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Legal Empowerment of the Poor through Property Rights Reform: Tensions and Trade-offs of Land Registration and Titling in Sub-Saharan Africa

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ABSTRACT *Land registration and titling in Africa is often advocated as a pro-poor legal empowerment strategy. Advocates have put forth different visions of the substantive goals this is to achieve. Some see registration and titling as a way to protect smallholders' rights of access to land. Others frame land registration as part of community-protection or ethno-justice agendas. Still others see legal empowerment in the market-enhancing commodification of property rights. This paper contrasts these different visions, showing that each entails tensions and trade-offs. The analysis helps explain why land law reforms aiming at legal empowerment may be controversial or divisive in African countries.*

1. Introduction

Strange bedfellows rally behind calls to promote registration and titling of the farmland and pasture that sustains 60 per cent, perhaps more, of sub-Saharan Africa's population. Global actors at the vanguard of the neoliberal revolution rally behind land registration and titling: for them, titling transforms existing land rights into individualised, tradable assets that can circulate within a market economy, thus promoting economic growth by transferring land 'into the hands of those who can use it most productively'. Paradoxically, land rights formalisation is seen by other land rights advocates as a way of *protecting* ordinary farmers and pastoralists from the threat of predatory states and markets: registration is seen as a means of legal empowerment that enables the poor to defend their property rights. Human rights advocates promote registration as a means to legally-empower marginalised ethnic groups and indigenous peoples at risk of territorial encroachment and dispossession: it is part of ethno-justice agendas in parts of Latin America, Africa, and beyond. In policy advocacy, these three positions may merge and blur, as they do in the work of Hernando de Soto (2000), who single-mindedly argues that titles empower the poor, and in some 'rule-of-law' approaches that seek politically-neutral legal solutions to development challenges. This blurring happens because calls for legal empowerment by formalising property rights almost always call for the formalisation of *existing* rights, and assume that these rights are thereby strengthened and enhanced.

This paper argues that in fact, titling almost always involves a transformation and redistribution of rights. Almost inevitably, this produces shifts in the nature and locus of control over property, creating winners and losers, new risks and tensions, and trade-offs. Despite apparent overlaps in some policy discourse, the different visions of legal empowerment through registration and titling that are sketched out above – commodifying land through registration and titling (à la de Soto, 2000), shoring up farmers' and pastoralists' rights, and institutionalising ethnic entitlements – are very different visions of how existing rights and control to land should be transformed, and for the benefit of whom.

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Drawing out these differences in the African context reveals tensions and trade-offs associated with legal empowerment via land registration and titling.

Section 2 places debates over reform of neocustomary land tenure in Africa in historical context. Section 3 identifies three positions in current advocacy of registration and titling. It begins with the default position of the World Bank, which has been the most consistent advocate of registration and titling in the post-colonial period (although debates go back much further). For the Bank and other advocates market-promoting titling and privatisation, land commodification and enhanced transferability are the goal. Private property in land is envisioned as both a driver and the end-point in an inexorable process of economic and institutional modernisation. The second position regarding registration and titling, quite different in its long-run implications from the first, is put forward by advocates of legal empowerment of the poor. For these actors, recognition and titling of existing user-rights is the key to securing today's smallholders and pastoralists from future dispossessions. This vision in market-constraining: the goal is to stabilise existing rural communities and protect Africa's peasantries. The third position is advanced in ethno-justice movements and promoted by indigenous rights activists. It recommends that African governments uphold historically-grounded land rights derived from communal membership (that is, communal, customary, or neocustomary land rights). It is a market-constraining agenda that aims to empower communally-defined groups to sustain a measure of political and social coherence and autonomy. In academic and policy advocacy, the first two positions often blur and overlap, as do the last two positions. Yet the different visions of titling and registration involve different and even conflicting choices about who is empowered against what and whom, and for what larger purpose.

Section 4 draws out tensions and trade-offs inherent in these three different visions of legal empowerment through land law reform. It shows that legal empowerment agendas layer onto older arguments for land tenure reform, reproducing many of the longstanding tensions and contradictions in these debates.¹ In many situations, registration and titling can imply *some sort* of dispossession or disempowerment, heightening of societal tension, or exacerbation of vulnerability. I offer a glimpse of a few African cases which illustrate these tensions and trade-offs. These cases underscore the extent to which variations in context, both national and subnational, shape the practical meaning of land law reform (including its uneven distributional effects across space, different user groups, communities and individuals, and wealthier and poorer land users). They also point to the inherently political nature of land law reform and of struggles around implementation and enforcement of changes in land law. The conclusion summarises and looks beyond the land titling and registration agenda.

2. Neocustomary tenure regimes as targets for reform

This paper focuses on registration and titling of non-registered rural land, often referred to as land held under customary or neocustomary tenure. Land that is not registered and titled comprises about 90 per cent of the total in sub-Saharan Africa, varying across subregions of the continent and by country (Deininger 2003, p. xxiii).² These lands support about 60 per cent of all households (as a cross-country average), and are the foundation of a range of agricultural, pastoral, and other livelihoods. They comprise the homelands, ancestral places, community lands and territories, and sites of residence of the vast majority of the population in most countries. In rural Africa, land and livestock are citizens' main assets. Moves to alter the legal, regulatory, and political status of land rights are thus matters of immediate and vital importance to the lives and livelihoods of some of the world's poorest populations.

It is difficult to sort out the various strands of argument in property rights debates in Africa without placing these ideas in larger historical and institutional context. Top-down initiatives to alter the 'institutional context of agriculture' to achieve broader political and economic ends have a long history on the African continent. Colonial regimes claimed rights over all land under their domain at the dawn of the colonial era, and they used controls over land access to organise and discipline populations subjected to their overrule. What the Europeans called 'customary land tenure' was a wide array of local (usually pre-existing) tenure arrangements that had been reshaped through the colonial encounter,

that were modified through colonisers' attempts to bend pre-existing tenure arrangements to the needs of colonial economies and governments, and that were formally recognised by the colonial states (Boone, 2014; Chanock, 1998; Mamdani, 1996; Moore, 1986; Vail, 1989).

