

## ***Scaling up Legal Aid for Land Rights Regularization***

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### *Abstract*

*National laws to protect land rights are plentiful and often surprisingly robust. Their enforcement is not. A critical challenge to advancing land rights and strengthening tenure at the country level is the effective enforcement of well-written land laws and legal frameworks to property. New and/or well-intentioned laws can often create more harm than good by falling prey to elite capture. Institutions such as surveyors, notaries, land agency officials, and local government officers can be utilized to turn good laws in to bad practice that strips the poor and vulnerable of their land. To combat this elite-capture all internationally supported land reform programs need to contain a strong legal assistance component. Most, however, do not and even fewer are able to develop and support sustainable systems based on indigenous institutions that can accompany the often long, extended land reform processes. This article details recent field work to fill this gap and proposes a model for sustainable land rights legal assistance that can be scaled-up to provide access beyond the means of most internationally supported programs and in support of large scale land tenure regularization programs. By ensuring the wide availability of legal services at low cost to land holders the program addresses issues of scale and sustainability that plague international land projects with limited funding windows. Bringing extensive legal assistance for land rights can counteract the power dynamics that often undermine land titling efforts and can empower local land holders to make economic and family choices based on increased tenure security.*

### **I. Introduction**

National laws to protect land rights are plentiful and often surprisingly robust. Their enforcement is not. A critical challenge to advancing land rights and strengthening tenure at the country level is the effective enforcement of well-written land laws and legal frameworks to property. New and/or well-intentioned laws can often create more harm than good by falling prey to elite capture. Institutions such as courts, surveyors, notaries, land agency officials, and local government officers can be utilized to turn good laws in to bad practice that strips the poor and vulnerable of their land.

Access by the poor to mechanisms for challenging the violation of land laws and policies by institutional and private actors is critical to ensuring good laws have their intended effect. But the inefficiency and lack of coverage of courts and the under-development of the legal industry, particularly in rural areas of most developing countries hinders this access. Instead, laws, policies and programs that seek to strengthen local land rights result in the consolidation of land by those that have political or economic access to these programs and can manipulate the institutions charged with their implementation. This article draws on the experience of recent land reform efforts in Tajikistan, Rwanda and South Sudan where national

and local elites have been able to circumvent new national policies, often supported by international donors, which are meant to strengthen land tenure security to increase their personal wealth at the expense of vulnerable populations.

To combat this elite-capture all internationally supported land reform programs need to contain a strong legal assistance component. Most, however, do not and even fewer are able to develop and support sustainable systems based on indigenous institutions that can accompany the often long, extended land reform processes. This article details recent field work by Chemonics and Hakí to fill this gap and develop a model for sustainable land rights legal assistance that can be scaled-up to provide access beyond the means of most internationally supported programs and in support of large scale land tenure regularization programs.

## **II. Field Data**

Aspects of the land rights legal assistance model proposed by this article is currently being developed and tested in Tajikistan as part of a Chemonics-implemented, USAID-funded land reform project, the Tajikistan Land Reform and Farm Restructuring Project (LRFPR). The model includes both national policy and institutional reform and local NGO-based work, but the crux of the model is focused on the use of market dynamics to expand basic, or micro, forms of legal assistance most applicable to the tenure needs of local vulnerable populations at reduced costs.

In Tajikistan 70% of the population lives in rural areas and rural poverty is high at 49%. Agriculture accounts for 75% of total employment and women represent 70% of the labor force in this sector, but 26% of children under five are stunted (low height-for-age) as a result of chronic nutritional deficiency and 24% of women of reproductive age suffer from anemia. Tajikistan is a priority country for combating food insecurity despite its fertile soil, extensive irrigation infrastructure, and long agricultural history as an exporter of cotton, apricots, and other cash crops. As with many countries, low agricultural production and food insecurity in Tajikistan is not a product of a lack of agricultural know-how, but of insecurity of tenure and constant threat of eviction for small family farms.

Field-based research across two regions of Tajikistan identified a number of land-focused legal aid best practices, but also revealed persistent obstacles to providing legal services to poor and vulnerable populations. Research in the northern Sughd region identified progress that has been made toward sustainability by NGOs supported by grants under previous project iterations. Research in the southern Khatlon region looked at feasibility of introducing market-based sustainability approaches, including some of the positive examples identified by NGOs in the Sughd region. The reality was, however, slightly different. While Khatlon region suffers from greater food insecurity and is generally considered poorer and not as well administered as Sughd region, the obstacles to sustainable legal aid for land rights are similar. Also, while a number of successful fee-for-service models were

identified in Sughd, some were also identified in Khatlon. Similar positive examples of collaboration between private Bar attorneys and LACs were identified in both regions and examples of *jamoat* government support of *tashabuskors* and LACs was more evident in a few districts in Khatlon, while largely absent in Sughd (partially due to the continued operations from USAID funds). From the response of private lawyers, there did seem to be greater potential for paying farmer clients in Sughd versus Khatlon, where many farmers are still in collective *dekhan* farms or have not yet succeeded in turning their farms into profitable businesses. But even lawyers in Sughd stressed that without donor or government support they struggle to provide legal services to poor farmers. They also indicated that the need for legal services will likely increase if farmers are forced to recertify their alienation rights, as is proposed by draft regulations.

