REPORT

Context in land matters

The effects of history on land formalisations

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Abstract

Formalisation has become a widespread tool for state administrators and managers of land to document, legalise, normalise, and make legible to themselves land rights on the ground. Formalisation also serves to govern land transfers under the capitalist political economic conditions dominating global interactions today, even those in current or previously socialist regimes. Contrary to claims that formalisation programmes and practices can simply travel and be applied equally well in any nation-state, we argue that historical contexts matter, in two critical ways. First, past forms of land formalisation, whether implemented under different or similar political regimes in a single national territory affect various social groups differently. The historical, geographical, and social contexts within which new property rights are implemented have material and differentiating effects. Second, the 'social values' of land are often not taken into consideration by promoters of land formalisation, in part because of the assumption that land needs to be made into a commodity with commonly accessible mechanisms of transfer. Yet the social values of land are precisely what is not commodifiable and cannot help but influence how, under what conditions, and to whose benefit formalisation will succeed. History matters, and how it is told matters equally; formalisation has never benefited everyone equally, despite the exhortations of programme developers, ideologues, and idealists.

1. Context in land matters: Access effects and history in land formalisation

This paper considers the influence of context on the outcomes of land formalisation. We examine how contemporary and earlier forms of land formalisation, some starting as early as the colonial era, have affected often disadvantaged social groups: ethnic and racial minorities, women, and land users who seek their livelihoods through mobile practices such as pastoral work, swidden cultivation, and migrant labouring. While drawing our examples from selected African and South-East Asian nation-states, the paper addresses questions that are historical, yet fundamental to understanding how formalisation unfolds in contemporary contexts. We sought answers to questions such as 'How have institutions governing access to land been formalised over the last century and a half?', 'How have conflicts over land control, access, and use been affected by formalisation?', 'Who were the beneficiaries or losers when land management and ownership institutions were changed?', and 'How did early practices and ideologies of governance, including colonialism, nation-state formation, and non-capitalist political systems, influence expectations and practices toward land and livelihoods of diversely positioned subjects?' Land continues to have profound and diverse sociological and psychological meanings for its tillers, owners, and aspirants. Formalisation has the potential to affect social and socio-environmental relations far into the future; a historical approach can help assess new initiatives, literally putting them into context.

Following Hall *et al*. (2011: 28), we define formalisation as, 'the recognition and inscription by the state of rights and conditions of access within specific boundaries'. That said, 'land formalisation', as it has been used since the turn of the twenty-first century, has generally meant two things. Formalisation is, first, a technical mechanism for registering ownership rights with state authorities, usually a step toward commoditising land or instruments of access to land, enabling parcels to be bought, sold, mortgaged, leased or otherwise transferred through financial transactions in markets. Second, in that process, formalisation establishes or re-establishes the rule or authority of state institution(s) over land administration and the rules governing all transactions and allowable transfers of rights (Weber 1978, Lund 2008). This is accomplished by creating titles, maps, or other documents of formal, and written, recognition for parcels or tracts of land, granting rights and assigning responsibilities to the recognised holders of the land, and administering the land through a formal state organisation, such as a Ministry or Department of Lands, Interior, or Natural Resources.

Most nation-states today administer land, managing transfers, means of holding, and monitoring land uses, through a variety of property and governance forms: for individuals or groups, as private, common, or state property, or in trust for the nation's citizens. State institutions make and enforce new laws and rules to supervise practices of buying and selling, to transfer land or provide access to land through sale, gifts, or inheritance. They determine permitted land uses through zoning or ownership categories and maintain records proving ownership and taxation, and documenting various public and private transactions. Many of these administrative procedures also create state territories—jurisdictional spatial zones of state authority over land. State territorialisations can take many forms and involve other land management institutions or individuals. They are also in constant tension with each other and with land or land-based resource users, even after territories have been bounded and demarcated or legislated (Vandergeest and Peluso 1995, Paasi 1996).

Our discussion of formalisation refers primarily to formalisations that have been initiated, legislated, or decreed at the level of *national* states, although they may be implemented or administered

through state or provincial-level authorities. Some of these formal land controls were first conceived and applied as *colonial* state initiatives, although we recognise that colonial territories of land administration did not always map cleanly on subsequently constructed nation-state territories. The kinds of land formalisation we address in this paper are those in which government records become the ultimate legal evidence of land rights and rights-holders. Although sometimes non-territorial rights, such as a timber concession's rights to harvest certain trees, are associated with plots of formalised, registered land, boundaries drawn on the land (or its proxies in maps and images) generally encompass and define the limits of the non-territorial components, rather than the reverse, as we show in examples below. The 'governance' of land refers to state authorities' disciplining of people's behaviour in regard to their rules concerning the various parcels and tracts of land, or of state subjects' self-disciplining resulting from the state's bio-political controls, that is, 'the conduct of [their] conduct' or 'governmentality' (Foucault 2007).

Formalisation has become a widespread tool for states to document, legalise, normalise, and make legible to themselves land rights on the ground, for purposes of transactions under the capitalist political and economic conditions that dominate global interactions; they also rationalise in-state transactions and transfers of land according to the same (predominantly Western in origin) global standards. Occasionally, formalisation takes place under socialist and other non-capitalist state regimes or under post-socialist and transitioning regimes. We use historical and contemporary examples from South-East Asia and Africa to examine some of the processes, problems, and surprises experienced in implementing formalisation. States' attempts to formalise land rights in these regions date back to the nineteenth century, the era of widespread territorial colonialism in the colonies of England, France, and The Netherlands. The break-up of European colonial empires in the second half of the twentieth century gave rise to a plethora of new nation-states under socialist, communist, authoritarian, capitalist, and other regimes. We argue that earlier experiences of territories within contemporary nation-states continue to affect formalisation dynamics, and thus have important lessons to teach us about what we might expect in terms of the processes, problems and surprises that emerged in implementing formalisation.

Formalisation has become a common development intervention, and, in many cases, a prerequisite to international aid, loans, or grants. It is an intervention that has been promoted or encouraged by international governance and funding institutions, including United Nations organisations, the international development banks, the International Monetary Fund, the European Union, and many bilateral aid donors. Due to sovereignty doctrines governing national territories and to 'land' being an immovable resource that falls within globally recognised national territories, international institutions work through national-level institutions on issues pertaining to land, its formalisation, or its commodification. Nevertheless, formalisation of land or other resources has been required of some nation-states being subjected to structural adjustments, and is strongly touted by the World Bank and other international lending agencies as a poverty-alleviating measure (de Soto 2003, Deininger 2011. Many analyses of formalisation's capacity to reduce poverty, however, have reported the fallacy of such a claim, and the failure to achieve that desired objective (see, e.g., Bues 2011). Researchers have also shown that formalisation is more likely to create poverty by facilitating and finalising smallholders' losses of their land through willing transfer, violent seizure, or forced sale in the wake of even minor financial hardships or shocks (e.g., Bruce *et al*. 2007, Borras 2008, Borras and Franco 2011, Li 2011). Even the strongest proponents have had to recognise the overwhelming systemic and contextual risks of land formalisation despite the best of intentions (Deininger 2011, is particularly telling).

Formalisation of property rights guarantees neither fair nor equitable distribution of land and land-based resources. Rather, it is no more than an instrument of registration, a technical fix that empowers the state and provides state backing to the formal rights holder. This is one reason that we caution against basing all property rights in land-based resources on a single owner, single-use model; nor do we think all rights can or should be subsumed under territorialised forms of management alone. Our review of the literature, not all of which can be adequately represented here, refutes the claim that a commonly applied formalisation rubric can benefit all people equitably. Rather, no single process or concept, not even a robust idea with poverty alleviating capacities (which formalisation is NOT), can guarantee the same benefits and results in any and all historical, political, or environmental contexts. The outcomes of land formalisation programmes—the variations in their effects—differ *because of* the varied historical, geographical, and social contexts within which they have been applied. Any formalisation programme will articulate with, change, or be changed by pre-existing legal, political, social relations and institutions, as well as with the differences characterising them. New waves or forms of formalisation will inevitably be changed and reinterpreted through practice by those subjected to its rules and constraints, through their own diverse memories and experiences. Thus, answering the question of whether formalisation is a potential solution to resource or land conflicts requires contextualised, empirical and historical research. Neither the law nor any social relations operate in a vacuum. The answer, however, lies not in formalisation itself, but in how and under what conditions it is applied.