Where land was suitable for agriculture, the Europeans' vision in most places was to create African peasantries organised into officially-recognised 'tribes' that would be governed via Indirect Rule by government-recognised chiefs and elders. Most African subjects were thus constrained to live in officially-delimited 'tribal' territorial units, dependent upon chiefs for land-rights enforcement and adjudication, and tied to family-based units of agricultural production that produced for local needs and, in many cases, for wider markets. In zones of smallholder export-crop production such as those found across much of the coastal belt of West Africa, African peasantries joined the ranks of the world's leading producers of coffee, cocoa, cotton, palm oil, and groundnuts. Even in zones of large-scale land expropriation by white settlers, the 'African reserves' set up as the final destination for populations expelled from their family and/or ancestral lands were imagined as new tribal homelands for partially-self sufficient household producers who would live in communities firmly under the local control of chiefs. African land rights so recognised by government were institutionalised in what the Europeans called 'customary' tenure.

In so-called 'tribal homelands' under indirect rule, colonial authorities decided not to demarcate parcels, register them in family or individual names, or issue titles. This is because colonial rulers (a) preferred to leave discretionary powers in these domains in the hands of their chosen local agents, chiefs recognised under Indirect Rule, (b) believed that the rise of land markets would destroy 'tribal solidarity' mechanisms upon which they relied to control rural populations, and (c) feared that the rise of land markets would result in dispossession of the peasantry and the rise of floating populations – dispossessed and/or proletarianised Africans in the countryside and the cities – who would be a threat to colonial order. The 'neo' in the term 'neocustomary' tenure emphasises the important role of the colonial state and colonial Indirect Rule in restructuring and codifying land rights in much of Africa.³

Strong tensions and trade-offs arose around the feasibility and desirability of concerted state action to entrench the forms of neocustomary land tenure that were established across much of the continent under colonial Indirect Rule.⁴ Political, environmental, and economic pressures threatened the stability and sustainability of the forms of smallholder tenure that the colonial authorities relied upon as a political basis for ruling the countryside, and that many farming households relied upon for access to land, livelihoods, community, and a place to live.

Some of the structural economic weaknesses of the neocustomary land tenure regimes were clear in many areas from the 1940s, if not before. In response, land registration and titling initiatives were proposed after World War II as ways to modernise land tenure regimes to address the low productivity of land and labour; low rates of investment, including low rates of utilisation of purchased inputs like fertiliser and improved seeds; small size of production units and thus limited economies of scale, and so forth. Political strains arising from neocustomary tenure were also evident in many places. Resistance to chiefs, objections to state-enforced tribalisation, and demand for statutory and legally-transactable land rights emerged in at least some parts of almost all the African colonies. Yet with only a few exceptions, colonial regimes eschewed the titling agenda, arguably for both political and economic reasons that resembled those that had influenced colonial regimes before the war.⁵

Most of the independent governments made very similar choices in the 1960s, 1970s, and 1980s, either explicitly in land law or implicitly, by upholding and reproducing the existing land regimes.⁶ Patrick McAuslan (2013, p. 42) wrote of 'the lack of drive for land reform' in Africa from 1960 to about 1990. African governments depended heavily on the political support of African smallholder farmers who claimed land entitlements in their ethnic homelands, and who backed political leaders who confirmed these land rights. Where governments settled new farming populations on lands under direct state administration (that is, outside regions of Indirect Rule), such as in the settlement schemes for African smallholders in Kenya's Rift Valley, it was politically convenient for governments not to title land. This kept land-users dependent on the politicians who guaranteed their access to farmlands to which they had no neocustomary claims.

In the 1960s and 1970s, agricultural productivity was increasing along with output in most countries. Bottom-up and endogenous processes of land tenure change, in particular toward greater

exclusivity in land rights and the rise of vernacular land markets, were apace in zones where agriculture and pastoralism were more highly commercialised.⁷ Gains in productivity and output were highly uneven, but urgency around the idea of a systematic land registration and titling agenda was hard to muster.⁸ Strong political and economic forces militated against such moves that could threaten smallholders' land security, access, and ties to the political leaders, territorial jurisdictions, and communities that connected them to the newly-independent African states. Call for gradualism and reliance on endogenous, bottom-up processes and tenure evolution prevailed, especially given 'the great political sensitivity of the issue' (Platteau, 1996, p. 29).

By the 1980s, however, structural constraints on agricultural development began to seem more acute. Many countries were net food importers. During the 'lost decades' of the debt crisis and the SAP-aggravated economic decline that ensued, agriculture and pastoralism received little, if any, sustained policy attention, outside investment, or government assistance. By the mid-1990s, smallholder agriculture had been starved of state support for well over a decade and a half. Landlessness and food insecurity were on the rise in many regions (Jayne, Chamberlin, & Headey, 2014).

New initiatives to promote systematic land registration and titling gained momentum in the 1990s. The thrust and counter-thrust of these initiatives was defined by the all-pervasive pressure of neoliberal reform.⁹ Long-standing arguments about the need to reform land tenure regimes were fuelled by a new zeal for neoliberal orthodoxies, and by renewed interest in revitalising agriculture. Many African countries undertook to rewrite land law as part of 'second-generation' structural adjustment (Boone, 2007; McAuslan, 2013; Wily, 2001, 2003). The World Bank and other international lenders/donors were major players. Their priority was titling and registration of small holdings to 'bring these assets into the market'.¹⁰ By the 2000s, with arrival on the scene of new investors with voracious appetites for land and sub-soil resources, many national governments seemed to grow visibly impatient with smallholder agriculture and to throw their weight behind registration and titling as a way to accelerate the commodification of land, privatisation of land by domestic elites and investors, and the rise of agribusiness in regions of their countries that were deemed propitious for large-scale agriculture.¹¹

Counter-forces also mobilised around land in the 1990s and 2000s (Manji, 2001). Civil society in Africa, both national and international, was reinvigorated by the political liberalisations of the decade. Political liberalisation opened the door to public airings of long-simmering conflicts and historical grievances over land, some of which were played out in the electoral arena and/or gained strength from rule-of-law and initiatives to promote the legal empowerment of the poor. The end of apartheid in South Africa and the land tenure reforms that followed its wake were one of the most visible manifestations of this process. Growing anxieties about the spectre of smallholder dispossession, about ecological disaster born of climate change and wanton raw-materials extraction, and about the marginalisation and persecution of ethnic minorities, especially indigenous peoples (in Africa, especially pastoralists), also contributed to political pressure for and interest in legal reform – in not only the 'modernisation', but also the 'democratisation', of land rights. Large-scale, land-related civil conflict in many parts of the continent, from Sierra Leone and Liberia to Democratic Republic of Congo, Rwanda, and Kenya, showed that agrarian social tensions, including acute inequalities and smallholders' vulnerability to arbitrary dispossession, were risks to social and political order. Sara Berry (2002, p. 638–9) explained that '[e]vidence of growing land pressure and increasing [land] conflict has prompted some observers to argue that land reform, once considered a low priority on a continent with plenty of land to go around, is now a matter of urgency.' The rising spectre of dispossession of smallholders and pastoralists in the face of rising conflict, rising land values, demographic pressure, ongoing commodification, growing land-hunger of 'outsiders' and investors of all stripes, and myriad other pressures on ordinary land-users created momentum for land law reform.¹²

