The emerging formalisation agenda and some empirical evidence from Africa

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Abstract

In this paper, we review four African experiences with property formalisation in order to examine whether they conform to hypothesised mainstream effects. First, the demand for formalised rights must be deconstructed, taking into account the interests of local groups. No formalisation effort is likely to be embraced by all. Second, formalisation represents not only the recording of existing realities, but will often trigger alterations in the rights and institutions themselves. Third, given the generally limited resources of African governments, important trade-offs exist between cost and complexity, and there is often tension between capacity and ambitions. Each of these issues requires careful attention prior to, rather than subsequent to, the implementation of formalisation programmes.

Key words: Formalisation, land rights, Mali, Niger, Etiopia, South Africa
Introduction

Cries for property formalisation are nothing new in Africa. Colonial authorities were at irregular intervals concerned with formalising rural institutions, variously choosing to superimpose the law of the coloniser or formalising (and in many instances inventing) customary institutions, e.g. through establishment of tribal authorities. Fragmented holdings, matrilineal succession, collective use, and transhumance were sources of continuous worry, and rules of various kinds were devised and enforced in order to overcome them. Scott (1998) interprets such efforts as typical facets of the modernisation programme; formalisation was not merely an aid to solve particular problems, but an essential part of the transition towards structured governance, order, and ultimately civilisation. Furthermore, a large body of work, spanning the latter half of the 20th century, is devoted to hypothesising, testing, or insisting on the superiority of freehold tenure and the necessity of title deeds to African land (see e.g. Simpson 1954, World Bank 1974, Feder and Noronha 1987, and the extensive reference list in Platteau 1996).

During the colonial period and in the first two decades after independence, a number of privatisation programmes were carried out in Africa. However, these programmes are largely seen as failures, with unanticipated results such as increased conflict, greater asset inequality, legal pluralism, and the manipulation of the process by an elite to its own advantage. The negative effects of the privatisation programme in Kenya have been most extensively documented (e.g. by Shipton 1988, Haugerud 1989). In a similar vein, Hunt (2004) has documented the unintended consequences of the 1998 Uganda Land Act. However, Fermin-Sellers and Sellers (1999), who studied the effects of the 1974 Lands Ordinance in Cameroon, found that it led to increased tenure security and reduced contradictions between state law and customary law.

While the policy focus on the necessity to register individual land holdings has ebbed and flowed over the last 30 years, the 1980s and 1990s also witnessed an increasing emphasis on the possible benefits of communally held and so-called customary land, along with topics such as decentralisation, co-management, and natural resource management. However, this trend has also included titling of communal land, as in the case of the Communal Property Associations in South Africa (Cousins 2002) and the registration of village land as in the case of Tanzania (Alden Wily 2003). In francophone West Africa, Rural Land Plans were first implemented in Cote d’Ivoire in the late 1980s at the initiative of the French Development Agency (AFD) and later supported by other donors such as the World Bank, GTZ and UNDP and spread to Guinea, Burkina Faso and Benin (Chauveau 2003, Le Meur 2006). These Plans involve a survey of customary land rights at the village level through public inquiries and consensus building around land rights, land right holders and boundaries.
Over the last five years, the approach to formalisation of property rights advocated by the Peruvian economist Hernando de Soto and his Institute for Liberty and Democracy (ILD) has become increasingly influential, particularly among top politicians and officials in the international development industry. This popularity among policy-makers has culminated in donor-funded, ILD-led formalisation programmes in several countries and has also led to the recent establishment of a ‘High Level Commission on Legal Empowerment of the Poor’.\(^1\)

According to de Soto’s international bestseller *The Mystery of Capital* (de Soto 2000), the main cause of poverty is the continuing lack of access to formal property rights among poor people in poor countries. More than 90 percent of people in developing countries hold their land and businesses under informal arrangements, outside the ‘bell jar’ of the formal economy. If the poor majority are to gain access to the benefits of capitalism, their assets must be registered and integrated into national, unified property systems, de Soto says.

This conversion of assets from ‘dead’ to ‘living’ capital would in turn permit the latent investors and businessmen to realise their ambitions by putting their assets to productive use. Poor people are thus seen as ‘heroic entrepreneurs’, caught in an impasse of dead capital and inefficient economic institutions through lack of access to effective formal systems. The proposed solution involves the formalisation of both informal businesses, urban real estate, and rural land. Moreover, property reforms would not only lead to increased economic activity and growth, but the formal nature of the activity will permit governments to finance reforms through an increased tax base.

According to de Soto, the benefits of formalisation fall into six broad categories: fixing the economic potential of assets (making people think of property as a manipulable concept rather than as a physical entity); integrating dispersed information (leading to transaction cost savings); making people accountable (transgressions may, for example, be punished by seizing property); making assets fungible (divisible, combinable, and transferable e.g. as collateral); networking people (by facilitating exchange of information about property and property owners); and protecting transactions (making e.g. fraud and theft difficult).

