

The Role of Property Rights in the Debate on Large-Scale Land Acquisitions

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Abstract

The initial reaction to the sudden increase in large-scale leases and acquisitions of farmland in developing countries has been to promote titling schemes, allowing land-users, often poorly protected under customary forms of tenure, to be recognised as fully fledged owners of their land—allowing them to decide whether to sell, to whom, and under which conditions. This chapter places this transformation in a historical and global perspective. It recalls why titling was advocated in the 1990s as a development tool, and why—during the mid-2000s—doubts began to emerge with regard to such an approach. It then reviews alternatives to the simple transposition of Western conceptions of property rights; alternatives that may better serve the needs of rural households currently facing the threat of eviction and displacement, as a result of the race for farmland that we have witnessed in recent years. The chapter notes the importance of avoiding confusion between the need to ensure security of tenure, on the one hand, and the creation of markets for land rights on the other, the latter of which processes—when considered in a dynamic perspective—may not be advantageous to the poorest rural households. For these households, which depend on agriculture for their livelihoods, true security of tenure ultimately should be understood as the right to live decently from the agricultural activities that feed them.

1 Introduction

We have witnessed in recent years an unprecedented rise in the sale or lease of large areas of farmland, particularly in developing countries. The regions concerned are those where both land suitable for cultivation and water are abundant, the workforce is cheap, and access to global markets relatively easy. The investors are either the local elites or, increasingly, foreign investment funds or agribusiness corporations. But they also include the governments of cash-rich but resource-poor countries seeking to outsource food production

in order to ensure a stable and reliable supply of food for their populations (Haralambous et al., 2009; Cotula et al., 2009; Deininger and Byerlee, 2010; Kugelman and Levenstein, 2009; Center for Human Rights and Global Justice, 2010). Of course, the recent wave of large-scale acquisitions or leasing of farmland is not entirely unprecedented. But the speed at which the phenomenon has been developing recently and its overall scope are. In addition, the significance of this current surge is different from what was seen in the past: in many cases, rather than investing in countries that present certain comparative advantages in agriculture in order to supply international markets at the most competitive conditions, the buyers or lessees of land seek to ensure access to a stable supply of agricultural commodities in order to circumvent international markets, which have become increasingly unreliable. A global market for land and water rights is thus rapidly taking shape (Mann and Smaller, 2010).

The main problem, as many commentators see it, is that in many of the regions targeted by these new investments, the rights of land users are not properly secured. As a result of systems of tenure inherited from colonial rule, much of the land in rural areas is formally owned by the government, and land users have no property titles on the land they cultivate. This situation creates legal uncertainty. It also implies that land users will not have access to legal remedies, and will not receive adequate compensation if they are evicted from the land they cultivate, for instance after their government has agreed that foreign investors may take possession of the land.

The answer to the threat of 'land grabs', it would seem then to follow, is to strengthen property rights, or to transform informal use rights into formalised property rights. Titling schemes could be implemented in order to protect land users from the risks of unjustified eviction or eviction without fair compensation. Titling their property would allow land users to decide under which conditions they want to sell, and to whom, and would ensure that if their land is taken by the government for reasons of public interest, they will have access to courts in order to challenge the conditions under which this expropriation has taken place. This is the approach that characterised the 2001 Land Law (No. 197/C) in Cambodia, for instance, which allowed for the registration of property rights that had been enjoyed in peaceful, uncontested circumstances for a period of at least five years, while at the same time defining 'state public' and 'state private' property and imposing a prohibition on the sale or exchange of the former—that is, state property that serves a public purpose (Art. 15) (Special Rapporteur on Adequate Housing, 2006).

We now understand that such an approach underestimates the challenges associated with the commodification of land rights: the rolling out of rural

property titles in Cambodia launched in 2012, combined with the ‘Leopard-skin strategy’ in the country (in which smallholder farming is supported alongside economic land concessions), testifies to the shift that is now taking place (Müller, 2012; Dwyer, 2013 and 2015). This chapter places this transformation in a historical and global perspective. Section 2 recalls why titling was advocated in the 1990s, initially to accelerate the transition to market economies in Eastern Europe, but also as a development instrument, and why—a decade later—doubts began to emerge. Section 3 reviews the debate on the pros and cons of titling, illustrating why some of the hopes that were raised about this approach led only to disappointment. Section 4 turns to alternatives to the simple transposition of Western conceptions of property rights; alternatives that may better serve the needs of rural households that are currently facing the threat of eviction and displacement due to the race for farmland that we have witnessed in recent years. Section 5 provides a brief conclusion.