Advocates of legal empowerment of the poor in Africa through land rights registration have thus joined debates and policy-processes around land tenure reform that have a long and complex pedigree.¹³ In the 1990s and 2000s, political and policy discussions included highly disparate sets of actors pushing very different interests, and different visions of legal reform around land.¹⁴ In Section 3, I sketch out three poles in the debate: the agenda centred on promotion of private property rights, the effort to institutionalise user rights, and the campaign to reinforce community rights. Section 4 identifies tensions and trade-offs inherent in each of these agendas.

3. Three visions of 'legal empowerment' via registration and titling

3.1. *Land registration and titling for individualisation and commodification*

The World Bank has been a consistent advocate of land registration and titling.¹⁵ The theory is that individualisation of control and disposition of land (as in rights of freehold title) will create private property which can be bought, sold, and mortgaged according to market logics and incentives. Mortgaging land can create a flow of new capital in the form of credit that can finance modernisation of production techniques, new inputs, and intensification. Once land is a full commodity, labour will soon follow, and capitalist production units and production processes will emerge. Land passes into the hands of the most productive users, small units are consolidated into larger holdings, and economies of scale are achieved. Individualisation, titling, transferability of land rights, and the state's ability to exercise eminent domain through transparent, legal processes also opens the door to local, national, and international investors who seek land for real estate development, large scale commercial agriculture (such as horticultural and biofuel production), new infrastructure, and tourism projects.

In the last two decades, many African countries have adopted land law reforms that aim at individual registration and titling. During the 1990s and 2000s, 'nearly two dozen African countries proposed de jure land [law] reform that extended [the possibility of] access to formal freehold land tenure to millions of poor households' (Ali et al., 2014, p. 1). Land law reform in Zambia in 1995, Uganda in 1998, Côte d'Ivoire in 1998 and 2015, Malawi in 2002, and Kenya in 2012 are explicit in aiming to clear the way for full commoditisation of farmland.

The most internationally-prominent advocate of land titling, Hernando de Soto (2000), linked this market-promoting vision to smallholder (or peasant) farming via arguments about legal empowerment of the poor.¹⁶ De Soto argued that customary or neocustomary tenure keeps the poor 'locked out' of the market economy. Lack of land titles deprives the poor of opportunities to mortgage their land (or houses), and thus of the opportunity to turn their 'dead assets' into cash and capital. Lack to title also prevents the poor from selling their assets, and thus preventing them from capturing the rising value that comes from activated land markets and property holders' ability to buy and sell legally. In this vision, registration and titling puts African smallholders on equal footing with capitalist businessmen who can take full advantage of markets to buy, sell, borrow, and invest. 'Dead assets' that are locked up in small, unproductive parcels can be freed to gravitate to higher-return activities elsewhere. The local culmination of this process is gradual transfer of land rights via the market to capital-rich actors, and gradual concentration of land ownership in the hands of those who can invest to achieve optimal economies of scale in production and commercialisation.

Incremental scenarios by which legal rights are secured initially at low cost, with the option of more formal (expensive) titling in the future, are now built into land law and policy in many African countries, including Tanzania, Uganda, and Côte d'Ivoire. Whether the 'customary rights' certification programmes underway in Tanzania, and provided for in the 1998 land laws in Uganda and Côte d'Ivoire, fall into the market-promoting category is a matter of great political debate. Some see these programmes as a stepping stone to land privatisation, while others stress their potential to protect family smallholdings.

3.2. *Secure the use-rights of farmers to stabilise the peasantry*

In the African context, user-rights securitisation strategies gained tremendous momentum in the 1990s, in part in a reaction against the vision of market-led dispossession of small-scale African farmers and pastoralists. In agricultural areas, the goal of user-rights securitisation programmes is to shore-up and protect the land access and use rights of the small farmers now cultivating the land (including and often especially women). Advocates argue that user-rights securitisation would protect the poor from arbitrary dispossession by the government, powerful local elites (including politicians and neo-traditional authorities), and other land-grabbers; by reducing costly and disruptive land conflicts with neighbours and extended family members, and strengthening the position of women in such conflicts; and by enhancing incentives for investment and agricultural intensification on family farms. Holding

clear, formal, and state-enforced (legally-enforced) land rights could also help promote rental and leasing markets which would benefit ordinary land holders (and those seeking access to land), and could help make some kinds of investment and new technology adoption less risky for ordinary farming families.

Some advocates of user right securisation see this as a stepping-stone to titling and full commodification, as in the market-promoting vision mentioned above. The user-right vision I am describing now aims at a different goal: it aims to *constrain*, rather than promote, markets in land in order to strengthen family agriculture. This is to be achieved by constraining the mortgageability and transferability of land rights. Some do so with spousal consent clauses, but this is a low bar.¹⁷ Others subject sales to the consent of both spouse and children.¹⁸ Some may subject sales of registered land to approval by a local land board, as was the case in Kenya from the 1970s with lands in the Rift Valley settlement schemes (a mechanism that was used to ward off foreclosures and evictions under Moi in the 1980s). Ethiopia makes the registered lands of smallholders completely non-alienable.¹⁹ As Lavers explains (2012, p. 109), the government has sought to guarantee usufruct rights for smallholders in the politically-critical highlands (the political base of the ruling Ethiopian People's Revolutionary Democratic Front), 'arguing that land privatisation would lead to distress sales and displacement of the peasantry.'

