiary was identified, b) each of them became obliged to contribute to the "common good" and c) possible free riders were excluded.

The initially informal community quickly formalized and reinforced its coherence in abounding discussions over all questions found important. Of these I can only mention some of the crucial ones related to land management:

1. What was the procedure for defining the rights and the duties going with the "occupancy license"? There were elected leaders who had to prepare communal decisions and public meetings which endorsed the decisions to be taken. These were put down in minutes. In the case of entitlement for occupancy, a decentralized procedure was

agreed upon. Every 6 to 10 of the sections of 25 houses united in a "branch" which had to confirm the correctness of the section lists and also served as an organ of appeal in case of conflicts at section level. A number of tasks related to water supply, drainage, and even the responsibility to build and maintain particular pavillions of the ward school was ascribed to sections and branches. The procedure as well as the decisions taken, were layed down in written minutes. Hence there was much formalization and internal legalization according to the self-given rules, while the compound in its entirety was waiting for official legalization.

2. Seen from the bottom, there are many questions related to the self-given rules. Which are the fields of decision, on what matters and what not? What underlying logic do they follow: Being "friend" of the decision-makers? First comes, first served? Auctioning of privileges? Economic profit vs. conventional obligations? Could possible nuisance be balanced, and if so, in whose favour, to which extend and how? How are these rules technically working? Who controls their observance? Only in very few cases the police was called. There were some known thieves and law-breakers living in the ward; but since they kept quite, they were left in peace in turn. On the whole, the rules were enforced by means of social control. Environmental problems were a case in point. The rules of the occupancy certificate left the plot boundaries to the mutual agreements of the owners. There was very little fencing. Some people started horticulture and extended their plots at the expense of their neighbours. Others went on poultry husbandry which was seen as a nuisance to the respective neighbours. The conflicts connected with this were dealt with at section or branch level.

3. A problem which was only settled after much discussion at ward level was the extraction of soil to make laterite blocks. It had taken two years for the expatriate building experts to convince the people of using the local soil as building material instead of the usual sand-cement blocks, for which sand and cement had to be brought from far. Then, after the use of laterite had proved profitable for their own houses, some people discovered that they could produce the same laterite blocks to sell them. Many people started to dig holes in their gardens instead of growing vegetables. This not only hampered local food production in the long run, but caused immediate drainage problems. The problem was solved after much discussion involving most of the questions quoted by forbidding any extraction in the ward precinct. Instead, an adjacent site was opened and reserved exclusively to serve the inhabitants of the ward for personal use – a decision which required delicate measures of social control.

4. A key problem which kept the representatives and assemblies busy at all three levels was the question of transfer of occupancy rights. The transfer by direct heritage normally involved the direct neighbours in the section. But, if somebody wanted or had to move out, to whom would he pass his occupancy certificate? This was one of the crucial points, at which the World Bank formular of individual handling of occupancy licenses failed. The Kalingalinga community had ruled that concerning a prospective buyer the three levels, section, branch and ward each had the right of veto. The purpose of the provision was to ensure and foster community coherence. But the opinions of how to achieve this goal were always divided. In the end, the entire system broke down at this point, not from inside, but under pressure of some high-ranking politicians who by successfully claiming in court a plot in Kalingalinga attained their hidden goal of crashing the autonomy of the community.

The constellation of people living in urban density and consequently being compelled to manage their affairs, land and other resources in collective and self-organized autonomy, is completely different from that of conditions of rural subsistence. Both have in common a close property-ownership relation and thus distinguish from a third constellation for which absentee-ownership is common. I shall explain shortly the specificities of the three, because they are often mixed up, not only by de Soto in his "Myth of Capital", but also by most of his critics. (2)

The three modes of relating ownership rights to land (and natural resources)

1. The Urban mode

Kalingalinga became self-aware as, generally speaking, a community of parcel holders. The *raison d'être* of such a community is to assure the use value of each individual parcel, also in view of possible conflicts. Individuality and togetherness had to be combined. This is the common denominator of "urban" since Babylonian times and is found in the Arabian, Darwidian-indian, Chinese and probably any other urban culture, let alone the ancient Greek

and the medieval European city states. (3) Such societies live on arrangements of mutual respect of interests and alliance/free coalition for common defense. The use of land is diversified, because of the specialised urban economy, but also enables marginal subsistence. Consequently, transactions must be possible. Since urban culture is literate and money-based, the transactions are conducted in writing following an accountancy logic. (4).

