

Annex 1:

International perspectives on land tenure, development and spatial inequality

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1. Introduction

Various multilateral organisations, for instance the World Bank, the Food and Agricultural Organisation have been at the forefront of the different programmes designed to enhance tenure security of landholders as the basis for long-term agricultural development. This has been the case especially in parts of the world where customary systems of tenure are predominant. Wily argues that ‘so little of sub-Saharan Africa is subject to formal entitlements as legally recognised private properties’. Further, ‘the indigenous (or “customary”) system of land ownership, use and regulation in fact embraces three-quarters of sub-Saharan Africa excluding water bodies. Even when several million hectares of terrestrial protected areas (deemed to be state assets) are subtracted, this still amounts to 1.7 billion hectares’.¹ The insecure nature of customary rights to land has a long history, from land expropriations during colonial times often based on the justification that customary rights to land do not constitute full property rights.²

Efforts to introduce formalisation of property rights as part of modernising indigenous forms of ownership and agriculture in general have not yielded the desired results. In most instances, formalisation of property rights has resulted in the obliteration of overlapping and multiple rights to land characteristic of customary forms of tenure. The failure of land titling and registration programmes implemented by various national governments with the aid of various multilateral

organisations and donor agencies is widely documented. The precarious nature of customary rights to land has increasingly come under spotlight in the light of the recent large-scale land acquisitions associated with the 2007-2008 food and oil crisis. Particularly problematic is the characterisation of customarily held land as marginal and underutilised in the process overlooking the livelihood activities of multitudes that rely on these so-called marginal lands for survival. Further complicating scenarios are the overlapping rights where by ordinary people with customary rights are often restricted to usufruct, surface rights while the state holds rights to valuable sub-soil resources on the same parcels of land. This usually results in land dispossessions to make way for large-scale land acquisitions for resource extraction.

2. The titling thesis: The rise and fall of titling

The evolutionary theory of land rights is a neo-classical paradigm which has been used to analyse the evolution of African land tenure systems and has, for decades, informed development interventions by various international development institutions.³⁴ Its basic premise is that socio-economic changes, for instance, population growth, technological advancement, and commercialisation result in increased pressures on land. With the passage of time, a general shift from communal tenure regimes to more individualised forms of property ownership becomes inevitable.⁵ The point of departure in the evolutionary theory of land rights is that the customary system of land ownership has inherent limitations which may potentially stand in the way of commercialization and economic development. It is argued that, under the communal system of land tenure, rights to land fail to include the right to deprive others of access to it, except by prior and continuing use.

According to Hanstad⁶, customary tenure systems are only feasible in cases where there are 'few opportunities for trading surplus production', and a 'high degree of social cohesiveness of the group, little possibility of enforcement of contracts, and limited technical and economic change'. These are essentially traditional forms of land ownership where 'land is treated less as a factor of production and more as a source of security and a centre of cultural or ideological values and obligations'.⁷ The evolutionary theory of land rights only acknowledges the dynamic and efficient nature of customary systems of land ownership in cases where population density is low and there is little economic competition.⁸ However, as Hanstad⁹ argues 'with an increase in rural population relative to land, and greater opportunities for taking advantage of technological and market changes, some of the restrictions characteristics of these land systems come at increasing cost'. Thus, 'while the such land systems often allow for individual occupation and cultivation of land, tenure is often insufficiently secure for individuals to be confident of receiving all the benefits of land'.¹⁰

The thesis holds that state intervention is required to facilitate the transition from customary systems of tenure to more individualised forms of ownership. There is need for institutional innovation whereby governments intervene to clearly define land ownership rights. State intervention to actively promote individual private ownership of land is seen as imperative.¹¹ A clear policy implication of this evolutionary theory of land rights is that the state needs implement a land titling programme with a view to formalising private property rights in land once this factor has become scarce as to make it as source of competition.¹² 'In short, the ETLR holds that rising populations will drive property values up leading to increased demand and disputes over land which can only be solved through government orchestrated property formalisation (titling)'.¹³

It was against this background that the World Bank and other multilateral institutions actively promoted the privatisation of land tenure as the basis for agricultural development especially in areas where customary tenure is the dominant form of land ownership. In the 1970's the Land Reform Policy Paper (1975) is often identified as one of the first explicit pronouncements by the Bank with respect to its approach to land laws and policies which set the tone for its future interventions, for some decades. Among other things, the 1975 LRPP emphasized the importance of individual land tenure as opposed to communal land ownership systems as the basis for agricultural development.

The Bank (1975) envisaged individual tenure by owner-operated family farms as the basis of an efficient and equitable agrarian structure which is not only redistributive but allows for the transfer of land rights to better and more efficient users. In subsequent years, the World Bank continued to actively promote land registration and titling programmes in various countries. According to Byamugisha¹⁴ the aim was to 'convert systems of customary tenure to systems of individual land ownership through issuance of tile deeds. These deeds conferred land rights that were exclusively owned and fully tradable. The goal was to intensify agriculture through greater collateralised credit and more secure tenure, seen as important for enhancing investment and agricultural productivity'.¹⁵

Bromley¹⁶ succinctly summarises some of the perceived advantages of land titling which are often proffered by advocates of formalisation of property rights. Formalisation advocates argue that:

- Land registration stimulates more efficient land-use, by increasing tenure security and providing incentives to invest in the longer-term management and productivity of the land.
- Land registration reduces transaction costs and enables the creation of a land market, allowing land transfers from less to more dynamic farmers and its consolidation into larger holdings. In urban areas, it enables a formal market for land and housing that helps to increase supply and reduce prices.
- Land registration provides farmers with a title that can be offered as collateral to banks, improving farmers' access to credit, and allowing them to invest in land improvements. In urban areas, land registration also allows owners to use land as collateral for loans and safeguards their investment in housing.
- Land registration provides governments with information on land-holders and size of plots, i.e. the foundation for a property tax system.¹⁷

Questioning the efficacy of titling

Serious questions have been raised about the efficacy of land registration and titling programmes from the outset.¹⁸¹⁹ This has been on the basis of growing empirical evidence from various parts of the world indicating that customary systems of tenure are not inherently inefficient.²⁰²¹²² Importantly, there has also been mixed evidence on the question of whether land titling and registration programmes can enhance security of tenure and yield such benefits as increased investments in land and high agricultural productivity.²³ In many instances, land markets have *not* developed as a result of land titling and registration.²⁴ As a result, the World Bank and other advocates of land privatisation have had to review their approach to land titling and acknowledge the continued importance of customary systems of land ownership especially in developing countries.

According to Bledsoe²⁵ there is little direct evidence of increased investment and production in most countries that have implemented titling and registration projects. However, Thailand is one of the few

cases where rigorous empirical evidence indicates that capital-to-land ratios, improvements, land values, and outputs, and inputs per unit of land were higher for the titled than the untitled.²⁶ In contrast, in much of sub-Saharan Africa, land registration and titling, especially the individualisation and formalisation of small agricultural parcels of land, has not yielded positive impacts. Bledsoe concludes that besides a few examples, for instance, the case of Thailand, there is simply no direct evidence and it has not been 'extensively shown that titling and registration significantly increases investment or production'.²⁷

A recent systematic review analysed both quantitative and qualitative studies to ascertain the impact of land property rights interventions on investment and agricultural productivity in developing countries.²⁸ The systematic review concluded that there was no strong, direct causal link between tenure rights recognition and productivity as well as income gains. It was noted that tenure rights recognition may contribute to productivity and increasing farm incomes partly as a result of increased perceptions of tenure security and investments. Yet not all productivity and income gains may be attributed to the recognition of tenure rights. Of particular significance were the regional variations between sub-Saharan Africa on the other hand. In some instances, especially in Latin America and Asia, formalisation of property rights through titling has yielded significant productivity gains.

Conversely, African cases have shown comparatively weak gains in productivity following tenure formalisation. In much of sub-Saharan Africa, land is held under customary tenure and while this provides tenure security individual tenure recognition increased perceived tenure security. The lack of significant impacts in African cases may also be attributed to 'low levels of wealth of African farming families and constraints on access to resources needed to translate tenure recognition into commercial activity'.²⁹ Complementary resources in the form of what Reinikka and Svensson³⁰ term 'public capital' are necessary as part of a holistic agrarian reform processes if the recognition of tenure rights is expected to bring about positive results in Africa. All in all, the results of the systematic review underline the fact that formalisation of property rights through titling is not a universal panacea to problems related to agricultural development.

Various studies in sub-Saharan Africa seem to confirm the failure of land titling and registration and the formalisation of land rights in general to bring about agricultural development.³¹³²³³³⁴ Evaluation of titling programmes has revealed that these initiatives are not a universal panacea to agricultural development problems.³⁵³⁶ Sociological and anthropological studies have revealed that customary practices are resilient and exist alongside the newly created formal land administration processes³⁷³⁸³⁹.