In contrast to formalisation policies designed to displace village agriculture to promote agribusiness, registration scenarios that aim at securisation of smallholder user-rights often envision local-level land administration and governance institutions that could empower rural communities and their members to govern their own assets locally. Most optimistically, land tenure reform could provide a basis for building of new secular political institutions at the local level, and vesting these with some local administrative authority, and perhaps making them democratic. This was the ideal that guided the Shivji Commission recommendations that helped shape debate over the 1999 Village Land Act in Tanzania. Tanzania's law was founded upon the user-rights principle, and aimed at explicit institutionalisation and secularisation of local land administration (Mallya, 1999; Manji, 2006). It did not aim to be market-creating and was envisioned as creating conditions for local self-governance and democracy.

Proponents of the user-right securisation position often do not address the question of how land tenure regimes centred on user-rights would be sustained over time in the face of changes such as the growth of extended families, on-going socio-economic differentiation in rural communities, and/or continued adverse shifts in national and international regulatory contexts for smallholder agriculture. As I have argued elsewhere (Boone, 2007), this is at least partly due to recognition that the full political implications of user-right strategies would vary a great deal across space. Such open-endedness in the policy prescription (and in specification of the end goal) is one reason why the user-rights approach is often considered to be a flexible and practical way forward. Proponents of user-rights securisation see this kind of intervention as simply ratifying a *status quo* land distribution (although this may not be the case, as argued below).

3.3. Strengthen communal rights for ethno-justice and territorial autonomy

Those who advocate for the formalisation in law of the ancestral, communal or customary rights of 'culturally distinct' ethnic or indigenous communities are generally seeking legal protection for a status quo in which a 'natural community' manages its own resources in ways that promote group solidarity and some degree of economic, social, and political autonomy.²⁰ The contemporary demand is for state recognition of ethnic claims to collective ownership of ancestral territories and some if not all of the natural resources therein, as well as rights to some significant measure of indigenous self-governance. In the African context, such demands can closely parallel political calls for legally-affirming ethnic land rights that were institutionalised under colonial Indirect Rule (or extending such rights to groups not yet recognised by the state).²¹

International advocates of legal recognition and official registration of communities' customary or neocustomary rights cut their teeth on Latin American and Central American cases in the 1980s. They gained considerable policy traction in Africa in the 1990s (Hodgson, 2011), often dovetailing with

reform agendas centred on decentralisation and community-based national resource management. In Senegal and Burkina Faso, decentralisation programmes of the 1990s reinforced the land prerogatives of established communities and of long-standing local elites.²² New land laws in Niger (1993) and Côte d'Ivoire (1998) bolstered communal rights that *circumscribed* market forces, recognised the claims to property of those claiming to be autochthonous, and offered renewed state recognition of neocustomary authorities. These legal innovations were designed to affirm the kinds of land entitlements that were institutionalised under colonial indirect rule. In debates over Uganda's 1998 land law, Baganda nationalists pressed to vest authority over land in Baganda land boards. Their aim was to defend Bagandan land rights against government encroachment and current land users (tenants or 'squatters') who were to be protected by the 1998 law's (and the 2007 amendment's) proposed recognition of tenants' rights (Gay, 2014, 2016; Green, 2006; Joireman, 2007; Kjær, 2017).

Yet another set of demands for legal recognition of 'communal rights, defined as cultural, ethnic, or ancestral rights', emerged in Africa in the 1990s and early 2000s: those of pastoralists. Representatives of some pastoralist peoples, such as the Maasai in Tanzania, joined the international indigenous rights movement to press their demands for legal recognition of their territorial claims, to put an end to land expropriations and expulsions, to assert rights to cultural self-determination. The economic goal is livelihood security through preservation of the viability of transhumant livestock management systems (Hodgson, 2011, p. 70 *inter alia*; Loure & Kekaita, 2017).

Legal efforts to institutionalise community rights and group management of natural resources almost always entail efforts to formalise membership criteria, group decision-making and accountability mechanisms, and territorial jurisdictions (or boundaries). This entails *inter alia* efforts to constrain indigenous, cultural, or ethnic leaders whose authority rests in part on extra-legal sources of legitimacy (hereditary or religious legitimacy, for example), even though this may cut against the traditional character of the authority that advocates of cultural autonomy seek to preserve.²³ In Africa there is the spectre of deepening the balkanisation of national territory into separate ethnic homelands.

4. Tensions and trade-offs

Rather than offering a straight and clear path to pro-poor outcomes and to the mitigation of ethnic inequalities, the assignment and formalisation of property rights in land can generate powerful tensions and trade-offs. As the discussion below shows, this is because (1) the different land rights registration agendas entail different visions of the relations between individuals, communities, and the state; and (2) each land registration and titling path entails some sort of redefinition and redistribution of rights, creating winners and losers (albeit different ones).

4.1. Land individualisation and privatisation: tensions and trade-offs

Privatisation's implications for the (re)distribution of land rights can be understood in terms of market effects and broader political, legal, and property effects. In terms of market effects, it is true that privatisation would create winners. Winners will be those able to expand their holdings, defend them in court, borrow and invest successfully in their landholdings (or sell their land and invest the proceeds in an alternative, sustainable livelihood). Yet markets expose the poor and politically-vulnerable people to high risks of loss of property, either through the market itself, through legal manoeuvre, or perhaps through the government's increased latitude to exercise eminent domain and lawful eviction.

How property loss happens via market effects is easy to see. The mechanism is distress sales, due to economic recession, bad harvest, illness or death in the family, or calamity, whether through mortgage default or not.²⁴ This is, after all, the historical path to land consolidation in the United States, much of Europe and elsewhere, in the absence of explicit market restraints (such as homestead or other laws against foreclosure and eviction) designed to safeguard the homes and property of the poor. Markets offer many chances for opportunistic behaviour, and tend to favour strong market actors: those with

the capital, know-how, and information to protect and expand their property rights, and to buffer themselves against risk.