Specific findings for reach region are detailed below. The findings were used to formulate recommendations, detailed in Section IV.

### *a. Sughd Region*

The 15 districts in Sughd have been a focus of the previous USAID land reform project, including awareness-raising on farm restructuring with farmers and the provision of legal aid to farmers wanting to establish their individual land rights and form their own farms. Interviews were conducted with a cross-section of counterparts and beneficiaries, including district land committees, LAC NGO staff, other NGOs, individual lawyers, farmers, and *tashabuskors*. The focus was on trying to identify mechanisms that have been put in place since USAID support ended in the region to maintain the operation of LACs and legal services to farmers.

*Land Committee of Ghonchi.* The land committee in Ghonchi discussed the context of *dekhan* farms in the region and their role in providing certificates to farmers that want to start their own individual or family farms. 500 *dekhan* farms were created in Ghonchi in the past few years. The land committee wants to do 1,000 more. Farmers generally know where their land is within a collective farm, because it is indicated on their share, but they do not often get this. Instead they are typically assigned a non-irrigated plot and have to apply to the farm manager for a different piece.

*Saodat LAC, Khujand.* Saodat was a USAID grant recipient that supported a few of the single most impactful cases on land rights, including a 6 year case against a private/government action that tried to take a woman-owned *dekhan* farm that had set up irrigation. Since the USAID project ended in Sughd, however, they have largely been unable to continue providing legal services to farmers and have reduced to five staff. Instead, they focus on training, agriculture extension services, and microfinance projects with farmers. Local government will often support their trainings, either in-kind or with payment, and larger *dekhan* farms will pay a training fee. The lawyers that used to be part of Saodat now run their own private practices. Saodat still receives requests for legal services from farmers, but refers

them to the private lawyers. The lawyers will sometimes be able to take the case if the farmer cannot pay or sometimes will just request the farmer covers their expenses. Their view is that only collective *dekhan* and family farms can afford to pay for a lawyer, but individual farms cannot. Lawyers will negotiate with farms about the fee and if goes to court will negotiate to take a percentage of the judgment, if in their favor. Many cases are difficult as they are against the local government or *dekhan* farm head and require significant resources and political connections. Success in such cases was more likely when international actors supported the NGOs, as it raised the profile and likelihood that the case would be tried on the merits rather than corruption.

*Human Rights Center, Khujand.* HRC provides a range of legal services in Sughd with support from Helvetas/Swiss Development Corporation and other international donors. They provided legal services on various issues – criminal, tax, inheritance, housing, and sometimes on land. Seventy percent of their clients are women. HRC said their lawyers used to be allowed to use up to 30% of their time in private cases taken outside of the office, but that it affected the quality of their work on human rights cases. They now no longer allow private clients and do not charge clients, even if they can pay. All services are free. They indicated that this is partly a conditionality of their donor. HRC has a letter from the government granting them non-profit status. This letter reduces the professional fees they pay as lawyers, as well as their tax burden. It was not exactly clear how much this affected their business model, but it is an issue worthy of consideration for future models. It is important to understand the requirements for classifying and maintaining status as a non-profit. HRC claimed that one of the restrictions from their non-profit status is that they are not allowed to recover fees as a percentage of court damages. Research assistants expressed doubts over this statement.

*Center for Defense and Cooperation LAC, Isfara.* The director and main lawyer for CDC and former USAID-supported LAC conveyed the success of the program. Even their *tashabuskors* were hired by *jamoat* and land committees because of their training and knowledge on land rights. They are active in regulations reform and increasing awareness of government officials on the rights accorded by the land code. Despite not having a funding relationship with LRFRP they remain in regular contact for guidance on pressing legal issues and new developments. He said that land sales questions are on the rise and worries that if the alienability rights re-certification requirement is passed that individual and family farms will suffer and have more rights taken from them. The director discussed the role of the government in providing legal aid services and despite the existence of a government legal aid office and Ombudsman institution, government lawyers rarely provide legal services on land or other issues. He does not see local government funding as an option as they often have an antagonistic relationship and any financial dependence on the government could compromise their ability to represent cases against the government. Private lawyers will sometimes take cases for free if they see it as a chance to increase their visibility, normally for cases that push a particular issue or are seen as strategic.