Delville argues that the socio-economic processes of change related to land tenure are not mechanical or systematic. Instead of a linear evolution towards individual private ownership of land, communal land tenure practices based on local rules and or practices continue to exist and flourish in the shadow of modern law.⁴⁰ Delville presents evidence from Tanzania, which shows different forms of land-related conflicts and how they are resolved using both formal and informal channels of dispute resolution. In these various case studies, there is evidence of cross-fertilisation and continued interdependence between informal and formal mechanisms of resolving disputes around land. Cotula notes that in spite of significant socio-economic changes experienced in many African countries – population growth, commercialisation and increased competition for land – customary forms of tenure have not disappeared as argued in the evolutionary theory of land rights. For instance, "intra-

family individualisation processes may co-exist with the continuation or reinterpretation of collective dimensions of land tenure' and this is often necessary because of 'the need to reaffirm the primacy of land rights of locals vis-à-vis groups outside the extended family".⁴¹

Feder and Nishio⁴² argue that the introduction of a modern registration system to replace a customary (and typically less formal) system may provide opportunities for the privileged and other powerful interests in the community to grab land. For instance, those who are better informed or familiar with formal process, or have better access to official and financial resources required to register land may benefit from land registration programmes at the expense of their less privileged counterparts. Land grabbing may take the form of claiming exclusive rights to what would have previously been communal or open access land. Boone⁴³ argues that the privatisation of land in much of Africa where customary tenure systems consist of multiple and overlapping land rights may result in exclusion and dispossession. As a result, moves towards privatisation of land are by definition some kind of expropriation. According to Boone⁴⁴ 'by definition...individualisation of control over land – understood as the full privatisation over the use and disposition of land – dispossesses all others holding claims to a given parcel of their rights'. In cases where communal controls prevailed in the earlier period, the losers would be extended families and communities. Where user rights are enforced against the claims of indigeneity by autochthons, the losers are indigenous landlords, communal groups, and their descendants.

Arguments about the emergence of land markets following land titling and registration of ownership have also been challenged. Advocates of land titling have argued that land markets provide the basis for the mortgage of rights in land, which increases access to capital that is often critically necessary for productivity enhancing investments.⁴⁵ Migot-Adholla et al⁴⁶ analysed farm surveys conducted between 1987 and 1988, in 10 farming regions, across three countries, namely Ghana, Rwanda and Kenya. Evidence from this study indicated that there was no clear relationship between land registration and farm productivity, land improvements and credit access in the research areas. The research highlighted obstacles in the wider environment as critical in determining farm productivity. For instance, physical infrastructure, effective credit systems and marketing institutions are important in ensuring an increase in farm productivity. From their findings, Migot-Adholla et al argue that land registration programmes may not be economically worthwhile in much of sub-Saharan Africa where many countries are lagging behind in terms of economic development. However, land registration may be an option in some cases. For instance, in cases where indigenous land tenure systems are weak, or there is a high incidence of land disputes as well cases where the newly introduced development projects require privatisation of land rights in order for them to succeed.

To sum up, titling programmes have been known to extinguish pre-existing customary rights to land. The multiple and overlapping nature of customary rights to a parcel of land are affected when that parcel of land is subject to exclusive ownership through formalisation processes.⁴⁷ In addition to producing winners and losers through excision of overlapping claims to land⁴⁸, land titling may encourage land grabbing by the elite and other well-resourced members of the community who are more familiar with the processes of land registration, have more information and resources to comply with the processes of formalisation of land rights. Instead of enhancing security of tenure and yielding such advantages as increased investment in land, higher levels of productivity, increased access to

credit as land can be used as collateral security; there have been increased instances of land-related conflicts.

In some contexts, more resources have been directed towards litigation and conflict resolution as people who had previously enjoyed the use of land through multiple and overlapping customary rights contest to reclaim their lost rights to land.⁴⁹ In most cases, the existence of formal land administration processes has not diminished the relevance of customary systems of land administration.⁵⁰⁵¹ People may continue to utilise the customary processes of dispute resolution in spite of the formalisation of land rights. There is continued evidence of cross-fertilisation between formal and informal land management processes in many parts of Africa.⁵²⁵³⁵⁴ The idea of a unilinear change whereby customary forms of tenure will evolve and people eventually adopt highly formalised, private forms of land ownership is not supported by empirical evidence on the ground. Even institutional interventions, meant to spur the privatisation of land rights through land registration and titling, have not diminished the continued relevance and use of customary systems of land ownership.

De Soto and 'dead capital'

De Soto⁵⁵ and the ILD researchers have conducted research, initially in Peru, and this research culminated in the publication of *The Other Path* where they examine the widespread phenomenon of informality. In their research, the ILD argues that the conditions of informality in Peru are reflective of the challenges of underdevelopment experienced across the developing world. In *The Other Path*, De Soto develops his argument against the background of the socio-economic changes that occurred in Peru in the post-World War 2 period. During that period, Peru experienced increased urbanisation alongside rapid rural-urban migration as rural dwellers flocked to the cities in search of better prospects. Yet many of these migrants were confronted with an exclusive legal system, originally meant to benefit a few elite urban minorities, while discriminating against rural populations.⁵⁶

The reality of widespread informality across the developing world reflects the absence of an inclusive legal system whereby the poor lack secure property rights. The majority of the poor are confronted by enormous legal barriers as they try to access land, build houses and conduct business. These impediments diminish the capacity of the poor to generate capital, invest and contribute towards economic progress. Admittedly, the poor often exhibit ingenuity, innovativeness and resilience as they improvise, using their own set of norms to regulate their activities, outside the conventional legal system. Yet they do not function as efficiently as they would if they were to be included in the legal system and their property rights recognised by the state.⁵⁷

Subsequently, De Soto⁵⁸ and his team have extended their work to other parts of the Global South, mapping out and quantifying what they call 'dead assets' whose potential remains unrealised because of lack of inclusive legal infrastructure especially the property rights system. *The Mystery of Capital* specifically focuses on the question of how to ensure that the dead assets held extra legally by the majority of people in the Third World generate capital which may be channelled towards productive activities. According to De Soto poor people save, yet:

[...] they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded and unincorporated businesses with undefined liability...because the rights to these possessions are not adequately documented,

*these assets cannot be traded outside of narrow, local circles where people know and trust each other, cannot be used as collateral for a loan, and cannot be used as a share against investment.*⁵⁹

Without access to the legal tools required to convert their assets into capital, and access expanded markets beyond their narrow social circles, the majority of people in various parts of the developing world will remain poor and marginalised. Their assets are held in such a way that they cannot be used to generate capital. The problem is not lack of entrepreneurship, as is often argued. According to De Soto, in every developing country where the ILD has conducted research, 'the entrepreneurial ingenuity of the poor has created wealth on a vast scale – wealth that also constitutes by far the largest source of potential capital for development'.⁶⁰ De Soto argues that 'these assets not only far exceed the holdings of the government, the local stock exchanges, and foreign direct investment; they are many times greater than all aid from advanced nations and all the loans extended by the World Bank'.⁶¹

De Soto and the ILD researchers detail the vastness of the 'dead assets' held by the poor in various parts of the world. For instance, they estimate that 'the real estate held but not legally owned by the poor of the third world and former communist nations is at least \$ 9.3 trillion'.⁶² Specific estimates by the ILD of assets held but not legally owned by the poor in selected countries are as follows⁶³:

- The value of Egypt's dead capital in real estate is approximately \$ 240 billion and when the ILD conducted their research this translated to the value of shares at the Cairo stock exchange and fifty times the value of all direct investment in Egypt.
- ILD estimates revealed that the value of untitled real estate in the Philippines was approximately \$ 133 billion, and at the time of the research, this was four times the capitalisation of 216 domestic companies which were listed on the Philippines stock exchange. This also translated to seven times the total deposits which were held in the countries commercial banks, nine times the total capital of state-owned enterprises, and fourteen times the value of all foreign direct investment.
- In Tanzania, the ILD team's research findings revealed that 98 % of all businesses operated extra legally (approximately 1, 482, 000 in total) and 89 percent of all properties were held extra-legally (approximately 1,447, 000 urban properties and 60, 200, 000 rural hectares of which 10 % is under clan control –mainly Masai pastoral land, and the rest is privately held).
- ILD estimates, at the times, revealed that Tanzania's extra-legal economy created assets worth US \$ 29 billion, whose value at the time, they argued, was ten times that of all foreign direct investment accumulated since independence and four times the net financial flows from the multilateral institutions to the country in the same period.⁶⁴

The key issue for De Soto is to understand how the process of capital formation or the conversion of dead assets to generative assets which formed the basis for the rise of capitalism and subsequent economic progress in the Western countries unfolds. De Soto draws on classical economists to define capital and the centrality of capital formation to economic development. As economic development proceeds, there is increased division of labour and high levels of specialisation since economic actors concentrate their efforts, skills and resources on very specific activities and produce for exchange. In order to specialise and achieve high levels of productivity necessary for economic progress, substantial

capital resources are required. It is against this background that it is important to understand the process of capital formation.