Privatisation's implications for ordinary farming communities cannot be understood in terms of exposure of individually-held parcels to land market risks only. Great asymmetries of political and legal power also work to favour the strong. 'Subversion of justice by the strong' may well be the norm rather than the exception.²⁵

Individualisation may cause dispossession by what Ha-Joon Chang (2007, pp. 22–23) calls the 'coverage problem' – that is, it does not recognise all existing forms of property or rights-holders. Neocustomary land tenure systems that prevail in most of sub-Saharan Africa are built around land rights that are multiple and overlapping.²⁶ Systematic, market-promoting registration and titling spells the demise of the commons, or land held by collectivities and governed by them (for example, community grazing land, watershed, forests, sacred sites, water-access areas, and so forth). Not only do groups (for example members of extended families) claim shared rights to particular lands, but also rights themselves are complex bundles (for example rights to farm, graze animals, hunt, gather wood, access water points, transverse, and so forth) that give different classes of persons different kinds of access at different times. *Individualisation* of control over a parcel of land, by definition, dispossesses the holders of multiple and overlapping rights to that land.²⁷ Where communal rights and land management systems (for example, community management of the commons and unallocated farmland) prevailed in the earlier period, losers would include community members, members of extended families, and future generations. Erosion of these familial and community level entitlements may impose the highest costs on precisely those least likely to hold onto their property through market mechanisms. At the same time, land privatisation undermines other aspects of the social safety net function of community and (neo) customary ties.

Changes that erode communal coherence and structure enhance the economic autonomy of individuals vis-à-vis extended families, community leaders, and the community at large. This is indeed sometimes the intended effect. The argument appears explicitly in the advocacy of those who see titling and registration as a way to help free women from the patriarchal biases of neocustomary land. Women's movements in Uganda, for example, have called for 'rights-based' land systems that 'improve women's ability to buy, own, sell, and obtain titles on land' (Tripp, 2004, pp. 1–2). The World Bank's Frank Byamugisha (2013) and others have also advocated for registration and titling as a route to legal empowerment of women.

Where the process of land law reform has played out in the public sphere in African countries, many of the market risks associated with market-promoting individualisation are cast in stark relief. Major issues that emerge time and time again have to do with the security of existing rights, especially for the poor, and of communal claims. In Zambia, Malawi, Senegal, and Kenya, proposed or enacted measures to accelerate privatisation of land have encountered strong protest from defenders of existing users' land rights. Senegal's smallholder-based Conseil National de Concertation et Coopération des Ruraux (CNCR) opposed the government's market-promoting land law reform in 1998 (CNCR, n.d.; Tamba, 2004). Chiefs in Zambia argued against the socially-disruptive and -disintegrative impact of the land individualisation thrust of the 1995 Zambia Land Act (Mbinji, 2006, p. 33). In 2010, parliamentarians from northern Uganda resisted systematic certification and individualisation of land because they saw it as opening the door to government-facilitated land grabbing by powerful locals and outside investors (Gay, 2014, 2016; p. 584; Kjær, 2017).²⁸

4.2. Registration of user-rights to protect peasant holdings: tensions and trade-offs

Securitisation of user rights is the top priority for many international and Africa-based advocates for smallholder farmers. Such strategies seek to shelter smallholders from predatory markets and arbitrary dispossession and eviction. Some policies provide for incremental paths to full individualisation and title, and some securitisation programmes build in mechanisms for progressive and democratic political reform at the local level.

Yet as in the case of market-promoting reforms, movement from neocustomary rights to the registration of individual or household user-rights would strip land of (part of?) its connection to ancestral and extended-family rights, contributing to the erosion of communal/kinship bonds. Even if the market were held at bay, registration is highly likely to contribute to the break-up of complex interdependencies around community- and family-level resource sharing and use.

Formal institutionalisation and secularisation of local governance and land administration, as provided for by the 1999 Tanzanian Village Land Act mentioned above, is designed to address this possible trade-off between 'communal' and individualised land management. Yet in Tanzania, there was acute debate over whether a democratic or a bureaucratic-authoritarian form of government would take hold at the local level. Some were optimistic that the Tanzania land law could expand local democratic control over land management, since the village assemblies with land prerogatives would be elected, open to local participation (rather than centrally-controlled), and be easier for villagers to monitor and sanction (Manji, 2001). Issa Shivji was pessimistic on this front, fearing that registration of villages and users' rights would greatly enhance the power of the state at the expense of communities.

One of the most striking ways in which registration of village lands has expanded state power is by solidifying state control over lands not included in the village circumscriptions. As Stein and Cunningham (2015) argue, by delimiting village territories in Tanzania, the government has 'freed up' lands outside these limits for allocation to outside investors. In some cases, they argue, authorities appear to have drawn village limits to deliberately excise choice tracts from the village domain so that these could be leased for international agribusiness ventures.²⁹ When surveyors and lawyers operate on behalf of powerful actors, and where information asymmetries favour well-connected elites, outcomes that impose great costs on existing users and established communities may be achieved without explicit illegality or corruption.

User rights can also conflict with ancestral or communal rights. In some situations, upholding user-rights means overriding the rights of those who claim ancestral rights, rights as 'original inhabitants' or first-comers, or neocustomary rights. Users may be in-migrants (settlers, strangers, foreigners, newcomers, tenants, sharecroppers) who have displaced, moved-in alongside, or entered into farming contracts with indigenes. Tenancy and contracting arrangements are common in zones of commercialised smallholder agricultural production in many parts of West Africa. In settings in which 'users' do not have general social recognition as legitimate possessors or 'owners' of the land, the titling of user rights can imply a radical exertion of state power to transfer rights from 'indigenous inhabitants' to in-migrants, settlers, or newcomers. It would also usurp the right of the 'natural community' to govern land.

In some of sub-Saharan Africa's bitterest political struggles over land rights, user rights have been pitted against communal rights. The tension between user-rights and neocustomary rights was in full display in the debate over the 1998 Uganda Land Act. Conflict arose over the government's move to register and title user-rights as the first step in a process that would lead straightforwardly to the full individualisation and commodification of land. Baganda petitioners, politicians, and local government councillors mounted broad opposition to the 1998 law. The Land Act promised to register the land rights of farmers who had occupied a parcel of land for 12 or more years without paying rent.³⁰ Buganda leaders saw this as an outright expropriation of Buganda lands in favour of tenants in general, and in particular, in favour of pro-government Rwandans who had occupied their land during long years of civil unrest. Baganda leaders demanded that Buganda land control be vested in a regional-level land board, which would act on behalf of the Buganda king, the Kabaka. The Ugandan government resisted, arguing that creating a Buganda Regional Land Board in Mengo would 'revive historical conflicts and rivalries in respect of land' (Green, 2006, p. 383). Joireman (2007) and Gay (2016) report on the intense controversies provoked by Uganda land law reform, given its clear redistributive implications.