2 A Brief History of Titling: Its Rise and Fall

Though land registration processes have a long history (Place, 2009; Colin and Woodhouse, 2010), the belief that such processes can form the central component of development strategies is more recent. It emerged first with the large-scale and rapid privatisation of the formerly socialist economies of Central and Eastern Europe. In 1993, the World Bank presented a report entitled *Housing: Enabling Markets to Work*, in which—while it warned against costly titling programmes—it underscored the importance of ‘systems of property registration and titling and workable systems of foreclosure and eviction’, as these were considered ‘necessary to ensure the collateral security of mortgage loans’ (Mayo and Angel, 1993, 46). The emphasis in that report was more on ensuring security of tenure than on titling as one means of achieving it, but it did include a strong recommendation for the removal of any restrictions on the emergence of a market in property rights over land (Mayo and Angel, 1993, 117; and see Feder and Feeny, 1991). USAID first supported programmes for the privatisation of land and titling in Russia in 1994, with the purpose of supporting the Russian authorities in creating real estate and land registries and clarifying ownership rights, first in a number of ‘hub’ cities and then in larger areas, including the rural areas. Then, in 1998, a major titling programme was launched in Peru, with Hernando de Soto’s Institute for Liberty and Democracy (ILD) in the leading role. That programme inspired de Soto to publish his most important book, *The Mystery of Capital*, in which he attributes the failure of developing countries to grow to undeveloped property regimes (de Soto, 2000).

The book also placed the ILD on the map as the most effective advocacy organisation for titling and the clarification of property rights.

The promoters of titling programmes and land registration schemes see them as presenting a number of advantages. First, and perhaps of most direct relevance here, the security of tenure favoured through titling should encourage individual landowners to make the necessary investments in their land, thus improving their living conditions and, in rural areas, enhancing the productivity of the cultivated plot: the occupants, it is supposed, shall not invest in their land unless they are certain to be protected from the risk of losing it. In addition, as emphasised by de Soto, titling of their property allows the owners to mortgage their land, and thus to obtain access to credit, allowing them to make such investments. Thailand was seen as proof of this process: up to 50 per cent of rural households, having benefited from registration of their property rights, were able to obtain access to credit, leading to what de Soto calls the ‘capitalisation process’ (Feder et al., 1988). This process transforms ‘dead (physical) assets’—‘where assets can not be readily turned into capital, can not be traded outside narrow local circles where people know and trust each other, can not be used as collateral for a loan, and can not be used as a share against an investment’—into live capital, which can be mobilised for investment (de Soto, 2000, 6). The World Bank notes, referring to a study by the McKinsey Global Institute on the conditions of growth in India:

With fewer assets in the formal sector, more entrepreneurs are excluded from using property as a collateral, and less credit is allocated. The possibility of getting loans is the only reason to take on the daunting task of registering in some countries [...] But when it is too difficult, few bother. Entrepreneurs will invest less if their property rights are less secure. Inefficient registration is associated with lower rates of private investment. And it leads to lower productivity, since it is harder for property to be transferred from less to more productive uses. The result is slower growth. One study estimates that restrictive land market regulations cost 1.3% of annual economic growth in India. (World Bank, 2004a, 40; see also World Bank, 2004b, 78)

The contribution of titling to access to capital can operate directly, as registered property can be used as collateral to obtain credit. But it can also operate *indirectly*, as a signalling device that provides information about the trustworthiness of the borrower: recent research in Indonesia illustrates this by relating titling to the practice of local banks, who tend to see titling of property as proof that the household will be able to repay the loan, independently of the use of the property as collateral (Castañeda Dower and Potamites, 2012).

Second, the clarification of property rights should encourage the emergence of efficient land markets: lowering transaction costs, it is supposed, shall result in the land going to the most productive user, thus maximising the productivity of land as an economic asset (Feder and Noronha, 1987). The World Bank notes, thus, that ‘secure and unambiguous property rights [...] allow markets to transfer land to more productive uses and users’ (World Bank, 2007, 138). The intellectual roots of this argument can be found in the work of Ronald H. Coase, according to which if transaction costs are low enough (and, ideally, reduced to zero), the freedom of transactions shall result in solutions that are most economically efficient (Coase, 1960). The basic reasoning is simple enough: buyers of property will pay the price they considers reasonable, taking into consideration the streams of income that are expected to flow from making productive use of the assets acquired; therefore, if such assets are transferred to the highest bidder, as an efficiently functioning market for property rights should allow, they should ultimately be captured by the economic actors who can use them most productively, thus contributing to general economic growth.

Third, the clarification of property rights and the development of markets for land rights should attract foreign investors. This is why the *Doing Business* rankings of the World Bank, which use a series of indicators to measure the quality of the ‘investment climate’ of the countries surveyed, include among their criteria the time and cost of transferring a property title from one seller to the buyer—from the moment the buyer has a copy of the seller’s title to the moment when the transfer is opposable to third parties, so that the property can be resold or used as collateral when approaching a bank (Chavez Sanchez et al., 2014). The 2014 edition of the *Doing Business* annual report—the eleventh of the series—found that over the period 2008–2013, 90 economies undertook 124 reforms increasing the efficiency of property transfer procedures, though some regions remain far behind. The easier it is to register property rights, the faster and the cheaper the procedures are for transferring property rights, and the more investors will be willing to enter the country concerned and thus, it is hoped, to contribute to its development (although the automaticity of this relationship has of course been questioned; see De Schutter et al., 2012).