De Soto’s approach has been debated in both popular and academic media. Supporters emphasise the fundamentally sound idea of providing poor people with secure rights to their assets and the potentially vast increases in asset values that formalisation entails. Detractors, on the other hand, point

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\(^1\) The subtitle of the Commission is ‘Poverty Reduction through Improved Asset Security, Formalisation of Property Rights and the Rule of Law’. Hernando de Soto is co-chairing the Commission together with Madeleine Albright (former US Secretary of State). It is based in Geneva from September 2005 and is jointly hosted by the United Nations Development Programme (UNDP) and the UN Economic Commission for Europe (UNECE). Several high level politicians serve on the Commission.
to risks inherent in the formalisation process itself, including the enormous costs involved, the
tendency of land markets to accentuate wealth differentiation, the problem of formalising existing
inequalities, and the potential for opportunistic land acquisition by the elite that may precede
formalisation (see for instance Benjaminsen 2002, Mathieu 2002, Benda-Beckmann 2003,

What sets de Soto apart from previous formalisation visions and efforts is the overriding emphasis on
property formalisation as the key issue. Formalisation is not just one of many mechanisms that may
promote growth and development, but is all-important. Where many of the old initiatives emphasised
complementary policies related to anything from improved agricultural support services to
macroeconomic stability, de Soto requires only political commitment to implementation and
enforcement. And while hypothesised effects of formalisation typically were limited, for example to
increased agricultural investment and productivity, de Soto sees property formalisation as leading
almost unaided to economic growth and poverty reduction across the board. If his supporters have
gone somewhat overboard in embracing formalisation as the latest magic bullet, de Soto has done little
– in his writings and talks – to discourage them.

Although The Mystery of Capital provides no single definition of property formalisation, the concept
envisaged by de Soto and the ILD is quite clear and straightforward. Property formalisation involves,
first, the provision of legal representation of property in the form of title deeds, licences, permits,
contracts or the like. Second, these representations must receive official sanction and protection from
legitimate national authorities. And, third, the information contained in these representations should be
integrated in an accessible national registry.

The ILD conception of formalisation is notable for its implicit designation of customary rights as
informal. Even though this does not necessarily imply that customary institutions are regarded as
illegitimate, it tends to underplay the important distinction between property held under customary
arrangements and what is sometimes termed unauthorised possession (Payne 2001).

Two important questions remain with respect to the outcome of future formalisation efforts. First, will
formalisation be strictly demand-driven, allowing communities to influence the pace and nature of the
process and permitting individuals to abstain if they so wish? This is a watershed type of question,
with huge implications for legitimacy, local participation, and conflict avoidance. Second, and linked
to the above, will formalisation of land necessarily imply simplification and privatisation – that is, an
inexorable move towards freehold rights – or can the process also embrace formalisation of communal

2 For a discussion of the concept of ‘formalisation’ see Kaarhus et al. (2005).
rights, secondary rights, and multiple tenures? In the following sections, we use case studies from Mali, Niger, Ethiopia and South Africa to illuminate potential benefits and pitfalls of formalisation programmes and to draw some lessons for future programmes.

Urban Expansion and Formalisation of Property Rights in the Malian Cotton Zone

The cotton zone in the southeast of Mali has undergone rapid economic and social change over the last three decades. Cotton production increased for instance from 68,000 tons in 1972 to 620,000 tons in 2004. Increased cotton production has also been accompanied by a rise in grain production in the entire zone, mainly due to the food crops benefiting from the general intensification that is taking place. This has led to an influx of people to the area and a rapidly growing rural and urban population.

As the two main cities in the cotton zone, Koutiala and Sikasso, grow in response to these developments, land around the urban periphery is enveloped and altered. First, land originally cleared for purposes of farming and livestock husbandry is converted, gradually or spontaneously, into urban residential land. Second, land previously held under customary rules of access and use is, at some point, brought into the fold of formal state institutions. Third, the increase in the value of land, associated with the changes in both use and legal status, is vast, with per-hectare prices regularly increasing by a factor of 60 or more.

In the Malian cotton zone, land is said to be inalienable. Straight sales of farmland have traditionally not been accepted. Land chiefs would distribute land to the original settler lineages and confer temporary use rights to others in need in return for token gifts. However, customary rules have undergone radical and rapid change in areas that come into contact with the cities and sales of land around the urban periphery has become rife. These are informal sales where some form of semi-formalisation is attempted by written sales contracts signed by seller, buyer and two witnesses. Usually, these contracts are also brought to the local administration for a signature and a stamp. And sometimes the slogan of the Malian state (‘Un people – un but – une fois’) is handwritten in guise of a letterhead. This testifies to a certain demand for formalisation in the area.

In a typical chain of events, original settlers (often the land chief) will sell land to urban dwellers (merchants, bureaucrats) who often possess a genuine desire to farm the land. These will, in turn, either obtain a title to the land if they can afford it or at some later stage see it expropriated by the urban authorities. The land is then pieced off as urban residential parcels to dwellers who obtain

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3 For an overview of the methodology used, see Benjaminsen and Sjaastad (2002).
permits of occupancy. However, variations do exist: on some occasions, land is expropriated directly from original holders. On others, land chiefs may directly facilitate development of residential areas, bypassing official channels. Middlemen often mediate transactions.

Titles are both excessively expensive and require literacy in French. Hence, they are beyond the reach of most farmers. Landholders seeking titles must first obtain a provisional title, involving costs related to acquisition of a sketch map and annual taxes. To convert a provisional title into a full title, specified investments need to be completed and a substantial, official one-time fee needs to be paid. These costs are prohibitive for farmers. In addition, substantial bribes would be required by officials in the regional government, ensuring that only very few of the merchants and bureaucrats who purchase land are capable of jumping the queue to obtain full titles. According to interviewees with full titles deeds, the cost of obtaining one may total up to 3000 USD.