Drawing on classical economists, De Soto⁶⁵ argues that capital cannot be equated to money as is often assumed. Instead capital may be defined as stocks of assets which are deployed into productive activities to generate a surplus. The resultant high levels of specialisation means that economic actors have to rely on others to acquire what they do not produce directly. This makes cooperation imperative for economic progress. For assets to be converted into capital and for that capital to be effectively deployed into various specialised productive activities for exchange purposes there are requisite conditions which must be met. The conversion of assets into capital can only happen successfully where there is well developed legal infrastructure especially the property rights system.

An exclusive legal infrastructure, especially the poorly developed property rights system in the third World, is the missing link which explains the failure of capitalism to take root, and the persistence of poverty and underdevelopment. Failure to capitalise on the large amounts of assets held extra legally by the vast majority of people in the third world by converting them into productive capital is the underlying cause of poverty and underdevelopment in the Third World. The validity of De Soto's arguments has been questioned. Economic growth is an outcome of various interlinking factors and cannot be solely attributed to the formalisation or recognition of property rights. Esjaastad and Cousins⁶⁶ note that the emphasis on a single cause of economic growth amounts to oversimplification and creates the impression that formal property is not only a necessary condition for growth but a sufficient one. According to Madrick 'the debate over true sources of economic growth has long suffered from a misguided emphasis on finding a single cause and De Soto suffers badly from the same single mindedness'.⁶⁷ In the United States, various factors contributed to economic growth. These include, 'a high degree of literacy, freely available natural resources, an imported culture of commerce , a rapidly growing internal market and various government interventions in support of the "the little guy" '.⁶⁸

Similarly, Atuahene's observations underline the fact that land titling and registration is not a silver bullet to developmental problems especially in contexts where structural poverty is prevalent. The 'poor location of titled land, and other foundational structural barriers need to be addressed if legal title to land is to serve as an effective intervention against urban poverty in developing countries '.⁶⁹ Accordingly, Atuahene suggests titling mobility whereby the state allocates legal title to land in a manner that eliminates structural barriers that impair people's social mobility and their ability to accumulate wealth in the long-term.

Also, De Soto overlooks the fact that the extra-legal constituency is not a homogenous and undifferentiated group⁷⁰ and the process of titling may accentuate already existing inequalities, producing winners and losers. For instance, earlier titling programmes were not gender sensitive and in most cases women's names did not appear on the title. This often resulted in dispossessions in the event of a divorce or when a woman was widowed.⁷¹ Joint titling has been proposed where the names of both spouses appear on the property title. Besides, intra-household inequalities, land registration and titling may accelerate social differentiation as the well-off, better resourced and informed people may capitalise on titling programmes to accumulate land at the expense of the poor. Overall, the impact of titling programmes in terms of increasing access to credit and spurring investment on the part of the poor remains highly uncertain in various contexts.⁷²⁷³

3. Titling programmes and their consequences

Land titling in Kenya

Kenya's land titling and registration programme has a long history than any other.⁷⁴ Legal interventions to register land in Kenya date back to 1908 when the Land Titles Act was enacted to provide for the registration and issuing of title deeds to land parcels belonging to the white settler community.⁷⁵ However, the registration and titling of land in Kenya would later be extended to African smallholder farmers in the 1950s partly as a political measure to quell the Kikuyu rebellion. Through the conversion of freehold tenure the colonial government also hoped to improve agricultural productivity through increased use of credit and investment on land and through the redistribution of land to more efficient farmers.⁷⁶

By consolidating and registering parcels of land it was envisaged that a middle class of stable and prosperous farmers would emerge.⁷⁷ It was hoped that a system of individual land titles registered and guaranteed by the state would soon remove the uncertainties associated with customary tenure and unleash an agrarian revolution reminiscent of pre-industrial Europe. The fragmented landholdings were consolidated into economically viable units and individual land titles issued to allow the new farmers to access agricultural loans. It was envisaged that access to agricultural resources and capital would result in an increase in the production of cash crops and ensure the adoption of advanced production techniques.⁷⁸

Following the independence of Kenya in 1963, land registration and consolidation was accelerated and extended to other regions of the country as this was seen as a key component in the development of the countryside.⁷⁹ In the post-independence era, Kenya's land titling and registration programme was broadened to cover all the former Native areas as well as the pastoral areas of Masailand. In the 1980s, World Bank planners also approved Kenya's approach to land titling and registration especially most of the recommendations by the Swynnerton Plan.⁸⁰ However, various studies have been conducted to evaluate the effectiveness of the land registration and titling programme in Kenya's countryside.

Musembi⁸¹ notes that one of the problems experienced in land registration and titling initiatives in Kenya is the tendency to conflate the formalisation process with individualisation of property rights. In this narrow understanding of land registration and titling, formalisation is equated to individual and exclusive ownership. Kenya's Land Adjudication Act mandates the registration of all existing interests in land and not merely interests amounting to ownership. Yet in reality the titling and registration exercise proceeds as though only interest amounting to ownership in the absolute exclusionary sense matter. An analysis of the land adjudication cases and finalised registers did not show any other type of interests other than interests amounting to ownership.⁸²

The tendency to overlook overlapping rights in customary tenure often exacerbates conflict and struggles over land.⁸³ Empirical evidence from Embu and other parts of Kenya revealed growing conflict over access to and disposition of land titles which not only divided families but also strained the resources of all levels of the Kenyan legal system. Land-related conflicts are often centred on determining who amongst many family members with competing customary claims to a particular piece of land should have title to it.⁸⁴ In the case of Embu and other areas in Kenya, it was not uncommon for landholders to spend their resources trying to defend rights to newly registered land,

negotiating with kin and others with respect to rights of cultivation, inheritance, building and transfer".⁸⁵

As a result, there was widespread land litigation and post-reform tenure insecurity with negative impacts on agricultural productivity. Haugerud⁸⁶ concludes that "the official system of individual freehold titles poorly accommodates flexible and negotiable land rights and obligations associated with extended families and with frequent changes in household composition". Evidence on the impact of land titling on agricultural investment also revealed that most of the farmers in Embu who accessed loans from financial institutions did not channel those resource towards their agricultural enterprises. Instead, some of the farmers accumulated land "primarily for speculative purposes, for the future subsistence security of sons, and for the increase in cash borrowing power that each additional title deed confers").⁸⁷

Barrows and Roth⁸⁸ note that in most instances possessing legal title to land did not make the process of securing a loan easy for many smallholder farmers in Kenya. This is in spite of the fact that commercial banks generally accepted title deeds as collateral security for loans. The disproportionate costs incurred in administering small loans made commercial banks reluctant to provide loans to smallholder farmers. Most commercial banks had a fixed minimum size of loan that could be accessed by borrowers and this often exceeded the capital requirements of smallholder farmers. As a result of constraints associated with lending to smallholders, preference was given to registered proprietors, to those with off-farm employment or salaried positions and to larger farms.⁸⁹

Land titling in Peru

In Peru, there are two main organisations which have been responsible for land titling. According to FAO⁹⁰ in 1992, the promulgation of Decree-law No. 667 on the Rural Property Registry created a Special Land Titling and Cadastre Programme (PETT) which focused on land registration and titling in Peru's rural areas. The Commission de Formalizacion de la Propiedad Informal (COFOPRI) was formed in 1996 and its mandate was to facilitate the conversion of urban squatter settlements into nationally registered property (;).^{91,92} COFOPRI aimed to ensure efficiency and to reduce costs incurred in the process of acquiring legal land titles in urban areas. However, PETT was subsequently absorbed by COFOPRI and Peru now has once main organisation dealing with land registration and titling for both urban and rural areas.⁹³ PETT was created as a specialised instrument of Peru's Ministry of Agriculture (MINAG). This programme was intended to formalise property rights through titling, to encourage the development of an efficient and transparent rural land market and to promote investment in agriculture PETT was run over two phases, phase 1 (PETT 1) ran from 1993-2000 and phase 2 (PETT 2) ran from 2000-2006.⁹⁴ PETT was introduced as part of the broader efforts to adopt more liberal and free market approaches as opposed to the interventionist policies of the past. In the past, attempts to reform land laws and increase agricultural productivity had generally not produced satisfactory results.⁹⁵