Fourth, the formalisation of property rights over land allows public authorities to increase their tax revenues, and where necessary to deliver certain public services that depend on fees being paid by the users. As de Soto remarks, once they are formally registered, assets provide ‘an accountable address for the collection of debts and taxes’ as well as ‘the basis for a creation of reliable and universal public utilities’ (de Soto, 2000, 6). The two arguments are combined where public services are provided against the payment of users’ fees: only where users have registered property can they be taxed (preferably,

at a rate that will depend on the value of the property that they own) in order to finance the provision of water, telephone lines or electricity to the areas in which they live. For cash-strapped countries, struggling to provide basic infrastructure to their populations in large part due to their inability to collect taxes efficiently, this is not of minor significance.

Yet despite these apparently powerful arguments in favour of titling programmes, doubts have emerged in recent years. As more lessons could be drawn from a series of titling programmes implemented in the developing world during the 1990s, a number of ambiguities gradually came to the surface. A turning point was the establishment, in 2005, of the Commission for the Legal Empowerment of the Poor (CLEP). Launched at the initiative of a range of governments from different regions, working together with the United Nations Development Programme (UNDP) and the United Nations Economic Commission for Europe, the CLEP was established under the co-chairmanship of Hernando de Soto and Madeleine Albright. It was tasked with studying the relationship between 'informality' and poverty. The concept note presenting the initiative states:

One of the staggering facts about poverty, which is not addressed explicitly in the MDGs, is that the vast majority of the world's poor live their daily lives in what is often referred to as the *informal* or *extralegal* sector, often excluded from the benefits of a legal order. [The work of Hernando de Soto shows that] legal exclusion, in the sense that the assets and transactions of the poor are not legally protected and recognised, produces and reproduces poverty throughout the developing world and in former communist societies (CLEP, 2005, 3–4).

The process of 'capitalisation', through which 'dead capital' is brought to life, was central to the inquiry of the commission. Indeed, to many, the CLEP was seen as an opportunity to validate the findings of Hernando de Soto and his conclusion that underdevelopment had much to do with the failure to establish reliable systems for property rights through the registration of assets, especially immovable assets. It therefore came as a surprise to most that, when it presented its final report in June 2008, the CLEP felt compelled to note a number of problems associated with titling schemes. The CLEP referred to the risks associated with 'elite capture': '[i]n many countries,' it noted, 'speculators pre-empt prospective titling programmes by buying up land from squatters at prices slightly higher than prevailing informal ones. Squatters benefit in the short term, but miss out on the main benefits of the titling programme, which

accrue to the people with deeper pockets' (CLEP, 2008, 80, citing Platteau, 2000, 68; on the risks of elite capture, see also Firmin-Sellers and Sellers, 1999). The commission also identified, as one of the failures of titling programmes as they had been implemented in the past, that these programmes tended to neglect the role of collective rights and of customary forms of tenure: such forms of tenure, the commission conceded, could be highly legitimate and effective in guaranteeing security of tenure (CLEP, 2008, 52).

The CLEP concluded that the benefits of titling schemes may have been exaggerated in the past, and that it may be inappropriate to simply transplant the Western concept of property rights into the legal systems of developing countries, the legal traditions and needs of which may be markedly different:

Promoting a truly inclusive property-rights system that incorporates measures to strengthen tenure security requires learning from the mixed experience with past individual titling programmes. To ensure protection and inclusion of the poorest, a broad range of policy measures should be considered. These include formal recognition, adequate representation, and integration of a variety of forms of land tenure such as customary rights, indigenous peoples' rights, group rights, and certificates. Success depends greatly upon comprehensively reforming the governance system surrounding property rights [...] These systems need to be accessible, affordable, transparent, and free from unnecessary complexity. Above all, the poor must be protected from arbitrary eviction by due process and full compensation (CLEP, 2008, 65).

These statements are significant, both because the initial bias of the CLEP clearly was in favour of following de Soto in his optimistic views about the virtues of titling, and of course because—although not a member of the working group on property—he was the co-chair of the commission. But the conclusions of the CLEP were foreshadowed by a number of studies published in the interim, after the first large-scale titling programmes had been launched (Firmin-Sellers and Sellers, 1999; von Benda-Beckmann, 2003; Unruh, 2002). Indeed, the World Bank itself noted in 2006 that 'most policy analysts now no longer simply assume that formalization in a given context necessarily increases tenure security, and leads to collateralized lending. The original assumptions have now become questions for empirical research' (cited in Payne et al., 2007, 3). The next section summarises some of these findings that instilled doubt about titling programmes being the magic bullet they once were thought to be.

3 Why Titling Isn't a Magic Bullet

Why might titling programmes fail? And why is it that, after ten years during which such programmes were actively promoted and supported by all development actors, they now are heavily contested and have become a battleground for a highly ideological debate?

