

LAND GRABBING, INVESTMENT PRINCIPLES AND PLURAL LEGAL ORDERS OF LAND USE¹

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Introduction

In recent years, foreign direct investment in land has increased significantly in developing countries. Land acquisition in a developing context by foreign investors is often referred to as 'land grabbing'. In response to the growing concerns about the effects of land grabbing, various multilateral organizations including the UN Food and Agriculture Organization (FAO) and the World Bank have recently come forward with guidelines and principles to make such investments more responsible and transparent. One of the central tenets in the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO 2012, in short 'FAO guidelines') and the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (FAO et al. 2010, in short 'RAI principles') is that investors and involved host governments recognize and respect local people's existing property rights over land and other natural resources. To this end, it is suggested that prior to any large-scale land deals, existing property rights should be formalized in a

¹ This article is partially based on work conducted within the framework of the 'Special Research Project: Transnational Pressure on Land' of the Swiss National Centre of Competence in Research North-South (NCCR North-South): Research Partnerships for Mitigating Syndromes of Global Change. We would like to thank Norman Backhaus, Thomas Brey, Boniface Kiteme, Peter Messerli and Oliver Schönweger from the 'Malindi team', Craig Hatcher and the anonymous reviewers for their contributions and constructive feedbacks on the paper.

transparent and participatory manner. Thus, the two proposals build on the assumptions that all kinds of property rights over land can be formalized, and that such formalization is required in order to support the interests of local stakeholders.

In this article we want to critically examine and challenge these assumptions from a legal pluralism perspective. Referring to the four layers of social organization brought forward by F. and K. von Benda-Beckmann (1999; see also F. von Benda-Beckmann et al. 2006), we first show that the proposed guidelines and principles – and thus much of the recent land grab debate – do not adequately account for the existence of plural legal orders over land and other natural resources, and that they largely ignore the dynamics of power and everyday practices inherent to property relations. Based on this, we raise three fundamental concerns about the idea of formalizing property rights in a legal pluralism context, and discuss them in the light of empirical evidence of competing claims over land resources from Tanzania, Nepal, and Kyrgyzstan.

The article demonstrates that the identification and recognition of customary group or individual rights is a very complex and delicate endeavour, which entails the risk of neglecting existing claims and rights of local people (this is our first concern). Neither of the proposals addresses this in a satisfactory way. Nevertheless, there are cases where formalization by state intervention is necessary, namely when local individuals and communities² are at risk of losing their rights against their will, or if it is their own wish to enter deals with outsiders. In such cases, from a legal pluralism perspective, a centralist approach to formalizing customary land rights as proposed in the RAI principles cannot be recommended. In many contexts, it has resulted in adverse effects for local

² We use the term 'local community' interchangeably with 'local people' or 'local stakeholders'. However, we are aware that local communities are by no means homogenous and do not necessarily experience the same consequences when 'land grabs' take place. In this article, we only distinguish between local elites and 'common' members of local communities. Other important characteristics in the context of 'land grabbing' include gender (see Behrman et al. 2011) and indigeneity (Sawyer and Gomez 2008). For critical thoughts on the notion of 'community' related to natural resource management and land reforms, see Sikor and Müller (2009: 1310f).

communities rather than strengthening their rights (our second concern). A more "security and rights-based vision" (Assies 2009: 586) as brought forward by the FAO guidelines still bears the risk of reinforcing unequal power structures within local communities (our third concern). Yet, we argue, this approach is more promising in terms of leaving it to local communities to decide whether their land and natural resources should become a marketable good to outsiders or not. However, the introduction of such a property regime requires broad changes in governance. This cannot be addressed satisfactorily within the framework of investment guidelines. Instead, more long-term strategies on how to protect customary rights are required.