The attraction of a full title is related to the level of protection it affords: titled land would be expropriated only under extraordinary circumstances and would involve full compensation of value. Normally, when land is expropriated for residential purposes, titled plots remain like ‘legal islands’ inside the new, state-controlled areas. Expropriation proceeds through two mechanisms, lotissement and raccordement. The first of these is ultimately controlled by the regional government and involves expropriation of large tracts based on detailed development plans and a fixed schedule of compensation. The notable feature of this compensation schedule is that it is awarded only for the first 3.5 hectares of land. There is no incentive to possess holdings above this size immediately prior to expropriation, so farmers with larger holdings will try to alienate any ‘excess’ land by selling. The second mechanism, raccordement, involves the piecemeal ‘joining together’ of existing residential areas through development of the gaps found in between. This mechanism is under the control of the urban authorities. Compensation here is open to negotiation but is normally very low; expropriatees generally receive a single residential plot (0.03 hectares) for each hectare expropriated plus, sometimes, modest monetary compensation for any fixed investments already present on the land.

While original holders, practically forced to sell off land prior to expropriation, are left worse off than they would be in a status quo, the main riches are garnered by corrupt civil servants, the urban authorities and the central state (through appropriation of urban revenues). Middlemen pick up some of the crumbs.

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4 At the time of the study, in February and March 2001, the one-time fee was CFA 197,000 per hectare. Specific aspects of the titling and expropriation processes may of course have changed since that time.
5 We also encountered a single land speculator in Sikasso, who – with contacts in government – was able to buy customary land cheaply, title the land, and thus partially replicate the earnings normally realised by urban authorities. Given the rewards involved, it would be no surprise if land speculation has increased over the last few years.
So, what are the implications of this case study? First of all, it confirms the huge increases in the value of land that formalisation may entail. If original landholders are to benefit from this increase in value, titling or expropriation procedures need to be revised. First of all, titling needs be made cheaper and more accessible to ordinary land users. Secondly, in the expanding cities in the Malian cotton zone, it is not a question of whether land rights are formalised but when and how. Under existing conditions, formalisation of property occurs at the point of expropriation, with further permutations when residential plots are alienated by urban authorities to holders of permits of occupancy. It is the timing of formalisation that dictates the distribution of the rent that arises from the urban dynamics. By making formalisation more accessible for farmers in the peri-urban areas, the process would precede expropriation and deflect capital gains from the current winners towards original holders of land. However, at present through high costs and red tape involved in obtaining a title, it is mostly the wealthy, the powerful, and the informed that succeed. Although the social fallout of this process has yet to fully settle it is plain to see that few winners will be found among the farmers that held original rights to the land.

**Formal and Informal Land Registration in Niger**

In Niger during the 1980 and 1990s the land tenure reform, the Rural Code, was prepared and introduced. It was announced that people could have customary rights registered as formal property rights. The ambition was to make supposedly unclear customary rights into clear property rights. However, initially no clear statements were made about which customary rights were concerned. The promise of registration of customary land rights under the land tenure reform created a huge popular demand for registration. However, the state agencies’ incapacity to meet this demand opened the terrain for institutional competition. The first tangible result of the mere announcement of the reform was a massive upsurge of conflicts between competing right holders all attempting to position themselves most favourably for when the reform eventually would be adopted. Registration procedures were not at all operational, and very few government officials were assigned the amorphous task of registering demands and resolving disputes. While initially conceived as a simple reform merely transforming existing rights, the reform efforts stirred up a horns’ nest of dated and new conflicts. While several reasons can be brought out to account for the limited success of the reform, two can be considered particularly important, namely the uncertainty about what rights to secure and register, and the limited institutional preparedness. The institutional structures guaranteeing rights, registering claims, managing disputes, and systematising different forms of tenure were ambiguous, competitive, un-prepared and insufficiently educated (Lund 1998, see also République du Niger 2004).
In Niger, the Rural Code was seen as an opportunity to have claims recognized and strengthened in the process paying little attention to overlapping or competing rights. The announcement of the Rural Code constituted an invitation to have customary rights in land recognized now in order to secure irrevocable exclusive private property rights later. ‘Get customary rights in your land recognized before your neighbour does it’, became the mantra retained from the Rural Code by the general population. In addition to conflicts over customary rights, it also led to a demand of written proof of land rights. Thus, over the past few years the issuing of written deeds hoping it will curtail uncertainty has gained pace. Not only do farmers want tangible papers, which validate transactions like sales or land inheritance, they also increasingly want proof that they own land, which is already theirs. Basically, farmers who want written proof of their property are facing two options: to apply with the public administration’s Land Register to have a proper deed drawn up or to apply for a legally somewhat looser certificat written and signed by the Chef de canton.

The first option is often recommended by the local public administration for its precision, its extensive formal legal protection and, essentially for being a step towards modernisation. The protagonists seem to have a vision of a French-style cadastre, a full-blown land register. The actual capacity to deliver such deeds is, on the other hand, negligible. For example, in the Arrondissement of Mirriah in the department of Zinder in the east of the country, the population counts roughly 500,000 people. During the first few months after the inauguration of the Land Tenure Commission in 1994, just after the adoption of the Rural Code, almost 600 demands for deeds were launched. The result was that the Land Tenure Commission was paralysed. Five years down the road, less than 50 title deeds had been delivered, and the Land Register no longer received spontaneous demands from the villagers (Lund, 2000). No one expected the authorities to deliver them. The arduous task of measuring the fields and in particular the administration’s limited talent for organisation and planning seems to account for this mitigated success. Moreover, considering the potentially huge demand, the incapacity to render service to a mere 600 indicates the unlikely large-scale success. Ten years later, on a national scale, the results of formalisation with the Land Tenure Commissions at county level remained disappointing although simpler forms of registration were introduced, making the procedure lighter. In 2004 a total of 3100 such registrations of sales, gifts, mortgaging, loans, rents and customary freehold (détention coutumière) had been entered into the books of the Land Tenure Commissions for the entire country (République du Niger, 2004: Annex).