Strangely, the promoters of land formalisation rarely, if ever, heed what has been called 'the social value or functions of land', 'the meanings of land', or the 'fictitiousness of land as a commodity' by philosophers, theorists, and policy analysts as diverse in their political leanings as Karl Polanyi, Max Weber, and Karl Marx, by national leaders such as Thomas Jefferson, Emil Zapata, and Commandante Marcos, or by promoters of land reform in Indonesia, such as President Sukarno and Professor Gunawan Wiradi.

Land has always been imbued with great meaning under any and all political economies. The United States of America was built on Jeffersonian ideals of smallholder land ownership (the 'yeoman farmer'), even though the nation's founders did not shy away from the commoditisation of land or from enslaving and commodifying human bodies (Carney 2002). Land was important symbolically in constituting the nation of settlers (and dispossessing the native inhabitants) and in creating white male settlers (and later black male former slaves) as voting citizens of the nation. The ideal of individual land ownership was fundamental to the revolutionary formations of nation-states across the Americas, even amongst people who did not own land. The American and French Revolutions inspired anti-colonial, anti-feudal revolutions that were fought around the world to ensure the citizenry's control of land. Socialist and communist regimes generated different ideas about how land would be owned and whether or how it could be commoditised; nevertheless, broad-based access to land was a foundational, and motivating, principle in their revolutions and in their governing. As the expression '*tierra o muerte*' (from the Mexican Revolution) demonstrated, land is and has been one of the most emotional 'things' with which 'people' have been imbricated (Foucault 2007). Yet the influential texts of de Soto (2003), Deininger (2011) and others promoting land formalisation presume simplistic and straightforward relationships between land registration, poverty alleviation, and the production of capital, without recognising land's much broader meanings outside the market.

Wherever we look, the political economy of land is saturated with complex moral economies, whether or not rights to land have been formalised. To many peoples and their most poetic representatives, land has a mystical or sacred quality. Of the original 'fictitious commodities' that

Polanyi (1944) spoke about (i.e., land, labour, and money), land, as a 'thing' that could be bought and sold without emotion or ceremony, was a more complex and 'weird' notion than even the commodification of human labour or money. As Polanyi showed, when subjected to unregulated mechanisms of capitalism, these fictitious commodities of land, labour and money will be destroyed. 'Paradoxically enough, not human beings and natural resources only but also the organization of capitalistic production itself had to be sheltered from the devastating effects of a self-regulating market' (Polanyi 1944: 138).

Contrary to its proponents' expectations, land formalisation is becoming a means of enabling wealthy international and elite domestic actors to acquire land and benefit from its productions or from speculation (Deininger 2011, de Schutter 2011, Hall *et al*. 2011). For its intended beneficiaries, formalisation has been neither an empowering move nor a poverty-alleviating move. The implementation of land formalisation has turned out to be highly complex; it reinforces or creates new inequities and incites protests that may turn violent. In theory, formalisation facilitates the legibility of social relations on the ground (Scott 1998), and can be a means of writing more equal rights (e.g., for women or ethnic minorities) into national law. The on-the-ground actualities rarely match the formalised paper record (Hall *et al*. 2011).

Reports on formalisation by land administration institutions and their supporters tend to assess the legal formalities, acreage, and other dimensions of the process that can be accomplished at a distance. At the 2011 Annual World Bank Conference on Land and Poverty, for example, the Millennium Challenge Corporation (MCC) claimed that '1,055,000 hectares of rural land had been mapped ("cadastered") and 39,600 rural parcels legally formalised, while 2,500 urban parcels had been legally formalised'. By simple metrics of absolute territory formalised, the extensive nations of Brazil, China, and India led the way in the creation of new, national state-administered private property rights, according to the MCC. The MCC's presentation did not mention historical formalisations or transformations of land rights that had occurred in these countries; nor did it examine the goals of implementation, or any of the problems faced in implementing formalisation. The presenters never revealed that the concepts, laws, and practices of state-authorised formal property rights and territorially zoned lands were not new to any of these three countries. They also did not follow up on whether the land formalised had remained in smallholder hands or been consolidated by domestic or international interests, or whether the products (including capital and other financial instruments) of the formalised land had benefited the formal landowner or were exported, or whether the land was being held for speculation or abandoned. These questions are of fundamental importance to proponents of land formalisation hoping to generate positive local development and economic benefits through formalisation, particularly in light of statistics reported in public media consolidated by the International Food Policy Research Institute (IFPRI) on land 'exchanges' or 'grabs': that between mid-2007 and 2009, more than 10 million ha were exchanged between Northern and Southern or across Southern countries (von Braun and Meinzen-Dick 2009).

We purposely did not set out to find the most accurate statistics on land formalisation for this study; other scholars are documenting those. Instead, we focused on what has been reported in the literature about outcomes of the sedimented and dynamic histories of formalisation and re-arrangements of property rights in and access to land. Not much has been written on these dimensions of current formalisation programmes; this is partly because the definitions of formalisation are so narrow. We turn to earlier periods and patterns of formalisation, under colonialism, nation-state building, socialism, and all the 'posts' that go with those eras. Which groups have been affected negatively and which have benefited? How and why have various actors shaped or tried to influence the shaping of formalisation programmes? What have been the territorial,

conflictual, differentiating, and other effects of formalisation programmes? In what ways have the contexts, assumptions, and interests involved in implementing formalisation programmes affected their outcomes, such as those debated in the context of current 'land grabs'? (see, e.g., Borras and Franco 2011, Deininger 2011, de Schutter 2011, Hall *et al*. 2011).

The remainder of this report discusses the difficulties of defining land formalisation, and demonstrates how it has played out under selected historical and contemporary contexts, including territorial colonialism, post World War II nation-state building, and socialism and its aftermaths. Although our analysis is not a systematic or comprehensive comparison, we draw on examples from Kenya, Tanzania, Cameroon, Ethiopia, Indonesia, Cambodia, Vietnam, and Thailand. In the conclusion, we reconsider the differentiating livelihood effects of formalisation, the problems that seem to be perennially associated with it, and the rare instances where fewer problems have emerged.

2. Formalising land rights: The need for context

One difficulty with trying to compare the effects of land formalisation across nation-states has to do with the varied bases for governing land. Each nation-state as part of its constitutional philosophy defines how land within the territory of the nation will be governed and administered. New political economic forms are always emerging that challenge generalisations across states. One obvious, and major, difference in forms of formal land administration has been that between communist or socialist systems and states with capitalist economies. Under socialist regimes of the past, such as those in Ethiopia, Kenya, and Tanzania, the nation's land was owned by the people and managed by the state through various non-market mechanisms; land could not be bought or sold. Nation-states with market economies generally have full or partial land markets, mixed up with state administration of some lands held in 'trust' for the people of the nation. Yet, in China and Vietnam, for example, socialist governments are maintaining communist party [CP] control over the state while reintroducing markets, including land markets. Under different regimes of governance, formalisation is necessarily defined and plays out differently, given the different institutional conditions and political-economic constraints affecting both national political economies and legal-constitutional constraints of the broad categories of formalised land.

Even within a single nation-state, territory is organised into various land use zones, each of which is subject to the different rules and expectations governing land management, mechanisms of access, and the ability of individuals and groups to 'own' land and to exclude others from access to it. In other words, diverse state territories are governed by different, and mutable, bundles of rights and philosophical underpinnings. For example, administrative areas zoned as national forests, national parks, or conservation reserves are different kinds of 'political forests', and, across nation-states, are managed by a variety of government institutions (Peluso and Vandergeest 2001). National forest lands are divided into different political/jurisdictional categories, including but not limited to production forests where private or state enterprises can lease concessions. Protected forests generally allow low-impact uses or preclude most users from access. In community forests, access rights are generally allocated to or determined by adjacent communities. In various nation-states, the rules or guidelines governing access, conversion, transfer, use, and management of land under these general jurisdictional categories vary.

Given this variety of rules or even 'types' of land, and the number of countries around the world engaged in formalising land, comparison is obviously a difficult prospect. Every nation and its various regions have different political and cultural histories, rendering generalisation all the more difficult, even where common models of land formalisation are being implemented. For example, which European coloniser occupied a contemporary nation-state in the Global South is significant because the legacies of colonial land administration and resistance to it extend beyond the colonial era. At this level of analysis, other significant influences include the legacies of political regimes in place since the establishment of the nation-state, the specific ecologies of the lands being formalised, and whether all or parts of the nation-state have engaged in political violence within or outside its territorial borders. In addition, formalising legislation rarely considers the ways that commoditising or formalising private property can affect the non-market values associated with land. In other words, the simple passing of formalising laws does not erase history or the feelings of entitlement generated by prior governing institutions and ideologies.