Foreign direct investments in land and current proposals for a 'Code of Conduct'

In recent years, foreign direct investments in land have become a key factor of rural transformation in the Global South. Based on a new database it is estimated that between 2000 and April 2012, foreign land purchases and leases amounted to more than 80 million hectares (Anseeuw et al. 2012: 3). Deininger refers to 57.8 million hectares of intended or actual land deals in the year 2009 alone (Deininger 2011: 220). So far, most of these deals have taken place in Sub-Saharan Africa, yet large agricultural land reserves are also at stake in post-Soviet Eurasia, Latin America and Asia (Visser and Spoor 2011; Borras and Franco 2010; World Bank 2010; GRAIN 2008). Foreign investors often belong to either emerging and highly dynamic economies such as those of China or the Gulf states, or to developed economies from Europe and the US. The actual transaction of farmland usually happens in close collaboration with respective national governments in the host countries (Deininger 2011: 224; Borras and Franco 2010; GRAIN 2009). Some of the key drivers behind these investments are an increasing demand for food and non-food agro-products, such as biofuels, due to an ever-growing world population, changing nutrition patterns, and climate change and energy supply concerns. As a consequence, and in addition, land itself is also increasingly viewed as a central commodity and an object of speculation (Gonzalez 2010; Zoomers 2010; Cotula et al. 2009).

Along with the increasing pace and extent of these investments or 'land grabs', a growing number of observers started to raise concerns about their environmental, economic and socio-political consequences. The main points of critique pertain to the detrimental effects of large-scale plantations if compared to smallholder agriculture. These include impacts on natural resources such as water, soils, and

biodiversity, but also on the livelihoods of the affected population, e.g. through reduced food security or income opportunities (de Schutter 2011; Cotula et al. 2009). Considerable attention has also been paid to the consequences of such investments for local people's property rights over land and other natural resources, and thus their capacity for self-determination (Borras and Franco 2010). In recent years, civil society organizations have documented numerous cases where local people's property rights were ignored and violated by investors and involved government agencies alike, sometimes even leading to forced displacements (see e.g. GRAIN 2009). Also the World Bank (2010) has reported such cases. In addition, recent analyses suggest that a weak general recognition of land rights at country level correlates with high levels of foreign demand for that land (Alden Wily 2011; Deininger 2011: 218; Visser and Spoor 2011: 319f; Mann and Smaller 2010).

While certain sectors such as the extractive industry have taken up these concerns by agreeing on (voluntary) principles for responsible investment, no global consensus has been reached yet in terms of land- and water-intensive agro-investments. However, at the international level, two prominent proposals for such a Code of Conduct have been released, which have been subject to a more or less broad consultation process among multilateral organizations, national governments, and civil society organizations.

A first initiative was taken by the FAO, which brought forward the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (FAO 2012). They build on the final declaration of the 2006 International Conference on Agrarian Reform and Rural Development, which emphasized the importance of secure and sustainable access to land, water and other natural resources, as well as of economic, social and cultural rights of marginalized and vulnerable groups in terms of land and natural resource issues (FAO 2006). To carry the dialogue further, the FAO initiated a broad, participatory process to develop practice-oriented, voluntary guidelines on the responsible governance of natural resource tenure. More than 90 FAO member countries, several UN agencies and other international organizations, farmer associations, representatives from the private sector as well as civil society organizations (CSOs) participated in the process, which consisted of three rounds of negotiations facilitated by a working group of the Committee on World Food Security (CFS). The active involvement of CSOs seems particularly noteworthy; not only did they participate in the official negotiations, but they additionally held a series of regional civil society consultations, which were

facilitated by the International Planning Committee for Food Sovereignty (IPC). Thus, the FAO's consultation process developed into a highly contentious debate, but in return was positively acknowledged by a broad range of stakeholders. In their final version endorsed by the CFS on May 11, 2012, the guidelines mainly address potential host states rather than investors. Consequently, they refer explicitly to existing binding international law such as the universal declaration on human rights or international conventions on indigenous people or biodiversity. This is also why they gained the support of several important international agrarian movements such as La Via Campesina, the IPC, and others (Borras et al. 2011).