The difficulty of registering property and transactions with the government authorities and probably fear of capricious enforcement conduct people to an alternative option for formalisation, namely the chiefs. The local chiefs’ position vis-à-vis the state is ambiguous (Raynal 1991:61). Certain questions fall under the jurisdiction of the chiefs and others under the jurisdiction of the so-called modern administration. At the same time, the legal structure is hierarchical ranging from the Chef de canton, to the...
Sous-préfet to the Magistrate and the supreme Court. However, the formal limits of the legal powers of the Chef de canton and the Sous-préfet have always remained somewhat obscure to the average citizen. The point is that their respective jurisdictions are continuously negotiated.

The power of the chief over the commoners has historically been a relationship of authority where the chiefs command their subjects. As tax collectors, the chiefs were given a percentage of state taxes, and this incentive for zealous collection has been maintained to this day. When a landowner addresses a Chef de canton in order to get a customary deed or another certificate proving various transactions, he is thus acutely aware of the historical socio-political role of the chief. But this has to be weighed against the improbability of getting any kind of proof from the public administration.

When a citizen addresses a Chef de canton for some reason, be it for registration of births or deaths, for conflict resolution, for the registration of property transactions or merely for a call of courtesy, he has to give something. This is generally a small amount of money paid in recognition of his authority. However in addition to the symbolic recognition of authority, another practice has developed in particular alongside the commercialisation of land, namely what is known as ‘the chief’s part’. In case of contentious division of inheritance which requires the involvement of the Chef de canton, it has been common that the chief (or his officials) would divide the land among the heirs and reserve a piece for himself, which was then immediately offered for sale to (one of) the heirs. This notion of the chief’s part is now also generally attempted applied by the chiefs in case of land sales. The Chefs de canton thus claim it to be their inherited right to receive 10 per cent of the sum paid for the land.

This situation has produced dilemmas for citizens as well as the chiefs and, ultimately, for the state itself. For the average farmer, the interest of having a paper proof of his ownership lies in the protection it yields against predators with hostile claims to his land. However, if the only way of getting this proof is by submitting himself to one such potential predator by paying a sort of customary tax, security may be purchased at a high price. For all he knows the ‘tax’ may not be a one-off thing, but the inauguration of a new ‘tradition’. Ironically, a situation may thus occur of farmers paying a fee repeatedly in order to secure their property rights, but with the result that they increasingly recognise the chiefs’ rights over their land, thus in practice gradually forfeiting their own. For the chiefs the stakes may be even higher. The land shortage and the popular demand for formalisation of property

6 The actual character of the piece of paper being established by the Chef de canton varies between cantons, but a typically more precise one goes like this:‘Customary Deed. I, the Chef de canton of Dogo hereby certify that Amadou Ali of Dagogi Peulh has a field, a field given to him by the late Canton Chief of Dogo, Moussa Tango Yérima about 10 years ago, and I also pledge this gift. Witnesses = SouleyIdi and Rabiou Mahamane. Based on this statement I issue the present certificate for his use. Dogo December 11th 1997. The Chef de canton Dogo [signed]’ All names are pseudonyms.
transactions provides a golden opportunity to extend their source of income from merely contentious land transactions to virtually all land tenure transactions, and, more significantly, to re-assert and extend their authority in the rural areas.

The practice of the chief’s part is technically non-legal, but tolerated by the state, and as a consequence effective property rights are constructed. By claiming what they believe to be their part, chiefs operate at the outer margins of their jurisdiction and their authority is in practice extended and entrenched. From time to time, during meetings between the chiefs, the local administration and various development projects, the chiefs put forth the proposition that the concept of the 10 per cent should be formalised, and hence, in fact, enshrined, in the legal texts regulating land tenure transactions. This produces a dilemma, or rather several, for the state. On the one hand, the state has an interest in having the law, the Rural Code, enforced. Part of it consists in enhancing tenure security through the formalisation of hitherto informal, or customary, land holding. This is what is in fact happening, though not in the way it was initially intended. Whereas the Nigerien state initially thought that it would have to push for land registration, registration has now taken a momentum of its own with one possible consequence being the partial marginalisation of the state. On the other hand, the state has a profound interest in not relinquishing whatever authority it might still command.

The institutional transformation ushered in by the increasing importance of written documents is uncertain in itself. The informal formalisation (see Benjaminsen and Lund 2003) of property is only valid insofar as the notion of property and the authority of the paper-issuing chief are legitimate and recognised by the protagonists, wider society and in particular other institutions of public authority. And here, the state or the public administration depend upon the Chefs de canton and can hardly afford not to recognise their authority in this domain.