3.1 *The Two Faces of the Commodification of Land*

A major factor explaining this development is that the arguments that are put forward in defence of land registration and titling have been, from the very start, inherently contradictory (Table 3.1). These arguments have been summarised above. They follow two separate logics that run in opposite directions. On the one hand, the clarification of property rights was to provide security of tenure: to allow slum dwellers to be recognised as owners of their home in the informal settlement where they are staying, or to allow those operating small farms to be protected from eviction from the land which they cultivate. On the other hand, however, the clarification of property rights was justified by the need to establish a market for land rights, allowing a more fluid transfer of property rights—a lowering of transaction costs increasing the liquidity of these markets. The expansion from the former conception of 'security of tenure' to include the latter appears in a 1987 study by two authors from the World Bank, where they note that 'the ability of an occupant to undertake land transactions that would best suit his interests' should be considered part of 'security of tenure' (Feder and Noronha, 1987, 159). Yet, the contradiction between these two objectives becomes clear once we realise that the commodification of property rights can be a source of exclusion and increase insecurity of tenure.

Such exclusion may occur by means of any of four mechanisms. First, as already noted, the process of titling itself may be captured by the elites—in addition to the risk of 'pre-emptive speculation' noted by the Commission on the Legal Empowerment of the Poor, titling schemes may be manipulated or tainted by corruption; or the formalisation of property may be too costly or complex for the poorest segment of the population to benefit. Second, once property has been formalised and land demarcated, taxes may be imposed, and more easily collected, by public authorities. This may present an opportunity to better finance public services, as noted above. But it may also have exclusionary effects: it may occur that the poorest are not able to pay those taxes and are forced to sell off their land as a result. Third, whether to pay those taxes or to make the necessary investments in their houses or on their cultivated lands, the poor (who by definition have no capital of their own) shall be tempted to mortgage their land in order to have access to credit. But even

if this works—even if, that is, lenders are willing to provide loans—the risk is that the debts will accumulate, and that the land will finally be seized by the lender: the commodification of land, in such a case, shall have made the loss of land possible, rather than protecting the land user from such a risk. Fourth, the rural poor may be tempted to sell off land in order to overcome temporary economic hardship such as a bad harvest or a fall in the ‘farm gate prices’ received for their crops. In its 2003 report on land rights, the World Bank clearly recognised that land markets could encourage such ‘distress sales’, thus potentially increasing insecurity of tenure, rather than reducing it (Deininger, 2003, 96–98; see also Cousins et al., 2005, 3).

This risk, it is worth noting, should not be seen as *failure* of the system, or as a problem that should be remedied in order for the system to proceed more smoothly. Instead, it is *inherent in the very process of commodification of property rights* that gives property its value. It has been written that, in de Soto’s view, the problem of informal forms of tenure is not so much too little security of tenure, but instead *too much*: the problem of ‘dead capital’ is that it cannot be lost, because it cannot be sold or mortgaged (Mitchell, 2006, 7). Indeed, de Soto is explicit about this, noting that one of the benefits of formal property systems is that they make people ‘accountable’, encouraging people ‘in advanced countries’ to ‘respect titles, honor contracts, and obey the law’, because of ‘the possibility of forfeiture’ (de Soto, 2000, 55–56). In other terms, the counterpart of the improved security of tenure that formalisation of property allowed was the insecurity resulting from the possibility of losing property—whether because the household finds itself unable to reimburse the lender after having mortgaged the land, because the level of taxes makes paying those taxes unaffordable and forces the family to leave, or (where rural farming households are concerned) because the household finds it impossible to expand its property following the speculation fuelled by the titling process, and thus cannot achieve the economies of scale required to be competitive on the markets.

Nor was this permanent balancing between providing more security and introducing insecurity the only ambiguity inherent in titling programmes. Another results from the fact that the prescriptions were designed for urban populations (de Soto mostly wrote with the slum dwellers of Lima in mind), yet were transposed, with rather little reflection, to the registration of property in rural areas. The relationship to landed property is very different for each of these groups, however. Real property, for the urban poor, primarily ensures adequate housing. For the rural poor, land is a factor of production: the most important input to the farming upon which they depend for their livelihoods. The stakes are thus much higher for the rural poor. For urban dwellers, being priced out of certain gentrified neighborhoods means having to move to places

TABLE 3.1 *Contradictory arguments in favour of titling programmes*

Titling as a means of ensuring security of tenure	Titling as commodification of property rights
<ul style="list-style-type: none"> – Protect land users from eviction – Encourage land users to invest in their property to increase its long-term value – Allow land users to use land as collateral in order to have access to credit, bringing ‘dead capital’ to life 	<ul style="list-style-type: none"> – Ensure land goes to the highest bidder, presumed to be the most efficient user – Ensure registered owners can be taxed to finance public services—if they can afford it

SOURCE: AUTHOR.

that are located further from employment opportunities or less well covered by public services. But for smallholders who lose the land that they cultivate and lack the education and training necessary to take up jobs in industry or the service sector (provided such jobs exist) this means losing everything: what threatens them if they lose land is a fall into the most extreme poverty. Like the urban poor, rural farming households may benefit from the improved security of tenure that is allowed by the registration of property; but the costs of the insecurity referred to above may also be particularly high for them.