According to Fort⁹⁶ the Agrarian Reform Law in 1969 represents a key moment in terms of early legislative measures by the state to transform the agrarian structure in Peru. Large Haciendas were disbanded and replaced with cooperative ownership schemes. However, these new ownership arrangements came with restrictive measures as the cooperatives were not allowed to sell the land obtain during the redistribution programme. In subsequent years, most of the cooperatives became

highly unproductive and bankrupt. As a result, many of the cooperative beneficiaries were pushing the government to dissolve the cooperative schemes. It is against this background that the Legislative decree N. 85 of 1981 was made allowing cooperatives to dissolve. This was followed by fragmentation of land parcels as land was redistributed to individual owners. However, the newly transferred and individually owned parcels of land had no property titles and, in some instances, informal documentation confirming ownership was obtained from the former cooperatives. Nevertheless, the 1990s saw the adoption of more liberal regime in terms of land ownership under the auspices of the Fujimori government. The Fujimori government introduced titling policies for rural areas as well as the lifting of previous restrictions on land sales, rental markets, and mortgages.⁹⁷ PETT was introduced as part of these liberalisation efforts and the programme had ambitious objectives including the creation of a nationwide rural cadastre system valid in all parts of the country. By the end of 2005, the PETT program had managed to register and title more than 1.5 million parcels of land changing the percentage of formally-owned plots of land to more than 50 percent. In the last seven years, the programme budget accounts for more than 100 million dollars, which makes it also one of the largest formalization programs for rural areas in the developing world.⁹⁸

The impacts of land titling in Peru's rural areas reveal mixed results. For instance, Fort⁹⁹ reports that land titling programmes have a differentiated impact on investments depending on the farmer's level of tenure security over a parcel of land before land titling was initiated. Fort identified two groups of farmers before the titling programme was introduced: farmers with weak informal documents and those with strong informal documents. According to Fort 'the effect of titling policy on the propensity to invest and on the value of the investments was positive and significant for both groups' Yet, the impacts were stronger on parcels of land with previously weaker levels of tenure security. It is noteworthy that new investments following titling were mostly financed without credit. This suggests that the investments were not only small but entailed labour-intensive activities on the land. As a result, the impacts of titling on productivity and land values are minimal.¹⁰⁰

Williamson and Kerekes¹⁰¹ investigated the ability of individuals to use private property as assets to secure loans following the distribution of land titles in Urubamba, rural Peru. The research findings revealed that financial institutions were willing to provide loans to individuals irrespective of whether or not the individual possessed a legal title to land. However, the private financial institutions were only prepared to provide loans at very high interest rates. The high interest rates applied irrespective of whether the loan applicant possessed a government title to land. Williamson notes that government title to land is not a sufficient mechanism to guarantee property as collateral for loans from private financial institutions. Interestingly, even the national bank in Peru had stringent requirements for loan applicants even in cases where they possessed government title to land. It was found that prospective borrowers had to provide collateral in excess of the value of the loan and in addition to the land title; co-signers were required before a loan could be approved. Accordingly, it emerged that with respect to both public and private financial institutions a legal title to land does not guarantee access to a loan.¹⁰² However, some research findings from some geographic locations of Peru show uneven access to credit based on geographic location following the titling of property. In rural settings, legal title to land increased access to formal credit while in urban settings there legal title increased access to informal credit.¹⁰³

4. Land rights and large-scale land acquisition

While the large-scale land acquisitions have a long history, the 2007-2008 food and oil crisis triggered a faster pace and wider scope, and multiple actors which not only included nations-states, for instance, China, Brazil the Gulf states and South Korea but also the traditional transnational corporations from Western countries.¹⁰⁴ The 2008 commodity boom dramatically increased interest in agricultural land as a potential investment especially in sub-Saharan Africa. Deininger *et al*¹⁰⁵ indicate that investors expressed interest in approximately 56 million ha of land globally in less than a year, and significantly, approximately 29 million ha (around two-thirds) were in sub-Saharan Africa. As a result of interlinking factors, for instance population growth, rising incomes, urbanisation and the subsequent rise in demand for food products, the expansion of cultivated area is set to increase, globally. Importantly, two-thirds of this estimated expansion will be in sub-Saharan Africa and Latin America which are seen as investment frontiers with plentiful underutilised land.¹⁰⁶

As already noted, large-scale land deals are not an entirely new phenomenon and thus have historical antecedents. For example, there is a long history of land expropriations in sub-Saharan Africa, especially during the colonial period. However, the current land deals are not only occurring at an arguably enormous scale, but also, the speed of expansion of the current deals is perhaps more rapid than previous land rushes during the colonial and post-colonial history.¹⁰⁷ Considering the magnitude of current land deals, White *et al*¹⁰⁸ further note that there are potentially greater impacts in terms of “radically restructuring agrarian economies, transforming livelihoods and rural social relations, with this, changing the power dynamics in the countryside across the global South”. While there are continuities between past land expropriations and the current large-scale land acquisitions, these processes are also qualitatively distinct. According to Akram-Lodhi¹⁰⁹ “neoliberal land enclosure can be differentiated from previous enclosures in that its objective is not to establish social property relations but rather deepen already existing set of capitalist property relations by diminishing the relative power of workers and peasants in favour of dominant classes”.

McMichael’s food regime concept¹¹⁰ provides an analytical tool for understanding the global food system. The food regime concept not only provides insights into the contemporary features of the global food system but also affords us a long-term historical perspective on how the global food system evolved across different world-historical epochs. According to McMichael¹¹¹ the corporate food regime (1980s to present) is based on a panoply of rules and institutions which encourage agricultural liberalisation especially universal agro-exporting whereby states in global South increasingly open their economies to the Northern-dominated international food trade. McMichael notes that “all of these rules have institutionalised market and property relations privileging agribusiness in the name of production efficiencies, free trade and global food security”. He argues that the land rush unfolding in much of the global South is “is something other than simply a contemporary enclosure of land”. The land grabs essentially represents the changing conditions of accumulation in the international food system. Also, the predominance of land grabs in much of the global South represents a ‘spatial fix’ to the accentuating contradictions in the Northern-dominated global food system. Of particular significance is the simultaneous rise in capital’s costs of production (energy) and reproduction (wage foods). It is often argued that “land occupied (farms) or accessed (commons) by smallholders and pastoralists are low-yield and underutilised lands that, with capitalisation, can improve rural incomes and address the global food security problem underscored by the current food crisis”.¹¹²

As is evident from above, the recent large-scale land acquisitions are not without historical precedent. Scholars have identified a number of interlinking factors driving the current wave of land grabs and which also reflect the contradictions and tensions in the current global food system. Some of the widely mentioned drivers of the current land rush are the recent 2007-08 food crisis, the rise of oil prices, alongside rising interest in global farmlands by capital markets especially speculative investors. For instance, the food 2007-08 food crisis compelled a number of Gulf states to acquire long-term rights to land in anticipation of food export restrictions from their traditional suppliers (Woertz, 2014). The historically unprecedented rise in oil prices in the summer of 2008 has also had an impact in the recent land rushes. According to Kesicki (2014) “during the summer of 2008 oil prices peaked at almost US\$ 150 per barrel (bbl), while in 2011 average oil prices of \$ 111/bbl were experienced – the highest annual average in history ”.¹¹³ Alongside political drivers like climate change and renewed concerns about energy security in industrialised countries, high oil prices are seen as favourable to investment in biofuels.¹¹⁴

The rapid enclosure of land in the global South for the production of biofuels is linked to these global dynamics. Campanante¹¹⁵ argues that another driver of land grabs is the growing appeal of agricultural investment projects as profitable assets. What is often characterised as the ascendancy of agriculture as an asset class has attracted a wide range of private investors. The prospect of sustained price increases and the attractiveness of real assets in agriculture in the face of uncertainty over traditional capital markets is attracting the private investment industry in agriculture. For instance, Vencatachellum notes that “since the end of 2007 more than \$ 13 billion of investor funding has found its way into agricultural land and linked investment”.¹¹⁶ All this happens in an environment where various multilateral institutions and development agents the land rush through various pronouncements about global food insecurity.