CDC continues to provide free legal consultations and defense services in court, particularly on cases against the government. He says around 20% of individual farmers can afford to pay for services and closer to 60% of family and collective farms. He was not positive about the possibility of sustaining legal services by charging clients. He sees too many farmers that are unable to afford the legal fees necessary to sustain a purely private practice. Without alternative funding he is unable to provide legal services to the full range of poor farmers that request it. When the NGO receives cases they do evaluate whether the person can afford to pay. This is largely done by appearance and a general knowledge of everyone in the region and their socioeconomic status. No income determination forms or processes are followed other than this. Even if a person can pay it is often only enough to cover the lawyer's expenses not his/her market rate. Fees for cases are negotiated with individual clients and are dependent on three factors: 1. Location, 2. Complexity, and 3. Quantity of work. He learned about the business side of operating a legal practice/NGO with help from trainings by LRFRP. He says there are not many other lawyers that work on land issues, as it's a complicated topic and they have not received the same training.

*HRC office, Isfara.* This is a one lawyer branch of HRC in Isfara. They work mostly on inheritance, divorce and land, although they refer many cases to CDC. 70% of their clients are women *dekhan* farmers. They also provide consultation workshops in each of the 12 *jamoats* in the district. Half of the questions received at these workshops are land-related, about filling out land application forms. They have taken a few cases to court where the manager of the *dekhan* farm and/or land committee denied a woman's application for land. HRC is donor funded.

*Bar Association lawyers and LACs (joint meeting), Khudjand.* Met with two lawyers that are members of the regional Bar Association but also provide legal representation for land cases through LACs. They highlighted the issue of debts from old collective farms being transferred to new family and individual farms. They have won many of these cases on behalf of farmers but see it as a persistent issue. They have also represented many farmers that were given non-irrigated land by *dekhan* managers and land committees that was not the land they tilled under the collective farm. The uncertainty of land sales, lease and inheritance due to a lack of implementing regulations is a constant issue that will require legal assistance once regulations are set. There are also various cases around water access for new family farms that have required going to court. In summary, there are and will be a large number of cases and legal needs on behalf of new farms on a range of land-related that will require the assistance of legal aid centers. Many of those clients cannot afford to pay.

The lawyers operate a free legal consultation hotline and occasionally mediate disputes for free. They charge fees for legal representation when the client can afford, although often the client can only pay with farm products or after their crop has been harvested and sold. Lawyers often take cases for future payment that

never materializes. They are doubtful about their ability to fully cover the legal needs of poor farmers based on fee for services alone. They indicated that the local Bar association does play a role in supporting cases by providing young lawyers that are conducting internships. If the Bar becomes a stronger advocate for lawyers it would be able to help counter the threat of license-revocation that local governments make to lawyers supporting cases against them. The previous presence of donor projects helped mitigate this threat. They also suggested establishment of a regional advisory center for lawyers that can assist with cases and inform of new developments in the law.

### ***b. Khatlon Region***

Khatlon has become a priority region for many donors given its higher level of poverty, food insecurity, and still collectivized farms, and shared border with Afghanistan. Capacity in Khatlon, including at the NGO level is generally considered lower, but there also a number of NGOs and established USAID partners that have a record of success. Field research was conducted to better understand the context in Khatlon, identify best practices, and evaluate what practices from Sughd would be applicable in Khatlon given the context. Detailed interviews with NGO directors, farmers, and local lawyers provided the basis from which to do an analysis of the sustainability of legal aid services, generate recommendations for programming, and develop a series of business models (Section IV).

*Mahbuba LAC, Director and local farmer, Vakhsh.* Mahbuba is a Vakhsh and Bokhtar based NGO that has been providing legal service to women and vulnerable populations since 2006. They have worked with various donors and on topics from gender-based violence to children with disabilities, including some work with the World Bank on land certificate registration. They are now focused primarily on land rights and receive a sub-grant under LRFPR through the NGO Ilhom. There are three lawyers on staff including the director, a former prosecutor. They receive land case requests daily. A staff member registers the case and she or another lawyer reviews the file. Most requests are from collective farmers that want to leave to start their own farm and need assistance with the certification forms, the process to incorporate or “name” their farm, and to appeal to authorities, as they are often blocked or get no response from the farm manager, *hukumat*, and/or land committee. According to Ms. Rahimova, local officials often ignore applications as they want land for themselves. In addition to consultations and basic assistance with documents, they average around one court case per month. The day before they registered a case with the regional economic court in the Khatlon region capital (Qubadyan) on behalf of a collective farmer whose application for land was denied by the *dekhan* farm manager and the land committee.

Ms. Rahimova said that occasionally farmers can pay, especially the larger family farms, although often the NGO has to give farmers money to help them with the transport costs just to get to the NGO. Lawyers at Mahbuba know from appearance

and knowledge of the community which farmers can pay. Last year, Mahbuba receive a legal aid request from a larger farm to help with a case against a supplier. Mahbuba was able to successfully represent them and received 8% of the court ordered damages. They sent letters to the regional and national government to request funding for their work supporting small farmers, but government said they would only help with training. The Director said that the Bar Association (which she is a member of) is able to provide law interns to help with cases. They receive no assistance from law schools or law school clinics.