Urban togetherness demands restrictions to the private exertion of ownership. There have to be reserves for public space and common facilities (infrastructure). The individual freedom is also limited, just as that of any other citizens. A typical example impinging on urban property rights are the building regulations and use formulas of a given community. Other accepted restrictions relate to construction and climate requirements as well as prescriptions regarding the social order. Urban owners, knowing that they can enjoy the fruits of their property only together with public goods in material and immaterial terms (roads, water provision, public facilities on common ground and public order, rules for using the land for commercial purposes etc.) are prepared to pay taxes, duties, charges etc. for these. Urban property presupposes material and immaterial "commons" (5).

Urban order demands personal responsibility for one's real property. Hence, absentee ownership is rare. It furthermore demands well-defined entities of manageable size and a minimum of local autonomy. (6). The notion of "legitimacy" is translated into "local legality". The result is private property under societal control in a flow-equilibrium which opens, given a state of self-awareness, the perspective of a steady state for the society.

2. Rural mode

Parallel to this, another mode of land management exists. It is designed to fit a rural subsistence economy and an illiterate way of life. Just as nomad families are tied to their herds, peasants and the soil they live on are inseparable. Agrarian societies are built on these foundations in form of a hierarchy of rights and duties. Above the subsistence peasant there are several levels – the nobility up to the sovereign – each drawing its material resources from the surplus of the respective lower tier while assuring cultivation, specialized crafts, overall order and defense in relation to a given set of followers. As opposed to this, the legitimacy is defined top-down – the sovereign as representative of God, the tiers of nobility as representatives of the sovereign exerting paternalistically defined privileges and obligations.

Each level is composed of people and the corresponding land governed by a landlord responsible for preserving the livelihood in his realm. Absentee landlordship is risky. The attribution of the realm (territory) goes top-down with a minimum of formality. To pour this in the form of written laws is not only unnecessary, but also against the inherent logic of sovereignty. Territorial changes happen through descentance or conquest of peer domains. The property title is seen as a bundle of privileges, the accumulation of which is related to a person's or family's status. Commercial transactions are alien to this system of land management. If left to itself such a system is in continuous internal struggle. Yet, the system as a whole persists, just because of its constant mutations. (7)

3. Capitalist mode

Most agrarian societies are organized along these feudal principles. A common, but superficial belief takes this system as prior to the urban one. A closer look at feudal societies in the Maghreb, India, old China, Africa etc. shows that they have always been in a state of co-evolution with the urban mode of land management, a fact which has resulted in a large variety of urban-rural constellations (8). This co-evolution (see Europe's landed gentry, Indian Maharajas in towns, Fezzian merchants on the land etc.) ended up in a situation of increasing absenteeism of owners. At the same time the emergence of technology as an overriding phenomenon in the rising industrial society caused an accumulation of capital and, in a process of circular causation reproduced it. Real property accumulated to become employable at a new scale, both as private capital and in form of infrastructure. London and Paris became towns of tenants, living in great number on large tracts of property. It became a characteristic of modern town planning to think in undivided plots and even larger tranches of land.

In this situation, the national state became irreplaceable as provider of the material and immaterial infrastructure and took, in return, the monopoly on taxes, duties and royalties. Only a big scale allows for "economies of scale" and, consequently, economic efficiency. This goes together with absentee ownership. Absentee ownership, in

turn, brings new problems of control, especially if combined with rules like "the winner takes it all". The case of Bhopal and Union Carbide or the Niger Delta and Shell is exemplary for the concomitant logic. The profits are exported, the royalties go to a class of rulers far away in the capital, while the people on the spot are neglected or overruled. Formally this may be "legal", but the situation is "illegitimate"(9).

Hence an economic system running on big scale technologies, be it free market or state run, develops a dichotomy between "legal" and "legitimate". To decide over property, land and other resources including manpower, knowledge and information against the local people lacks legitimation. To point at this deficiency and to call for attuning large scale ownership with the human scale is the role of a new agent: the Civil Society and its /NGOs. These agents follow two lines of reasoning leading to two, mutually exclusive strategies: Either demanding from the companies, big as they are (private, parastatal, state) legal conformity or breaking the down their size by making them answerable to local control, i.e. fostering local empowerment which is sometimes confused with "informal" state of affairs. (10)

Towards the oneness of a legal regime?