One way of framing this discussion is to distinguish between a static analysis (attentive to the immediate or short-term impacts of the formalisation of property rights) and a dynamic perspective (attentive to the longer-term impacts). The commodification of land rights, which is often seen as being an inherent quality of registration processes, may benefit land users in the short run, as the assets they ‘own’ (and shall henceforth be recognised as owning) can be transformed into capital, increasing their value. But whether or not they benefit in the long run will depend on the range of conditions that will either allow them to seize the opportunities this creates for them, or instead increase their marginalisation further. Why this possibility of marginalisation should exist becomes clear when we consider the consequences of treating land as a tradeable asset.

3.2 *Land as a Tradeable Asset in a Dynamic Perspective*

Will the registration of land allow small-scale farmers to have access to credit, and thus to improve their productivity? The short answer is that it will

only do so under a specific set of circumstances, including the existence of a network of credit institutions that can provide loans suited to their needs (Bruce and Migot-Adholla, 1994; for a literature review see Place, 2009). But establishing such institutions shall not suffice, unless complementary measures are adopted. Lenders typically will have no interest in accepting as collateral a parcel of land that is too small in size to be of interest to commercial investors, or that cannot be easily resold because of the resistance of the community to the arrival of an outsider (Smith, 2003, 214); and smallholders themselves may be too risk-averse to take loans, particularly if the consequence is that they may lose their land through foreclosure (Platteau, 2000, 59; Shipton and Goheen, 1992, 317).

Even more troubling is the fact that where titling schemes have been implemented, they have often led to increased inequalities, making the poorest even worse off. More than a decade ago, Berry already noted that 'in country after country, when land has become valuable enough, the powerful have pushed the weak off what land they had' (Berry, 2001, 130). This is true to the extent that the national elites, who have superior purchasing power, may emerge victorious from the auctioning of land that titling schemes in fact lead to. As noted by Geoffrey Payne et al. (2007, 9), 'the provision of titles may actually reduce security for both tenants and newly titled owners, given the attraction of the suddenly enhanced values of their assets to higher income groups or others with the motives and ability to take advantage of the changed tenure status'. Because land in general cannot be used twice as collateral, first in order to purchase and then to acquire the working capital required, access to credit by mortgaging land is in fact only a means of improving the productivity of relatively large plots of land or of those who have access to other forms of capital beyond land; it hardly benefits those who have nothing but a small parcel of land that increases in value. Inequalities may increase, rather than be reduced, as a result.

This effect may be further strengthened where investors from abroad seek to acquire large areas of land in order to develop agriculture for export, and are encouraged in their quest by the creation of a market for land rights. As such markets develop, speculation over land increases, and so does land concentration: foreign investors are mostly interested in developing large-scale plantations that are relatively non-labour-intensive and contribute relatively little to rural development (De Schutter, 2011); and conflicts over land increase as land becomes a valuable asset (Amanor, 2012). This is particularly problematic in contexts where the distribution of land is already unequal, because in such contexts access to land—and not merely security of tenure, which in itself may in fact simply confirm existing inequalities—should be a priority for the landless or quasi-landless rural poor. Yet, as acknowledged by Klaus Deininger,

a lead economist at the World Bank, in the absence of outside support, 'the purchase market does not operate as a mechanism of land access for labour-abundant, capital-constrained households' (Deininger, 2003, 114).

The further markets for land rights develop, the more there is a risk that the price of land shall increase as a result of speculation. Speculation means that capital that could be put to productive uses, for instance for creating employment, will be immobilised. Even if we hypothesise that the 'speculative' part of price-setting can be separated from the 'market' price, the price of land following titling shall increase, by at least 25 per cent according to most studies available (Payne et al., 2007, 15–16). In principle, that represents a benefit for those who can register their land. But things look quite different when examined in a dynamic perspective: the poorest households may in fact be tempted to sell their land either to overcome a temporary shock or to profit from the opportunity resulting from sudden increases in the price of land, only to discover that the prices of other parcels too have become unaffordable, as the increased price of titled land creates ripple effects making all land more expensive (Payne et al., 2007, 16).

The speculation on land that follows registration processes, leading to inflated prices for land, leads one to question not only the de Soto hypothesis according to which such processes should benefit the poor by allowing them to use their (until then 'dead') assets as capital, but also the Coase hypothesis, which anticipates that, as markets for land rights develop, land will go to the most 'productive' users. As we have seen, these two narratives to a certain extent contradict each other: whereas the latter emphasises the benefits to the poor of the formalisation of property rights, the former emphasises property's contribution to economic growth when in the hands of the most efficient actors. Yet, remarkably, both these narratives fail to take into account the impacts that result from the highly unequal distribution of purchasing power in many of the societies where such formalisation processes take place. One implication of speculation over land is that the poorest landowners will be priced out of land markets, and that even those who manage to register their property may soon lose it, as a result of incurring unsustainable debts or because they seek to benefit from the 'windfall' effect that follows. Another implication is that where land is transferred it does not necessarily go to the most productive user, thus leading to efficiency gains and improving average productivity; rather, it goes to those who have the strongest purchasing power. Indeed, as interest for agricultural land has been rising significantly in recent years, the risk of the poorest being priced out of increasingly speculative land markets is higher now even than in the past.

