

Decentering emergent truths on tenure security: Genealogy of a global knowledge regime

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Abstract

Land governance has taken center stage in global development discourse and practice, with widespread support from international financial institutions, governments, the private sector and civil society. “Respect for land rights”, “women’s land rights” and “tenure security” have emerged as central concepts, with tenure formalization and detailed procedural guidelines for community consultation emerging as the key instruments through which these aims are advanced. A long history of scholarship questioning the benefits of titling and consultation and highlighting associated risks for customary rights holders seems to have been buried under the enthusiasm of this new global consensus. This paper aims to explain this paradox by exploring the inner workings of an emergent global knowledge regime in which the socially progressive language of respect for local land rights is deployed to advance instrumentalities which are equally likely to pry open as to safeguard communal land in the face of outside interests.

I. Introduction

On the heels of concern over “global land grabs”, improved land governance has become a mantra in international development circles. A fragile consensus has emerged among international financial institutions, bilateral development agencies, the private sector and socially conscious NGOs in which “respect for land rights” and “tenure security” serve as overarching principles, and the focus of interest has come to center on women and youth. Does this represent an achievement in reconciling the interests of governments, agribusiness and local rights holders? Or are fundamental divides or dominant interests masked under the language of consensus? To begin to address these questions, it is important to go beyond discourse into the key instruments through which these principles are to be achieved – namely, the formalization of property relations through land registration and titling, and in the case of communal rights, detailed procedural guidelines for the acquisition of customary land in the context of investment.

The argument that land titling provides tenure security, and that this serves as a necessary incentive for farmers to make on-farm investments, has been made by the World Bank for at least 30 years (World Bank 1989). These ideas are embedded in evolutionary theories of land rights which assume that private claims on land will eventually replace those made on the basis of kinship, and bolstered by the argument that untitled property represents “dead capital” – financially and commercially invisible (de Soto 2000; Yngstrom 2002). This 30-year period also saw mounting evidence to question these ideas in the African context and elsewhere (Amanor 2001; Bromley 2008a; Bruce and Migot-Adholla 1994; Kerekes and Williamson 2010; Meinzen-Dick and Mwangi 2007). This leads Bromley to declare fully 10 years ago that, “Formalisation of property relations through the registration of land and the issuance of titles is but the latest in a

long history of optimistic policy prescriptions imposed on the poor nations of the world... As with a long list of previous simple solutions to complex problems, this too shall pass” (Bromley 2008a: 20). Yet it has not passed, and is in fact gathering steam. Despite ample efforts by the World Bank’s own land economists to review the counter-evidence of economists, anthropologists and political scientists (e.g. World Bank et al. 2008), the Bank continues to equate tenure security with titling, for example stating that, “for the majority of the world’s poor, secure property rights are a rare luxury. Only 30% of the world’s population has a legally registered title to their land.”¹ The World Bank’s optimism about the “potentially large benefits” of titling (World Bank 2006: 165) in the face of mixed evidence leads Bromley to ask, “Is the World Bank advocating policy prescriptions that its own research staff cannot support?” (Bromley 2008a: 21).

Procedural guidelines for responsible investment have also proliferated in recent years as a prominent instrument in the land governance toolkit. From the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* of FAO, IFAD, UNCTAD (2010) and the World Bank Group, to USAID’s *Operational Guidelines for Responsible Land-Based Investment* (2015); FAO’s *Safeguarding Land Tenure Rights in the Context of Agricultural Investment* (2015); the G7 New Alliance for Food Security and Nutrition in Africa’s *Analytical Framework for Land-Based Investments in African Agriculture* (2015); and The Interlaken Group and Rights and Resources Initiative’s *Respecting Land and Forest Rights: A Guide for Companies* (2015). While some guides give a nod to investments that do not require land acquisition, all outline detailed steps required for “responsibly” acquiring customary land, invariably incorporating community consultations. This enthusiasm with “good process” comes on the heels of a proliferation of case studies profiling the negative livelihoods outcomes of land transactions involving consultations on communal lands (JA and UNAC 2011; Nhantumbo and Salomao 2010; Obidzinski et al. 2011; Schoneveld et al. 2011), as well as a much deeper history of alienation of indigenous lands through purportedly voluntary contracts and treaties (Banner 2005).

How might we explain the persistence and further entrenchment of these ideas in the face of evidence that they seldom produce the policy outcomes they are said to advance? This paper argues for the centrality of an emergent global knowledge regime in the production of consensus and the stabilization of policy prescriptions over empirical evidence (see also Williams 1994; Yngstrom 2002). The continuity of development interventions having effects counter to those used to advance them is reminiscent of Ferguson’s work in Lesotho (Ferguson 1990), in which other more political ends are argued to underpin the continuity of otherwise “failed” development interventions. For the tenure security case, we ask whether these other ends might be reflected in the “conflicting objective of programs to formalize land rights” acknowledged by the World Bank in 2009 – namely, to make it easy to alienate land (World Bank et al. 2008), and a guiding principle World Bank land policy since 1975 – promoting transfers to “more efficient” land uses (Deininger and Binswanger 1999: 247).

¹ <http://www.worldbank.org/en/news/feature/2017/03/24/why-secure-land-rights-matter> (accessed June 6, 2018).

The paper begins by exploring the literature on the role of discursive practices and the wider knowledge regimes in which they are embedded in the making of self-evidence “truths”, and through these, the world itself. We then explore the convergence of a global knowledge regime around respect for land rights – profiling what it has come to mean through a look at the instruments deployed through it. A look at the evidence from the literature on the outcomes of these very instruments in section 4 suggests the need for a more critical look at the concepts, principles and mechanisms deployed in the land governance arena.