According to Deininger *et al* ¹¹⁷ countries attracting investor interest include those that are land abundant and those with weak land governance systems. Thus countries with poorer records of formally recognised rural land tenure are some of the common destinations for large-scale land investments. Consequently, this raises serious concerns about the capacity of local institutions to vulnerable groups from losing land on which they have legitimate, if not formally recognised, claims. The veracity of claims that most countries in sub-Saharan Africa and other destinations of large-scale investments in land are endowed with plentiful and underutilised land has been widely questioned.¹¹⁸¹¹⁹ The general narrative is that there is a solution to the food and oil crises, and the solution lies in the existence of global reserve agricultural lands that are marginal and underutilised, and that transforming these lands into zones of food and biofuels production for export would result in a ‘positive sum’ for societies and not undermine the food security of the affected communities.¹²⁰

Wily¹²¹ observes that most land in Africa is already being utilised. However, in most cases people using the land are vulnerable since they often do not have formal land rights and access to the relevant law as well as institutions. The ownership and status of unregistered communal lands is a source of conflict especially when large-scale land deals are introduced. In most cases, both the state and communities claim to be owners of the land. The state relies on national law which is based on imported European norms while the communities depend on customary law. National law and by implication state ownership usually takes precedence while the overlapping and contested customary rights to land are neglected. Decisions to allocate or lease land for large scale land investments are usually approved by

government without the consent of rural communities. This provides a fertile ground for conflict as it sets the state on a collision course with the local communities under customary tenure.¹²²

Cotula and Vermeulen¹²³ argue that the extent to which local land users enjoy secure rights is very important. Secure land rights not only protect local communities from arbitrary dispossession and give them an asset to negotiate with when large-scale land acquisitions occur. However, there are instances when governments do not consider local interests in land, water and other resources resulting in land deals happening without proper consultation and consent of local communities. They suggest that it is imperative to focus not only on individuals deals but to ensure that the national legal framework protects local rights. For Cotula and Vermeulen¹²⁴ this may involve ensuring strong legal recognition of local (including customary rights), collective land registration where appropriate, ensuring the principle of free, prior and informed consent, providing legal aid and assistance and improving governance of land and related resources.

Land Grabs and customary tenure in Kenya

Contemporary land struggles in Kenya often involve instances of land grabbing by both foreign and domestic companies, often with the collusion of local elites, displacing indigenous populations and pastoralists, and disrupting their livelihoods. Kenya has experienced a significantly large inflow of investments into areas with high potential land as both foreign and domestic investors seek to acquire land for agricultural ventures and biofuels investments. The sources of large-scale investments have included foreign states. For instance, Qatar entered into a large-scale land acquisition with the Kenyan government. In this deal, at least 40, 000 ha of high potential agricultural land was made available to Qatar government in exchange for a US \$ 2.5 billion loan. Some of the large-scale investments in recent times include, a jatropha biofuels plantation by a Canadian company, a sugarcane plantation involving a Kenyan company all in the Kana Delta.¹²⁵

In an analysis of land grabbing by domestic elites and wealthy individuals in Kenya, Klopp (1999:15) argues that 'Kenya was founded on successive acts of land grabbing, and hence, land grabbing is as old as Kenya itself, if not older'. From the time Kenya emerged as an East African British protectorate, vast tracts of Kikuyu and Masai prime lands were expropriated on the basis that these were unoccupied marginal, wastelands. The expropriated lands were subsequently transferred to the state before being parcelled out to white settlers. As Klopp¹²⁶ notes, by 1939, most of the remaining land was considered crown land under the direct control of the governor alongside native areas or trust lands administered by land boards accountable to the governor. The Mau Mau rebellion was a struggle against land dispossessions and the colonial state, through the Swynnerton Plan, responded by consolidating land and allocating it to loyalists at the expense of those who were rebellious. While the Swynnerton Plan was later framed in terms of economic imperatives, for instance, creating a dynamic and highly productive group of smallholder farmers, its genesis was purely political. Thus, from the outset, Kenya had a highly centralised land administration system where land allocation was used by the state to maintain social order.

The post-colonial state in Kenya not only continued with the Swynnerton Plan of allocating land titles to private holders but land allocation has also been used for political patronage.¹²⁷ Thus in the post-colonial period, Kenya has not had an explicitly articulated land policy. However, the country's legal framework for land has consistently promoted the privatisation of all forms of tenure, especially

customary tenure.¹²⁸ A New Land Policy was adopted in December 2009 as part of efforts to democratise land laws. The NLP distinguishes between public land, community land and private land. In terms of the NLP, the category of land previously owned by the state and for which the president was legally empowered to allocate will be replaced by public land. All public land in Kenya will be under the National Land Commission which reports which accounts to parliament. Another important development is that former trust lands become community land administered by local communities instead of being held in trust by the county councils. Previously, county councils were expected to consult communities before land allocations. Yet experience reveals that land has often been allocated arbitrarily without proper consultation.¹²⁹

Duval, Medard, Hamerlynck and Nyingi's (2012) research¹³⁰ shows the destructive impacts of large-scale land acquisitions on local livelihoods in Tana Delta, Kenya. The Tana delta is home to diverse ethnic groups who have co-existed through informal access customary tenure systems, though at times this has involved harsh social negotiations and conflict. Some of the livelihood activities include rain-fed maize production, small livestock rearing, and rangelands for the mobile pastoralist from as far as Somalia, and the harvesting of wetland natural resources. Local autochthons, migrants and pastoralists have pursued their livelihood activities drawing on various livelihood resources in the floodplains and the terraces of Tana delta. However, the official narratives have not considered land the land rights of these different ethnic, livelihood groups as constituting full property rights. For instance, Verma¹³¹ notes that during the colonial era in Kenya pastoral ways of life were problematically disregarded as traditional and backward as the colonial state dispossessed pastoralists of their land to make way for private investors, commercial farming, urbanisation, and the creation of national parks. The doctrine of public trust from the colonial era, whereby the state is a custodian of public land, has often been deployed to legitimise land grabbing in contemporary times. This essentially involve as elites capturing public land in their custody for private profit gain.¹³²¹³³

Often, the Tana delta has been seen as consisting of free land, land that is free of people and therefore free for development. Such spaces are essentially viewed as government land which was previously crown land and now falling under the direct control of the state. Alongside these vast tracts of contested land are established residents occupying a smaller area of land. These lands fall under the category of trust land under the direct administration of the county council on behalf of the people. Recently, two companies, one a Kenyan private company and the other one a Canadian company acquired large tracts of land in Tana Delta depriving the different livelihood groups in the area of land. The private Kenyan company acquired more than 40 000 ha of land in the central flood plain of Tana delta to establish a large-scale sugar cane plantation. More than 160 000 ha of land were acquired by the Canadian company on a 45 year lease and 64 000 ha of this land was set aside for the production of *Jatropha*. The enclosure of these lands has resulted in evictions of usual residents and denial and restriction of user rights of various ethnic and livelihoods groups.¹³⁴

Land Grabs and customary tenure in Tanzania

Recent commercial pressures on land occasioned by the global land rush involving large-scale foreign investors acquiring land on a massive scale in developing countries, alongside domestic investors and elites represents a threat to customary systems of tenure in Tanzania. On Tanzania's experience with land grabs, Galaty¹³⁵ argues that large-scale land dispossessions are prevalent, yet the country arguably has progressive, decentralised local-level land administration structures meant to protect

customary land rights. The occurrence of land dispossessions, in spite of recent progressive reforms, may be explained in terms previously predominant land management processes.

Tanzania has for long had a statist land tenure regime whereby the post-colonial state has not offered juridical recognition to *ethnicity-based* customary rights, and has also not institutionalised the powers of neo-customary authorities in administrative practice.¹³⁶ Boone argues that 'land administration in Tanzania is largely secularised and land disputes scale-up into the national court system' and 'there is a de jure legal and administrative non-recognition of ancestral (and ethnic) land rights, and non-recognition of neo-traditional local leader with land powers'.¹³⁷ Under this land administration system, direct state agents as opposed to chiefs play a central role in rural jurisdictions allowing the central state to have a direct role in land allocation and dispute adjudication.¹³⁸ As Galaty¹³⁹ suggests socialism in Tanzania 'left a legacy of centralised decision making, a philosophical denigration of the capacities and rights of the peasantry, and a party that feels it has both the responsibility and privilege of unilaterally determining policies that affect every local community'.