In a second initiative, the World Bank Group, the FAO, the International Fund for Agricultural Development (IFAD), and the United Nations Conference on Trade and Development (UNCTAD) joined to propose *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (FAO et al. 2010). Being the result of negotiations among officials of the involved organizations rather than of a broad consultation process, these so-called 'RAI principles' have been promoted since early 2010, most prominently in the World Bank's report on land-related investments (World Bank 2010). Their intention is to provide guidance for host countries and investors on how to prepare strong domestic legislation and carry out socially responsible investments respectively (FIAN 2010a). They consist of seven key principles addressing the issues of property rights, food security, transparency, participation, economic viability, as well as social and environmental sustainability. However, unlike the FAO guidelines, and despite a consultation process initiated in early 2010, some of the governments most directly concerned as well as civil society organizations have repeatedly denounced the RAI initiative for a striking lack of consultation in its early stages. In addition, it has been criticized for its reliance on the mainstream tools of 'good governance' and on corporate social responsibility frameworks rather than on binding human rights obligations. So far, it has also remained unclear as to how the RAI principles will be linked to the FAO guidelines (de Schutter 2011; Li 2011; FIAN 2010a).

The Notion of 'Property Rights' in the FAO Guidelines and the RAI Principles from a Legal Pluralism Perspective

Proponents of large-scale investments in land have often argued that they invest in 'unused land', 'reserve agricultural land' or 'idle land' only, i.e. land which was not used for any form of production and for which no local claims existed

whatsoever (World Bank 2010; Woertz et al. 2008). Critics have remarked, however, that much of this seemingly 'unused land', which is usually in the formal ownership of the state, is subject to long-standing, often vague and informal tenure rights of the local population, be it individuals or groups, and that the neglect of such rights may trigger conflict and undermine effective land use and management (Cotula et al. 2009; Haralambous et al. 2009). Both the FAO guidelines and the RAI principles have taken up this concern. In principle, both proposals demand that governments and investors recognize and respect existing property rights to land and associated natural resources, namely by demarcating and formalizing these rights prior to any investment-related land transfer. For the detailed formulations in both proposals regarding the notion of property rights see Table 1.

Table 1: Selected main elements of the FAO guidelines and the RAI principles

	<i>FAO guidelines:</i> Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO 2012)	<i>RAI principles:</i> Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (FAO et al. 2010)
<i>Main demands</i>	"Where informal tenure to land, fisheries and forests exists, States should acknowledge it in a manner that respects existing formal rights under national law and in ways that recognize the reality of the situation..." (16).	"Existing use and ownership rights to land, whether statutory or customary, primary or secondary, formal or informal, group or individual, should be respected." (First of the seven RAI principles: 2)
<i>Procedure</i>	"States should allocate tenure rights and delegate tenure governance in transparent, participatory ways, using simple procedures that are clear, accessible and understandable to all, especially to indigenous peoples and other communities with customary tenure systems" (13).	Investors and government agencies must identify all right holders and legally recognize, demarcate and register their existing rights and uses. This is followed by "negotiation with land holders/users, based on informed and free choice" (2). Demarcation should be done "in a participatory and low-cost way that can be implemented quickly" (4).

PLURAL LEGAL ORDERS OF LAND USE
Bernd Steimann, Martina Locher and Bishnu Raj Upreti

<p><i>Objective, expected outcome</i></p>	<p>States should "protect tenure right holders against the arbitrary loss of their tenure rights" and "[p]romote and facilitate the enjoyment of legitimate tenure rights" (3).</p> <p>Ultimately "These Voluntary Guidelines seek to improve governance of tenure of land [...] with the goals of food security [...], poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development" (1).</p>	<p>Recognition of land rights "can greatly empower local communities and such recognition should be viewed as a precondition for direct negotiation with investors" (2).</p> <p>Ultimately, the objective is to avoid "[l]oss of land and other resource rights to an investment project without recognition of quite valid sensitivities and without full compensation" and "...the disruption of livelihoods and the dislocation of communities" (3). Further, another objective seems to be to prevent "public criticism of large-scale investment" due to such neglects (3).</p>
<p><i>Other Comments</i></p>	<p>"States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems" (15).</p> <p>Recognizing other than central state practices: "States should respect and promote customary approaches used by indigenous peoples and other communities with customary tenure systems to resolving tenure conflicts within communities..." (15).</p>	<p>Acknowledging that the formal recognition of group rights may be difficult and may foster individualisation of former common property (3).</p>

Challenging the two proposals from a legal pluralism perspective

Since the consultation processes began in 2010, much criticism has been raised against the two proposals, not least regarding their approach to property rights. Many observers consider it naive to believe that legal recognition of land rights can guarantee their protection from 'unfriendly takeovers'. It has also been remarked that the simplistic focus on 'existing land rights' disregards the resource needs of future generations, thus underestimating new local claims that may arise in future (Borras and Franco 2012: 54, 2010: 517; de Schutter 2011; Li 2011; FIAN 2010a: 3; Scoones 2010).