The recent formalising work of the World Bank, much of which is associated with the restructuring activities of the International Monetary Fund (IMF), follows principles Hernando de Soto (2003), laid out in his book, *The Mystery of Capital*. The World Bank has made land formalisation one of its most important programmes, and, as mentioned above, makes sweeping claims about its potential to 'capture the dead capital of untitled properties held by the poor', to paraphrase de Soto (2003); see also Deininger (2011). Nevertheless, despite his 'discovery' of 'dead capital' in the collective assets of the poor, De Soto's principles are not new. They follow long-established principles of private property formation and land governance under capitalism that emerged in Europe centuries ago. Moreover, they have been highly contested both in terms of their internal logic as well as the empirical evidence at sites where they have been explicitly tried in the last decade (see, e.g., Bruce *et al*. 2007, Bromley 2008, Bues 2011, de Schutter 2011, Li 2011). As James Scott (1999) has pointed out, states prefer legibility, i.e., simple forms of management and conceptualisation. When land 'assets' within a nation-state's territorial boundaries are formalised, homogenised, and made legible to the state and managed by it, the state is expected to 'see' more clearly; however, it can also earn revenues: from registration, transaction fees, and taxes. Such formalisation generally criminalises previous mechanisms of claims-making and changes the terms of and channels for 'unauthorised practices', further empowering state authorities in the process (Peluso 1993, Agrawal 2001). However, although documents such as deeds and land titles are more legible in government cabinet drawers or on computers, they are often less efficient at explaining continuing conflicts over registered pieces of land. Although some of the key goals of the World Bank [WB] formalisation programme include eliminating conflict and erasing overlapping claims and uses of land, these are exactly the problems that continue to motivate serious land disputes after formalisation (Durand-Lasserve and Selod 2007, Bromley 2008, Sjaastad and Cousins 2008, de Schutter 2011).

Why does formalisation lead to conflict, rather than solving it, as its promoters claim? Land titling, especially when done to identify and empower a single user/owner, superimposes formalised land rights as a new layer of claims atop pre-existing ones. The myriad ways these claims manifest before and after titling are almost never given sufficient consideration—simply because they complicate the formulas and make implementation too difficult for the implementers. Yet practices associated with rights recognised by earlier authority regimes continue even when new formalisations render them criminal acts, even when the formal consequences are severe. Time and time again, scholars have documented that the shifts in property rights do NOT in and of themselves alter historical memories or feelings of having had prior rights in land usurped by formalising practices (Lund 2006, Lund and Sikor 2009). The formation of national parks, forests, and biosphere reserves without the acquiescence of residents and previous land users is only one of the more recent examples we can offer (Peluso 1992, 1993, Neumann 1999, Brockington 2002, 2008, Kelly 2011). Whether private or state property, criminalisation of previous practice by new laws and legal codes, of course, produces criminals and crime, a fact that, since early European transitions to capitalism, has been documented time and time again—with the creation of both private and state properties (Thompson 1975, Hecht and Cockburn 1989, Peluso 1992, Schroeder 1999, Peluso and Vandergeest 2001, Greenough 2003, Federici 2004).

In sum, land formalisation for the exclusive access of individuals, households, or corporate units is a *political*, not merely a *technical*, act; it has distributional effects. Even a rudimentary knowledge of any country's history suggests that heterogeneous claims are more the rule than homogeneous ones. A single piece of land can have many different overlapping claims to its use; defining a single 'owner' generates conflict. As a result, the formal instruments—the cadastre, the map, the registries, the computer files—rarely reflect what is actually happening on the ground (Hall *et al*. 2011).

3. The effects of ‘national’ histories on contemporary land ideologies and property regimes

Most nation-states in the Global South experienced colonialism by European powers or the US, some for several hundred years. In South-East Asia and Africa in particular, many of the nation-states in which land formalisation projects were implemented recently have been constituted only since World War II. Some of these have experienced considerable periods under socialist or communist regimes, and some of these, further, have abandoned portions of their foundational legal and institutional framings to embrace or engage with capitalist markets. In addition, former member states of the Soviet Union have experienced diverse transformations in their land relations since the fall of the Berlin Wall.

One of the few ideas that the world's nation-states share is that ‘national sovereignty’ legitimates their governing authority over the territory encompassed within their land-based boundaries. Yet, definitions of national territory vary widely. The multiplicity of national territorial claims extending 12 or 200 miles from their coastlines, the inclusion of water bodies circumscribed or defined by archipelagos and other island configurations, the extension of ‘extra’-territorial rule over citizens living in another nation-state's territory, all suggest a convoluted mix of nation-state sovereignties, histories, and geographies, rather than commonalities that allow for common means of formalisation to produce the same effects.

As we argue, site-specific histories matter profoundly, at multiple scales and through various domains of law and everyday practice, as well as in individuals' or institutional memories (Sjaastad and Cousins 2008). Just as historical narratives influence conceptions of sovereignty and economy, they also influence the cultural politics of what are considered ethical practices in allocating and adjudicating rights to land. In this section of the paper, we look in more detail at some of the effects of land formalisation under colonial, national, socialist, and post-socialist regimes. We trace several instances of nation-states whose complex histories illustrate the legacies of previous political economies on contemporary formalisations and the differentiating or equalising effects of various land codes. This approach is also suggestive of the ways that both revolutionary and evolutionary transitions can affect the implementation and effectiveness of formalisation. Timing matters: When, in relation to other programmes of formalisation and in relation to a nation's own historical regimes, is a formalisation programme put in place?

4. Colonial interventions: First forays into formalisation

Scholars have long documented the profound legacies left by colonial regimes on nation-states' legal and institutional mechanisms for claiming, holding and administering land, in a literature far too vast to review or even cite here. Colonial administrations were often the first to formalise land administration as a step in the capitalist development of their colonised territories, some through the development of general land codes based on common or civil law, others through legally pluralist systems. Among other effects of these imposed formal legal systems to register and administer land, colonial land administrations often contributed to the production of static ethnic, racialised, and territorial identities of their subjects. By creating laws applicable to particular groups of people according to their alleged places of origin or places of settlement at the time of colonial contact, and their 'recognition' of racially/ethnically 'different' people as 'exceptional', they set in motion the dynamics of cultural and territorial naming and claiming that have spiralled into the future (see, e.g., Stoler 1995, Li 1999, D. Moore 1999, Povinelli 2002). Thus, it is important to try and understand how colonial ideas interacted with precolonial practices of land access and control, and with conflicts developed before, and in the wake of, colonial conquests.

The variety in colonial interventions that produced territorial and racialised associations of colonised peoples is too extensive to document in detail here, but we have written about these in regard to the construction of 'political forests' and 'customary rights' elsewhere, as have other authors for various parts of the world (Sivaramakrishnan 1999, Peluso and Vandergeest 2001, Vandergeest 2003). However, a brief example from colonial Indonesia illustrates one of these. In the Dutch colonies that later were consolidated into the nation-state of Indonesia, law was regulated by legally plural systems based on ascribed 'races', thus racialising many aspects of everyday life, including land ownership (Furnivall 1944, Hooker 1978). In The Netherlands East Indies (NEI), legal pluralism recognised certain people as 'indigenous', or in the words of their time, 'natives', (*'Inlanders'* in Dutch), and others as 'aliens' or 'foreign'. Besides Europeans, most famous and numerous among the aliens were people from the countries now known as China, India, or Yemen. NEI residents of partial Chinese, Indian, Yemenese, or Arab descent were considered aliens if their fathers had been of those ethnicities, even if their mothers were 'native'. Thus, a gendered dimension entered into the ethnicities and racialisations of these named groups, one which carried over into the domains of the state's recognising or authorising land claims as subject to customary rights.

Names and categories were crucial, as no 'aliens' were allowed to own land in the NEI. This prohibition was believed to benefit the 'true natives', deemed 'sons of the soil' (another term that was sexist in English but illustrative of colonial authorities' focus on the male's ethnicity in any household. In Indonesian, the term '*pribumi*' does not delineate gender). Creating certain territories as customary land and recognising all land in the colony as the territorial legacy of the true natives (even some 600 different language-speaking 'native groups') was believed to protect them from the allegedly more industrious, possibly rapacious, aliens cum migrants cum outsiders who had risked long, uncertain journeys to make their lives and fortunes in the islands then occupied or claimed as part of the NEI.