II. Knowledge Regimes: A Brief Theorization of the Knowledge-Power Nexus

Social scientists have long recognized the intimate association between power and knowledge, and between regimes of rule and regimes of truth. Michel Foucault, in particular, is widely credited with observations related to productive forms of power and subjection – namely, how power operates not through overt repression, but through the relationship between knowledge and power, and the intimate role this knowledge-power nexus plays in the constitution of subjects and subjecthood (Foucault 1980). He is thus credited with demonstrating how power operates by shaping the concepts that are thinkable, and the practices and ways of being considered normal (Bazzul 2016). In his own words, “We are subjected to the production of truth through power and we cannot exercise power except through the production of truth” (Foucault 1980: 93). Along these lines, power is not considered as something located in a particular place or held by particular actors and absent elsewhere, but rather something which circulates among and is exercised by individuals who are simultaneously the targets of and the ‘vehicles of power or elements of its articulation’ (Foucault 1980: 98).

Foucault explores how, through the operation of certain “apparatuses of knowledge” (“methods of observation, techniques of registration procedures for investigation and research, apparatuses of control”), knowledge is produced and contributes to the construction of shared and largely unconscious “regimes of thought”, *knowledge and discourse* (Foucault 1980: 93, 81, 102, 112, 113):

Each society has its regime of truth, its general politics of truth: that is, the types of discourse which it accepts and makes function as true ... the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true... ‘Truth’ is the object of immense diffusion and consumption...; is produced and transmitted under the control, dominant if not exclusive, of a few great political and economic apparatuses... and linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it” (Foucault 1980: 131-32).

In an interview with Foucault in the 1970s entitled “Truth and Power”, he talks of how these new knowledge and discursive regimes may emerge over the course of a few years – constituting not new relations of meaning, but new relations of power (Ibid: 112). The knowledge that emerges is constituted as self-evident “truths”, through which power assumes a technical and positive, rather than purely repressive, essence and thereby becomes harder to see and diagnose as it permeates our very modes of thought and understanding of reality. This

knowledge-power nexus involves but is not exclusive to the state. While forms of state power involving “right and violence, law and illegality, freedom and will, ... State and sovereignty” persist, they have “gradually been penetrated by new mechanisms of power [...] whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus” (Foucault 1990: 89).

Foucault traces the relationship between political rationalities and techniques involved in efforts by powerful actors to “govern others”, with processes of subject formation through which actors “govern themselves” (Lemke 2002) – through which more insidious forms of power emerge. What makes this form of power accepted is the fact that it “does not weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse” (Ibid: 119). Truth – including that held by marginalized groups – is thus not something that lies outside of power or is devoid of power, but a manifestation of it.

This intimate relationship between knowledge and power points to the need to “provincialize” dominant modes of thought, exposing them not as universal, objective truths but the product of particular times, places and power relations (see, e.g., Chakrabarty 2000). This has long been the project of political ecologists, feminist and race theorists, and postcolonial scholars, among others, who have struggled to de-center and deconstruct received wisdoms about environmental conditions and their causes (Fairhead and Leach 1995, 1996; Sivaramakrishnan 1999), gender (Amos and Parmar 2005; Abu-Lughod 2013; Haraway 1988; Oyewumi 1997), race (Baker 1998; Gould 1981; Mbembe 2017) and European superiority (Cohn 1996; Escobar 1995; Gruffyd Jones 2013; Sousa Santos 2014; Spivak 1993). This is not just an academic exercise of exposing knowledges which stand above and apart from material and social reality, but an exercise in understanding how the very world is made – from “rights” to regimes of rule and material reality itself. Foucault, for example, frames his core analytical problem as, “What rules of right are implemented by the relations of power in the production of discourses of truth?” (Foucault 1980: 93) and make exposing the conditions which give rise to certain concepts, and the conditions that these concepts in turn sustain, as a core analytical project. This resonates with critical scholarship that has traced the intimate linkages between regimes of truth and regimes of rule (Amos and Parmar 2005; Cohn 1996; Gruffyd Jones 2013; Mitchell 2002), and to wider political-economic systems and the ways in which marginalized groups experience them (Ferguson 1990, 2006; Kingfisher and Maskovsky 2008; Rose et al. 2006).

To place land rights discourses and practices within this knowledge-power framing, it is important to both crystallize key facets of the knowledge-truth regime and the techniques through which they are operationalized, and to provincialize them – exposing their “situatedness” in particular times, places, actor constellations and interests. Where the evidence fails to neatly stack up in support of the truth claims therein, it will be possible to expose current land rights discourse as a (historically, politically) situated project, and to begin to highlight all that is obscured from view – from other ways of conceiving of land relations, to the conditions that these framings sustain.

III. Convergence of a Global Knowledge Regime: Titling and Consultation as “Respect for Land Rights”

In the mid to late 2000s, a confluence of global policy and market drivers generated a renewed interest in land in the global South as an investment destination and asset class in and of itself. Eased by host country policy reforms enabling the registration of a business and secure land access for foreign firms, this interest led to a rapid increase in large-scale land acquisitions (Anseeuw et al. 2011; Deininger et al. 2011). While governments and international financial institutions saw this as an opportunity to generate much-needed investment into rural areas (Deininger et al. 2011; World Bank 2009), early reactions by civil society were ones of concern. A 2009 World Bank report entitled, *Awakening Africa's Sleeping Giant: Prospects for Commercial Agriculture in the Guinea Savanna Zone and Beyond*, argued that reducing poverty in Africa will require stimulating agricultural growth, and that commercial agriculture is a powerful driver of that growth. It also declares the 600 million-hectare Guinea savanna zone, which cuts across the continent from West Africa to Ethiopia and Angola to Mozambique, “one of the largest underused agricultural land reserves in the world.” On the other hand, reports by Sawit Watch, La Via Campesina, Friends of the Earth, FIAN, Oxfam, and others published reports with titles such as, “Seized!”, “Losing Ground”, “Our Land, Our Lives” and “Africa: Up for Grabs” (FoEE 2010; GRAIN 2008; Oxfam 2012), highlighting land acquisitions as human rights abuses. Thus, the early stage of the debate was marked by a high degree of polarization.