The Ujaama villagisation programme, following the Arusha declaration of 1975 had far-reaching, adverse impacts on local systems of tenure.¹⁴⁰¹⁴¹ During its initial phases, the villagisation programme had the semblance of voluntary relocations yet relocations gradually intensified and villagers were forcibly displaced especially during operation Sogeza.¹⁴² This programme was carried out administratively without any legal framework and this has had serious legal implications especially in terms of violation of pre-existing customary land rights.¹⁴³ Many villagers had their lands confiscated for redistribution to others with less land, and in subsequent years, the legality of these dispossessions was increasingly challenged in courts. On the part of the state, there was an inclination to extinguish pre-existing customary land rights which were affected by villagisation while upholding land rights established under the programme.¹⁴⁴

Research shows that other efforts to reverse the adverse effects of the villagisation programme while strengthening customary rights to land have largely been unsuccessful. The Presidential Commission, popularly known as the Issa Shivji commission, found that the executive arm of the state had excessive powers by virtue of the fact that it owned all land. This undermined any prospects of administering land in ways that would ensure security is extended to customary rights. Alongside the Issa Shivji commission was the committee created Ministry of Lands, Housing and Urban Development which also sought to deal with inconsistencies around land laws. For this committee, the predicament was 'how to protect smallholder farmers' rights to land while at the same time responding to interests of 'investors' who had been approved by Investment Presidential Council'.¹⁴⁵

Unlike the Shivji commission which recommended the decentralisation of land administration from the executive, Ministry of Lands, Housing and Urban Development created committee generally saw customary land rights, especially pre-existing land rights before the villagisation programme as an obstacle to investment. Its recommendations are seen as behind the adoption of the Regulation of Tenure and Established Villages Act 1992 which attempted to extinguish customary land rights affected by villagisation. While this Act was thrown out in Court in 1994, it had become apparent that the general approach on the part of the state in dealing with customary land rights is to prioritize large-scale investments. This general thrust in land policy was also borne out in the National Land Policy held in January 1995. The question of divesting land from the executive arm was seen as an

obstacle to investment and that if necessary, customary land rights may be extinguished to make way for investors who had been accepted by the IPC.

In spite of these tensions and contestations, Tanzania went on to develop fairly progressive land laws. The adoption of the 1999 Land Act and Village by Tanzania are seen as important measures in terms of securing the land rights of rural communities and providing safeguards against the uncoordinated and undemocratic alienation of communities' land rights.¹⁴⁶ Specifically, the Village Land Act No. 5 of 1999 not only provides the basic framework for local communities to manage and govern their customary village lands. Importantly, it outlines specific procedures to be followed before the acquisition of village land can be authorised. For the acquisition of village lands larger than 250 ha it is imperative to transform the village land to general in terms of S. 4 (6) and this requires the president's approval and public pronouncement in the government gazette.¹⁴⁷ Among other things, the village governance organs, the Village Land Council and Village Council must approve the requests for land by investors and convene a meeting with the village assembly. The Village Assembly is broader and includes all members of the community above the age of 18. After the approval of the request by the Village Assembly, minutes of the meeting are submitted to either the Tanzania Investment Council (TIC) or the Commissioner of Lands. These two bodies have the authority to transfer villages land to public land making way for investors to acquire the newly converted land.

Following the global land rush in 2008, customary land rights are under increased pressure as new investment is prioritised. In spite of the predominance of large-scale investments, this should not diminish the significance of domestic land grabs driven by local elites and investors as well as wealth individuals from the urban areas. Observers like Chagache¹⁴⁸ argued that as early as the 1980s, Tanzania was already experiencing intense social struggles for land especially localised forms of land grabbing and resource capture by domestic elites. The surge in local land struggles was, to a large extent, spurred by the abolishment of the restrictive socialist policies and the subsequent adoption of market liberalisation policies under the auspices of the Breton Woods institutions. This era of reform, also culminated in the revision of national land laws, as part of wider efforts to overcome agricultural stagnation associated with villagisation. Market liberalisation would stimulate growth in the agricultural sector and enhance its contribution to economic development.

Through their research on Bioshape Tanzania Ltd's (Bioshape), jatropha project in Kilwa district of Tanzania, Sulle and Nelson¹⁴⁹ demonstrate that land grabbing by large private corporations can still occur in spite of what may be seen as progressive land laws. In this case, Bioshape requested 800, 000 ha of land for the development of jatropha. Only 34, 000 ha were granted and the company only managed to utilise 500 ha of the acquired land. The project eventually collapsed, as is the case with many large-scale biofuels investments in Tanzania, which failed to take-off. Nevertheless, Bioshape's encounter with Kilwa villages provides important insights into the vulnerability of communal land rights under the current land management regime. From their analysis, it emerged that the villagers did not understand the legal implications for transferring their village land into general land for acquisition by the company. The villagers did not comprehend that the transference of their village lands through either Tanzania Investment Council or the Land Commissioner extinguishes their customary rights. It was also assumed upon the failure of the project the ownership of the land would revert to them as the original owners. Other irregularities included the fact that the land had not been publicly gazetted upon acquisition as required by law. Sulle and Nelson argue that villagers are often pressured by local and national government bureaucrats whose primary aim is to attract large-

scale investment in line with national policy imperatives. They argue that the current process of land acquisition by large-scale investors is disempowering for local villages since it routes investments through TIC. In what is evidently a centralised system, rural villages are seen as obstacles to productive investment and development. Sulle and Nelson also argue that villagers 'surrender their rights, be paid compensation, and continue to participate as passive recipients of benefits or employment but lose all their leverage over the investment itself'.¹⁵⁰

Land grabs and customary tenure in Mozambique

The land reform process in Mozambique, especially the period preceding the adopting of the 1999 land law, was characterised by calls to privatise land. As Hanlon¹⁵¹ notes, calls to privatise land came from powerful interests, for instance, the World Bank and the United States as well as domestic elites who hoped to gain from land concessions. However, resistance from other constituencies which included the peasant movements and peri-urban co-operatives saw the move towards privatisation of land being rejected. As a result, the position was adopted that all land belongs to the state and cannot be sold or mortgaged. However, 'individuals and communities have the right to occupy their land and gain a title document, and then to use the land, develop it and even rent it out'.¹⁵² According to Fairbairn¹⁵³ the formulation of the 1999 land policy was a Herculean task as government sought to balance different competing interests. The major challenge was how to ensure secure community rights to land while simultaneously promoting private investment within the overall context of continued state land ownership. It is against this background that the new law identifies three ways through which people can gain land use rights.

- Mozambican individuals and communities have the right to land that they have traditionally occupied. This right of occupancy is permanent.
- Mozambicans have a right to land that they have occupied 'in good faith' for at least ten years. This right of occupancy is permanent.
- Mozambican and foreign individuals and companies can be authorised by the government to use land for 50 years, and this can be renewed once for another 50 years. This is in fact a lease.

From the above, it is clear that the law tries to maintain a delicate balance whereby the system guarantees the rights of Mozambicans to land they occupy while creating a modern land titling system necessary for investment.¹⁵⁴ While the land law has progressive principles, in practice the rights of ordinary individuals and communities under customary tenure have not always enjoyed adequate protection. This is particularly the case in cases of large scale investments by domestic elites and private companies as and also in the context of the recent land rush by large-scale foreign corporations. Besides their own accumulation activities, national elites and other powerful local interests have played a mediating and facilitative role for large-scale foreign investments. In spite of the arguably progressive land law which recognises the centrality of communal land rights, policy makers and domestic elites have always accorded large-scale investments a high priority status. Hanlon analyses what he terms the 'cargo cult' whereby the Mozambican elite and its international

allies expect developmental solutions to come from elsewhere. As the then Mozambican Minister of Agriculture and Rural Development asserted:

Our grand objective is to facilitate investment. We have to be able to respond to an investor who arrives and says: 'I want 10, 000 ha to grow soya and my plane leaves in two days'. We want to be able to meet in an office and have him able to leave 90% sure that he will have the land he needs'.¹⁵⁵

In this context, other important social groups, for instance, smallholder farmers and their rights to land are often neglected. Besides this outward looking mind-set about the development question, local elites are also implicated in processes that produce domestic social inequality. They thus enjoy a mediating role exercising control over land resources through a bundle of powers derived from such sources as previously acquired land holdings, legitimacy as a customary leader, access to bureaucratic channels of land administration and locally-based business knowledge.¹⁵⁶ An appreciation of these sources of power partly explains why peasant dispossession is occurring in spite of the fact that peasant property rights are protected by the law (*ibid.*).

One of the widely reported land deals involved a private company Procana which was allocated prime agricultural land adjacent to the Oliphants river.¹⁵⁷ The large-scale land acquisition happened between 2007 and 2009 and entailed the leasing of 30, 000 ha of land on a 50 year contract.¹⁵⁸ Procana was expected to produce sugarcane and ethanol for export and to create 7 000 jobs for the local communities. However, after failing to commence operations, Procana's contract was revoked and the land was allocated to new investors. The new investor, Massingir Agroindustrial (MAI), is a consortium made up of 51% shareholding by the South African company, Transvaal Suiker Berpek (TSB) Sugar. The remaining 41 % was owned by a consortium of Mozambican businessman known as SIAL (Sociedade de Investimentos Agro-Industrias do Limpopo).