*Ilhom LAC lawyer and tashabuskor, Bokhtar office.* The Ilhom branch in Bokhtar was established three months ago with LRFRP support and is run by a single lawyer with *tashabuskors* in a few *jamoats*. In the *tashabuskor's jamoat* alone there are 247 *dekhan* farms. The lawyer said he would theoretically take cases for payment, but has not had the opportunity yet. If it is a complicated case the lawyer said he would have to ask permission from the head office.

*Bar Association lawyers, Qubadyan.* The Bar Association has its office in the district court building in Qubadyan through a grandfathered agreement. The two lawyers agreed that poorly executed regional land certification done without local input is the main source of disputes. They also receive requests for assistance in applying for certification to land committees. Approximately 35% of cases are land cases. The Bar lawyers estimate that LRFRP support allows access to legal assistance for 70% of the target population. The volume of cases in their district is high as there are only 5 lawyers for 150,000 residents. The regional Bar Association requires that young lawyers serve as interns for six months before they can practice. They pair them with experienced lawyers, including some NGOs. There is no pro bono requirement established by the Bar for lawyers in the region, but they keep an active list and timesheet of the time lawyers have spent on pro bono cases. Lawyers do not, however, get any tax deductions from their pro bono work. It appears to be entirely voluntary with no ancillary benefits that create incentives for continued work. While the Bar does not receive any support from the government, they say that local government receives annual funds from the central government for legal services, but that it is never available. The lawyers would also like a regional legal support center to help them with complicated land cases and to stay up to date on changing land laws.

*Women of the Farm, LAC, Qubadyan.* The NGO Women of the Farm has been working since 2008 to provide legal advice to women on various issues. They provide free legal consultations, court representation and training for *dekhan* farm shareholders over two districts covering 12 *jamoats* and over 1,000 farms. Services are provided for free. They hold monthly roundtables on land problems in each *jamoat* as part of LRFRP. They work through a network of *tashabuskors* in each *jamoat* that are reimbursed for office supplies. *Jamoat* governments have generally been supportive and provide office space for 10 of the 12 *tashabuskors*.

*Women of Tomorrow, LAC, Director, tashabuskors and farmers, Shartuz District.* WOT started in 1999 working only with women. Now it provides legal assistance to all groups. They have been working with USAID since 2008 and currently with LRFRP through *tashabuskors* in 8 *jamoats*. They provide a combination of legal consultations and trainings at the local level. There are only two lawyers at the NGO so sometimes have to contract outside lawyers to help with cases. Courts will include lawyer fees in their judgment, but it has to be requested by the lawyers. *Tashabuskors* provide various services at the local level – they provide legal education for farmers, help fill out land application requests, and sometimes help farmers appeal to local authorities. *Tashabuskors* are not paid beyond reimbursement for their operating expenses. The division between the services lawyers and *tashabuskors* is clear in the training materials and agreements from LRFRP. They have found that farmers can sometimes pay, but with agriculture products, not cash. The *tashabuskors* felt that farmers would pay for legal assistance provided by them, even if it was a small amount to help with filling out forms. She posited: farmers are used to paying for certain services, such as irrigation, so why would they not pay for legal services that establish their rights?

### ***c. National legal aid workshop***

A national workshop was held with land rights legal aid providers to discuss viable business models for the Tajikistan context and activities that could build sustainability. Individual working group sessions were held with LACs over a four day period to review business plans and suggest changes. A one day training followed with presentations on successful examples of sustainable legal aid service provision in Tajikistan. NGOs discussed and verified activities that could build sustainability. These discussions helped ground in reality the recommendations provided in Section III below.

### ***d. National-level Policy and Institutions***

*LRFRP Legal Advisor.* Discussed the role of the Ministry of Justice, Bar Association and other national actors in the provision of legal aid. There is no separate legal aid department at the MOJ, but the MOJ does provide some reimbursement to the Bar Association when their lawyers take a case and apply for reimbursement. Eligible clients for free legal aid, largely public criminal defense, only include youth, women and certain vulnerable populations. The MOJ is considering a new draft legal aid bill that would support legal aid services. But government funded legal aid is not likely as there is no budget for it. Fund would only be possible if international donors contribute to it.

*Open Society Foundations Tajikistan.* OSF conducted a legal needs survey this past year that identified land issues as the most prevalent legal topic, followed by domestic violence and legal identity. OSF is working on the draft legal aid law with the MOJ. The law is just in the initial stages and needs input from other Ministries.

Currently the MOJ wants all legal aid lawyers to be certified by the MOJ. OSF is against this approach and feels an independent commission should oversee who provides legal aid. Helvetas (Swiss Development Cooperation) and UNDP are also supporting the draft legal aid bill. The Ministry of Finance wants donors to fund any legal aid mechanism. MOJ is also considering a draft law on mediation. The MOJ does have criminal public defenders on staff but they are not effective. OSF is also supporting a legal aid center, the Bureau on Human Rights, based in Dushanbe with 10 regional representatives. They plan to train 160 paralegals. Legal clinic work occurred in the past with the National University, but is no longer active.