Today, this polarization has given way to a somewhat fragile global consensus on the need to respect local land rights. This consensus was first codified in *The Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGTs), a globally negotiated and agreed framework endorsed in the Committee on World Food Security and FAO in 2012. The VGGT represents a “political agreement on the minimum standards for land governance”, an “authoritative interpretation of international law” and a “global consensus on a set of norms” (Hall et al. 2016: 10). Yet this consensus is conceptually wide-ranging, embodying concepts that are often difficult to reconcile: recognition and respect for customary, indigenous, women's, informal, undocumented and subsidiary rights; self-governance of land for indigenous peoples and other communities with customary tenure systems; equitable access for women; facilitation of means of transfer of rights of use and ownership; state expropriation where rights are required for a public purpose; good faith *consultation* with indigenous peoples before initiating any investment project; safeguards against the extinguishment of rights of others when States allocate tenure rights; and tenure governance for the benefit of all and with an emphasis on vulnerable and marginalized people (CFS and FAO 2012).

It is also important to notice how the rapprochement required for the negotiation of these norms and the guidelines flowing from them have shifted the discursive space for all actors – but most notably, civil society. A June 4, 2018 posting on the Rights and Resources Initiative listerv on global deforestation commitments, for example, embraces secure rights for customary land users and corporations in a single breath:

Because communities have long protected the world's natural resources, inadequate recognition of their rights puts the forests and waters we all depend on for global environmental sustainability at risk. Without secure rights, conflict and deforestation often follow. Insecure rights also threaten companies' bottom lines and long-term financial success. Disputes over land between companies and local communities frequently lead to conflict, work stoppages, and stalled investments. These conflicts are of course detrimental to local peoples, but they are also costly to investors.²

Such rapprochement of previously antagonistic actors and ideas has led La Via Campesina to observe,

"We, social movements, grassroots organizations and their allies, observe with concern that some states – together with some UN institutions and non-governmental organizations (NGOs) – are not focusing on the rights and needs of the most marginalized, but are concentrating their efforts on helping companies and private investors to use the Guidelines for their business interests."³

They go on to identify a large number of guidelines aimed not at helping States meet their commitments to customary rights holders under the VGGT, but at providing guidance to companies and private investors on how to use the Tenure Guidelines in their business operations – such as USAID's *Operational Guidelines for Responsible Land-Based Investment* (2015); FAO's *Safeguarding Land Tenure Rights in the Context of Agricultural Investment* (2015); and RRI and Interlaken Group's *Respecting Land and Forest Rights: A Guide for Companies* (2015). Each of these guides advocate *transactional* views on land rights, in which a detailed set of steps for negotiating rights to be transferred and forms of compensation are laid out rather than how the existing suite of rights and entitlements should be safeguarded. In these and other guidelines, community *consultation* of "legitimate tenure rights holders" has become standardized process and language through which local land rights are to be respected and local livelihoods safeguarded. Community consultations, and procedural forms of rights recognition more broadly, hereby emerge as the first instrumentality through which "respect for land rights" and "tenure security" are being operationalized.

The emerging global consensus on land rights has also emphasized enhancing tenure security through the formalization of property relations. On the World Bank's website, legally registered titles are equated with secure property rights, a "rare luxury" for "the majority of the world's poor"⁴. The World Bank, the G8 and many bilateral donors (e.g. DfID, Norway, USAID) have supported national land titling programs across Africa, Asia and Latin America (Maganga et al. 2016), and support for such efforts is wide-ranging, from the UN Special Rapporteur on the Rights of Indigenous Peoples to NGOs such as OXFAM, the International Land Coalition and

² 'To End Deforestation, We Must Protect Community Rights', Rights and Resources Initiative, June 4, 2018.

³ <https://viacampesina.org/en/the-guidelines-on-the-responsible-governance-of-tenure-at-a-crossroads/> (accessed June 6, 2018).

⁴ <http://www.worldbank.org/en/news/feature/2017/03/24/why-secure-land-rights-matter> (accessed June 5, 2018).

others (Bayisenge et al. 2015; Feirling 2013)⁵. While a longstanding focus of the World Bank (World Bank, 1975, 1989), this commitment has been recently codified in the context of the Global Land Indicators Initiative (GLII) and the Sustainable Development Goals – with efforts to formulate and track progress on land indicators related to tenure security. Here, security is measured through the presence of “legally recognized documentation”; “perceptions of tenure security”; and the proportion of individuals in agricultural households with “a legally recognized document on agricultural land OR the right to sell it OR the right to bequeath it” (FAO n.d.). The emerging literature suggests that such indicators serve as a powerful incentive for individuals and countries to align behavior with institutionally or globally recognized performance standards, highlighting their effectiveness but also raising concerns about mechanisms of social control (Berg and Cazes 2007; Shore 2008; Strathern 2000). In the case of the land rights indicators of the SDGs, this work is being supported by global studies comparing country performance (Kumar et al. 2017) and a GLII-planned *Global Report on the Status of Land Governance*. Thus, land titling emerges as a second instrumentality through which “respect for land rights” and “tenure security” are being operationalized.