However, the concept of customary land was as much a detriment to the locals as it was a benefit, a double-edged sword. It contributed to 'the myth of the lazy native' (see, e.g., Stoler 1995, Li 1999, Povinelli 2002) and to the impression that the industriousness of foreigners was necessarily

competitive with the efforts of natives. The focus on the father's ethnic line for ascribing a racialised category of legal practice contributed to later legal forms (colonial and post-colonial) that put property in the name of the household head, a position normalised as the husband/father in the household (if he died, the widow could become household head and usually inherit property). In addition, colonial-era regimes of ethnic, racial, and gender recognition influenced how local people came not only to see differences among themselves, but also to normalise differences and rights through legislation and practice. These histories of racialised and gendered land rights carry over into current regimes of land titling by continuing old rifts or creating new ones along similar lines amongst people who disagree with how land has been meted out.

Colonial governments willing to recognise at least some pre-existing land regimes often chose which groups among conflicting claimants could control jointly used lands or overlapping claims on ancestral lands. Where colonial formalisations included 'recognising' some forms of collective property rights, other users' competing or complementary land claims could be lost. In Kenya and Tanzania, for example, British colonials adopted legally pluralist approaches to land rights. Many transhumant pastoralists had long-standing arrangements with settled agriculturalists along their grazing routes, and territorial claims were often seasonal and complementary, with both types of uses over the course of a year (Alatas 1977, Homewood *et al*. 2004). Yet the British viewed overlapping rights as complicated to understand, administer, and register. Pastoralists have suffered as a result.

In Kenya, Maasai pastoralists' land uses, and colonial rulers' interpretations of their activities as productive of land degradation eventually led the British colonial government to create Maasai reserves, which the Kenyan national government called 'group ranches' after independence. The reserves were intended to formalise and recognise specific territories as Maasai, increasing herd productivity in the process, and to control (at least to limit the extent of) what colonial scientists perceived as degradation, while sedentarising these pastoralists used to traversing hundreds of miles. Maasai travelled long distances in adapting their grazing practices to the conditions created by the arid climate, seeking water and food for their herds. By allocating separate reserves for Maasai and settled agriculturalists, the colonial state expected to make their land governance practices more legible and to render the spaces and people more 'governable' (Scott 1998, Watts 2003). State attempts to more permanently settle the mobile Maasai, and to limit their herds' access to land only within the reserves, constituted them as a territorial people, creating new, fixed notions of Maasai territories. Sedentarisation, however, required Maasai to change land and resource rights, in part because of the ways in which their practices on the land had to change in their more constricted work and living spaces. Although reserves were large, they were not as extensive as the vast distances over which the pastoralists had previously led their herds.

These colonial land formalisation policies and practices, and extensive changes in the precolonial landscape, have had reverberating effects into the present, through several national regimes. With their sedentarisation on the 'group ranches' after independence, Maasai experienced changes in their lives, livelihoods, and practices beyond the immediate effects of confinement to formally demarcated and recorded lands. Sedentarisation increased rather than decreased the pressures on the grazing resources within the group ranches, and intensified competition among some of the newly settled Maasai. Formalisation of land rights without addressing herd sizes (a more complex practice to limit and monitor) also opened the way for increased class differentiation; better-off herders kept larger herds on the common lands. Elites on some ranches thus created the kinds of scarcities associated with open access resources, i.e., degraded land, water, and grass. Such

scarcities were greater relative burdens on the owners of smaller herds. Some of the less-well-off Maasai pressured the government to individualise land rights within the ranches (Mwangi 2001). Widows also favoured the subdivision of land within group ranches because subdivision would allow them to become landowners by inheriting their deceased husbands' shares in the group ranch. Such arrangements would lend them greater independence and control of some resources within the group ranch (Hodgeson 2011). Nevertheless, sedentarising Maasai on group ranches often increased conflict and resource scarcity, and accelerated declines in the well-being of the people, their animals, and the land in the reserves, despite the colonial administrators' taking 'cultural factors' (e.g., the groups' collective grazing of extensive territories) into consideration.

Individualisation or redistribution of group-held rights, in this case to try and deal with the problem of unequal herd sizes confined to common spaces, can be seen also as an unintended consequence of collective land use's formalisation of a titled group ranch. Although individual aspects of collective resource use or sharing were not unknown to local property regimes before colonialism, formalisation changed them from temporary or short-term conditions of use to more permanent but not more beneficial or effective practices and principles. Prospective or intended land use in the wake of formalisation thus matters—especially in contexts where policy makers want to be understood as fair, democratic, or otherwise accountable to the land-holders. Kikuyu and Luo agriculturalists of Kenya already had forms of land tenure moving towards private or individual tenure before colonialism, but these had not been as important to other more extensive land users (Mwangi 2001). So-called 'communal' land tenures amongst [individualist] shifting cultivators also have some distributive characteristics in common with both pastoralists and more privatised or individual systems (Dove 1983).

Some colonial governments also left legacies of certain kinds of 'settlement' processes, meant here as the settlement of claims, a process to arbitrate among multiple claimants to specific plots or tracts of land before formalisation is set in motion (Peluso and Vandergeest 2001). Settlement processes were meant literally to determine who at the moment had the strongest prior claims to a piece of land. Settlement procedures often require(d) a public announcement of the dates that people should come to register their claims to plots in a specific location; announcements could be made in a newspaper or over the radio. In 1950s Sarawak, for example, after the Borneo territory had become a formal British colony, settlement announcements were made in the colony's newspaper, *The Sarawak Gazette*. Such announcements generally fell on blind eyes: What did or could they mean to colonised peoples, many of whom had no concept of land markets, especially where the idea that land could be owned or alienated and sold to complete strangers was anomalous? That claims had to be publicly made and a proof of claim presented to new and often distantly located government authorities, were even more bizarre concepts. Most people, except those well-connected or who had managed to become literate, did not understand what was about to happen—that is, that these newspaper announcements meant that new authorities would soon have the tools to control the locals' land (Hong 1986, Cramb 1992). As in Tanzania when land on Kilimanjaro was being commodified and subjected to new rules, most people did not realise that the process could sever their ties to this land forever (S. Moore 1986, D. Moore 1999, Neumann 1999). Unfamiliar circumstances and uncertain outcomes such as these caused land disputes to occur well after settlement processes were 'over'.

During settlement, or in the creation of a cadastre or other type of land register, records were made to allegedly create clear information on holdings for governments planning to tax the landholders. The Germans wanted to formalise land in order to more easily tax land transactions in Cameroon, but they were not alone in this objective (Harbeson 1971: 233, Coldham 1978: 93). In their colonies

in Africa and Indochina, the French were also eager to levy taxes—which they did, but mainly in the lowlands. The British in Africa and Asia, as well as the Dutch in the NEI, during the first global 'liberal' period, began taxing landholdings, and requiring payments in cash, not in crops, corvée labour, or other goods or services (Njoh 1997).

In Cambodia and Vietnam, then part of what was called French Indochina, the French favoured large landholders over smallholders, and granted large tracts of land through various mechanisms to French colonists or to Vietnamese collaborators, middlemen, or brokers. Similarly, local people who collaborated with the French in Cameroon were allowed to hold private property. By the 1930s in the Mekong Delta, a small group of landlords owned much of the land, and 80% of the cultivated land was farmed by tenants (Scott 1976). In the words of Charles Keyes (1995: 77), 'whether he be tenant, a sharecropper, or a wage labourer, the Vietnamese who worked land he did not own was a product of the colonial period'. Taken at face value, this statement demonstrates the land alienations and massive landlessness caused by formalisation and the creation of land markets.

In some Vietnamese villages prior to colonialism, access to communal rice fields had been rotated among the men in the village. Where colonial power took the least hold, some of these communal practices survived, but the French pushed for full privatisation of holdings, which led eventually to highly uneven land distribution. Just before the Geneva Accord was signed in 1954, some 3% of Vietnamese owned 52% of the land, while 60% of the farmers in North and South Vietnam were landless (Do and Iyer 2008: 534). In the south of Vietnam, during the war, the American-backed Republic of Vietnam government (1954–75) eliminated communal lands and other local property regimes, pushing for the privatisation of property. These moves did not endear the South's government and its backers to the majority of the poor and landless, pushing them closer toward the National Liberation Front (Sansom 1970: 66–69, 228–245, Kerkvliet 2006: 286). The National Liberation Front controlled whole areas of the south, where they proceeded to redistribute land. In response, in 1970, the South Vietnamese government launched the 'Land to the Tiller' programme, backed and funded by the US. Both in light of its previous strong defence of private property and landlords in Vietnam and its shift from Keynesian to Reaganist neoliberal domestic policies, the US's funding of this land reform (and a similarly successful one in South Korea) paradoxically provided support for the formalisation of private property. But this does not guarantee equity and is not necessarily the best basis for development. By 1975, some 1 136 705 ha, nearly half the rice-growing land in the South, had been redistributed and 77% of tenants became landholders. About 70% of the population in the Mekong Delta that same year were recorded as 'middle landowners' controlling some 80% of cultivated land (Do and Iyer 2008: 534, Dang 2010: 78-79).