4.3. Registration of communal and ethnic land rights: tensions and trade-offs

Whereas both land privatisation and user-rights registration strategies assign land rights to individuals or households, communal registration strategies aim at assigning rights to groups.³¹ In the ethno justice vision, these political collectivities are defined as descent-based groups with a claim to a

particular territory and to a measure of self-governance. Such groups are recognised as natural, constituent units of the modern nations that the postcolonial state seeks to bring into being.³²

Critics of ethno-justice land agendas in Africa (Branch, 2011; Mamdani, 1996; Ribot, 1999) stress the extent to which a land tenure regime that institutionalises large ethnic territories as subnational jurisdictions can consolidate 'local states' that may be insulated from pro-democratic and progressive political currents and possibilities that may prevail in the wider political arena of the secular state.³³ The reach of the the national state, rule-of-law, and national democratic institutions may be compromised by the presence of local states whose legitimacy and efficacy is judged in part on their ability to reproduce the 'natural community'. Customary or neocustomary authorities cannot be truly democratic, Mamdani (1996) suggests, because their authority is at least partly derived from, and exercised through, non-democratic principles or practices.

Along with local states comes sub-national citizenship, identities, rights and duties, and legal entitlements that are reserved for those whose status as indigenous is confirmed by the local community, and by extension, the state itself. Those not indigenous to a given locality would have some second-class status therein: they would lack not only the economic but also the political rights of indigenes. This form of local citizenship competes with the project of developing truly *national* citizenship.

This critique overlaps with critiques of consociationalism, colonial Indirect Rule, and other institutional constructs that allot representation on an ethnic basis and divide up national territories into ethnic sub-regions – for example, the effect of 'hardening' identities and artificially creating group boundaries (thus perhaps laying institutional bases that structure future conflict along these very boundary lines; creating incentives for continued ethnic identification and disincentives for the strengthening of national identities and national legal and political norms and rules; creating subnational citizenship hierarchies in which 'ethnic homelands' contain populations of disenfranchised ethnic outsiders or second-class citizens who are not members of the titular ethnic group). It also overlaps with critiques of 'neocustomary' authority as patriarchal, and at odds with individual rights in a myriad of other ways as well. Legal recognition of communal rights can legitimate rules of land access that discriminate along the lines of ethnicity, gender, age, religion, or other ascriptive status. Ribot (2004) critiqued land law reform strategies that shore-up neotraditional authority as anti-democratic.³⁴

The tension between neocustomary (or communal) rights and user rights lies at the heart of Côte d'Ivoire's 1998 land law. Although the law was originally envisioned by some of its drafters in the 1990s as a move that would both secure smallholder rights and set in motion a long and gradual process of commodification and privatisation of land, it was interpreted very differently by the Gbagbo regime that came to power in 2000. The law not only bars non-nationals from registering acquired land rights, but in the hands of the Gbagbo regime, it was also envisioned as a tool to promote the land rights of autochthones over those of all others (Boone, 2009). The law gave responsibility for certifying landholdings (which could then be registered and eventually titled) to committees of village-level chiefs and elders whose mandate was to certify the claims of those holding neocustomary or ancestral rights to the land. The *initial allocation of rights* was thus to be done on the basis of autochthony. User-rights clearly lost out to rights based on communal membership.

The shift in the distribution of power over the land proved to be politically-explosive in the south-central and south-western parts of Côte d'Ivoire, where massive immigration since the 1950s had created a regional population comprised largely (at perhaps the 50% level) of non-indigenes who had spear-headed the creation of smallholder coffee and cocoa plantations all across the southwest. The 're-traditionalisation' or neo-traditionalisation of the land rights allocation process effectively dispossessed in-migrants to Côte d'Ivoire's southwest on a massive scale, contributing decisively to the outbreak of civil conflict in 1999, armed rebellion in 2002, and paralysis of the county until 2011 (Chauveau, 2000, p. 113–4). With the coming to power of Alassane Ouattara in 2011, the tables were turned. Conflicts that pit holders of user-rights against customary rights holders continue to burn in Côte d'Ivoire.

Echoes of these struggles are heard in Kenya today. Kenya's new 2010 constitution and subsequent implementing legislation have created 47 counties to which many central government functions are to be devolved. The accompanying 2012 Land Act declares that all land in Kenya be registered by 2012. Both moves have been hailed as reforms that will empower ordinary citizens and small landholders to fight corruption, predatory politicians, and land grabbers. Among the first conflicts to arise in the land

domain, however, were precisely conflicts over whether devolved administration of land rights would shore-up the land claims of those currently farming the land, including those who purchased land in earlier decades (titleholders or not), or whether the new county powers should be used to restore land to members of the titular (or majority) ethnic group in each county.³⁵

Does land rights registration and titling uphold the rights of those farming the land today, or those with neocustomary or ancestral claims? This divisive debate is very close to the surface in Kenya and Côte d'Ivoire today. The cases underscore the point that the decision to register rights does not resolve the logically-prior matter of who the legitimate rights-holders actually *are*.

5. Conclusion

This paper has argued that very different visions of political and economic order may converge and blur in policy proposals that advocate for legal empowerment of the poor through land titling and registration. Each generates tensions, trade-offs, and risks, although these cut in different ways. Framing contrasts draws out some of these downside risks and potential conflicts.

These dilemmas are inescapable when contemplating transformation 'of the institutional context of African agriculture' or landholding more generally. Any assignment and registration of rights will involve some redistribution of rights and transformation in the nature of the rights themselves. This helps to explain why land registration and titling proposals and policies have been divisive in many African countries.

The dilemmas and trade-offs are compounded by the limits of legalism itself.³⁶ A system of assigning and politically-recognising property claims or rights will be embedded in markets (national and global, be they formal or informal, competitive or rigged), the larger political system, and legal order. Legal empowerment solutions cannot protect against any of these, and in some ways may heighten ordinary farmers' and pastoralists' exposure to political, economic, and legal risk.³⁷ Four points about these tensions, trade-offs, and risks can be summarised here.

The first is that registration and titling do not protect the poor against the market. To protect against market risk, safeguards like homestead laws; zoning; and restrictions on eviction, credit, mortgaging, leasing, and so forth need to be designed with this social purpose in mind. Policies and regulations that govern the ways in which smallholder agriculture and pastoralism are incorporated into larger national, regional and international economies also need to be designed to achieve this social purpose.