The case for formalization has also centered on the plight of women and youth. This is being advanced in part under the notion that customary norms undermine tenure security for women and youth. The *Gender in Agriculture Sourcebook* by the World Bank, FAO and IFAD provides a somewhat nuanced treatment of gender and tenure security, but frames cultural norms as a key impediment to land rights. It finds “local prohibitions against women’s ownership of land ... often more powerful than written laws that allow women to own land”, and the attainment of gender equity is said to resting on “overcoming social and cultural constraints” (World Bank et al. 2008: 127, 130). Landesa has sought to quantify the problem, declaring there are 90 countries where “customs inhibit women’s access to land”⁶. This narrative has been picked up by a host of organizations on the front lines of efforts to advance tenure security worldwide, with the *Her Land, Her Story* – a campaign organized by the Cadasta Foundation and Land Portal in partnership with 10 other organizations (including ILC, Landesa and Oxfam) – framing women’s vulnerability as a problem of “laws or customs [that] undermine or block women’s rights to own, manage, or inherit land or property”⁷. Thus, household income and food security gains are to come from secure women’s rights and access to land, and this is to be advanced by overcoming constraints within de jure and customary normative orders. Specifically, the vision includes “independent and transferable rights to land for women.”⁸ This is a far cry from customary land relations in the region, in which claims to land emerge within social relations (Arnfred 2011; Peters 2010; Yngstrom 2002), that is, “out of relations between people, rather than out of property relations – relations among people and things” (Whiteside and Tsikata 2003: 76). Such relations between land tenure and kinship institutions have proven remarkably

⁵ See also: <https://policy-practice.oxfam.org.uk/our-work/land-rights/community-land-rights#3c51edb9-18c3-4afd-9a42-2d30635cfd03>; UN Doc. A/HRC/18/35/Add. 7: 36.

⁶ <https://www.landesa.org/resources/property-not-poverty/> (June 5, 2018). This comes from an OECD database, for which the indicator in question, 84 of these countries are places where there “are some customary, traditional or religious practices that discriminate against women”.

⁷ <http://herlandherstory.com> (June 6, 2018).

⁸ <http://www.worldbank.org/en/topic/land> (June 7, 2018).

resilient in the face of land scarcity, commercial agriculture, and increased land transactions and markets (Bruce and Migot- Adholla 1994; Peters 1997; Vaughan 1996, referenced by Yngstrom 2002).

IV. Decentering Emergent “Truths”

Land Titling: Tenure Security for the Vulnerable?

Land titling is purported to advance a host of benefits for local land users and society at large. World Bank economists identify enhanced tenure security, the incentive this provides to farmers to work and to increase investments, and through this, increased output and productivity, as some of the localized benefits of titling (Deininger 2003; Deininger and Binswanger 1999; World Bank 1989). Other purported benefits include access to credit through the use of land as collateral (Deininger 2003; Deininger and Binswanger 1999; de Soto 2000; World Bank et al. 2008); decreased conflict by addressing uncertain claims to resources (Feder and Feeny 1991); incentives to use the land sustainably (Deininger and Binswanger 1999, citing Baland and Platteau 1996); and the protection of women’s access to and control of land (World Bank et al. 2008). Titling is also said to improve “the overall efficiency of land use” by enabling the transfer of property to more productive individuals and the most efficient uses and users (Binswanger et al. 1993; Deininger and Binswanger 1999: 250; see also Baland and Platteau 1996). Recognition of the collective property of indigenous groups is also said to allow the community to “gain direct control over natural resources and a better bargaining position with outsiders who may want to invest.”⁹

A 2008 review of the evidence for the linkage between titling, tenure security and enhanced agricultural productivity found surprisingly little evidence to support this claim (Bromley 2008a). Rather, the reviewed studies report no relationship between titling and investment or plot yields; factors other than property rights affecting productivity; higher productivity on rented land; and rights not a significant factor in determining investments in land improvements, use of inputs or productivity (Jacoby and Minton 2007; Migot-Adholla et al. 1993; Ouedraogo et al. 1996; Payne et al. 2009; Pinckney and Kimuyu 1994; Place and Hazell 1993). Many studies also find land titling to have little effect on access to credit from private banks, given other requirements for securing a loan, banks’ perception of their limited ability to foreclose on land acquired through titling programs, or reluctance of low-income households to use land as collateral (Field and Torero 2006; Jacoby and Minton 2007; Payne et al. 2008, 2009).

Studies on the relationship between tenure formalization and conflict also find that in many instances, formalization enhances rather than mitigates conflict. This has been linked to competing claims and contestation over whose rights should be recognized in the titling process; the use of state power to redistribute land rights and exclude pastoralists under formalization; mistaken assumptions about the social organization of property rights and the causes of insecurity; and the tendency for elite groups to assert claims over land that was not theirs under customary law (Askew et al. 2013; Boone 2012; Galaty 1994; Jansen and Roquas

⁹ <http://www.worldbank.org/en/news/feature/2017/03/24/why-secure-land-rights-matter> (June 7, 2018).

2002; Maganga et al. 2016; Rigon 2015; Toulmin 2009). Such findings lead the World Bank's own economists to conclude that, "traditional interventions such as titling, which were very effective in other parts of the world, have proven inadequate in many African contexts where, instead of fostering growth, they may even have led to higher levels of conflict" (Deininger and Castagnini 2004: 1). Thus, many titling and land governance interventions are now accompanied by conflict mediation. Evidence for the use of state power to systematically disadvantage certain social groups and efforts by donors to strong-arm governments to advance large-scale land acquisitions under titling programs, and effects of wealth and political connections in shaping access to titles, also lead us to question the assumption that titling enhances tenure security itself (Askew et al. 2013; Brown 2005; Maganga et al. 2016; Meinzen-Dick and Mwangi 2007; Toulmin 2009).

Yet how does titling look for women? Tenure systems based on private property rights and a land market are often theorized to be gender-neutral, given the ability to purchase land on the open market. Yet women's opportunities to acquire land and participate in the market system are often limited by their uneven ability to claim rights under customary tenure regimes, limited access to capital, limited political power, a higher burden of care, and gender ideologies among government officials that tend to discriminate against women (Lastarria-Cornhiel 1997; Nhlapo 1987b). However, women are not a unified category and in Mozambique socio-economic markers of differentiation such as poverty, low or inexistent education or illiteracy level can play a detrimental role in the interaction with State agents (Braga 2017).