The land tenure reform in Niger, the Rural Code, accelerated the popular demand for registration from the mid 1980s. However, ambiguity about what rights to register and secure, and the element of exclusion involved in the formalisation of the primary right holders’ rights, made the process very contentious. Moreover, insufficient administrative preparedness made average farmers opt for informal formalisation. Claims to rights have generally been registered with chiefs whose vested interests in rents and authority derived from the operation have had unsolicited consequences. Currently, the attempt to increase security of tenure in many parts of rural Niger has had the unintended aggregate result of accentuating the uncertainty of authority: which institution can legitimately validate property? So far, it is an unresolved question.
Impacts of Land Certification in Ethiopia

Contrary to the rest of Africa, Ethiopia does not have a colonial history. But this does not mean that Ethiopia has been impervious to global political ideologies. The Ethiopian Land Reform in 1974 was based on a radical communist ideology. Before this reform there was a diversity of tenure systems from absentee landlordism in the south of the country to the more communal rist system\(^7\) in the north. The land reform therefore caused larger changes in the tenure system in the south than in the north. The radical land reform implied that all land was made state property and user rights to land were distributed to households within communities based on needs (household size). The maximum farm size was set to 10 hectares and land renting and hiring of labour were prohibited. Further land redistributions took place after that at irregular intervals to provide land to new households and to adjust farm sizes to changes in household sizes. The use right to land was considered a strong human right that was guaranteed to all residents in a community. The reform was also a product of the ‘Land-to-the-tiller’ student movement and this created some tension and local variation in land allocation between ‘needs’ and ‘ability to till’ the land.

Population growth and high population pressure in the Ethiopian highlands caused a fragmentation into smaller and smaller farms and farm plots. There was therefore a growing concern that repeated land redistributions would cause tenure insecurity and undermine incentives to invest on and conserve land and also lead to inefficient production on increasingly fragmented and tiny farm plots (Holden and Yohannes 2002, Alemu 1999).

The change in government in 1991 implied a shift towards a more market-friendly policy regime. Although land remained state property, short-term land renting and hiring of labour were allowed. Land redistributions were mostly stopped.

The new government also decentralised some of the land policy responsibilities to the regional level and regional land proclamations were developed within the wider framework of the federal land proclamation. This resulted in some diversity across regions in the proclamations, implementation rules, and timing of land certification. We will draw on some of this variation in our analysis.

\(^7\) This was a form of customary rights held by a corporate community or descent group in which individuals had only use rights to their allotments (Rahmato 2005). It gave rise to tenure insecurity because it allowed claims from extended families and gave rise to increasing claims from the urban elite who were better positioned to win legal cases (Alemu 1999).
The Tigray Region in northern Ethiopia was the first region to implement land certification in 1998-99. Amhara Region started piloting land certification in 2002 and Oromia and Southern Regions started in 2004 and 2005.

Land certification in Ethiopia focuses not only on urban and peri-urban areas, but covers most of the cultivated land in rural areas of the four regions. There are also plans to include the communal lands in the process. However, the land certificates do not provide full private property rights. They are still only certificates of the user rights of land and of the rights to (benefits from) investment on land. Selling and mortgaging of land are still prohibited, but rights to lease out land for a longer period have been provided to varying degree. It is therefore too early to see any effect on access to credit or investment.

There are some basic inconsistencies in the land proclamations. They state that all residents above 18 years in a community have a right to access land. At the same time the proclamations specify minimum holdings and plot sizes that are in conflict with the basic right to land in many densely populated communities, a problem will only grow over time. We therefore find many communities where landlessness is increasing and with plot and holding sizes below the minimum requirements in the proclamations. Provision of land to everybody, including newly established households will necessarily entail either further fragmentation of existing holdings, continuation of land redistributions, or growing extended families living on farms insufficient in size. The proclamations do not prohibit further land redistributions, however, and these are still allowed in the case of irrigated land. Moreover, when the communities themselves demand redistributions and where it can be documented that they would not have adverse effects on land productivity, they are still accepted.

In Tigray, where land certification was implemented in 1998-1999, people expressed an appreciation of the certificates. Households that for some reason were denied certificates were eager to obtain them in order to feel more secure about the rights to their land. Earlier studies have, however, revealed considerable variation in the feeling of tenure insecurity (Holden and Yohannes 2002). In the Sidamo area in Southern Region, some communities rejected the land certification process. The local leaders perceived that their own system was functioning well; they had a strong autonomy and did not feel that their land rights were threatened.

In all the regions except Tigray land certificates were issued with the names of both husband and wife. The proclamations in the same three regions stated explicitly that husband and wife had equal rights to the land and should share it equally upon divorce. However, women’s participation in meetings and in land administration committees is weak and it will probably take time before women can fully benefit.
from the certification process. Although local social courts have started to rule in favour of women who have brought their cases to court, local norms and practices also persist.

The land certification processes in the different regions have typically involved clear demarcation of plot boundaries in the presence of all interested parties. This includes demarcation of boundaries between private holdings and communal land. The land demarcation revealed boundary disputes but generally resolved these through local mechanisms. Thus, although the land registration process initially generated an increase in disputes, a significant reduction in such disputes was evident after the process had been completed. The benefits from demarcation may also have been greater in areas where a long time has elapsed since the previous land redistribution and where plot boundaries were less clearly demarcated. The quality of the demarcation process may be important for the extent of future boundary disputes.