Second is that empowerment solutions do not protect against the state and the law in contexts of great power asymmetries and economic inequalities, and where legal systems are 'systematically biased against the poor' (Binswanger & Deininger, 1997, p. 1964). Legal systems, like markets, are not inherently benign or neutral. The implementation of legal empowerment rules and procedures, even if designed to be pro-poor, may not be in the hands of those who embrace this objective. Binswanger and Deininger (1997, p. 1964) are correct when they point out that land registration does not dispose of the risk of exposure to the 'larger policy environment'. Experience in Africa and beyond shows that powerful actors will use both the market *and the law* for land grabbing.³⁸

Third is that in most places – that is, where de facto privatisation of commodification of land is *not* present – existing land tenure regimes are comprised of multiple, overlapping claims to land. These existing multiple and overlapping claims are embedded in *institutions* – lineage, familial, neocustomary, chieftaincy, patriarchal, age-sets, and so forth. Collective and many secondary claims, as well as the institutions in which they are embedded, are weakened by registration and titling, and likely to be extinguished by full commodification of land.

Fourth and lastly, the land tenure status quo in many parts of contemporary Africa is a tenuous and contentious one: in many places, it is unstable and is built of *conflicting* claims around land. Land law reform is thus not neutral, necessarily welfare-enhancing or empowering for all those affected, or even necessarily pareto optimal.

This means that land registration as a one-size-fits all strategy is not necessarily 'better than nothing'. As Jean-Philippe Colin (2013) writes, there are still

very large debates around registration and titling, with different views on many points, including the respective roles of the state and communities in the processes of formalisation and enforcement, the nature and content of rights to formalise, and their individual or collective character. (p. 430)

He adds that empirical evidence from Africa often sheds doubt on the effectiveness of land registration as a strategy for reducing tenure insecurity and conflict, and for securing the land rights of the poor. Context matters: this includes the nature of the prevailing land tenure regimes, national and subnational political regimes, socio-economic and legal environments, and existing distributions of power, resources, and market opportunity.³⁹

Some land rights activists and scholars seek to avoid a narrow focus on land registration and titling – what Ha-Joon Chang (2007, p. 21–23) characterised as ‘property rights reductionism’ – and advocate instead for broader strategies aimed at enhancing rural communities’ capacity for collective action in defence of shared interests in complex and often changing national contexts.⁴⁰ Such capacities may be enhanced by local conflict resolution, building institutional capacity at the local level, and bridging local social and political cleavages. Economic empowerment via ecosystem revitalisation and improved opportunities to participate in local, regional, and international markets on advantageous terms – that is, going beyond defensive strategies and toward economic rebuilding – is also necessary for the success of the empowerment agenda.

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Notes

1. I draw upon and update Boone (2007).
2. The history of large-scale land expropriation by white settlers in eastern and southern Africa – especially in South Africa, Namibia, Zimbabwe, Mozambique, and Kenya – means that the highest rates of land titling are in these sub-regions. Rates of land titling are very low across most of the rest of the continent.
3. See Mamdani (1996, 2012).
4. De facto forms of indirect rule prevailed across most of rural Africa during the colonial period (Boone, 2003, pp. 15–16), but of course not everywhere (as for example where statist land tenure regimes were imposed) (Boone, 2014).
5. On Kenya’s 1954 Swynnerton Plan, see Sorenson (1967).
6. See Williams (1981), as well as Amanor (1999) and Boone (2014). The World Bank was very much part of this discussion from 1960 onward. In an analysis of land policy in Tanzania, Askew, Owens, and Stein (2010, p. 2) write that ‘[w]hile a major Bank policy stance on land reform was not fully established until 1975, earlier individual country economic reports noted complications arising from existing land institutions. For instance in Tanzania (then Tanganyika), the 1961 report on economic development identified existing land codes as a limiting factor on long-term economic development, yet it also

acknowledged that the transition from traditional communal to formal individual title could result in a large class of landless peasants. The report notes that 80 per cent of land is under “native law and custom” that is not static or uniform.’ See Ng’ong’ola (1982) for a partial exception: a frustrated case of World-Bank assisted experimentation with titling in central Malawi that started in 1967.