Furthermore, property rights are better understood as overlapping "bundles of rights" (Schlager and Ostrom 1992) or as a "web of interests" (Arnold 2002) than as ownership or the right to completely and exclusively control a resource (Lund, 2000; Meinzen-Dick and Mwangi 2008). With land titling/privatization, most of these rights are typically brought together and claimed by one or two people. It is therefore no surprise that titling tends to result in situations in which ownership "becomes concentrated in the hands of those persons (such as community leaders, male household heads) who are able to successfully claim their ownership right to land, while other persons (such as poor rural women, ethnic minorities) lose the few rights they had" (Lastarria-Cornhiel, 1997: 1317; see also Meinzen-Dick and Mwangi 2008). Gender has also been found to intersect with class in shaping the outcomes of land allocations (Bloch 1989; see also Freudenberg 1994). In South Africa and Zimbabwe, for example, the perceived threats to male authority under women's land rights movements has interacted with legal recognition of customary authority in ways that have caused patriarchal interests in land to become further entrenched – reconfiguring "custom" as well as the state's deployment of certain notions of "customary law" in the process (Walker 2002). The "fast-track" land reforms initiated in 2000 to formalize occupations of commercial farms in Zimbabwe were also found to privilege men as primary recipients of resettlement land, and to prop up traditional authorities in ways that further marginalize women (Goebel 2005).

Formalization also interacts with customary systems of tenure to shape outcomes. One of the clearest examples related to gendered access to land are found within matriliney. In matriliney and matrilocal kinship, decisions about land are not centered on a conjugal unit, but mostly accessed through the women's lineage, typically through a women's mother, older brother or

maternal uncle (Peters 2010; Braga 2001; Kaarhus 2010)¹⁰. Matrilineal kinship is also known to be highly flexible, with increasing urbanization, the possibility of salaried work or other economic advantages influencing the site of post-nuptial residence – a choice which can be the subject of complex negotiations (Braga 2001; Arnfred 2010). Here, formalization has been shown to erode women's land rights by undermining matrilineal systems of inheritance or via their interaction with state-sanctioned rights regimes. In Ghana, for example, the Land Administration Project was found to have undermined women's ability to inherit land due to matrilineal systems of inheritance, which make it impossible for them to directly inherit their father's (now state-sanctioned) properties (Anafo and Guba 2017; Tonah 2006). And when the World Bank-funded Lilongwe Land and Development Programme sought to extend titling in the Shire Highlands of Malawi in 1972, individual title was rejected by local inhabitants and a sub-lineage unit called *ndunda* was chosen as the relevant unit for registration. Land was registered under the name of a single 'proprietor', usually the *mwini mbumba* – an elder brother customarily designated the caretaker or guardian of the group of sisters. This contravenes customary practices, in which only "daughters" (younger female members of the matrilineage) inherit their matrilineage's land, while sons use the land of their wives or acquire temporary use rights of fields belonging to female matrikin. Ethnographic research showed tenure security to have decreased under the program due to the erosion of customary rights, or the sale and mishandling of land to the detriment of women's rights and claims (Peters 2010: 182; see also Kaarhus 2010). Thus, formalization was shown to have the effect of eroding women's rights in these areas by reinforcing rather than mitigated the "secondary" status of these rights. Yet Peters (2010) also tells a different story – which runs counter to the notion that women's land rights are always secondary and fragile. Customary systems of (female) inheritance have prevailed despite "a long and continuing history of prejudice against matriliney" (Peters 2010: 179). She documents several cases in two districts of Malawi in which brothers attempted to get the ownership of their matrilineal land, were taken to customary courts and *all*¹¹ the decisions favored the sisters. A new draft land policy was set up to make the same mistakes in matrilineal areas by providing for all children, irrespective of sex, to inherit land from their parents.

To fully explore the gendered consequences of titling, it is also important to explore to what extent outcomes of tenure reforms with an explicit emphasis on gender equity are able to counter the risks of titling for women. Here, the evidence is more ambiguous. Amendments to inheritance laws have been shown to have positive effects on gender equity in Ethiopia (Kumar and Quisumbing 2012, 2015), India (Brule 2010) and Rwanda (Ali et al. 2014), and among patrilineal Hmong households in Lao PDR (Fujita et al. 2006). On the other hand, customary inheritance among lowland matrilineal communities in Lao PDR which recognize land rights for the youngest daughter (who is responsible for taking care of her parents in old age) have been undermined by the new Inheritance Law, which grants equal rights to all children. In Rwanda, the 1999 Inheritance Law abolished gender discrimination in land inheritance only for

¹⁰ In the Shire Highlands of Malawi, for example, the sibling bond between brother and sister – which is life-long, is often stronger than the conjugal bond between husband and wife, with most adults having several spouses over their lifetime (Peters 2010).

¹¹ Emphasis in the original.

“legitimate” children, leaving the children of common law unions vulnerable (Newbury and Baldwin 2000; Pottier 2002, 2006). The laws also do not apply retroactively, undermining inheritance rights of the tens of thousands of women whose fathers and husbands died in the genocide (Pottier 2006); and were found to have a large *negative* impact on plans to bequeath land to girls in female-headed households (Ali et al. 2014).

Co-titling, intended to enhance gender equity, has also proven to have mixed results. In Rwanda, recognition of women’s rights is conditional on the matrimonial regime and its formalization, and women in informal marriages and polygamous relationships face challenges when attempting to actualize their rights (Bayisenge 2015b; Brown and Uvuza 2006; Vanhees 2014). In Zimbabwe, formal commitment to co-titling was found to not translate into landownership documents, and the informal character of the majority of marriages in rural areas to have undermined legal protections for most rural women (Goebel 2005). Comparative studies in South Africa and Uganda find limited evidence for the benefits of co-titling on women’s ability to shape decisions about how to use or transact in property (Jacobs and Kes 2015; Swaminathan et al. 2007). In Mozambique, failure to recognize inheritance rights for women in informal or polygamous unions in the purportedly “gender neutral” Land Law and Family Law has left the rights of an estimated 33% of women living in polygamous unions and 55% of women in informal unions unprotected (Kaarhus and Dondeyne 2015). The same study found community land delimitation to provide a space for men to assert their power and authority, while women’s voices and interests were marginalized. As for the theorized benefits of titling, a recent review paper finds limited evidence on associations between titling or reported land ownership on the one hand, and credit, technology adoption and agricultural productivity on the other (Meinzen-Dick et al. 2017). Thus, while this does not represent a comprehensive review, there is ample evidence to question the role of titling in advancing tenure security for women and customary rights holders.