In Java, a somewhat different situation came about under Dutch colonisation. Famous for their 'recognition' of customary laws and rights, the Dutch designated certain tracts of land in Java as customary land, and the rest was made available for lease by private and government entrepreneurs to produce plantations of export crops in the early nineteenth century. Instead of taxing land, they taxed labour and required villages to deliver certain quotas of crops (Fasseur 1992). In the best forest districts, teakwood was the product delivered by quota (Cordes 1881). Tax on the labour required to cut and deliver teak trees to the colonial resident was a tax levied only on landholders. These labour taxes could be so onerous that some village landowners chose to designate part of their privately held rice-growing land to be used as rotating 'communal' plots, thereby increasing the number of village residents with access to land, and increasing the pool of landholders eligible to provide corvée labour in logging (Peluso 1992). This is a clear example of how the formalisation of certain customary practices, as 'Customary Rights', changed or even invented these traditions

(Peluso and Vandergeest 2001). Villagers developed new customary practices to deal with the hardships imposed by individualisation and taxation.

These colonial-era practices provide examples of how identities connected with particular territories were created, reinforced, embodied, and mapped in colonised African and South-East Asian countries. The identity–territory–legal nexus played a fundamental role in colonial land administrations because most settler or territorial colonies were established with agricultural production and 'improvement' in mind (Li 2007). The dilemma historically, of course, is that shifting cultivators were not the only group that moved from place to place. Even the assumed-to-be-well-settled Javanese had histories of entire settlements moving because of wars, epidemics, or because one village strongman provided better protection than another (Fasseur 1992). Some of the 'customary lands' in Java and the NEI had only been converted to agriculture not long before the arrival of Dutch legal researchers (Pigeaud 1960, Dove 1985). In Kenya and Tanzania, colonial authorities were confused because Swahili speakers seemed to be too 'mixed' (or cosmopolitan!); they expected to find, 'pure Africans with a rural, "tribal mentality" who might be easily relegated en masse to a native reserve' (McIntosh 2009: 56 [citing Allen 1993: 4]). In [French] Cameroon, the racialisation process was political in a different way: Cameroonian (African) subjects in favour of or collaborating with the French colonial government were called '*assimilés*' and subjected to one set of land laws. Those who resisted, and who were neither elites nor collaborators were called '*indigenes*' and subjected to yet another set of land laws (Njoh 1998). Some of these ethnic categories have had very long lives and material effects on who can claim certain pieces of land, providing fodder for intense contemporary debates.

Colonial identity categories erected atop pre-existing associations of cultural difference and political allegiance produced 'harder' social boundaries between groups, not least by inscribing them on the land in racialised territories. The racialised categories implied that differences in people and territorial practices were natural rather than political. At the same time, these categories formalised and concretised notions of territorialisation. By connecting certain identities with control of certain territories, colonial authorities sought to encourage 'indigenous' or 'native' subjects to collaborate with them, often pitting them against 'migrant' or 'alien' groups who could not 'own' land (Li 1999, Schroeder 1999, Vandergeest 2003, D. Moore 2005).

The census both created and reinforced the notion of the formalized household, and made it a category of everyday life and of governance (Anderson 1984). The household head, usually male, was most frequently recorded as the landowner. This posed significant problems for women who were widows, divorcees, or unmarried, especially those without sons (or with disloyal sons). Women's rights in colonised areas were subjected to the biases and cultural expectations embedded within both customary and colonial ideas about access to land. For example, women became juridical minors and dependants of men (their fathers, husbands, or eldest sons) under the British colonial regime in Kenya and thus were progressively denied rights to own land or livestock and to manage resources. It was not only the colonial government in that era that created uncertainties and insecurities for women, minorities, and the poor. Other powerful and disempowering institutions such as Catholic missions, Protestant evangelicals, and Anglicans accompanied, preceded, or followed the formal colonisers and had effects on where people farmed and lived.

Who colonised and why they colonised also made some difference. For example, German colonisers in Cameroon in the early nineteenth century were there to make profits from trade and not to institute territorial rule. They were more interested in markets than in settlements or land control. French and British colonisers were given authority over different parts of Cameroon after the

Germans were defeated in World War I (in Europe), arriving at a time when ideologies of 'protecting' the rights of native citizens of the country (the 'White Man's Burden') prevailed. In the NEI, the early twentieth century was the dawn of the so-called 'ethical policies'. Yet, in Cameroon, as in the NEI, the late nineteenth century had already seen formalisation, enclosures, and state territorialisations emerge as part of colonial-era capitalist market relations.

Many of these practices on the land, the institutions and associations, and the ideas about land and 'native' rights, remained even as colonial governments withdrew or were over-thrown. In post-colonial contexts, however, they became tools for legitimating national state powers.

5. Nation-state legacies

The creation of national regimes under socialist or capitalist authoritarianism, or democracy did not guarantee real change in the approach to land. Some produced 'new' ideological frameworks meant to replace colonial-era ideas; others reproduced very similar land regimes and ideologies of ownership. Nevertheless, whatever the political system adopted, and whichever units of ownership formalised under colonial rule were retained or rejected (individual, household, collective, or state), the practices and processes of formalisation under the rule of the nation-state required some shifts in the cultural and political ideologies around land.

Recognising land control as an important means of gaining and maintaining social/political control, many post-colonial governments formalised land in ways reminiscent of those of the colonisers. In other states, completely different ideologies of land ownership and use were put in place by revolutionary governments. Although it is not possible to address them at length in this paper, revolutions and other forms of political violence also influenced institutional and individual memories and practices. National authority was legitimated by either winning revolutions (as, for example, in Vietnam, Cambodia, and Indonesia) or by creating national geobodies to which colonial authorities transferred power (as in Ethiopia, Tanzania, Cameroon, and Kenya). In some cases, the sheer frequency of changes in ruling ideologies of numerous regimes caused citizens to lose confidence in national authorities and their laws.

Centralisation of land control and administration by a state agency at national or provincial levels are among today's legacies of colonial practice. Even more so than under colonial power, independent, nationally administered states gained power over territory. As new 'owners' of land, state authorities also became embroiled in new sorts of land disputes. Unfortunately, state institutions and actors could also become a part of new problems, some being predatory, privileged, and armed. In South-East Asia, dominant lowland ethnic majorities tended to take the reins of power and act as neo-colonials vis-à-vis upland minorities (Reid 1989, Vandergeest 2003). In Africa, dominant positions generally went to members of settled agricultural groups as opposed to migrants and pastoralists. Under both socialist and capitalist regimes, therefore, the land rights of upland minorities and pastoralists were over time recast in the images of the lowlands and settled agriculture.

Ethnic, class, gender, and political histories greatly influenced how formalisation schemes that began in the colonial era were carried over into the post-colonial period. For example, following the Mau Mau rebellion in Kenya, the land consolidation programme put in place as part of the Swynnerton Plan was meant to reward colonial loyalists, make rebels landless, and stabilise a conservative middle class of Africans. The Kikuyu who fought on the side of the colonial government and against other Kenyans were thus favoured in the distribution of land—in the end, 45% of all land in this resettlement program was given to Kikuyu (Homewood *et al*. 2004: 569).

5.1. Where there was no territorial colonialism and no socialism: Thailand

Thailand, or Siam, was never formally colonised by European colonial occupation, but leased its teak forests to the British colonial foresters and engaged in a bit of colonial-era land-grabbing of its own, particularly in the Lanna and Lao kingdoms in the north of the country (Thongchai 1997). Siam's king engaged with the Western colonial powers in his region with an eye to modernising Siam and to both maintaining and extending the kingdom's sovereignty in relation to the British and French

citizens and Siamese subjects living inside and around the kingdom's territory (Larsson 2008: 15). As early as 1861, private property rights were recognised or created by King Mongkut when he decreed the end of all land ownership by the monarchy (Nartsupha and Prasartset 1981: 191 [cited in Peluso and Vandergeest 2001: 778]). King Chulalongkorn modernised further by moving taxation practices away from labour services and toward taxpaying citizens, adopting a 'Western-styled' modern state, and legal administration ideas from English, French, and Belgian legal experts (Feeny 1989: 292–295). The 1892 Siam land law that, according to Feeny (1982: 94), called for a 'comprehensive system of property rights', was never implemented, and the 1901 and 1908 versions introduced some tenure uncertainties into the system (Larsson 2008: 6). Nevertheless, some titling began after the 1901 law, and even more was accomplished after 1936, when the Civil and Commercial Code set out new laws on private property. In addition to the monarchy, a parliament was established in the 1930s and addressed many issues related to land.