*World Bank Land Certification Program.* The World Bank became involved in land certification largely due to the failure of its irrigation water associations. The uncertainty of tenure made new farms and farmers more resistant to pay water fees. The current WB land registration project ends in March 2015 and there are still many *hukumats* that have lists of farms to be restructured. No new projects are in the country partnership strategy.

*Ministry of Justice.* The MOJ certifies and licenses all lawyers in Tajikistan for a period of 5 years. There are 3,000 lawyers currently in the country. MOJ has an MOU with UNDP to help increase knowledge on the law – provides trainings and seminar. Draft law on advocates was approved by the President and is with the Parliament. It says that legal aid centers should be established in each district (although it doesn't establish a mechanism or budget). The draft law on legal aid services is supposed to set up the specifics of the legal services system. The law is based on the Tajikistan national strategy to reduce poverty. The MOJ is waiting for input on the law from other ministries. As it currently stands, all legal services will be provided by MOJ staff lawyers.

*Private lawyer and former judge.* MOJ does certification of lawyers at the national level, not the Bar Association. In Dushanbe there is very little interaction with the two Bar Associations. It is possible that the draft law on lawyers activity might create a single national bar association, as a government agency. He feels that government lawyers will not be effective in providing legal aid. They already have a mandate for representation of indigent defendants in criminal cases but do not do a good job. He says government lawyers are not paid or reimbursed enough to actually carry out the investigations and legal work needed to defend. Says a joint donor fund for legal aid would be a good idea if it funds private lawyers and NGOs to do the work and has a committee of government, donors and NGOs that can operate independently of the government. Also feels that the courts are too corrupt and inefficient. He has started providing an alternative to the courts through arbitration panel services that has been well received by the business sector.

### **III. Developing a Market-based Approach to Expand Legal Aid for Land Rights Regularization**

Tajikistan is an important case study on the feasibility of a market-based approach for land tenure legal assistance that can expand access to legal support. While the Constitution still provides that all land is owned by the state, recent land code and agrarian reform laws have created strong use rights for the population. These legal reforms have allowed thousands of farmers to segregate their use rights from large commercial farms, vestiges of soviet-era collective farms, to create smaller, more efficient family-run farms.

There are, however, many potential legal challenges that can block recognition of individual and family land rights. These challenges are often counter to the law but driven by local dynamics and interests from local governments, local elites and more powerful local economic actors. Often the only mechanism for addressing this power imbalance is through legal action in the courts or administrative institutions largely inaccessible to poor farmers. For the benefits of the land rights under the new laws to reach their intended population in rural Tajikistan their enforcement needs to be ensured. This is a difficult, intensive task given the lack of a well-developed legal infrastructure, the paucity of lawyers, and the lack of awareness of the target population.

The precursor project to LRFRP supported LACs across Tajikistan, including in Sughd region. The current project has shifted focus out of Sughd entirely and to Khatlon region only. The resulting reduction in international donor assistance in Sughd has forced NGOs to find alternative mechanisms for funding legal services. Their efforts provide a window into opportunities to enhance sustainability across the country. Yet they also provide a cautionary tale on the societal and economic realities in Tajikistan for ensuring legal services for the large number of impoverished farmers.

Even in Sughd region, where indices of poverty and malnutrition are lower than Khatlon, there are insufficient resources to provide legal services on land issues given the sheer volume of requests, inability of poor farmers to pay lawyers, and lack of alternative, public funding sources for legal aid. A number of former project-assisted LACs have found ways to offset costs, including charging fees for services and providing other services to *dekhan* farms and local governments. But the clear conclusion of this assessment is that these efforts are not sufficient to ensure legal services are widely accessible to poor farmers.

Furthermore, there are significant structural barriers, such as no tax deduction platform for public interest cases and a lack of public funding to compensate free representation.

Combining the Tajikistan research presented here with other country experience and comparative international models, the author proposes a model for scaling legal aid services for land rights regularization that uses an array of mechanisms, including both private and public funding sources to develop a hybrid public/private system based on market dynamics that will extend services to hard

to reach populations and more remote villages. Working through a network of local civil society organizations, public interest lawyers and community-based paralegals the model borrows from concepts of microfinance to provide scale and cost-appropriate services for small land holders. To achieve this the authors lays out a series of reforms and activities that donors, national governments and local NGOs can implement to increase cost effectiveness, expand reach, offset costs, mitigate donor dependence, and begin to build toward a sustainable system for legal aid for land rights regularization.

**a. Local-level Recommendations**

Donor-funded projects that use grant agreements with local NGOs to provide free legal aid services for land rights and other topics should be careful to analyze the effects on local legal services markets to ensure they do not undercut the availability of low cost legal service alternatives. In addition, international donors should require as part of the grant criteria sustainability plans from each NGO legal aid provider over a two to three year period. Sustainability strategies should include:

**1. Establish appropriate business model**

The most effective model for sustainable NGO operation will depend on the circumstances in individual countries, including the relative socioeconomic status of local villages and farms. Context will also shift depending on success in creating a publicly-funded legal aid system and policy reforms that increase incentives for pro bono legal support. Three potential business models are presented below to cover different scenarios:

*Sustainable Legal Aid Service Model - Option 1*

*Non-profit law firm model*

Characteristics: non-profit status is achieved with minimum requirements for free legal services - <50% of budget covered by fees; tax deductions allowed for pro bono work by lawyers; increase in types of services provided to appeal to other donors.