The new investors, under MAI planned to put 37 000 ha of land under sugarcane by the main plantation, 12 000 ha of sugarcane by the out growers. In addition, 2 500 ha of land would be set aside as a community farm to be used for sugarcane production by people from the communities.¹⁵⁹ Paradza and Sulle argue that there were conflicting narratives on the meaning of property and land with respect to marginal lands. For the officials, the land allocated for the large-scale acquisition was seen as previously marginal and under-utilised. On the contrary, there were scattered settlements, smallholder farmers and pastoralists utilising the land. This is confirmed by FIAN¹⁶⁰ in an earlier study. From the time Procana was the large-scale investor, it was noted that the land acquisition would disrupt spaces for livestock grazing and pastoral routes. The land marked for the large-scale land acquisition is also the main source of livelihood for Massingir communities involved in livestock rearing, charcoal production and subsistence farming. Allocation of extensive irrigation rights could potentially deprive the adjacent local communities of water and undermine their capacity to produce food.

Another project, Maragra Sugar estate has had profound impacts on local tenure systems and local livelihoods. Maragra was resuscitated by Illovo a South African sugar company after years of lying dormant during the civil war. In 2006, Associated British Foods acquired 51 % shareholding in Illovo. Over the years, Maragra Sugar Estate has experienced significant expansion. In 2000, Maragra produced 6 000 tonnes of sugar and this increased to 75 000 tonnes in 2009. In 2013, the Estate produced 84 000 tonnes of sugarcane. In the Maragra case, local authorities played a prominent role

facilitating the conversion of grazing and arable lands to the DUAT system for acquisition by Maragra Sugar Estate. Also, Maragra Sugar Estate compelled the formalisation of land titles since it required all its outgrowers to have registered DUAT titles. In this sense, land that had previously managed and accessed as common tenure resources was now privatised and subject to exclusive use for cane production.

5. Tenure insecurity and mining

Impacts of mining on land and resource rights

Another important dimension of the land grabs phenomenon, which nevertheless predates 2008 food crisis, relates to land dispossessions and displacements resulting from the expansion of the extractive industry. The expansion of the extractives sector on the back of the commodities boom predates the 2008 global food crisis which is often cited as one of the main drivers of increased demand for global farmland. As Anseeuw¹⁶¹ notes, the agricultural sector remains the primary driver of the land rush as it accounts for 69 % of the reported deals, with food crops constituting 39% of the announced projects, biofuels 29%, other non-food crops 6% and livestock 3%. However, other sectors also significant. Thus, forestry, and carbon sequestration, mineral extraction and tourism account for a combined 11% of land acquisitions globally.

In the recent past, from 2001 to 2013, the extractives sector has experienced unprecedented growth globally and this period sustained of growth has been attributed to a surge in demand in the commodities market. This growth in global demand for commodities was not only unprecedented but cut across a number of commodities. Among other things, rising demand in the emerging economies of China, Brazil and India has been cited as one the driving forces behind the 2001 to 2003 commodities boom. The World Investment Report¹⁶² noted that foreign direct investment (FDI) to Africa increased substantially during this period and this surge was in large part related to the extractives sector. For instance, in 2006, FDI inflows to Africa rose by 20% to \$36 billion, twice their 2004 level. Thus following substantial increases in commodity prices, many TNCs, particularly those from developing countries already operating in the region significantly expanded their activities in oil, gas and mining industries.¹⁶³ However, most large-scale mining investments have become highly capital intensive, providing limited prospects for labour absorption, especially semi-skilled and unskilled labour. Yet these investments often displace local and indigenous communities, taking up land and natural resources vital for sustaining local livelihoods. Mining-related land dispossessions are not uncommon in much of the developing world where there is significant expansion of the extractives sector.¹⁶⁴

The FAO¹⁶⁵ Voluntary Guidelines on the Responsible Governance of Tenure highlight the importance of recognising local and customary land rights with respect to natural resources, for instance fisheries, forests. These principles can be extended to understand resource governance and rights in other sectors expanding sectors like mining which increasingly have growing impacts on local land rights and customary tenure systems. According to FAO, tenure governance has important implications for the extent to which different societal groups can access to resources. Thus, 'tenure systems define and regulate how people, communities, and others gain access to natural resources whether through formal law or informal arrangements. The rules of tenure determine who can use which resources, for

how long, under what conditions'. Often times, there are tensions between written policies and laws and unwritten customs and practices with respect land and natural resource access.

The state has a significant role to play in terms of formulating and implementing equitable land and resource governance laws. According to Byamugisha¹⁶⁶ the compulsory acquisition of land whereby the state possesses exclusive powers, in one form or another, to acquire land for public purpose or use, without relying on the market has previously been seen as an essential tool for development. However, the arbitrary exercise of this prerogative has often resulted in the disruption of livelihoods especially for indigenous and rural communities relying on land and other natural resources for survival. In recent years, a more progressive and nuanced approach has emerged. This approach is essentially more inclusive and takes into account the rights of 'various forms of tenure, including rights allocated under customary and indigenous tenure systems, rights over common property such as forests and grazing areas, and community held rights'.¹⁶⁷

King and Veit¹⁶⁸ make an important observation with respect to weight accorded to local and customary rights in land and resource governance systems in Africa. The main problems relates to the fact that '...the bundle of land rights that most rural people legally hold is small – usually limited to surface rights and certain rights to some natural resources on and below the surface, such as rights to water for domestic use'. By contrast, 'many high-value natural resources, –such as oil, natural gas, minerals and wildlife are governed by separate legal regimes and administered by different public institutions'.

In most cases, African governments use their prerogative to allocate these resource rich lands to private corporations, mostly of foreign origin, for large-scale investments. According to King and Veit 'while most communities hold rights to the land, foreign companies hold the rights to the natural resources on or under the same plot'. It is because of these overlapping land and resource rights whereby various holders pursue competing and contradictory land use practices that social conflict, unsustainable use of resources and injustices become prevalent. Besides the prominent role of the central state and its various agents, customary chiefs also play a critical mediating role in land tenure governance. In many contexts, traditional chiefs are customarily considered to be custodians of land and this allows them to facilitate large-scale land acquisitions in their communities.¹⁶⁹

Similarly, the prevalence of mining and land use conflicts are typically most intense in developing countries and this is often related to the question of land tenure. Usually there is lack of clarification of who owns land in communities where mining takes place. In most instances, customary tenure systems are not regarded as full property rights and the state cedes land where communities have usufruct rights to mining corporations without proper consultation. In some contexts, governments retain the rights to sub-surface minerals to a large-scale mining company seeking to explore and extract minerals even on land that has been awarded to another group.¹⁷⁰

A focus on mining in former homeland areas in South Africa

South Africa experienced a significant geopolitical shift in its mining industry in the last two decades. This geopolitical shift was characterised by the gradual decline of the gold industry in the urban industrial centres and the subsequent rise of platinum mining in the peripheral former labour sending areas.¹⁷¹¹⁷² The unprecedented growth of the platinum industry saw emergence of former homelands areas, endowed with large quantities of platinum deposits, as new frontiers of large-scale mining

investments. The former labour sending areas of Lebowa and Bophutatswana were now experiencing a surge in large-scale mining investments. Already existing platinum mines were expanding while new investments were also introduced. However, Platinum is not the only mineral which has seen the emergence of former labour sending areas as new frontiers of mineral exploitation. Coal mining has also expanded to the rural areas of South Africa, and just like platinum mining, coal expansion in areas like KwaZulu Natal happens against the backdrop of weak customary rights to land amongst rural households residents whereby land administration powers remain disproportionately concentrated in the hands of the traditional authorities. Weak customary rights to land experienced by most rural landholders diminish their capacity to negotiate with large-scale mining corporations and other investors interested in rural land. As a result, the principle of prior and informed consent which is a generally accepted standard for engaging communities in the extractives sector is rarely adhered to.¹⁷³

A number of legislative interventions by the post-apartheid government have enhanced the political and administrative powers of traditional chiefs in the communal areas of South Africa with important implications for customary land rights in mining communities which fall under the jurisdiction of traditional chiefs.¹⁷⁴¹⁷⁵¹⁷⁶. These legislative interventions designate rural residents as part of traditional communities under traditional chiefs. Some of the significant legislative interventions include; the Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003 or the TLGFA), the Communal Land Rights Act of 2004 (Act 11 of 2004), and the Traditional Courts Bill (B15-2008). The Mineral and Petroleum Resources Development Act (MPRDA) of 2002 is also significant in terms of its attempts to enhance the contribution of large-scale mining to the upliftment of the welfare of surrounding communities hosting large mining corporations Yet its effectiveness is partly undercut by the privileging of traditional authorities as custodians of land and other resources in communal areas.¹⁷⁷ Traditional chiefs were an integral component of the administrative machinery during apartheid, facilitating the system of indirect rule.