Issuing of certificates was postponed in some areas of the Amhara Region that were subject to urban expansion for public investment purposes. Other households that had lost their land due to such land takings had in most cases become landless as the communities where they belonged had a long list of applicants and little alternative land for redistribution. The land proclamations state that households exposed to land takings should be compensated but they are not clear on the extent of compensation to be paid. The practice was, predictably, in the direction of no or very limited compensation. Municipalities that claimed land from neighbouring rural communities typically compensated only for investments on the land and did not give any value to the user rights. They also claimed they were too poor to pay compensation. The situation was better in the case of land takings for private business development, such as the recent establishment of greenhouse industries for export of flowers. These could provide compensation and alternative employment.

We are not yet in a position to assess whether land certificates have resulted in more land leasing and more long-term rental contracts. Informal long-term rental arrangements have been in place before they were approved by the formal land proclamations. It is possible that legalisation of such contracts may improve the bargaining power of those renting out the land, and this may have gender implications. Poor female-headed households with limited labour resources often rent out their land on a long-term basis but receive low prices due to their weak bargaining power.

Local informal practices are far ahead of the formal regulations and to some extent the formalisation represents a kind of legalisation of informal practices. The continued prohibition of mortgaging and sale of land is contrary to de Soto’s approach and will reduce potential benefits related to credit access and investment. Current Ethiopian land policy is more informed by the human-rights-based approach and retains strong equality elements.
It still remains to be seen how the land certification process in Ethiopia affects the efficiency and sustainability of land use; this will require more detailed field studies and many effects can only be observed after some time. Land rental markets are already very active in large parts of Ethiopia and appear to enhance land use efficiency. Whether the duty to conserve land implied in the land certificates will result in better land conservation also remains to be seen.

The realisation of some of the potential benefits from land certification is highly dependent on the content of the proclamation and the way it is implemented. The benefits in terms of reduced land conflicts and increased tenure security depend on the implementation rules and practices, the staff and resources available for information dissemination, local perceptions and customs and the extent to which they are in conflict with what is attempted implemented, and the local trust in the regional and federal government. There is evidence of a reduction in boundary conflicts and encroachment on communal lands in some areas, but also a burst of new conflicts where land certification revealed illegal land sales.

**Surveying of Individual Plots in a South African Commons**

Although land reform in South Africa in general has been a sluggish process, an exception can be found in the area known as Namaqualand in the dry northwestern corner of the Northern Cape Province close to the Namibian border. While most of Namaqualand is taken up by private farms in addition to two national parks, around 30,000 people live in the six so-called communal areas that make up 30 per cent of the land. The communal areas were created as mission stations by and for people of Khoi, San, and mixed European descent, all of whom were later classified as ‘coloureds’ under the Apartheid regime. More than 2000 households use the commons for husbandry of sheep and goats and dryland crop farming, usually as a source of income to supplement wage labour and state welfare. Mining has traditionally been the biggest employer in the area, but the industry is now in decline.

Communal farmers use a system of livestock husbandry based on *kraaling* and some stock post mobility, a traditional way of using unfenced rangeland by multiple herds. Individual farmers move with their grazing animals during the day and return them to a pen at a stock post each night (Benjaminsen et al. 2006). One of these communal areas, Concordia, was established as a separate mission station in 1852, which introduced crop cultivation and the establishment of village settlements (Boonzaier et al. 1996). Most of Concordia receives winter rainfall, while the northeastern part of the area lies within the summer rainfall area.
Soon after liberation in 1994, efforts to effect tenure reform in the communal areas of Namaqualand were instigated. The aim of this initiative was to return the communal land to its original inhabitants and current users. The Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA) stipulates procedures required to effect this return of land. Referenda were subsequently held in the communal areas in order to decide on future governance, but the minister of lands has yet to ratify the results (Wisborg and Rohde 2005).

In four of the communal areas in Namaqualand, members of the community possess dryland plots (*saaiperseële*). In years of adequate rain, these plots are ploughed and grains are planted for both human and animal consumption. Plot holders pay an annual tax to the commonage committee and will be evicted if payment is neglected over several years. Plots may be inherited, but sales and rentals are formally prohibited, and permission must be sought before investments in e.g. boreholes or fences can be undertaken. Today, there are 320 dryland plots, located mainly in the southern two thirds of the 63,000 hectares that comprise the ‘old commonage’ of Concordia.

As part of the reform effort, it was decided that the dryland plots should be surveyed and mapped, a process that was completed in 2002. The main aim of this survey was to take stock prior to the impending land reform, to simplify administration, to prevent and solve land use conflicts, and – last but not least – to secure land rights for communal farmers. In terms of these intended effects, the survey has fared reasonably well. It has provided the commonage committee and local administrators with a detailed overview of properties and registered holders, although the process led to some changes in the properties themselves. And although at least one major dispute remains, the initial squabbles over apportioned areas and specific boundaries seem to be subsiding and will probably vanish in the near future. New conflicts are likely to concern succession and other intra-family disagreements. The chaos that characterised the existing registry has been sorted out. And it seems clear that the new map and registry will facilitate more accurate management and decision making around these plots. In addition, rights of non-holders to servitudes such as water points have now been established and formalised, reducing opportunities for ‘gradual privatisation’ of these communal assets.

Effects on security of rights were also generally perceived as quite positive. In the sample of 79 plot holders interviewed, 8 58 per cent perceived no change, 39 per cent perceived an increase in security, while 3 per cent were uncertain. However, none perceived a decrease in security. But with the exception of fencing, not a single respondent had converted this increased security into fixed improvement on their plots. The reasons for this seem in part to be that the risk of eviction largely

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8 For an overview of the methodology used, see Benjaminsen and Sjaastad (forthcoming).
relates to payment of the annual tax rather than the existence of an updated registry, that farmers overwhelmingly tend to invest in animals or animal-related assets (such as fences) when they in fact possess a surplus to invest, and – perhaps – that only five years have gone since the completion of the survey.