The example of Kalingalinga shows that the distinction between "legal/illegal", "formal/informal" and "legitimate" is not easy to draw in a concrete situation. But the tendency is clear: people start with "legitimacy" and aim at some "formalized" state of affairs to proceed, if possible, to a situation of formal legislation based on written and thus objective legal documents.

Unfortunately, no legal system is perfect. For example, the legal system may not provide for facts such as environmental damage. If it does, it may not offer adequate procedures for going to court. And if this is the case, a fair trial may be hampered by the interference of powerful interests etc. In addition, legal systems are in constant evolution. International laws under the evolving United Nations legal system and international agreements are cases in point. Some degree of inconsistency is unavoidable, but the entire system should be geared to minimize its effects. (11)

The avoidable and incidentally more dangerous inconsistency arises from the superposition of two legal systems being in conflict. Colonies are notorious for this deficiency. For example, the British put up, in their African colonies, a system of licencing for every economic activity in order to transform the indiginous people into a labour force and to nurture a group of docile immigrants being at the mercy of the licencing authorities. Unable to enforce this strict control generally, they restricted it to the crown land. After independence the distinction of crown land and native reserve was abolished, but the law, from the economic point of view obsolete and simply neglected, became to serve a special purpose: Those in power – the president and the little policeman – took it (together with other obsolete legal provisions) as a stick in the arbitrary use of power. It became an instrument of corruption. (12)

Until today, most reasoning in development politics, including the World Bank policies and and also some of the arguments put forward at our workshop falls into the trap of subduing local legitimacy, called "informal" to global pretensions, called "legal". In my view this is the essential point for criticizing de Soto. The first task therefore is to accept and respect the multitude of local legality systems and to open a perspective of integrating them in the oneness of an ultimate legal system tuned for consistency.

As far as I can see, there are two mutually excluding views of the latter. They reflect the two Civil Society strategies already mentioned. The conventional view is that of imagining a legal system top-down. It starts from a general assumption at the top and deduces all the rest from it. The supposition is that only through this approach all-inclusive equality is assured and efficiency in execution achievable. This supposition reflects the intellectual tradition of regarding ultimate justification as being vested in and definite truth emanating from God or some other supreme authority. Its partizans hold that, once the general principles are accepted, implementation is a purely technical matter. They reprimand to the bottom-up model that low-level agreements are just temporary and arbitrary cease-fires of contesting interests. Local rules can easily be sidestepped and foster instead of hindereing corruption. In particular, these as any other peacemeal arrangements would impede the cherished economies of

scale. Legitimacy, it is hold, will come with the efficiency of the entire system. On the way to the final state of perfection, deficiencies such as social disparities are to be tolerated.

The counter position doubts this outlook. Deficiencies which relate for example to social inequality and injustice, to the sinking of refuse (its sheer quantity, but also its harmfulness e.g. when from nuclear plants), to the exhaustion of maritime resources etc. and might have detrimental long-term effects threatening the course of global survival, let alone long-term development. Messing first and cleaning later may not work. This counter position is based on the respect for the individual human being and his/her "feeling of legitimacy". If the individual is respected, he/she will respect the fellow beings, too. Legitimacy is drawn from living in communities. Communities which are respected as integer entities learn to respect other communities. Once such communities become self-aware, they strive for transparency and elimination of corruption in their own interest. A process of institutional standardisation comes into being, which opens the way to a bottom-up federate structure. Legitimacy at local level calls for for a local community's right of command over its resources, just as the individual has, by its mere existence, the right of access to the resources for a life in dignity. This is reflected in the concept of property rights as part of a legal system in correspondence to the urban mode explained above. In such a world, the economic system would be decentralized, too. Economic globalisation would not be excluded, but take a completely different turn.

The example of Kalingalinga proves the inclination of communities for self-organisation along territorial lines as well as for standardisation of the institutions of self-government. This propensity for standardization opens, at least in the long run, the way to a consistent legal system. My conclusion, derived from this example is to accept a local community as an entity in its own right including the right to rule itself and its resources exactly in the sense as the individual citizen was established as an integer holders of fundamental rights by the philosophers of the Enlightenment. This means nothing less than an extension of the corpus of the Universal Human Rights. Once equipped with this kind of autonomy, the dual situation, individual here and State there, is dissolved. The logic of the top-down legal system would be replaced by the logic of a multi-tiers, slowly bottom-up growing self-reflexive legality which follows the principle of federations. In such federate structures the local community would and should act as a mediator between the individual and the upper tiers.

Notes (to be completed in due time)

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