In addition to these legitimate points of critique, a closer look at the two proposals from a legal pluralism perspective raises a number of further caveats and concerns. These mainly pertain to their somewhat simplistic notion of 'property rights' and the measures proposed to strengthen and protect them. We have chosen the legal pluralism perspective, because we consider it particularly useful for analysing the complexity of land tenure in contexts where different understandings of property converge.³ First of all, legal pluralism accounts for the co-existence of parallel legal systems or institutions (F. and K. von Benda-Beckmann 1999). This is in contrast to a legal centralist perspective, where "law is and should be the law of the state, (...) exclusive of all other law, and administered by a single set of state institutions" (J. Griffiths 1986: 3). The debate on whether and how non-statutory legal systems should be formalized (e.g. Fitzpatrick 2005; Meinzen-Dick and Mwangi 2008; Assies 2009) will be taken up towards the end of this article. Second, from a legal pluralism perspective, engaging with property means to

³ Borras and Franco claim that it would be more appropriate to focus on "rural poor people's effective control" – in Ribot's and Peluso's words 'access' – instead of property, and thus on the question of which people have "the ability to benefit from things" – in this case land – by drawing on different "bundles of powers" (Borras and Franco 2012: 55, following Ribot and Peluso 2003: 153, 154). While we agree with this view to some extent, we also see some challenges related to the use of this concept in this context (particularly in cases where people have rights to land, but too little power and thus no ability to use it). We have chosen the perspective of legal pluralism, as we consider this framework with its broad definition of property as useful for analytical purposes in relation to the FAO guidelines and particularly the RAI principles, which focus on land (tenure) rights (not land access).

acknowledge that it encompasses more than (private or common) ownership of a resource (Wiber 1992: 470). Instead, property rights are better understood as bundles of rights (or "web of interests", see Meinzen-Dick and Mwangi 2008), since different individuals or groups can have different rights over the same resource at the same time. The different types of rights can be broadly grouped into two categories, i.e. *use rights* (the rights to access and use or withdraw a resource) and *control rights* (the rights to manage a resource, to exclude others from using it, or to alienate it to others through sale, rental, or gift) (Benda-Beckmann et al. 2006; Meinzen-Dick and Pradhan 2001; J. Griffiths 1986; see Ostrom 2003 for a detailed categorization of different property rights). Third, legal pluralism means to acknowledge that property is not just a specific right or relation, but "concerns the ways in which the relations between society's members with respect to valuables are given form and significance" (Benda-Beckmann et al. 2006: 14; see also Sikor and Müller 2009: 1311; Meinzen-Dick and Mwangi 2008: 36). Consequently, property is always seen as embedded in a specific social and political context, encompassing a wide variety of different arrangements at different levels. These can include more formal aspects such as written rules, less formal ones such as people's beliefs and values, but also concrete practices related to property (Mehta et al. 2001; Wiber 1992; A. Griffiths 1998). The work of Benda-Beckmann et al. (2006), who distinguish four 'layers of social organization', helps to analytically grasp this plurality behind property relations. The first layer includes *ideologies and culture*, where neoliberal concepts of private property may collide with traditional or religious concepts of common property. The second layer focuses on *legal regulations*, which are usually directly related to ideologies and culture, but are more specific in the sense that they define concrete rules and procedures. This includes state law, but also customary or religious law. The third layer refers to people's actual *social relations related to property*. These are often multifunctional and reflect local power relations shaped by community and kin or by social, political or economic dependencies (e.g. patron-client relations), rather than abstract norms defined by state, customary or religious law. Thus, disputes over land tenure can only be understood within a wider socio-political context (Lund 1998). The fourth layer emphasizes that it is in people's concrete, everyday *property practices* (e.g. fencing or paying land rent) where ideologies, laws, and social relationships regarding property are reflected, negotiated, reproduced, and eventually transformed. In this context, we consider 'forum shopping' (Meinzen-Dick 2009: 3; Meinzen-Dick and Pradhan 2001: 11; cf. K. von Benda-Beckmann 1981) a useful concept⁴. It describes the practice of