Siam/Thailand is thus an unusual site, not only because it was never formally colonised, but also because it voluntarily engaged in the development of European laws and concepts of land rights and property well before World War II. It is misleading of the WB to celebrate it as an exemplary pilot project for Asia. The World Bank's privatisation/formalisation project was established in Thailand in 1984. Not only was it widely considered a success story, but it was also meant to become a model for other Asian formalisation projects (Feder and Onchan 1987). The contextual factors that caused the Bank to select Thailand in 1984, however, demonstrate that the lessons learned (and the successes) had no chance of being reproduced elsewhere.

Thailand was selected *because* it had already had experience with creating private property in land and land codes (Burns 2004). Some land had been redistributed in 1975 through the Land Reform Act, allowing landless settlers to migrate to degraded forest lands in the north and farm them. No legal pluralism existed in Thailand, as it did in many former colonial sites. Even ethnic Laos in the north-east and Malay-speaking subjects in the southern part of the country were considered full Siamese subjects; no ethnic reserves governed by customary practices had ever been set up for them. After titling spurred by the 1936 code had slowed down, new land codes were established in 1954, 1967, and 1971 (Rattanabirabongse *et al*. 1998: 2–7). Various certificates and title documents were distributed with each code, causing confusion, but also allowing the general populace to become accustomed to thinking about land as a commodity, to certificates that represented ownership, and to create land markets across a wide swathe of the country (Ganjanapan 1994: 617–619, Vandergeest and Peluso 1995: 405).

The intention of the WB's titling programme was, among other goals, to strengthen already existing formal land rights, to facilitate the acquisition of credit by landholders, and to stimulate agricultural development and investment. The WB wanted to give 'stronger' titles to already-legitimate landholders; some 49% of the country's agricultural lands were held with weak legal documents. Thailand was strongly aligned with the US and not averse to adopting neoliberal policies. Partnering with the Royal Thai Government and the Australian Agency for International Development, the project began in 1984 and was declared completed in 2004.

How successful was the Thai land formalisation project? In 1984, Thailand had issued approximately 4.5 million land deeds. By the end of 2001, over 18 million titles had been issued and covered about 11.3 million ha or some 22% of Thailand (Burns 2004: 7). By 2004, approximately 40% of the total land area of Thailand had been 'upgraded' as private property with stronger, more market-ready titles (Nabangchang-Srisawalak 2006: 84). However, records indicating how many titles were actually issued are difficult to acquire. This was, perhaps, as one WB economist said in 2004, because it might

take as long as 200 years to issue titles for all of Thailand (Giné 2004: 5 [cited in Immigration and Refugee Board of Canada) 2008: 1]).

Thus, it was not only the lack of a colonial legacy that led to the programme's success—or to the specific problems that Ganjanapan (1994) had already noted halfway through its 20-year term. Rattanabirabongse *et a*l. (1998: 15–16), for example, claimed that success was partly due to the easy procedures of titling and land administration: titles were issued by the experienced and long-established Department of Lands (DOL) in the Ministry of Interior. Even more unusual, according to this account, was that staff of the DOL were 'highly capable'. Such praise is rarely associated with titling or other bureaucratic programmes and administrators (de Soto 2003). Ganjanapan's (1994: 62) critiques are mainly about the conceptual underpinnings of the programme and their realisation, such as preventing families and villages from developing land allocation mechanisms and putting legal land control into the hands of nation-state actors and markets. In addition, he notes, business people have often had advance knowledge of the impending titling of particular areas and rushed to buy land before the surveyors arrived (ibid.). Some of these same critiques would later be echoed as late as 2012.

5.2. The effects of socialist interventions

Although different from one another, socialist regimes generally sought to radically 'level the playing field' after enduring earlier regimes, especially repressive and inequitable ones, as in Ethiopia, after severe colonial oppression as in Tanzania, Vietnam, and Cameroon, and after excessive land-grabbing or violent atrocities by privileged groups when capitalist development ensued after colonialism, as in Cambodia. Socialism, like capitalism, re-ordered spatial and social relations to make people and their productions easier to manage by state agencies. The two political economic systems accomplished this in different ways. Examples of socialist spatial relations include the Ujamaa project of village collectivisation in Tanzania, collectivisation of agriculture imposed by Vietnam's communist government in Vietnam, and the Vietnamese-backed regime's collectivisation of agriculture in the People's Republic of Kampuchea (PRK) from 1979–89. Communal farming arrangements worked relatively well while they lasted in the ethnic minority areas of Vietnam. They were also well received for a short time in the PRK; there, some individuals who had survived the Khmer Rouge period (1975–79) were able to return to the lands from which they had been violently evicted.

Nation-states that experienced socialist governance for a period of years, or where government is still organised under socialism, also saw their people strongly influenced by ideologies of justice and equity; land formalisation's acceptance and form was influenced as well. Ethiopia, Tanzania, Vietnam, and Cambodia saw drastic shifts in their educational systems, access to government, general ideals of equity and fairness, and division of access to resources during their socialist regimes. Even in places where communist parties did not take over the government but were permitted as one of many parties, as in Indonesia, socialist ideas left a strong mark on ideas of equity and justice, and rightfulness of land claims; these remain a part of Indonesia's land affairs, having been enshrined in the Basic Agrarian Law of 1960 which promotes ceilings on land holdings and land reform. They can also be noted in the language of the constitution and the nation's Five Principles (*Pancasila*).

Not all memories of collective agriculture and land formalisation are positive. The residues of land formalisation and 'villagisation' left a bitter taste in Tanzania where they were used as a method for controlling and oppressing the population under both colonialism and socialism, making it more

difficult today to integrate new formalising practices because citizens remain suspicious of government motives.

Cambodia experienced colonial, post-colonial, war-time, and post-war regimes that have largely confounded later attempts to start a new formalisation programme by assuming a 'clean slate' after the signing of the Paris Peace Agreement in 2001. The French colonial government had introduced private property during the mid–late nineteenth century. After Indochina's war with the colonial French and independence in 1954, the Sihanouk royal family took power. In 1975, the Khmer Rouge took over and for the next four to five years instituted the notorious regime that invalidated all previous property arrangements and destroyed land records, cadastral maps, and titles in the process (Roughton 2007: 584). As part of the Khmer Rouge's imagined 'agrarian utopia', collectivisation was violently forced on the population; millions died of starvation and overwork (Bugalski *et al*. n.d., Chinnery 2009: 170). In 1979 the Vietnamese invaded and established the People's Republic of Kampuchea, a government that lasted for a decade. During that time, some people apparently tried to return to the family lands occupied prior to 1975, or found new ones, but no one had papers to prove ownership or claims (Un and So 2011: 292). The Vietnamese set up small-scale communal farms, with land allocations to be based on family size and the ages and abilities of labourers. These communal farms did not last long, as Biddulph (2011: 227) explained, '…sometimes only for the year or so that it took to over come the acute shortage of rice seed, draft animals, and other inputs'. Slocomb (2003: 263) said that, counter to expectations, the decade between 1979 and 1989 was 'a time when the free market flourished; the PRK encouraged the family economy and made this the foundation of its rural legitimacy'. Land on communal farms, each comprised of some 10 households, was meant to be distributed equally to each household, with equity being determined by the number of family members and their ages (Biddulph 2011: 227). Even after a new constitution for Cambodia was signed in 1989, land was distributed to households on a per person basis. Observers generally agreed that distribution was done equitably, except at some sites where political elites received more or better quality land (Ledgerwood 1998: 129–130 [cited in Guttal 2006], Un and So 2009: 292).

The WB-style formalisation programme implemented in Cambodia, accompanied by IMF structural adjustments, arrived with the United Nations Transitional Authority in Cambodia (UNCTAC), after the 1991 Paris Peace Agreement and national elections. In addition to private property, new laws were written governing forest land, state public land, state private land, and other kinds of private lands. Conflicts, rather than being settled, proliferated. The documents for land redistributed between 1989 and 1991 were considered weak (as had been argued to justify WB titling in Thailand) and insufficient to solidify claims; people who had already lost and regained old or new lands for their families saw their documents and their claims invalidated overnight. Biddulph (2011: 227 [citing Van Acker 1999, Biddulph 2000]) described it as follows; it is worth citing at length to illustrate the chaos unleashed by formalisation and the return of 'democracy'.