3.3 *The Opportunity Costs of the Registration of Land Rights*

A different set of questions arises once we examine the impacts of the formalisation of property rights and land registration for the rural dwellers who have no access to land before the titling process, and are therefore entirely dependent on their labour as a source of income. Titling is generally defended on the grounds that it will support the poor, and small-scale farmers in particular, since the registration of the property that they own *de facto* shall allow them to unlock their productivity potential (Deininger and Binswanger, 1999; Platteau, 2000, 51–74). What generally fails to be mentioned, however, is that registration also gives a premium to those who already occupy land, making entry into land markets more difficult for the landless. Land registration may benefit the relatively better-off, who have some land and may hope to improve its productivity by making the necessary investments; it is not a means of ensuring access to land for those who have none, who should instead be supported by grants (Deininger, 2003, 96). In that sense, titling may be said to constitute a transfer of wealth from the landless to those who occupy land, and from the next generation to the present one: as titling increases the market value of land, land will become less affordable for the poorest part of the population or for new entrants to the land markets, for whom *access* to land—not just the *consolidation* of unrecognised property rights—is vital. This consequence is, of course, particularly disturbing where inequality in the distribution of land is greatest, and where the population comprises a large number of landless rural workers, or small-scale farmers who must rent the land that they till and may not be able to afford higher rents (Payne, 1997, 46).

3.4 *'Clarifying' Property Rights and Competing with Customary Forms of Tenure*

A final ambiguity stems from the terms 'clarification' and 'formalization', which are used to refer to the improvements to property rights regimes that titling should allow. The purpose is, ostensibly, to confirm existing use rights. But these use rights are often complex. It is not unusual for conflicting claims to exist over any piece of land. And there are various types of land users, not all of who are 'dormant landowners' awaiting an opportunity to register the land they occupy.

Moreover, prior to the formalisation of property rights through titling, tenure generally is regulated by custom, which is often highly legitimate and, as recognised by an influential report authored in 2003 by Klaus Deininger for the World Bank, can ensure a high level of security of tenure (Deininger, 2003, 53) and deliver the same services as formalised property rights, including by

favouring in certain cases efficiency-enhancing exchanges (Deininger, 2003, 31–32). Research has highlighted that, in fact, traditional (or customary) systems of tenure in many cases allow for the individualisation of ownership, and that even where communal ownership subsists, such systems allow for cultivation and possession to remain with individual households (Feder and Noronha, 1987). The superimposition of titling on these pre-existing, customary forms of tenure may result in more conflicts rather than in more clarity, and in less security rather than in improved security (Toulmin and Quan, 2000). In addition, customary forms of property may provide security for those depending on the commons—such as pastoralists, artisanal fishers, or those with small herds—for whom classic property rights are generally not an appropriate solution.

Though they present many advantages, customary forms of tenure tend to exclude certain members of the community and outsiders, however, and are often a tool which traditional elites use to maintain their dominant position within communities. Women in particular may be discriminated against under existing customs. Though the phenomenon is by no means limited to that region (Yngstrom, 2002; Whitehead and Tsikata, 2003), discrimination against women in access to land is particularly pronounced in some parts of Asia. In much of rural China, for instance, though the Marriage Law gave women the right to land within the household unit and the Agrarian Reform Law granted men and women equal right to land in general, customary practices still prevail, and sons rather than widows or daughters continue to be considered the natural heirs of land (OECD, 2010, 25).¹ It is therefore hardly surprising that women's land rights are seldom reflected in the land certificates issued to households: a study published ten years ago concluded that only 7 per cent of certificates were in the name of the woman, while 5 per cent of the certificates were issued to a man and a woman jointly; the remaining land-use certificates were in the name of the husband, father, or father-in-law (Zongmin and Bruce, 2005, 276). In India, to give another example, even after the amendments introduced in 2005 to the Hindu Succession Act, giving women equal rights in their natal family assets,² women inheriting property is rare. Women also often tend to renounce their claim to natal property that they are entitled to in order to

1 This is particularly troublesome since, in large part due to migratory patterns in which men, more frequently than women, seek employment outside agriculture, women account for between 60 and 70 per cent of all farm labour (de Brauw et al., 2012).

2 A first reform of the Hindu Succession Act, in 1956, had guaranteed equal inheritance rights for sons and daughters, but exempted agricultural land (Ramachandran, 2006, 4).

maintain good social relations with their brothers: in particular, women may accept a lump sum payment in lieu of their property rights, in order to preserve visitation rights to the parental home. Customary forms of tenure should therefore not be idealised: it would be wrong to think of them as inherently equitable and inclusive (Feder and Noronha, 1987).