⁴ When introducing the concept termed 'forum shopping' in her work in 1981, K. von Benda-Beckmann described it as the practice of certain stakeholders appealing

certain stakeholders manoeuvring between different norms and regulations to secure their claims over resources. Consequently, property rights and the ways in which resources are used do not simply derive from statutes or formal rules, but "should be understood as negotiated outcomes" (Meinzen-Dick 2009: 3).

To some extent, the examined guidelines and principles account for these aspects of legal pluralism in property rights. The FAO guidelines state explicitly that resources have not only an economic and a political value, but that they can also have social, cultural, and spiritual values (see Table 1 above). In this way, they refer at least indirectly to the layer of ideas and ideologies related to resource property. The RAI principles distinguish not only between use and ownership rights, but refer explicitly also to statutory and customary, primary and secondary, formal and informal, as well as group and individual forms of property (see Table 1). They thus acknowledge that property rights over resources can take multiple forms and that there may be other layers of legal regulation besides statutory law. Nevertheless, both documents still build on a rather static understanding of property, since they largely ignore the dynamics of concrete social relationships and property practices. Neither the FAO guidelines nor the RAI principles acknowledge that property regimes may be contested, that they may be subject to ambiguous rules, and that especially powerful rights holders may draw on different legal systems to legitimize their property claims. In short, the social embeddedness of property and related aspects of power are largely absent from these documents. This is particularly problematic because both proposals seem to assume that property rights over land and other natural resources can and should be formalized, and that such formalization necessarily supports the interests of all local stakeholders.

In the following, we raise three fundamental concerns from a legal pluralism

to different institutions (i.e. forums) representing different legal systems in order to solve conflicts in their favour. In this article, we use the concept in a broader sense for the practice of using different norms and regulations to support claims over resources, without necessarily appealing to conflict resolution forums. While a cognate term such as 'shopping for normative orders' or 'shopping for legal systems' would be more precise for this broader concept, we use 'forum shopping' by referring to Meinzen-Dick who describes it as a process in which "individuals and groups make use of one or another of these legal frameworks as the basis for their claims on a resource" (Meinzen-Dick 2009: 3; see also Meinzen-Dick and Pradhan 2001: 11).

perspective, focusing on the identification of plural legal arrangements (our first concern) and the process as well as potential consequences of the proposed formalization (our second and third concerns). We will discuss our concerns in light of empirical evidence from three different regional contexts, i.e. Kyrgyzstan, Tanzania, and Nepal. Only part of this evidence (i.e. the evidence from Tanzania) stems from explicit empirical research on what is now called 'land grab'. We intentionally use material from other contexts in which existing patterns of land rights have changed and resource claims of various actors compete with each other. We are convinced that much can be learnt about the complexity of dealing with multiple socio-legal arrangements in land issues and the potentials and pitfalls of formalization procedures also from other (and earlier) cases, as has been argued and demonstrated also by Hall (2011) and Li (2011: 285f).

First Concern: Non-Statutory Legal Orders of Land Use are Difficult to Identify

Our first concern is that the formalization of property rights is a very delicate endeavour. Formalization as a first step requires the identification of claims (Meinzen-Dick and Mwangi 2008: 38). Claims are based on legal orders, and these are expressed in ideas and ideologies, concrete social relationships, and property practices, particularly where property rights are not (only) defined through statutory law. Elements in these layers of social organization are often difficult to identify and recognize, as we will show in the following two examples.