Funding Source	Percentage of operating costs		
	Year 1	Year 2	Year 3
International donor grants	85%	65%	20%
Self-funding (in-kind, pro bono, tax benefits)	15%	10%	25%
Lawyer fees from strategic court judgments		10%	20%
Paying clients		10%	25%
Trainings and community development activities		5%	10%

Cost/Benefit Analysis: Under this model international donors reduce grant support to NGOs to 20% of operating costs by year 3 of the grant while other revenue

streams scale up during years two and three, accordingly. NGOs increase their focus on paying clients and taking more strategic cases to court that will likely result in a favorable judgment that will afford their fees or will establish an important precedent. NGOs should establish fees based on analysis of the capacity of their communities to pay. Fees should also be negotiated on an individual client-by-client basis and based on the difficulty of the case. Under this scenario NGOs are less able to provide day-to-day assistance to poor farmers or others that cannot afford services. They are also likely to take cases beyond land-related issues, including commercial issues and family disputes, in order to cover costs. Donor funding under this model would support legal awareness efforts and representation of poor clients only, as determined by NGO forms that determine income and carefully track time spent on those cases. Given the emphasis on fees for representation NGOs will likely keep less staff in favor of contract attorneys, reducing their ability to provide free legal consultation. One way to offset a lack of legal awareness activities by lawyers is to develop a market-oriented *tashabuskor* service, where *tashabuskors* are licensed to provide and charge for limited legal services under the supervision of a lawyer. A profit incentive could increase the awareness-raising activity of *tashabuskors* but must be monitored closely, first piloted and will likely require revisions to laws/policies governing the legal profession. NGO operating costs are covered by a series of factors, including qualification for non-profit status that reduces costs for staff lawyers and tax payments by the NGO and creates incentives for other lawyers to provide tax deductible, pro bono services. NGOs also increase their focus on paying clients and fees from court judgments, allowing for more attention for non-paying, poorer clients. Donor funding will support legal awareness raising and cases for poor clients, ensuring a focus on land issues for the most vulnerable. Due to non-profit requirements and for donor purposes NGOs will need to develop income determination procedures and track the amount of time dedicated to non-paying clients, including land-specific cases. An assumption under this model is that regulations for non-profit status will still allow for NGOs to have a small subset of paying clients and to receive fees from court judgments, so long as they only cover costs and do not compromise their stated non-profit mission. Broad donor support is envisioned under this model, as non-profit status and coverage of multiple issues will increase appeal. This coincides with a need for NGOs to focus on non-land cases as well, as a method toward greater sustainability.

*Legal Aid Service Model - Option 2*  
*Public legal aid fund model*

Characteristics: Government and donors establish a legal aid fund to support NGOs to provide free legal aid services; donor support focuses on fund, not direct grants.

Funding Source	Percentage of operating costs		
	Year 1	Year 2	Year 3
International donor grants	85%	60%	5%
Self-funding (in-kind, volunteer)	15%	15%	15%

Lawyer fees from strategic court judgments		10%	10%
Paying clients		10%	10%
Trainings and community development activities		5%	10%
Public-funded legal aid grant			50%

Cost/Benefit Analysis: Under this model donors reduce grant support to NGOs to 5% of operating costs by year 3 of the project, instead contributing the majority of legal aid funding to a legal aid fund established with the Government and other donors that provides funding to legal aid CSOs. This model requires considerable policy and institutional reform support to governments to draft new legal aid legislation that provides for public procurement of these services through a legal aid fund for NGOs. However, with the combined support of donors a fund of this sort would have the biggest impact on sustainability of legal aid services for land issues for poor farmers. Under this model, NGOs would have to qualify for legal aid funding, likely through non-profit status and by keeping track of income eligibility of clients. They would be able to complement the free services provided with paid services on a limited basis, and restricted to a maximum of 20% of time. This model would incorporate the best aspects of option 1 but with the added benefit of dedicated, sustainable funding for legal aid and awareness raising for poor clients.