4 Alternatives to the Commodification of Land through the Globalisation of Property Rights

The recent wave of large-scale land acquisitions has undoubtedly increased the risks of eviction of land users who lack adequate legal protections, and has made the prospects of landless or quasi-landless rural households even more dire. However, it does not follow that the rolling out of titling schemes shall produce the magical outcomes they are sometimes touted for. Rather, the remarks above suggest that we may have to make a clear distinction between protecting the rights of land users against the risks of eviction, which we must, and transplanting Western concepts of property rights into contexts for which they may be ill-suited. At a minimum, protecting the rights of poor rural households requires ensuring security of tenure by the registration of land-use rights and by the adoption of anti-eviction legislation, combined with the provision of tools—such as legal aid, legal literacy training, and access to legal advisors—to ensure that formally recognised rights can be effectively vindicated (Cotula and Mathieu, 2008); and by strengthening the capacity of land administrations and fighting against corruption in these administrations. However, as illustrated for instance by the certification process that took place in Cambodia in 1989—in preparation for the withdrawal of the Vietnamese army from the country, a process during which farmers were granted land certificates confirming that they had applied for title (Dwyer, 2015)—neither certification (or registration of use rights) nor anti-eviction laws require that land be commodified; neither require that fully fledged property rights should be granted as if this were the single institutional means by which security of tenure could be ensured.

Anti-eviction laws should be conceived as the domestic implementation of the international standards set by the Committee on Economic, Social and Cultural Rights in its work on evictions (CESCR, 1998) and by the Special Rapporteur on the right to adequate housing when he presented the Basic Principles and Guidelines on Development-Based Evictions and Displacement to the Human Rights Council (Special Rapporteur on Adequate Housing, 2007).

The main purpose of such laws is to impose on public authorities or on private landowners the condition that, when they seek to evict land users from land that they occupy—provided at least that the land users have been occupying the land for a certain length of time—certain procedures are complied with. Classic examples among these requirements are that the occupiers are given due notice, that no eviction can take place without a negotiation, that the occupants must have options for relocation, and that, in order for their resettlement to be possible, they are provided with financial support (UN-Habitat, 2003). Of course, as illustrated by Chapter 10 (Cismas and Paramita) of this volume, for such laws to be effective the beneficiaries should have access to remedies in cases of violation, including access to legal aid, which in many developing countries is weak or non-existent. Provided the institutional support is adequate, however, anti-eviction laws can ensure a certain security of tenure without requiring the attribution of full property rights as would occur through a classic titling process (Santiago, 1998).

But other instruments may also be used. The adoption of tenancy laws could protect tenants from eviction and from excessive levels of rent or crop-sharing. Thus, for example, the tenancy laws in the Indian state of West Bengal, which a left-wing administration revived in 1977 in what was known as Operation Barga, provide that if tenants register with the Department of Land Revenue, they are entitled to permanent and inheritable tenure on the land they have sharecropped against payment to the landlord of at least 25 per cent of the output as rent (Banerjee, 1999; Banerjee et al., 2002). Such laws may also allow the heirs of the tenant to occupy the land if the tenant dies, and provide the tenant with a right to preemption if the landowner wishes to sell (ideally, at lower than market prices); they may provide for joint titling, as tenants, of both husband and wife in order to protect widows from the risk of eviction; and they could ensure that the tenant will be allowed to remain on the land if the property changes hands. Tenancy laws are often circumvented by unscrupulous landowners who tend not to register their tenants in order to avoid having to recognise their rights. Where such laws have been effectively enforced, however, they have been shown to increase productivity, both because they improve the crop-share of tenants and thus are an incentive to produce, and because they encourage productivity-enhancing investments in land, because of the increased security of tenure that benefits the tenant: in the 2002 study cited above, Banerjee et al. (2002) estimate that the revival of tenancy laws in West Bengal led to a 28 per cent increase in agricultural productivity.

Finally, where landlessness or near-landlessness are strongly correlated with extreme poverty, access to land should be improved by agrarian reform schemes. The international community has acknowledged the importance

of agrarian reform 'mainly in areas with strong social disparities, poverty and food insecurity, as a means to broaden sustainable access to and control over land and related resources' (ICARRD, 2006). A more equitable distribution of land can have strong poverty-reducing impacts: cross-country comparisons show that 'a decrease of one-third in the land distribution inequality index results in a reduction in the poverty level of one-half in about 12–14 years', a level of poverty reduction which could only be achieved after 60 years of 3 per cent annual agricultural growth in the absence of changes in land distribution (El-Ghonemy, 2003). Progress in the reduction of rural poverty in the Asian region has benefited largely from this approach: post-World War II land reforms in Asia have resulted in a 30 per cent increase in the incomes of the bottom 80 per cent of households while leading to an 80 per cent decline in the income of the top 4 per cent (Penciakova, 2010, 8). This was what led those drawing up the Cambodian 2001 Land Law to include a provision for 'social' land concessions intended to benefit the landless rural poor, though this part of the law remained essentially a dead letter (Dwyer, 2015; Müller, 2012, 3).