Tanzania: Challenges in identifying customary property rights

The example of a UK-based forestry company acquiring land in Tanzania illustrates challenges for outsiders to identify customary property rights during the land acquisition process (Locher 2011). In this case, a village assembly in the Southern Highlands had decided to hand over a certain area of reserve village land to the investor (Chachage and Baha 2010). The land is far from the core settlement and at present not used by the villagers. It is known under a specific name given by local people who had been living there before they were resettled by the socialist government during the 1970s. The decision was recorded in the meeting minutes accordingly, and a committee was formed to show the area to the district officials so that they would demarcate it for the land transfer. However, as Locher (2011) illustrates, the committee was headed by the village chairman who did not originate from that particular area. Since he did not know the exact boundaries of

the respective area, he only showed it roughly to the district officials by pointing at it from afar. Hence, a considerably bigger area than what the village assembly had agreed upon was transferred, and several parcels, which according to customary law belonged to local households, were transferred, too. Further, some of those parcels were used by households from a neighbouring village, who had been provided use rights by the landholders. Unfortunately, the concerned households only realized that their land was transferred to the investor once the deal was made. They had to struggle for more than a year until their claims became formally accepted. They did not succeed, however, to revoke the transfer and finally felt forced to agree on the offered compensation. The example shows that detailed knowledge about complex customary property rights is not shared by everyone in a village, not even necessarily by elected village representatives. This lack of specific knowledge is likely to be more pronounced in respect of secondary property rights. In such cases, sometimes only those directly involved know their property arrangements and exact boundaries. Boundaries of individual property are not visibly marked, but are both conveyed verbally by referring to natural landmarks and reproduced through regular use such as planting crops. However, some land is not used intensively and there are also fallow periods. This makes it particularly difficult for outsiders to physically detect customary property rights in short visits.

Nepal: Dispute over ownership of a land pooling Joint Venture Project

In Nepal, particularly in the capital and big cities, real estate companies have emerged as key players in the housing sector market. They acquire fertile agricultural lands from farmers at cheap rates and sell high priced houses or house construction sites, thus earning huge profit margins (Shrestha 2011; Upreti et al. 2008; Upreti 2004b). In order to prevent such exploitation, the Bhaktapur Municipality together with the Kathmandu Valley Town Development Plan Executive Committee recently initiated a Joint Venture Project (JVP). In 2009, they accumulated approximately 30 ha of land from different landowners. The objective of this land pooling JVP was to improve the housing standards in the residential areas by providing basic requirements such as open spaces, food paths, drinking water, electricity, waste collection points, children's play areas. Once the land was endowed with all these facilities, the JVP intended to sell it for fixed prices, whereas the former landowners were provided right of pre-emption. However, the land soon became a major source of contestation among the involved stakeholders. While the JVP claimed full control rights (including access, withdrawal, management, exclusion and alienation rights; see Ostrom 2003;

Schlager and Ostrom 1992), the original land contributors argued that the JVP had no exclusive alienation rights, even if the project was exercising other control rights. In addition, many landowners, farmers, bureaucrats and politicians, who had not directly contributed their land to the JVP, have started to object to the JVP work by claiming different rights such as their freedom to use the surrounding open spaces for cultural, religious and social activities, which was altered after the land was taken by the JVP. The affected people cite their historical association, cultural and religious values, as well as their land use practices in order to oppose the provisions of the JVP.

Conclusions from the presented cases

The two cases from different contexts illustrate that 'existing property rights' over land resources can only be understood if conceptualized as overlapping 'bundles of rights'. Local claims and rights often coexist and overlap in terms of scale and time, and build on a broad variety of normative and cognitive frameworks as well as resource-related practices of access and use. Tanzanian smallholders convey their right to use certain land parcels from long-standing social relations and regular use practices, and Nepali land users interpret the rights to the JVP land according to their own customary and religious frameworks. Thus, local claims and rights not only build on different legal regulations but are also superimposed and further adapted by individual social relations, beliefs and practices.

Consequently, local people's perceptions of 'legitimate' and 'illegitimate' property rights often differ and even conflict with each other. The example from Tanzania shows that elected representatives (who are usually among the first ones to be involved in a participatory planning process) are not necessarily aware of all the flexible and often-changing tenure arrangements. In both cases, these coexisting and competing claims have become publicly contested in the course of an external intervention, such as the appearance of an investor seeking to acquire arable land in Tanzania and the municipality authorities acquiring land for a housing improvement project in Nepal. Apparently, both interventions have failed to sufficiently account for existing claims and rights, even when they tried to do so in a participatory manner (as in Tanzania) or sought to make access to land resources more equal (as in Nepal). This raises the question, whether and how locally existing claims and rights can be 'recognized' in the course of a large-scale investment in land. The complex endeavour is even more delicate for investors that usually deal with formal authorities who often themselves do not know or recognize the plural legal arrangements at the local level.