> *'An unequal struggle emerged between people who had connections to state authority, and those who did not have such connections despite their informal occupancy rights. These poor villages suddenly discovered that land between the villages which previously 'had no owners' in their eyes, was now privately owned…Small areas of communal land held in trust by local authorities rapidly became the private property of village chiefs and their families, whole vast areas of forest and scrub were turned over to national and international business interests as agricultural or forestry concessions.'*

Moreover, the fresh memories of the Khmer Rouge's violence, and the wars with the French and the US, clearly prevented the poor and powerless from challenging government officials, whether rural, urban, provincial, or national. This was neither a 'clean slate' nor a replica of the conditions in 1984

Thailand. A decade later, the 2001 Land Law created new state public lands, state private lands, and private and collective properties. Ownership of private plots might have been based on possession during the PRK period, but few, if any, had papers to prove their claims. As a result, 'the stage was set for land grabbing and power abuses' (UNDP 2007 [cited in Un and So 2011]). Titling programmes on private lands and indigenous lands have been plagued with problems, not least because of the scores of bureaucratic requirements indigenous groups must fulfil in order to claim collective land rights. Only three indigenous land claims have been processed; those are government pilot villages (Grimsditch and Henderson 2009, Biddulph 2011, Un and So 2011).

The workings of decollectivisation in Vietnam provide insights into both the challenges and achievements of land collectivisation during the late 1970s and 1980s. During and after the 'American war' (ending in 1975) many South Vietnamese were indifferent to collective farming (Dang 2010: 87). However, many had celebrated the National Liberation Front's land reforms that took place before collectivisation, a move that led to the 'Land to the Tiller' reforms of the 1970s, backed by the US government (Dang 2010: 78–79). Collective farms did better and lasted longer in the North but by the mid-1980s, many in the northern regions were 'collapsing from within' (Kerkvliet 2006: 209). Resolution 10 in 1988 declared the end of collective farming and farm households made into the economic units of the countryside (Luat Dat Dai 1987, Article 27.1; Ban Chap Hanh Trung Uong 1988). Quotas by collective were scrapped by 1989 (Akram-Lodhi 2004: 762), and the 1993 Land Law, built on Resolution 10, allowed people to obtain Land Use Certificates for time periods of 20 years for rice land and up to 50 years for perennial crops. Various kinds of certificate transfers—through inheritance, sale, and mortgaging—were allowed as well. Use right certificates were thus commodified. By 2002, some 10.6 million households reportedly held certificates for 6 million ha of agricultural land—almost 90% of all agrarian households had formal access rights to some land for farming (World Bank and ADB 2002: 47 [cited in Akram-Lodhi 2004: 762]). Another law (Resolution 6/1998) allowed for higher ceilings on household land holdings and certificate transfers, as well as provisions for farm households to hire labour (Akram-Lodhi 2004: 763). This moved the agrarian economy in a more liberal direction, deepened the land market and virtually eliminated a foundational tenet of the socialist regime, that is, 'Land to the Tiller'. The land today still belongs to the 'entire people of Vietnam' and is managed by state institutions, many of which are at local levels, but land holders pay taxes on the right to use land, not paying to buy access to the land itself. Use rights have specific time limits, and there are ceilings on the maximum area for individual holdings. In addition, certain crops may be required to be planted on certain lands (Kerkvliet 2006: 288–289). While there have been some abuses and corruption by cadres, these perversions are not unique to former socialist or transitional socialist political economies as we know. As far as differentiation is concerned, the introduction of land markets makes this somewhat inevitable, but some constraints on extreme differentiation are afforded by government regulation. Some researchers found, in fact, that only the most land-poor households sold their distributed rights, but that ultimately, 'the transition process favoured the "land-poor"' (Ravallion and van der Walle 2006: 22). The latter go on to say, 'this must be understood in the context that this process favored households with long-term roots in the community, with male heads, better education, and with more non-allocated land being those households that were favored' (Ravallion and van der Walle 2006: 22). In Black Thai and some other 'indigenous areas', it was found that differentiation trajectories varied (Sikor 2001: 926). Thus, both the expectations of people on the ground, governmentalised over time into expecting equitable access to land due to its social functions, and the socialist governing principles maintained while overhauling the economy, provided different realisations of formalisation in Vietnam. As Sikor put it, 'Villagers were found to have incorporated elements of the new legislation while preserving certain features of socialist land relations' (Sikor 2006: 627). Contemporary context and specific histories were important, after all.

5.3. Authority effects

Whether they are socialist, authoritarian, or state capitalist, nation-states' formal powers have been strengthened by formalisation in several ways. Land registration, the institution of cadastres, and the creation of private property have strengthened state power and reach by giving nation-states formal legal control and the authority to take action to manage people, resources, and land in distant sites as well as sites close to national capitals and provincial centres of government. States have to stay involved in the process of protecting property as they enact and enforce the law, backed up by the national military and police.

As under colonialism, land registration and formalisation laws have also made one or more national or provincial state agencies the ultimate arbiters of land rights for claims, transfers, and control of uses. Land registration with state underwriting was meant to eliminate overlapping claims and facilitate the state's governance of land. However, no one has accomplished this goal simply through registration (Blomley 2003). Rather, registration remains a significant source of conflict, as we saw in the discussion of the differences emerging between the new elites and non-elites on group ranches in Kenya.

On the other hand, the informal arrangements that often prevail on the ground remain unknown to the formal agencies meant to administer the law. Many women in Kenya and Tanzania, for example, go through customary avenues rather than formal ones to resolve land disputes. Perhaps influenced by equity-seeking ideologies of socialist governments, after socialism ended in Tanzania, the Village Act gave women more property rights in land than they had ever had under customary land governance. This law has rendered invalid any customary law that denies women, children, or persons with disabilities lawful access to ownership, occupation, or use of any such land (Harbeson 1971: 243). It also presumes that spouses are co-occupants of land and requires that women give their consent before their husbands can alienate matrimonial land (Roughton 2007: 583). The village council is required to consider the effects of a land grant on women before approving a right of occupancy (Roughton 2007: 583). Women's rights are at least codified into law, whereas previously they were not. Despite being given formal rights, many women still prefer to work through customary channels because they do not have the money, literacy, or understanding of law that would facilitate interaction with the state. Even though customary authorities and practices tend to be biased against women as landowners, their procedures are more flexible than formal procedures. Whether these rights will be actually supported by village men also remains to be seen.

One of the most recurrent issues with formalisation under nation-state authority is that, in combination with various free trade arrangements and other globalising connections, it facilitates the takeover of large tracts of land by wealthy foreign and domestic investors, in ways that may have been guarded against explicitly (through law, ideology, and normative practice) when land rights were adjudicated by local courts, decentralised controllers, or nationalist administrators. Creating exclusive property rights in land is often the origin of localised or broader categories of 'landless' and 'landlessness', through familiar processes of enclosure and exclusion (Thompson 1975, Hall *et al*. 2011). These categories are increasingly gendered female and racialised as ethnic minorities (for example, among other national ethnic majorities).

Since formalisation has become more oriented toward investors and exporters, reformist ideas of 'Land to the Tiller' or nationalist ideas of 'land for the nation's citizens' have gone by the wayside for most governments. Yet we have seen that the citizens brought up on these ideologies still often hang onto them or demand accountability from officials in terms of these ideologies; this is because social/cultural meanings and non-market values of land remain critical to the majority of the people.

In sum, the effects of the nation-state form on contemporary land formalisation programmes are still unfolding. Thailand is actually not an appropriate example, even for other South-East Asian countries embracing neoliberal policies in the 1990s and 2000s. By the time the World Bank and its partners started the titling programme there, Thailand had already put in place formalising, private-property-supporting mechanisms within the bureaucracy. Many of its citizens, not only elites, were eager to have their lands registered. The country already had a significant middle class, credit could be obtained with land certificates, and it even had land reform. Land rights had been administered as private property by the state Department of Lands for one-half to three-quarters of a century. The WB, in effect, only had to give the titling programme a push to get it off the ground. It is unreasonable to expect a formalisation programme to fall seamlessly into place in Cambodia or Vietnam, with the upheaval and turmoil of their agrarian histories since colonialism, enduring wars, other political violence, and repeated agrarian transformations. The Vietnam case shows that strong state involvement and protest from communities worried about too many private property rights can protect against the most dangerous pitfalls of unregulated land markets.