In addition to its economic function in stimulating growth and reducing rural poverty, a more equitable access to land for the rural poor contributes to social inclusion and economic empowerment (Quan, 2006, 3). It improves food security, since it makes food more easily and cheaply available, providing a buffer against external shocks (Carter, 2003): as illustrated by the case of China, access to even a small plot of land provides an almost complete insurance against malnutrition at the household level (Deininger and Binswanger, 1999, 256). Land distribution schemes also support the growth of small, family-owned farms, which often can use the land in more sustainable way, and contribute to rural development because they are more labour-intensive. More equitable distribution of land and the development of owner-operated family farms is thus desirable on both efficiency and equity grounds (Deininger and Binswanger, 1999, 248). Where rural areas face high unemployment and under-employment of labour and relative scarcity of land, it is sensible both from an economic perspective and from a social justice perspective to raise land productivity rather than to try to increase labour productivity. Such land redistribution schemes will fail to produce such impacts, however, unless the beneficiaries are supported in their ability to use the land productively, and to achieve decent incomes through farming. Indeed, Michael Lipton warns of the risk that land redistribution schemes may benefit primarily those operating larger farms since they can more easily obtain bank loans and thus use land productively, whereas those operating smaller farms may be led into distress sales or be tempted to sell off land (Lipton, 2009, 25). Others have estimated that improving access to credit, access to markets, and rural extension, can

account for 60–70 per cent of the total costs of a land reform, thus exceeding the costs of acquiring and transferring the land (Palmer et al., 2009, 31).

A final comment relates to the framing of the debate on land redistribution schemes. In the past, the discussion of land reform was discouraged by a strong ideological divide between the proponents of market-led land reforms and those advocating state-led land reforms. In general, the arguments of the former are based on the principle of a willing seller and a willing buyer negotiating transfers of land at market prices, a relationship in which the role of the state is primarily to provide a regulatory and institutional framework ensuring a fluid market for land rights and to support the access of the poor to credit in order to allow them to enter such markets (Deininger and Binswanger, 1999; World Bank, 2007, 141–147). In contrast, state-led land reforms generally include compulsory expropriations from the owners of large quantities of land in the name of social justice objectives, in principle against a compensation that may or may not correspond to the actual market value of the land concerned. While market-led land reforms are defended as more economically efficient—as land, it is supposed, shall go to the most efficient users, who can use it most productively—state-led reforms are sometimes seen as the only realistic possibility in the face of social inequalities so marked that the state cannot compensate for them; but they also have been associated with authoritarian regimes, and they are seen as exacerbating social and political conflict to such an extent that they may ultimately prove counter-productive. In fact, however, this opposition is misleading. There are many ways in which the state may promote a more equitable access to land, ranging from the taxation of land left unproductive by the owners of large quantities of land to progressive inheritance laws, and from subsidies to smaller production units to ceiling laws that impose limits on how much land can be owned by a single individual (El-Ghonemy, 2003). Classifying the various instruments that can be used into two groups unnecessarily transforms what should be a pragmatic search for the most optimal mix in specific contexts into an ideological discussion in which participants adopt postures that make the emergence of a consensus less likely (Borras Jr. and McKinley, 2006; Borras Jr. et al., 2007).

5 Conclusion

Although the formalisation of property rights has been widely promoted as a safeguard against the threat of expropriation in the current wave of large-scale acquisitions and leases of land, it is important not to confuse security of tenure, which is certainly of considerable importance to rural households,

and the creation of markets for land rights, which in a dynamic perspective may not be advantageous to them. The role of property rights in the debate on 'land grabs' has therefore been highly ambiguous: while such rights are seen by some as a key to avoiding massive disruptions, they have also been denounced as legitimising increased land concentration in the hands of the elites or potential buyers with the highest purchasing power. As seen in Section 4 of this paper, there is nothing inevitable in this trade-off. Security of tenure may be protected using a number of tools, without necessarily having to result to fully fledged property rights.

For rural households that depend on agriculture for their livelihoods, security of tenure ultimately should be understood as the right to live decently from farming. This presupposes access to land, and protection from eviction; but it includes much else in addition. Indeed, policies that promote a more equitable access to land are futile, and may in some scenarios render a disservice even to their intended beneficiaries, unless they fit under broader schemes for rural development. Even in regions where the pattern of land distribution is highly unequal and where hunger and malnutrition are closely correlated with landlessness or quasi-landlessness, simply redistributing land will not suffice. In order for such a reform scheme to be sustainable, the beneficiaries must also be supported by comprehensive rural development policies supporting smallholders and improving their ability to compete against larger farms, or the positive redistributive impacts may be significantly eroded.

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