In any case, trying to identify existing rights by adopting a 'quick' and 'simple' procedure (as suggested in the two proposals) seems not only unrealistic but also irresponsible, given the conflicts and displacements that this may cause. We will take up this thought again towards the end of this article.

Second Concern: Centralist Approaches to Formalizing Property Rights Allow the State Administration to Expand its Influence at the Cost of Local Communities

Our second concern is that the formalization of hitherto non-formalized property rights allows superior levels of the state administration to expand their influence and increase their control over subordinate levels of the administration as well as over local communities and individual resource users. While this is not negative *per se*, under certain circumstances it can result in adverse political and financial pressure upon local communities and resource users. Thus, land titling may run counter to the declared intention of the FAO guidelines and the RAI principles to strengthen local communities and to ensure the effective use of scarce natural resources.

Nepal: Formalization and legalization of property rights as a means to expand state influence and control

Until 1950, land rights in Nepal were shaped by various cultural, social and normative practices and plural legal arrangements such as state, folk, customary, indigenous, and religious law (Upreti 2004a). In 1951, Nepal started a land reform to formalize and legalize property rights, which has been a major agenda for six decades. In the course of the reform the state changed all existing forms of land ownership into the *Raikar* ownership system. *Raikar* denotes an ultimate state ownership over all land, which is then cultivated by individuals as direct tenants of the state. The reform thus did away with six existing different forms of land control rights (Pyakuryal and Upreti 2011; Alden Wily et al. 2009; Caplan 2000; Thapa 2000; Regmi 1999). Studies show that at the operational level such expansion of state control and influence created numerous complications and led to many local conflicts (Upreti 2010; Upreti et al. 2008). The government argued though, that it was necessary to merge all land tenure systems in the country into one form of ownership in order to reach the declared objectives of improving land management, increasing agricultural production and productivity, and ensuring

access to land for the landless (Kshetry 2011; Shrestha 2011). However, the reform provided a conducive (and to some extent manipulative) framework for a close nexus between the bureaucracy of government land administration and powerful elites to reap the benefits of the reform (Pyakuryal and Upreti 2011; Alden Wily et al. 2009). Basnet documents that when the land reform was implemented through the Lands Act 1964, the poorest 65 percent of the total population held 15 percent of land as opposed to 3.7 percent of the population, the rich peasants and feudal lords, who held 39.7 percent of land (Basnet 2011: 143). After the reform, according to the UNDP (2004), the 5 wealthiest percent of the people in Nepal own 37 percent of all arable land, whereas the poorest 47 percent own only 15 percent of all land. Though these figures show a gradual improvement over time they also demonstrate that the poor, marginalized and landless were not among the main beneficiaries of the most hyped land reform programme in Nepal. However, government officials not only gained control over land resources, but greatly expanded their influence over local communities. By using their authority, connection and influences, political and bureaucratic elites manipulated the provisions of the different land-related acts and regulations in order to exploit local people. This has also created problems in food production and security (Ghale 2011; Upreti et al. 2008), as it altered the existing agricultural practice, moving away from food production to non-agricultural commercial activities, and consequently food insecurity became more prevalent (Khatri and Upreti 2012).