In contrast to other investments, fencing of whole parcels seems to be on the rise since the survey. Respondents were asked both about own fencing and neighbours’ fencing. Among those 20 perimeter fences that could be dated, eight were erected prior to the land survey in 2002 (the earliest in 1965) while 12 plots had been fenced since the survey. Even considering that most of the eight fences that could not be dated were erected prior to the survey, this would still seem to indicate a noticeable acceleration in fencing. In addition, 57 per cent of respondents perceived an increase in fencing on the commonage since the survey, while none perceived a decrease (39 per cent perceived no change, while 4 per cent were uncertain). The increase in fencing further strengthens the impression that the survey has led to an increase in farmers’ sense of individual and exclusive rights. And while that might have been a potentially positive development in an area characterised by a need for increased individual agricultural productivity and the potential for investments capable of achieving this, such benefits are questionable in Concordia, which is characterised by land that is suitable only for small stock grazing and where mobility of herds and communal grazing are key issues.

However, we are also concerned here with the unintended effects of the survey. First, in order to render the surveying process tractable, existing boundaries were straightened out. Existing boundaries were quite amorphous and irregular, generally based on simple descriptions and available landmarks. In the process of surveying and simplification, this also caused corridors previously found in between the plots to vanish. Apparently with the blessing of the commonage officials and the farmers themselves (most of whom attended the surveying of their own plots), neighbouring plots that previously were separated by narrow strips of commonage and which served as livestock corridors were joined together with a common boundary. Second, when gaps in between plots were more substantial, new plots were established through the survey.

Neither subletting nor sales of dryland plots are officially accepted in Concordia. While subletting (often involving very modest sums) is ubiquitous, sales are less common. Of the nine sales that we have managed to identify, three occurred prior to the land survey, while six were subsequent to the survey. However, these transactions involve only the assets (buildings, etc.) rather than the land itself, even though the buyer becomes the registered holder of the plot. The commonage committee retains the power to accept or reject such transactions.

However, it must be emphasised that traditional land use in the Namaqualand commons is based on mobility and free grazing. This is especially true in Concordia, where herds move seasonally between
dryland plots, winter rainfall and summer rainfall areas. The land in Concordia is simply too poor to support any intensive forms of agriculture and communal land is also insufficient in quantity to support the replacement of the current grazing system with a private camp system as practiced on commercial farms in the area, without excluding the vast majority of communal farmers.

What are then the implications of the Concordia land survey with respect to de Soto’s hypothesised benefits of formalisation? First of all, the benefits of fungible assets specified by de Soto are related to enabling effects of asset divisibility, combinability, and – above all – collateral value. These aspects will, unfortunately, remain irrelevant in Concordia, given the limited rights of alienation for dryland plots and the control exercised by the commonage committee. Moreover, the plots held by farmers in Concordia are simply too small and of too modest potential to permit farmers to benefit from these effects. According to managers of financial institutions in the area, they would not provide credit for land of this type and size even if full title deeds were available.

The land survey in Concordia seems to have done reasonably well in terms of its intended effects of increasing tenure security for individual plot holders. In addition, land markets and greater security in terms of access to servitutes may have positive long-term effects. However, the survey has also altered, in various ways that which it set out merely to record. And some of the changes triggered by the survey – closed corridors, reduced communal rangeland, and increased fencing – may also ultimately undermine the grazing patterns on which local livelihoods rely.

Conclusions

The cases reviewed in this paper have, clearly, several lessons that are context-specific and particular to each. The Mali case demonstrates that the timing of the formalisation process is crucial. If farmers and other ‘rightful’ holders of land in peri-urban areas are to share in the huge increases in land value that attend urban expansion, formalisation needs to be made accessible to these land holders before their land is engulfed by growing urban areas. Without a timely formalisation process, local landowners are defenceless against wealthy and politically strong outsiders. This suggests that some form of formal proof of ownership can act as a bulwark against predation. Moreover, formalisation must encompass ownership rights; with formalisation of user rights only, as in Ethiopia, compensation may be limited only to the often moderate sums represented by investments and discounted net income flows. In the peri-urban areas of the Malian cotton zone, there is a clear demand for accessible and affordable processes of formalisation.

The Niger case also shows that formalisation writ large can be at least partly a response to popular demand. However, in Niger the state was unable to back up its policy and legislation with adequate
implementation mechanisms and procedures, and also introduced reforms that were at odds with local practices. In such cases, formalisation policy introduces legal pluralism and the formalisation process may be usurped by local leaders and power holders. Formalisation becomes an instrument for opportunism and, ultimately, inequality. This suggests that formalisation is as much a governance issue as anything. ‘Struggles over property are as much about the scope and constitution of authority as about access to resources’ (Lund, 2002: 11).

The Ethiopia case illustrates how demand for formalisation may depend on whether sources of insecurity originate from within the group or from outside. While in some areas there is a demand for land certificates as a route to improved tenure security, other areas insist that the pre-formalisation system gives them sufficient security. In Ethiopia, land certification has reduced conflicts in some areas and the certificates may have strengthened women’s rights to land, especially in the central and southern parts of the country. However, the case also highlights the importance of avoiding internal inconsistencies in new regulations; in Ethiopia, inconsistencies obtain with respect to land ceilings, population pressure, and a lack of legal redistributive mechanisms.