*Legal Aid Service Model - Option 3  
Community Development NGO model*

Funding Source	Percentage of operating costs		
	Year 1 (2013-2014)	Year 2 (2014-2015)	Year 3 (2015-2016)
International donor grants	85%	60%	20%
Self-funding (in-kind, volunteer)	5%	10%	10%
Lawyer fees from strategic court judgments		10%	20%
Paying clients		5%	15%
Trainings and community development activities	10	15%	35%

Cost/Benefit Analysis: These are NGOs that are not run by lawyers but provide other services, such as education, training, agricultural extension support to the community. As these NGOs are not run by lawyers it will be harder for them to adopt an effective legal services-based scheme. Some can hire lawyers as staff and raise funds through legal service provision but there also could be more effective, alternative revenue sources that they might adopt with better effect. Saodat NGO in Khujand was a good example. Saodat has started providing agricultural extension

services and microfinance to communities and receive some funding from local governments for training. This model has also been developed with great success by BRAC in Bangladesh and subsequently introduced in various countries around the world. The BRAC model uses microfinance and microenterprise as an entry point to communities and then uses the profit from these activities to fund legal and other community services.

## **2. Obtain non-profit status.**

Most countries have laws that affords tax-free status or tax deductions for not-for-profit organizations. Donors should support NGOs to investigate how to qualify for this status and apply for tax-free status and the operating and reporting requirements. Many legal aid NGOs around the world are accorded non-profit status for their work, which provides them with financial benefits for their work and allows for law firms and private foundations to claim tax deductions for *pro bono* services or donations, thus contributing to the sustainability of free legal aid. All NGOs should apply for this status to reduce or eliminate tax payments, eliminate lawyer license fees, receive reimbursement or tax reductions for pro bono cases, and/or be eligible for future public legal aid funding mechanisms. Depending on the requirements of the law, NGOs will likely have to develop a number of structures and processes that demonstrate their non-profit status:

- a. Establish a mission statement that clearly outlines the not for profit activities of the NGO – i.e., providing free legal services for Tajikistan citizens that cannot otherwise afford them.
- b. To substantiate the mission of the NGO, develop an income determination process for clients to keep a record of how many clients were not able to pay and how this was determined.
- c. Establish the operating budget needs that will be covered by paying clients, including maximum percentage of paid legal services, clearly indicating that fees cover costs only, and do not produce a profit. *Diversify the types of legal services provided.* NGOs should provide a broader range of legal services on issues from family law to housing and tax disputes to increase the volume of paying clients and appeal to donors with other interests, such as human rights. NGOs and donors should closely track the number of land cases being received versus other cases and, if necessary, set clear requirements on the percentage of time allocated to land cases.

## **3. Establish payment for legal services**

Many NGOs indicate that some clients, mostly larger landholders and family farms, can pay for legal services. Others can pay for services in-kind or with agricultural products, or once the crop is harvested. NGOs should begin to explore working with paying clients in year two and be required to have paying clients by year three. NGOs will need to establish a system for determining whether a client can pay and negotiating payment. This is a necessary step for building sustainability of NGO

services, but it presents a number of extra considerations, options, and extra steps, identified below:

- a. Each NGO should conduct an assessment of the district in which they operate that identifies the number of farms that could potentially afford to pay for services and what amount would they pay. This could be in the form of a simple survey implemented by paralegals.
- b. NGOs should then craft a strategy for targeting paying clients and devise a locally-specific strategy for outreach to these clients based on an analysis of potential clients. A percentage of NGO operating budgets should come from fees negotiated with paying clients and increase each year.
- c. NGOs should also establish reasonable standard rates for certain services, such as filling out a land certificate application, representing a client before the land committee, etc. Standard rates can be approximated with in-kind or agricultural products. An initial survey of potential clients willingness to pay in target districts might help identify an initial rate schedule.
- d. Included in these standard rates, NGOs should explore developing a mediation practice and associated rate schedule for paying clients.
- e. NGOs should identify a system and record keeping system for income determination of clients. NGOs that currently charge a fee largely determine ability to pay based on knowledge of clients and their appearance. First, a more systematic process with criteria should be established and followed. Second, justification for the decision should be recorded in the clients file. This will help justify and differentiate free cases funded by donors (and potentially government), and services eligible for tax deductions.
- f. Create a guideline for establishing rates for more complicated cases (to ultimately be negotiated with clients). One NGO used three factors for guiding rates negotiations: 1) location and travel costs, 2) complexity of case, and 3) quantity of work that will have be provided.
- g. NGOs should include a request for full lawyers fees in all court cases, for winning cases covering all costs and up to 10% of court-imposed damages.

#### **4. Establish payment for service models for Paralegals**

Paralegals can potentially play an even greater role as legal extension agents to increase knowledge of legal rights and expand access to affordable NGO services by establishing a fee schedule for certain tasks, such as filling out land application forms, assisting with hearings before land administrative bodies, and mediating disputes. Legal aid clients have indicated a potential willingness to pay for paralegal services when needed and if of value. To ensure responsible uptake of this approach donors should:

- a. Maintain free legal consultations, trainings and general outreach of paralegals.

- b. Pilot a fee schedule for paralegals with a few NGOs. Encourage them to cover their costs (and get more clients) by charging a nominal fee to fill out a land application.
- c. Establish arrangements with local governments to give paralegals office space for consultations. This should be tried by each NGO where government relations are positive.