Consultations: Respect for Rights and Livelihood Security?

The second key instrument for respecting local land rights consists of consultations with local rights holders. A review of global land rights discourses finds a growing emphasis on procedural over substantive forms of rights recognition – anchored in the notion of consultation or consent *in the context of investment approval and related land acquisitions* (German et al. in press). Distinct from the more protective positions on land rights advocated by civil society, such as the International Land Coalition’s emphasis on no one being “deprived of the use and control of the land on which their well-being and human dignity depend” (ILC 2016: 10), “respect for land rights” is coming to mean adherence to key procedural elements for “responsible” land acquisition. This is best evidenced by the proliferation of guidelines for responsible land-based investment (FAO 2015; FAO et al. 2010; Interlaken Group and RRI 2015; USAID 2015; World Bank 2014). The absence of consultation is said to lead to disputes and misunderstanding between investors and local communities and to operational delays, while its inclusion is said to “reduce risk to tenure rights” (FAO 2015: 54), protect local livelihoods, lead to positive socioeconomic impacts, and lead to a stronger endorsement of planned operations, greater

returns on investment, and improved practical and financial viability and sustainability of the business operation (FAO 2014, 2015; USAID 2015; World Bank 2014).

These processes take a variety of forms, may be deployed for multiple purposes, and vary in their definition of those whose rights are to be respected through them. Free, prior and informed consent (FPIC) has emerged as the global gold standard for customary rights recognition in the context of land and investment (FAO 2014; ILO 1989; UN 2008), as *consent* implies the right to veto any project or to establish conditions on their consent, and *prior* means this consent occurs in advance of any statutory approvals or project initiation (FAO 2014)¹². Yet weaker variants of these processes (“free and informed participation”, “community consultation”, “effective and meaningful consultation”) are gaining in popularity not just within international legal instruments and national policies flowing from them, but by industry standards, multi-stakeholder initiatives, and NGOs seeking to advance land rights protections (Colchester 2010; ILC 2011; Interlaken Group and RRI 2015; MacInnes et al. 2017). Yet it is not just the form of the consultation that matters, but to whom it applies. FPIC has long been enshrined in international laws for protecting the rights of indigenous people, as enshrined in the International Labor Organization’s *Indigenous and Tribal Peoples Convention* of 1989 (ILO 169) and the *UN Declaration of the Rights of Indigenous Peoples* of 2008 (UNDRIP)¹³. Yet local communities not considered indigenous are seldom afforded these same rights. In the VGGT, the rights to FPIC are restricted to indigenous peoples, and mentioned in two contexts: project approval, and the adoption and implementation of “legislative or administrative measures affecting the resources” for which they hold rights (Article 12.7). For others, principles of consultation and participation apply to “investments involving all forms of transactions of tenure rights, including acquisitions and partnership agreements” (Article 12.9). Consultation and participation are defined in the VGGT as, “engaging with and seeking the support of those who, having *legitimate tenure rights*, could be affected by decisions, prior to decisions being taken, and responding to their contributions”. With States given the responsibility of defining the categories of rights that are considered legitimate (Article 4.4) and the VGGT remaining voluntary, it is impossible to predict to whom these rights will apply or how these processes will play out. The best source of evidence lies in the documented processes and outcomes of consultations of customary land users.

A three-country project carried out by WRI finds that,

“In practice, community consultations are fraught with irregularities and seldom reflect genuine community consent. Consultations are often perfunctory, with government agents clearly on the side of investors. For their part, communities are barely in a position to participate meaningfully: power asymmetries and low levels of education hamper their ability to fully understand the

¹² *Informed* means information relating to the project is provided in a form that is understandable; and *free* means the absent of coercion, intimidation or manipulation.

¹³ Articles 16.1 and 16.2 of ILO 169 and UNDRIP Article 10, for example, establish a principle of not removing indigenous peoples from the lands which they occupy, and where such relocation is considered “necessary as an exceptional measure”, of only doing so with their “free” and “informed” *consent*. UNDRIP Article 32 further states that States should obtain “free and informed consent prior to the approval of any project affecting [indigenous] lands or territories and other resources.”

process, their legal rights, and the nature and implications of the investment. Promises of job opportunities and other benefits induce community consent, but are often unfulfilled, leaving communities with no recourse. Likewise, many projects fail to get off the ground or founder soon after.” (Salcedo-La Viña and Morarji 2016: 2)

Such deficiencies flow from a host of problems, both structural and agential. A four-country review of processes of large-scale land acquisition by German et al. (2013) finds deficiencies in the law (e.g. provisions for consultation but not consent) and in practice – giving consultations the character of symbolic gestures rather than procedures that can be expected to guarantee substantive safeguards or livelihood outcomes. Common shortcomings included the duration of consultations (often limited to a single meeting); the tendency for intermediaries to inflate benefits and obscure costs; coercion, intimidation or higher-order directives that undermine the discretionary space of the consultation in favor of land alienation; circumvention of community consultations in favor of negotiations with the District Council; limited awareness of local land users (e.g. low levels of legal literature, lack of clarity on how much land is at stake, unrealistic/inflated expectations about future benefits); absence of downwardly accountable community representation (e.g. chiefs as the sole interlocutors, local elites dominating consultation deliberations, chiefs receiving bribes to acquiesce); incomplete or biased documentation of agreements reached verbally (e.g. lacking in detail, biased in favor of investors’ interests, not time-bound, failure to provide affected communities copies of consultation records); and absence of compensation or irregularities in compensation mechanisms (compensation flowing to District Councils rather than affected land users, low or symbolic compensation, undisclosed evaluation procedures, frequent failure of investors to comply with agreements) (see also Cleaver et al. 2010; Habib-Mintz 2010; Manuel and Salomão 2009; Mkindi 2008; Nhantumbo and Salomão 2010; Nolte and Voget-Kleschin 2014; Overbeek 2010; Ribeiro and Matavel 2009; Siteo 2009; Sulle and Nelson 2009). The scale and prevalence of such irregularities is of course suggestive of the wider power dynamics in which such deals are embedded, as elucidated by many authors (Alden Wily 2010; Fairbairn 2013; Nolte 2014; Vermeulen and Cotula 2010).