Boone's distinction¹⁷⁸ between two ideal types of land regimes, or processes, which can be traced back to the colonial encounter between the state and indigenous populations, is important here. The user rights land regime is evident in instances where government has have used the powers of the modern state to challenge pre-existing rights, land management processes, and land allocation authorities by standing behind and enforcing the land claims of 'whoever farms the land'.¹⁷⁹ Conversely, the communal land tenure regime involves 'the *de facto* (or *de jure*) state recognition of neo-traditional forms of local authority, and thus of state action that confirms or strengthens (or even grants) the land management powers of non-elected, non-state, non-secular, local level actors like chiefs and marabouts'.¹⁸⁰ These arrangements have been perpetuated in the post-colonial era in most African countries as is the case in South Africa.

The case of Bakgatla tribe in platinum-rich Rustenburg is illustrative. Intense social struggles around access to platinum mineral resources have unfolded. These contestations are rooted in the historical privileging of neo-traditional forms of local authority by the state and their continued recognition in contemporary times.¹⁸¹¹⁸²¹⁸³¹⁸⁴ During the colonial and apartheid years individuals and family groups could only purchase land on a tribal basis. Whenever land was purchased, the property would be registered in the name of a chief or kgosi whose name appeared on the title deed. This obscured the identities of the individuals or family groups who would have mobilised resources to purchase the land. In earlier periods (up to 1881) the purchase of land on the part of natives was mediated by missionaries. After 1881, natives could purchase land through state functionaries for instance, the

Minister of Native Affairs. The land would be registered as tribal land in the name of a chief who was assumed to be its custodian.

The platinum boom and the rapid expansion of large-scale mining in the former homelands put the traditional chiefs in a strategic position. Large-scale mining corporations negotiated with legally recognised chiefs as custodians of communal land. The history of land purchases, where different families and clans mobilised resources and purchased their own land was overlooked. With these different groups of purchasers not having a direct stake in platinum mining and missing out on platinum proceeds, intense social struggles have ensued. Different groups have attempted to reclaim pre-existing customary rights to land which were extinguished when land they purchased was registered in the name of legally recognised chiefs.¹⁸⁵¹⁸⁶¹⁸⁷

According to Mwanza and Capps, a striking feature of the modern Bakgatla territory is that it encompasses a large number of farms purchased by African groups but formally registered in trust for the Bakgatla chief and tribe. Sefikile village comprises one of the African families who mobilised resources to purchase a farm in the Bakgatla territory. The ethnically diverse families, about 52 families contributed towards the purchase of Spitskop farm. This purchase was mediated by a Dutch Reformed Church (DRC) minister Reverend Makgale. The people of Sefikile did not have enough grazing land and decided to buy a second portion of land. However, because of the prevailing land laws, they were compelled to register the land in the name of the Bakgatla chief, Ramona Pilane in October 1910 (Sefikile was historically integrated into the territory under the Bakgatla Traditional Authority. Yet the Bakgatla never appointed dikgosana or headman to rule over the village. Conflicts between, on the one hand villages of former land purchasers like Sefikile and the Bakgatla traditional on the other hand have intensified especially with respect to the distribution of mineral wealth. For instance, Amplats had been paying royalties to the Bakgatla administration in Moruleng for operating on Sefikile land since 1982. These royalties were to be later converted into a 15 % stake with the Bakgatla as the shareholders depriving the small groups of land purchasers like Sefikile the chance to benefit from the mineral wealth on their land. Other villagers who are in the same predicament with Sefikile in Rustenburg area are Lesethleng, and Motlhaba.¹⁸⁸

Large-scale platinum mining has also expanded in the Limpopo province of South Africa which forms part of the Bushveld Mineral Complex and is endowed with vast platinum deposits. Some villages in Limpopo's Mokopane area fall within the mineral rights area of Anglo Platinum's Mogalakwena mine. The villages surrounding Mogalakwena mine fall under the jurisdiction of the Mapela traditional authority area. These communities have, across the years, experienced mine-related land dispossessions. The land dispossessions and displacements have been more pervasive in the 2000s following the platinum boom and the subsequent expansion of mining activities in the area. Anglo Platinum's Mogalakwena mine has existed in the area since the 1920s. However, the mine has been dormant for years largely as a result of unfavourable conditions in the global markets. Following the recent platinum boom, Mogalakwena mine experienced a period of rapid expansion from the 2000s.¹⁸⁹

Since Anglo Platinum Mogalakwena mine in Limpopo is an open pit operation its phase of expansion has taken up fairly vast tracts of land. Recent research in selected villages of Mapela namely, Ga-Chaba, Ga-Molekana, Armoede and Skeming reveals that mining expansion has resulted in the loss of arable land, grazing commons, access to natural resources and depletion of ground waters

sources.¹⁹⁰¹⁹¹ The village of Armoede consists of newly relocated homesteads. Most of the relocated people in Armoede remain dissatisfied with the compensation they received following the relocations. Some the original homesteads consisted of several domestic units forming one big homestead. For instance, some young and married adults had not established their own independent homesteads. When mine-related relocations occurred, they still resided with their parents enjoying access to collective homestead resources including arable land. However, compensation was only given to the individual heads of homesteads usually the male patriarchs. Some of the women had been *de facto* homestead heads because of the absence of husbands involved oscillatory labour migration. Yet absent males often captured the proceeds from compensation in spite of having been absent, at times for prolonged periods. Overall, the multiple nature of customary rights, especially with respect to homestead resources like arable land, was ignored when determining compensation. In Armoede, Mokopane, women and young adults disproportionately endured mining-related land dispossessions as the model of compensation reinforced and amplified existing social divisions within homesteads.¹⁹²

Another key problem is that villagers in Mapela, as is the case with other localities in South Africa's former homelands, merely enjoy usufruct rights on communal land. In the post-apartheid era, traditional authorities in the former homelands continue to be considered the legitimate custodians of the land, and play a lead role in negotiations involving large-scale land acquisitions and other development initiatives. Mineral rights and surface rights were also decoupled following the enactment of the MRPDA of 2002. In the new dispensation, all minerals, or sub-soil resources belong to the state. This has resulted in overlapping rights whereby people in communal areas have usufruct rights on the same land where other powerful interests like the state and mining corporations may have claims rights to sub-soil resources.¹⁹³ Anglo Platinum negotiated with the chief, Mapela, who was seen as the custodian of the land while individual homesteads with customary rights to land were virtually excluded from the negotiations.

A new platinum mine, Platreef, which is expected to commence operation in year 2019, was also established in the neighbouring communal area of Kekana in Mokopane, Limpopo. Similarly, the traditional leadership of Kekana was considered to be the custodian of communal land while people in surrounding the villages of Tsamahansi, Kgubudi, Ga-Molekana, Mzombane were not adequately consulted in line with the principles of prior and informed consent.¹⁹⁴ The presence and impacts of large-scale mining in both the Kekana and Mapela traditional authority areas of Mokopane, Limpopo illustrate the weak nature of customary rights to land in South Africa's former homelands. The weak nature of customary rights to land is rooted in the continued privileging of neo-traditional forms of authority as custodians of land and legitimate community representatives.¹⁹⁵ In most cases traditional authorities enter into deals with mining corporations surrendering communal land without the consent of their subjects. In most cases inadequate compensation is not given to the dispossessed individual land owners.

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¹⁶⁶ Byamugisha (2013)
¹⁶⁷ (Byamugisha, 2013:104)
¹⁶⁸ King and Veit (2013)
¹⁶⁹ Boamah, 2014
¹⁷⁰ (Hilson, 2002)
¹⁷¹ Mnwana,2015
¹⁷² Capps, 2016
¹⁷³ (Greenspan, 2014)
¹⁷⁴ Claassens, 2014
¹⁷⁵ Claassens and Matlala, 2014
¹⁷⁶ Mnwana , 2015
¹⁷⁷ Mnwana , 2015
¹⁷⁸ Boone (2007)
¹⁷⁹ Boone, 2007:564
¹⁸⁰ (Boone, 2007:563)
¹⁸¹ Capps and Mnwana, 2015
¹⁸² Capps, 2016
¹⁸³ Manson and Mbenga, 2003
¹⁸⁴ Manson, 2013
¹⁸⁵ Capps, 2016
¹⁸⁶ Mnwana and Capps, 2015
¹⁸⁷ Manson, 2013
¹⁸⁸ Mnwana and Capps, 2015
¹⁸⁹ Mnwana, Mtero and Hay, 2016
¹⁹⁰ ActionAid, 2008
¹⁹¹ Mnwana et al, 2016
¹⁹² (Mnwana et al, 2016)
¹⁹³ (cf. King and Veit, 2013)
¹⁹⁴ (Mnwana et al, 2016)
¹⁹⁵ (cf. Boone 2007 and 2015)