6. Final thoughts: Implications of formalisation for livelihoods

Deciding who wins and who loses under formalisation of land requires attention to both the contexts and the forms or procedures of formalisation. What economic, political, and social factors have allowed which people to benefit from land formalisation? We have found that formalisation, whatever its era of introduction or transformation, has been a frequent source of confusion and conflict, and the source of new or continued marginalisations: of mobile peoples such as pastoralists and swidden cultivators, women more than men, and people defined as 'ethnic minorities', within nation-states with one or more dominant ethnic majorities. This is because history matters. It is not just the ideas of what happened but the actual experiences of historical actors—ordinary, notorious, and distinguished—that influence what will happen. How did formalisation programmes articulate with colonialism, socialism, nation-state building, legislation, and revolutions or other violence; and what do these articulations bode for the future?

Sedentarisation and 'improvement' in land use and productivity are among the expected political and economic outcomes of formalisation. But formalisation alone cannot guarantee that they will come to be. Colonial governments in Cameroon, Indonesia, Burma, India, Malaysia, and elsewhere argued that unused land or land that appeared 'vacant' should be made available for 'productive use' or 'improvement' by other people. This had massive social as well as ecological effects as people tried to make land look used and or not vacant. The law favours crop agriculture.

Some 1.9 million ha of Ethiopian rangelands were converted to agricultural (crop) production in 2003 alone (Flintan 2010: 156)). Other than in the Afar Regional State, there are no policies for managing tenure arrangements in pastoral areas. Many converted lands were subsequently labelled 'empty' or 'badly used' pastoral lands to justify the government's making them available to large, sometimes foreign-owned or foreign -operated, commercial farms. Because the Ethiopian government, like those of Kenya and Tanzania, regards a sedentarised lifestyle as a prerequisite for becoming a 'developed' or 'modern' person, pastoralist lifestyles were discouraged by the government's methods of land formalisation. Because no specific national legislation to protect pastoral landholdings exists, and because the government regards pastoralist lifestyles as barriers to development, both investors and agriculturalists are protected by default when competition arises over pastoral lands (Flintan 2010: 158).

In Tanzania, pastoralists are also losing their land to sedentarised land users such as tourist hotels and lodges near the Ngorongoro Crater and other popular tourist spots (Flintan 2010: 158). Pastoralists have been alienated from their lands to make way for plantations and national parks by both colonial and post-colonial governments (Homewood *et al*. 2004: 592). In Kenya where pastoralist land is rapidly being converted into land for cultivation (Odgaard 2002: 81). Boone estimates that in the past, a Kenyan herder may have utilised 5000 km^2 to access forage for his/her animals, but today the same herder may only have access to only 80 km^2 within 5 km of the village, greatly diminishing his/her ability to find enough forage (Homewood *et al*. 2004: 570).

Neither customary nor formalised land control practices favour women, ethnic minorities or outsiders to a community; formalisation may simply reinforce discriminatory, though customary, practices and norms or it might provide opportunities for women to equalise their standing. However, in some codes where women had no customary rights previously, some improvements in

the law have been reported, as briefly discussed above. In Kenya, Coldham (1978) showed that the rights of women in relation to men, that is, as widows, wives, mothers, or daughters, are difficult to accurately define, and family interests are still not well-protected by Kenyan law. Instead, by registering land only in the name of the household head, he is made the absolute owner and women's rights are put in danger of being extinguished.

Land formalisation in Ethiopia has been painted as quite successful by some writers. By the state's 1997 Proclamation, Ethiopian peasants gained the right to have free access to land for grazing and cultivation. This right includes the right to alienate, bequeath, and transfer title. While they also have a right to not be displaced from their land, individuals are prohibited from selling or exchanging it on their own accord. The rights of women and children have also been enumerated and gender and age discrimination are prohibited. Likewise, equality of rights to use, transfer, administer, and control land are laid down in Articles 25 and 35. Amendments made to the land policy in 2007 granted women equal rights with men to possess, use, and administer land under joint ownership; both men and women are able to hold his or her individual land with an independent certificate (Flintan 2010: 164).

Regional land laws reflect the equity emphasis of those at the federal level, not least strengthening equality in inheritance and improving women's rights upon divorce from or death of their husbands (Flintan 2010: 157). Article 6 requires that regional land administration laws be free from gender bias. Some regions' codes include provisions for polygamous marriages. Although these are not recognised by federal law, some landholdings can be issued in the wives' names, recording their husbands as having secondary interests only (Flintan 2010: 157).

In an article praising the Ethiopian experience, the situation prior to titling was presented as being ripe for intervention (Holden *et al*. 2009: 370, Belay 2010: 22). Before land certification, more than half the population feared they would lose their land in future redistributions. Yet, after 2006, 84% of households stated that land certification had reduced their perceived risk of being evicted. In addition, 78% stated that certification had increased the probability of getting compensation for land takings, and 75% of households believed that certification had reduced border disputes (Belay 2010:22).

According to World Bank-associated writers, the Ethiopian case showed that land certification could have significant and positive investment and productivity effects (Hall *et al*. 2011). The process reduced tenure insecurity and undermined investment incentives (Holden *et al*. 2009: 360). However, this was because of how the formalisation process took place, particularly the relative lack of money and corruption associated with it. The Ethiopians did not carry out expensive cadastral surveys using satellites and GPS; rather they used hand-written registry books, students served as registrars after simple training, and they generated strong local participation. Some more 'modern' ('high-tech') support is now being implemented, but at the beginning it was mainly very low-tech (Holden *et al*. 2009: 360).

World Bank consultants also concluded that Ethiopian land certification had had a positive effect on land improvement and land-related investment (Holden *et al*. 2009: 361–362). They found land certification had led to better maintenance of homesteads and more tree planting, including planting eucalyptus even with land restrictions on tree planting on arable land. It also reportedly contributed to better soil management and conservation structures. Certification increased productivity on lands with certificates by around 45% (Holden *et al*. 2009: 361–362, Belay 2010: 44). Although specifics may vary in implementation, they are codified in law, and constitute a first step.

Yet, recent celebrators of Ethiopian success have not explained why the Ethiopian government, at the end of 2011, leased 25 000 ha of recently formalised land to a Saudi billionaire to grow rice for export. Famine and suffering had swept the nation that year. Government officials claimed, 'It is better to have people employed [by working on the rice plantations] and able to buy food [that they had not produced]'. They did not acknowledge that food produced in suffering Ethiopia was being exported to Saudi Arabia (http://www.pri.org/stories/world/africa/in-famine-stricken-ethiopia-a-saudi-company-leases-land-to-grow-and-export-rice-7663.html). The anomaly raises questions about whose 'dead capital' (de Soto 2003) is helping whom in the wake of an allegedly successful formalisation.

Formalisation, despite claims of its capacity to generate capital for the poor, to empower the poor, and to unleash the potential of the poor (de Soto 2003), does exactly the opposite when it is uncontrolled: it creates 'the poor' by establishing the conditions for rapid expropriation or purchase of their land when crisis or uncertainties strike. Formalisation under capitalism does not include automatic tenets for land reforms or redistributions; it formalises claims extant at any particular moment, and then only some claims (de Schutter 2011, Hall *et al*. 2011). The definition of the term should make these expectations clear: formalisation makes land claims legal, titled, and legible to government. As time passes, more 'poor' are criminalised for having no formal titles and are harmed by neoliberal promoters' push for formalisation.

We found that formalisation tends to benefit outside investors, government land managers, men in general, local elite men in particular, and more sedentarily occupied people. Formalisation is less beneficial to the poor, the marginalised, females, ethnic and other minorities, mobile peoples, and others whose rights are most easily expropriated in formal markets. Formalisation projects, in and of themselves, have no inherent ability to recognise multiple or overlapping claims and rights. Nation-states' necessary assumption of monitoring, enforcing, and allocating roles creates a catch-22 for formalisation programmes, best framed as the classic property question: 'Who will watch the watchers?' International organisations have to work through nation-states and their institutions, and land laws have to be instituted and implemented by states. However, state actors are often predatory. Those insiders who have historically benefited (often multiple times) from successive forms of land governance, and from previous privatisations and formalisations of land or other resources, tend also to benefit most from titling and other new formal arrangements.

As a policy, formalisation may be difficult to eliminate but needs significant improvement and oversight. For example, one of the major weaknesses of land formalisation has been that formalisers rarely take into account either the myriad meanings of land or its history. Vietnam's case showed the benefits possible when property rights are recognised as overlapping and administration is flexible. The instances cited in this paper show that formalisation has unintended consequences that derive from unique contexts and histories and lead to a variety of outcomes. Moreover, there is no such thing as a clean slate; only sedimented histories, cultural practices, and political expectations.

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