Finally, the South African case highlights the intrinsic capacity of formalisation mechanisms not only to record and register, but also to alter rights. Translating certain indigenous property concepts into the language of ownership may therefore tend to strengthen the element of exclusivity to the benefit of the primary right holder and at the expense of others. The idea that the formal recognition of property will turn dead capital into living capital should not cloud the fact that it may turn somebody’s dead capital into somebody else’s living capital.

This refers back to the question posed in our introduction about privatisation. Although it may not be the intention, exclusion and hence privatisation seems to be inherent in formalisation. The question of how formalisation drives privatisation is associated with the more general problem of the trade-off between cost and complexity and the tension often found between a government’s capacity and its ambitions. This is a theme that runs through three of the cases. Many forms of property encountered in Africa are significantly less exclusive than what is normally associated with ownership. This is not to argue that African land tenure is essentially communal, but often several layers of interest in property are recognised as legitimate. In Niger, secondary rights holders ended up as victims of formalisation. In Ethiopia, the land certification process failed to establish a universal and acceptable way of dealing with the problem of land previously subject to informal transactions, with different regions choosing somewhat arbitrarily to protect either the rights of the original holder or the buyer. The Malian case is a relatively straightforward case of insufficient government capacity to supply land titles and to effect just compensation for expropriated land. A lack of capacity may thus partially explain the simplifying tendency often evident in formalisation efforts. In Namaqualand in South Africa, however, even though there was no evident shortage of funds to
record detail and complexity, formalisation still seems to have bred increasing exclusion through its effect on local perceptions and goals.

In terms of demand-driven versus supply-driven processes, some form of demand for property formalisation clearly exists within the cases reviewed here. In Mali and Niger in particular, this demand finds expression in the ‘informal formalisation’ observed in peri-urban and rural areas. We note, however, that local demand cannot be divorced from the question of the type of formalisation involved. It is equally clear that different social groupings possess a demand for different forms or formalisation (or non-formalisation). It is thus not only a question of whether there is a demand for formalisation, but a question of whose demand for what kind of formalisation. If the variation in local interests and capabilities is large, the notion that a single, universal formalisation model with broad local appeal can be found may be seriously flawed. To be sure, the first order of business must be to ensure that broad formalisation efforts – for example those operating on a national level, as in Niger and Ethiopia – are closely attuned to existing local realities and perceptions of justice; formalisation programmes that challenge local culture seem unlikely to succeed.

But this is not enough. The cases in this paper indicate that national policies and legislation must leave room for substantial variation in local stipulations and practices, and also ensure local ownership of the formalisation effort by providing local communities with real decision-making powers. And this needs to build into the process from the start; as illustrated by the Niger case, failure to do so may result in the ability of powerful minorities to take control of the process for its own ends. Flexibility in turn poses serious challenges for the possibility of national integration into property registers and the like; while integration remains possible, it again becomes a matter of resources and capacity to tackle the greater variability and complexity involved.

Formalisation of land rights does not automatically increase or undermine tenure security. Effects on security will depend on the source of insecurity and the legitimacy of the public authority that guarantees formal rights (Fitzpatrick 2005). One might posit that the ideal formalisation programme is one that is responsive to the varying demands and interests of local rights holders, that there are attempts closely to match post-formalisation rights to pre-formalisation realities, and that there are budgets with sufficient resources to avoid the temptations inherent in simplification. Yet, as these cases demonstrate, even genuine efforts to formalise ‘what is already there’ may have adverse or unintended effects. First, even just the knowledge of impending formalisation may be enough to trigger opportunistic behaviour and a race for property rights, as demonstrated by the cases from Mali and Niger, and effectively render the notion of establishing ‘what is already there’ an impossibility. Second, formalisation programmes have the capacity – through inadequate attention to detail, but also through their effects on people’s perceptions – not only to record, but to alter ‘what is already there.’ This is illustrated particularly by
the Namaqualand case, but also by the programmes in Niger and Ethiopia. In fact, on the evidence of the cases in this paper, the capacity to alter and to accelerate existing processes appears to be more important than the oft-cited propensity of formalisation to ‘freeze’ existing rights structures and destroy the intrinsic dynamics of local institutions. Finally, programmes that simply formalise ‘what is already there’ may cement existing inequalities, rendering reforms difficult or even infeasible. While this, as yet, is no major issue in the cases reviewed here, it may become important in Ethiopia as formalisation efforts expand and intensify, particularly given the internal inconsistencies in the proclamations developed.

Various measures may be employed in order to counter these problems. Opportunistic behaviour is, we believe, best countered by complete transparency in the formalisation process, ensuring that all those affected have complete information ahead of implementation, and by promoting local, democratic ownership of the process. Changes in rights structures and institutions may be minimised, but not entirely eliminated, by sufficient attention to detail and complexity. And where vast inequality exists in land holdings, formalisation may need to be attended or preceded by separate redistribution efforts.

All such measures are difficult, complex, and, hence, costly. However, as we have noticed, people’s efforts at formalisation are manifold regardless of there being a formalisation policy or government institutions to undertake it. Hence, the alternative: ‘not to formalise’ is not realistic. Formalisation programmes in Africa, we hold, need therefore to be preceded and informed not only by a careful examination of the resources available and the associated level of ambition, but also by the realisation that no single model of formalisation is beneficial to everyone at all times.
References


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