### **5. Pursue strategic cases**

As donor and public funding decreases, NGOs will have to adjust their strategy from one of providing legal assistance to all to one of strategic litigation. NGOs should identify cases that have a good chance of success, resulting in payment of lawyer fees; address a strategic issue; or are high-profile and thus have the potential to change behavior and tacit enforcement of relevant land laws and human rights principles

### **6. Create and/or expand training services**

A number of NGOs provide training to farms, businesses, and local governments on different legal issues relating to taxes, debt, land laws and/or trainings on non-legal issues. Some also mentioned providing training on behalf of local governments and judges. NGOs should be encouraged to identify funding sources for trainings of local government officials, judges, and farms and businesses. Some training might target small farmers and be subsidized by local governments while other training might target larger businesses or governments and should charge a regular market rate. NGOs should consider hiring a training coordinator/specialist to lead this. An expanded training offering will have the dual purpose of identifying alternative funding options and increasing connections and awareness to increase the potential client base for legal services. NGOs should also develop paid training programs for judges on the new land code and associated regulations in partnership with regional judiciaries. This will provide funding options and help increase awareness of the services NGOs can offer through the judiciary.

### **7. Provide free legal consultations**

All legal consultations should be free and a phone hotline for legal consultations should be created to help increase awareness and attract and identify clients.

### **8. Maintain strategic donor funding**

It is the determination of this research that donor funding of some form plays an important role in establishing credibility and strategic support to NGO legal aid activities, even though it cannot realistically support free services to all in need. There is also an argument that too much unstructured international donor support can increase the availability of free legal services to the detriment of broader coverage and access to cheap legal fees by undercutting the natural market for legal service and driving low-cost lawyers out of the profession or to other markets. In Tajikistan the reality is that the profitability of individual and family *dekhan* farms is too low and the complexity of legal cases often too high to allow for full coverage of all legal needs. A combination of funding from various donors, regional and national

governments, and private foundations, law firms or businesses could offset the costs of free legal aid. The need for donor funding will likely reduce over time as socioeconomic status improves. NGOs should attempt to identify a range of donors and develop a strategy for appealing to donors, including local and regional governments, based on their interests.

### ***b. National Policy Recommendations***

Building sustainability of legal services for land cases is related to developing a broader system of public support for legal aid for poor citizens. Donors can support a number of policy initiatives toward this end. Public support combined with market-oriented approaches is the most promising scenario for continuing legal assistance post-donors. This assessment has four primary recommendations for immediate implementation:

#### **1. Establish a national legal aid system**

Many developing and developed countries have established publicly-funded legal aid systems that utilize local NGOs as the main implementers. Studies have shown these systems to be the most cost-effective, efficient and fair services. The impartiality of these NGOs is ensured via an independent legal aid commission or board. In many developing countries donors have jointly fund these systems, with government matching, largely in recognition of the large volume of legal needs and inaccessibility of legal services in countries going through economic and political transitions. Donors should provide legal, technical and management support to establishment of an independent legal aid commission that will administer grants to local NGOs to provide legal aid. Funding support should not be provided to a system that uses government-employed lawyers as providers, as this approach has been shown in other countries to be inefficient, not cost-effective, and biased toward political interests. An NGO-implemented system will also allow for leveraging private sector funding. A legal aid commission composed of a cross-section of public officials and civil society will receive NGO applications, make funding determinations, and review performance. This recommendation will take time and effort and should be started immediately, with the understanding that a successful result might not occur until after donor support has ended.

#### **2. Create a donor-supported legal aid fund**

As an incentive toward creating a public-funded, NGO-implemented legal aid system, donors should consider pooling funds into a legal aid trust fund with matching from national governments. Initial donor support will serve as an endowment from which to build value of legal aid fund. Linked to the above, this could potentially require donor work beyond initially envisioned time periods.

#### **3. Standardize non-profit approaches to free legal aid**

Donors should work with the national tax authorities of countries to determine the criteria and benefits for non-profit status for NGOs providing free legal aid,

including application procedure, non-profit eligibility criteria, and tax deductions for non-profit staff. Standards should include consideration of an appropriate percentage of fees that can be covered through paying clients and tax deductions for private lawyers that provide pro bono services. Donors can help provide guidance to NGOs on how to obtain this status.

#### **4. Establish systems for local support**

Donors should work with counterparts in the government to help establish and execute central budgetary support for legal aid at the local level is earmarked and its use for this purpose monitored and reported on by regional and local governments.

#### ***c. International market-driven approaches***

There is great promise for the use of global markets and economies of scale to expand the provision of legal aid for land and other disputes at the local level. Research and pilot projects are currently being carried out on these potential models. The author expects to release further information and the final chapter of this article in the form of a new global program by the end of 2015.

#### **Conclusion**

By ensuring the wide availability of legal services at low cost to land holders the program addresses issues of scale and sustainability that plague international land projects with limited funding windows. Bringing extensive legal assistance for land rights can counteract the power dynamics that often undermine land titling efforts and can empower local land holders to make economic and family choices based on increased tenure security.