With such egregious practices undermining rights of entire populations, the literature has tended to focus on “communities” rather than differentiated social groups therein. Yet a few studies do shed light on the unique experiences of women and other marginalized groups. The three-country review by Salcedo-La Viña and Morarji (2016), for example, finds that, “For women in the affected communities, the situation is often even worse. In Mozambique, Tanzania, and the Philippines, women are often either absent from consultations or present but silent. Women tend to recede into the background, with limited opportunities to influence important decisions that will affect the entire community” (Salcedo-La Viña and Morarji 2016: 2). Another study from Mozambique also found marginalized groups such as women and itinerant groups to be frequently absent in community consultations (Waterhouse et al. 2010). This is not to conclude that women’s absence or silence means they fail to exercise any power in these circumstances; the literature points to a more nuanced understanding of how power operates. (Hedge 1996; Kandiyoti 1988; Mernissi 1975; Reay 1986; Tannen and Saviile-Troike 1985). Such observations resonate with Foucault, for whom “discourse is ambiguous and

plurivocal. It is a site of conflict and contestation. Thus, women can and do adopt language to their own ends. They may not have total control over it, but then neither do men" (Sawicki 1991).

While the literature is short on evidence that might allow for an analysis of gendered power relations in these encounters, the wider dynamics above suggest that forms of power they might exercise are likely to be trumped by the wider political economies in which consultations take place.

V. Discussion

The evidence presented here, if not comprehensive, nevertheless points to the cracks in the logic and the shaky ground on which the theories of change guiding land governance interventions rest. Titling and consultations may advance "security" for some groups under some very specific conditions, but are just as likely to undermine that security – particularly for already marginalized groups, but also at times for entire communities. While deficiencies in "customary" rights are used to justify state intervention, the literature highlights that customary rights holders and women may be just as disadvantaged by formalization as they are by "custom". The literature reviewed points not only to the deficiencies of the instruments (titling, consultation) in advancing land rights and tenure security, but also situates and provincializes the very concepts on which these interventions rest. What is security in these framings, and how else might this be conceived of? What is property or conjugality for that matter? And why are land relations framed in the language of "rights"?

The literature provides ample evidence for the need to question a suite of assumptions surrounding "security". The first involves the presumption that the state is superior to "custom" in guaranteeing security. Evidence from across Africa and beyond highlight the law and practices of "the state" as mechanisms through which men seek to recapture patriarchal control, certain ethnicities or livelihoods are marginalized, and elite interests advanced (see, e.g., Cheater and Gaidzanwa 1996; Goebel 2005; Maganga et al. 2016; Peters 2010; Walker 2002) – raising questions about the ability of the formal state apparatus to serve as a neutral arbiter of rights. Another is that "security" is best advanced through individualized access and control. Many scholars have highlighted how security was ensured through customary norms of inheritance which guaranteed the perpetual control and access to land by the social group or lineage (Scapera 1970). Under such a conception, titling and consultations could be considered as instruments which instead undermine security. Notions of "custom" must also be subject to scrutiny, in light of the evidence for the co-constitution of customary and state authority (Ubink and Amanor 2015) and how many of the inequities in so-called "customary arrangements" are in fact the product of histories of colonial and post-colonial state intervention (Awusabo-Asare 1990; Davison 1988; Feder and Noronha 1987; Goebel 2005; Linares 1992; Okali 1983; Rosen 1971; Sebina-Zziwa 1995). The literature also points to other ways in which "property" might be conceived, less as a thing that can be abstracted and commercialized than a set of relationships involving mutual responsibilities towards others as much as rights (Doss et al. 2014; Evans Pritchard 1940; Gluckman 1965).

Finally, assumptions related to conjugality and power need to be scrutinized in the context of women's land rights. Joint titling as a mechanism for advancing women's land rights, for example, flows from western concepts of conjugality (monogamy) and kinship (the nuclear family) rather than diverse ways in which marriage and kinship are constructed cross-culturally (see, for example, Yngstrom 2002; Peters 2010). Gender analysis instead questions assumptions that concepts of "family" and "household" (or the "idealized household", as Yngstrom (2002) puts it) represent uniform, coherent and undifferentiated wholes, and brings to the fore the specific needs and interests of men and women. Oyewumi (2006), for example, points out that "family" and "household" are usually assumed to be universal units of analysis and conceived as having a conjugal unit (husband and wife) at its center. Based on her ethnographic fieldwork in Nigeria, Amadiume (1997) shows how in Nnobi culture, the "ideology of gender had its basis on the binary opposition between the *mpuke*, the female mother-focused matricentric unit and the *obi*, the male-focused ancestral house". She found the *mpuke*, not the nuclear family, to be the smallest kinship and production unit – a cultural conception that is found in several West African societies. Amadiume (1997) thus advances "the matricentric production unit", in which the central nucleus is constituted by the mother and her children, as the basic kinship unit in these societies. Women's marginalization is also conceived of in very narrow terms such as absence of state recognition, or silence in consultations, which contrasts with more nuanced conceptions of how power operates and is navigated, negotiated and contested (Hedge 1996; Kandiyoti 1988). A final irony is how at the local level, women are seen as embedded in marital and kinship relationships that systematically and evenly disempower them whereas at the wider societal level, local communities and marginalized groups are assumed to be on par with state representatives and corporations as equally empowered actors within consultations. All that is needed is a set of voluntary norms to guide transactions, and "processes" of interaction to give marginalized actors an equal voice.