7. See Ensminger (1997, pp. 171–3); Chimhowu and Woodhouse (2006); Mathieu (1997); Joireman (2011).
8. See Bruce & Migot-Adholla (1994, p. 262), and Platteau (1996, p. 30).
9. See Wily (2003) for land law reform in Africa in the 1990s. As Kay (2016, p. 511, citing Blomley, 2004, p. 614) explains, property is a central concept in neoliberal governance. ‘Neoliberalism is, in part, a language of property – a return to central axioms of eighteenth century liberalism which locates private property as the foundation for individual self-interest and optimal social good.’ Privatisation, enclosure, boundary drawing, new regulatory roll-outs, and roll-back of preexisting rules are ‘central tenets of neoliberal policy-making. [This involves] “framing and reconfiguring of what counts as property”’ (Kay, 2016, p. 511).
10. The World Bank’s lending portfolio for land-related projects expanded dramatically in the 1990s. See Wily (2003); Boone (2007); Moyo and Yeros (2007).
11. See Bernstein (2010), Stein and Cunningham (2015).
12. See Kydd, Dorward, and Morrison (2004) on stabilising smallholder agriculture.
13. See also Peters (2004).
14. Platteau (1996) and McAuslan (1998) highlighted these tensions in the 1990s. See also Colin, Le Meur, and Léonard (2009); Lavigne-Delville (2014).
15. See World Bank (1989, pp. 90, 100–104); Deininger and Binswanger (1999); Ali et al. (2014).
16. See Cotula and Mathieu (2008) on the ‘formalisation agenda’.
17. Tanzania’s Certificates of Customary Right of Occupancy (CCROs) are an example. As Stein and Cunningham (2015, p. 2) write, Tanzania’s 1999 Village Land Act fully recognised established user rights and placed them on an equal footing as statutory or granted rights. Under this law, elected Village Assemblies were empowered to manage village lands. In the period since 2004, Tanzania initiated two large-scale pilot programmes (one directly sponsored by the World Bank, the other designed and run in cooperation with De Soto’s Institute of Liberty and Democracy in Lima) to delimit the boundaries of village lands, and then to register, survey, and title individual holdings therein via the issuance of Certificates of Customary Rights of Occupancy, or CCROs. From 2011, it has been possible to obtain CCROs for group holdings. Askew et al. (2010, pp. 16, 18) reported that by mid-2010, the World Bank programme had delivered 6800 titles to village offices, and that 17,500 CCROs had been delivered under the ILD-affiliated initiative. Villagers are encouraged to register spouses’ names on the land certificates.
18. In Uganda, after long debate, Museveni assented to the Land (Amendment) Act of 2004, which reinforced the (weak) land-transaction sanction powers of family members (wives and children) that existed in the market-promoting 1998 Land Act (Gay, 2016).
19. See Deininger, Ali, and Alemu (2011). They define the non-alienability feature of Ethiopia’s programme as a departure from traditional approaches to land titling (2011, p. 312). They report that Ethiopia’s land registration programme was one of the largest in the world: between 2005 and 2010, Ethiopia registered more than 20 million parcels of rural land to some six million households (2011, p. 315). This followed a similar programme implemented in the Tigray region in 1998.
20. See Anthias (2016) on Bolivian indigenous communities’ quest for territorial recognition as the basis of a range of rights, including land rights, and for political autonomy that exceeds autonomy over land. See also Engle (2010); Brinks (2016).
21. As for example in the case of the Ogiek in Kenya. See Di Matteo (2017).
22. See Kaag (2001); Ouedraogo (2001, p. 1); and Ribot (2004).
23. Some group-based land registration strategies are not founded on the principle of shoring up ‘natural’ or descent-based groups, and some are not linked to individualisation and titling. For example, Kenya’s Community Land Law of 2016 allows ‘registered groups’ who are not defined in terms of ethnicity or cultural distinctiveness to obtain corporate land titles for ‘community lands’. These are to be managed by elected individuals who act as the group’s agents, and who follow decision-making rules stipulated by law (formal meetings, quorum, voting). Tanzania and Mozambique register and certify village agricultural lands governed by secular councils of village members who are defined by residence, not ethnicity (Greco, 2016; Loure & Kekaita, 2017; Quan, Monteiro, & Mole, 2013; Shivji, 1999). In Côte d’Ivoire, Benin, and Burkina Faso, *Plans Fonciers Ruraux* (PFRs) have documented and demarcated customary village (customary or neocustomary) and lineage lands, building on the principle of neocustomary village-centred land management (but in some circumstances as a half-way house to individualisation and privatisation) (Boone, forthcoming; Colin et al. 2009; Lavigne-Delville, 2009, p. 76–81; 2015). In Sierra Leone and Liberia, there are programmes to protect community lands by delimitation and documentation of village or community land perimeters (see Waldorf, 2016, p. 12).
24. These risks are especially acute where risk-mitigating institutions and policies are absent (insurance, price stabilisation schemes, and so forth).
25. Glaeser, Giacomo, Ponzetto, and Shleifer (2016, p. 22) report that ‘in the WJP [World Justice Project] general survey [of 2015], respondents in developing countries see courts as among the least trusted institutions, and judges and magistrates among the most corrupt officials.’ On corruption in the legal profession itself, see Manji (2012); Joireman (2011); and Askew, Maganga, and Odgaard (2013).
26. For example, land cultivated by a household may be opened to other community members for post-harvest grazing; a community’s reserve land may be subject to legitimate claims from multiple claimants; an extended family may have

- exclusive control over land, but individual family members may own crops (or trees, grazing rights, forest-collection rights, watering rights, and so forth) upon that land. See Downs and Reyna (1988) and Bassett and Crummey (1993).
27. See Atuahene (2016) on expanding the legal definition of ‘takings’ to cover these sorts of losses.
 28. Kjaer (2017) explained that in both northern Uganda and Buganda, many people feared that the 1998 Land Law would open the door to land-grabbing by government and politically-connected individuals, including politicians. See also Joireman (2011). Do and Iyer (2008) found in a study of rural Vietnam that politically-connected households were the most likely to have land titles.
 29. Drawing on the work of Linda Engström (2013), they describe a Kigoma, Tanzania case in which, as part of the formalisation process, a village’s land was surveyed by the regional commissioner. Nearly 7700 hectares were carved out of the village and put into the general land category, and thus available to investors. The ‘new’ border was moved away from the river which is now outside the village. A joint Belgian-Tanzanian company obtained a 99-year lease covering 4258 hectares and has called upon the police to evict unauthorised users from this space. The process has been contentious.
 30. See Kjaer (2017, p. 14).
 31. See Munro (1998, p. 40).
 32. Some strategies to register community or group land rights are agnostic about the essential character of the ‘community’. See above, note 23, which describes group registration strategies that are not founded on the principle of shoring up ‘natural’ or descent-based groups.
 33. Some analysts may also highlight the market-constraining and rent-generating aspects (as for example in restricting land ownership and land transactions to ethnic insiders) of these tenure systems.
 34. Anthias’s (2016) case studies of ‘The New Extraction’ in Bolivia suggest that realisation of indigenous autonomy via state-recognised communal control over natural resources may empower local leaders to act as brokers vis-à-vis outsiders, and that as brokers, they may be relatively unconstrained when it comes to leasing-out or otherwise contracting-out community assets. Mechanisms of downward accountability are not necessarily guaranteed.
 35. See Boone et al. (forthcoming) on the autochthony discourses around land in Kenya’s new counties.
 36. See Joireman (2011); Colin (2013, p. 430); and Manji (2012). Kennedy frames the problem as ‘the risk of overestimating the ease with which social purposes can be achieved through law’ (2006, p. 106).
 37. Stein and Cunningham (2015, p. 8) write that ‘[t]he idea that formalization is the best route to prevent land grabbing is a simple one which abstracts from the real power dynamics embedded in rural Africa.’
 38. See Manji (2006, p. 2012); and McAuslan (2013). All three visions of land registration, as Platteau (1996, p. 42) suggested, entail expansion and intensification of the role and presence of the state in land administration. State agents and agencies must not only supervise, enforce, and adjudicate contracts, and so forth, but also regulate land valuation, registration itself, demarcation, and presumably taxation.
 39. See Domingo and O’Neil (2014, pp. 4–5); and Waldorf (2016).
 40. See for example Cotula and Mathieu (2008); Waldorf (2016); and Gauri and Meru (in press). See also Jacobs (1989).

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