These contradictions and counter-concepts help us to move beyond totalizing and generalizing concepts associated with the contemporary land governance knowledge regime to expose land rights discourses as a historically- and politically- situated project. Such generalized policy prescriptions don't just produce, but *require* a "flattening" of otherwise complex realities through simplified and standardized (western) concepts (Mohanti 1988). This would suggest that once the plurality of legal-social arrangements, relationships and ontologies of land become clear, the possibility for generalizable policy prescriptions solving a unified set of challenges becomes meaningless. But does it? With such mixed, if not downright contrary, evidence on the consequences of land titling and consultations for customary rights holders and women, what explains the ongoing and growing enthusiasm for more of the same? Is it simply a failure to understand the complexity of local realities or to adequately locate the nexus of the problem (e.g. Bromley 2008b), or is some other logic at play? Scholars from Foucault to Ferguson (1990), Yngstrom (2002) and others call us to go beyond explanations for failure to ask, "What *other* projects might such 'failed' interventions be advancing, aside from the those advanced in dominant public discourses?"

Foucault's genealogical method, in particular, aims to identify not only the conditions which give birth to concepts, but also the conditions which those concepts sustain – thereby drawing

a relationship between power and subjectivity to the social and material realities produced and sustained by these knowledge regimes. While beyond the scope of this paper, it is clear that security of tenure is declining rather than increasing in parallel with the consolidation of this global knowledge regime. While the pace of large-scale land acquisitions for agriculture has slowed (Nolte et al. 2016; Cotula and Berger 2017), a recent report finds that pressure on land and resources is being felt more acutely in many places due to the conclusion of new investment deals, implementation of past land deals, national strategies to pursue economic growth, and growing urbanization (Cotula et al. 2018). Private and public sector land acquisitions and investments also continue to undermine land access and livelihoods, heighten tenure insecurity for marginalized groups and exacerbate conflict as much as they contribute to local economic empowerment (Cotula et al. 2018; Cotula and Berger 2017; Nolte et al. 2016). The report also finds a trend of growing inequality in land relations “based on gender, age, wealth, socio-economic status and ethnicity” (Cotula et al. 2018: 10). And land rights activists continue to be murdered, criminalized and subject to smear campaigns – with 312 documented murders of land rights defenders in 27 countries in 2017 alone, “67% [of whom] were engaged in the defense of land, environmental and indigenous peoples’ rights and nearly always in the context of mega projects, extractive industry and big business” (Front Line 2017). And the very states and corporations who are supposed to voluntarily engage in respecting local land rights were found to be at best unresponsive to these attacks and at worst, responsible for the killings. While these trends have as much to do with the wider political economic system as it does the truth regimes surrounding land governance, it does raise the question of how these trends can be sustained in the face of a discursive regime emphasizing progress and consensus on land rights governance.

The correlation between moves to respect land rights and growing insecurity may at first seem contradictory. Historical accounts may provide unique insights on this relationship, while illustrating how discursive regimes are implicated in shifting material conditions. A 300-year history of US-Native American land relations by Banner (2005), for example, shows how discursive and legal moves to recognize Native American land rights correspond with outside interests in land acquisition, whether governed by market transactions (when land speculators pushed for government recognition of Native American rights as a crucial step in the commodification of land) or treaty between sovereigns (when “consensus” proved cheaper than taking land by force). Banner shows how titling and consultation were each pursued when ‘extinguishing Indian rights’ was an established aim, first by private speculators and then by government officials. Might the primary aim formalization and consultations are intended to advance, rather than tenure security for women and the poor (a target which has failed to be achieved for many places, groups and indicators), be land access by outside actors? It would certainly help explain the growing tenure and physical *insecurity* in the face of so much interest in advancing “respect for rights”.

VI. Conclusions

This paper sought to explain the paradox of growing support for land titling and consultation as mechanisms for customary rights protections in the face of a long history of scholarship

questioning their purported benefits and highlighting their attendant risks. We do so by first exploring the convergence of a global knowledge regime around “respect for land rights” and identifying the instruments deployed through it, and then looking at the evidence on the outcomes of these very instruments. While neither represents a systematic review, there is ample evidence pointing to *processes and outcomes counter to those theorized*. This points to the very real possibility that the socially progressive language of “respect for land rights” and “tenure security” are in practice advancing instrumentalities which are equally likely to pry open as to safeguard communal land in the face of outside interests. Is titling a mechanism to safeguard tenure security for the vulnerable, or a means to commoditize land (and land relations) and enable secure access for investors? Are consultations a process for respecting customary rights, or a form of “polite dispossession”?

At a very minimum, this paper suggests some naiveté regarding the theories of change we have bought into. Yet at a more fundamental level, it points to the need to critically assess the concepts we use to think about land rights, the mechanisms we deploy to realize them, and the very contradictory meanings and instrumentalities they lend to the world. If we accept the arguments and evidence herein, how can it be that techniques with such dispossessory histories or tendencies come to pass as “respect for land rights”? Here it is worth re-visiting Foucault – who highlights how each society has its regime of truth, its general politics of truth – or the types of discourses which it accepts and makes function as true. These productive forms of power work not through repression, but by shaping what is thinkable. And the cloaking of this knowledge regime in socially progressive language makes it all the more difficult to decipher; are the desirability of respect for land rights and tenure security for women and youth not self-evident truths? Through such processes, the possibility of conceiving of tenure security without (exclusive) ownership as the background has become unthinkable; so, too, has the ability to conceive of women’s land tenure beyond homogenizing discourses about households, conjugality and the threats posed by diverse forms of relationality (male-female, “custom”). What other forms of households, gender and land relations, and security are made invisible through these processes? And following Ferguson (1990) and Ynstrom (2002), what *other* projects might contemporary land rights discourses and instrumentalities be *more* effectively advancing?

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