Kyrgyzstan: Private arable land as a liability for the less wealthy

Agrarian reforms in Kyrgyzstan gained momentum in late 1993, when in view of the rapid impoverishment of the rural population, the central government declared the de-collectivization of former collective and state farms compulsory. Consequently, most of the hitherto state-owned arable land within these farms had to be equally distributed on an individual basis to all current and former farm employees and their family members. The land was first distributed in the form of land-use rights, which were converted into private ownership rights in 1998. However today, less wealthy households are often unable to cultivate all the land they received (Steimann 2011). They either lack the financial and technical means or the skills and knowledge required to do so. In addition, many irrigation schemes are in bad shape, and the allocation of water by local committees is often subject to arbitrariness and corruption (Lindberg 2007). At the same time, selling land is difficult because the concerned plots are usually far from the village and of bad quality; further, a nationwide moratorium on land sales was not lifted before

2001, this seriously slowed down the emergence of a functioning land market in rural Kyrgyzstan. Returning the land to the state is also not possible. As a consequence, a great deal of arable land has fallen out of production in recent years (Mamytova and Mambetalieva 2008). Nonetheless, irrespective of whether rural households use all their arable land or not, they are obliged to pay land taxes to the communal authorities. In addition, arable land serves as a basis for assessing a household's entitlement to state child allowances. This means that rural Kyrgyz households are taxed and assessed on the basis of land assets that many of them can neither use nor sell. In this way, private land ownership has turned into a liability for many among the less wealthy. At the same time, it has given the state an opportunity to exert pressure upon the local population. For instance, communal authorities use the threat of tax increases as an effective means to get their way in the course of local conflicts (Steimann 2011: 182).

Conclusions from the presented cases

The two examples may illustrate very different processes, yet they both show how legal centralist approaches, which define statutory law as the main or only normative framework (J. Griffiths 1986), inevitably lead to the expansion of power of the state administration. In many cases, this happens at the expense of local communities and resource users. Political elites in Nepal capitalize on the land reform by adjusting certain provisions of the new land acts and regulations to expand their influence and power at the local level. The Kyrgyz state endowed rural people with private property over land but not the means and structures required to effectively use it; since land is subject to taxes it has become a liability for many.

This raises considerable doubts as to whether a centralist approach can really do justice to legal plural orders over land property. It seems instead that the statutory recognition (or redefinition) of existing claims and rights strengthens the state administration rather than local communities. This confirms again that property is not just about questions of legal regulation and economic efficiency, but is always embedded in a concrete social and political context and is thus closely linked to issues of power and domination. In other words and with reference to the four layers of social organization of Benda-Beckmann et al. (2006), by enforcing statutory law as the dominant or only normative framework, the state gains authority over the layer of ideologies and culture and the layer of legal regulations. Hence, it automatically gains considerable control over the layers of social relations and people's property practices and thus over local patterns of power and

domination.

Third Concern: Formalizing Property Rights Bears the Risk of Reinforcing Unequal Local Power Structures

Our third concern is that even if the central state introduces formalized property rights with the best intentions, it still runs the risk of reinforcing unequal local power structures. The implementation and maintenance of a respective regime and thus the expansion of state authority to the local level in a way that supports local people is complex and often beyond the state's capacity. The new legal provisions may be difficult to understand and become commingled with previous property regimes, thus providing ground for contestation. In such situations, local elites may benefit much more from formalization procedures than the poor. Since property regimes are always embedded in networks of dominance and dependence, local elites are usually in a better position than the less wealthy and less powerful to get their existing claims recognized, or to defend them towards external actors. To a large extent, this is to do with the practice of 'forum shopping' (see text and footnote on page 9), which allows especially wealthier and well informed people to manoeuvre between various normative and cognitive orders to defend their claims over resources.

Kyrgyzstan: Privatization of arable land and redefinition of pasture use rights

In rural Kyrgyzstan, the rapid privatization of state-owned farmland contributed to the reproduction of existing disparities between rural elites and ordinary workers (Steimann 2012). In most cases, the distribution of land and other farm assets was carried out by a local commission consisting of former farm leaders, agronomists, local elders, and other well-respected people. Building on two case studies from Central Kyrgyzstan, Steimann shows that the result was often a land distribution that was equal in a quantitative, but not in a qualitative sense (Steimann 2011). In fact, many among the local elite managed to secure undivided land parcels close to their own house, while less well informed people – mostly ordinary farm workers and their family members – often received their land share in the form of several divided parcels. Since these were usually far from the village and difficult to access and irrigate, this has seriously hampered people's ability to benefit from their land in the long run. The same study shows how new claims to farmland emerged once the official privatization procedure was over. In view of their ever-increasing flocks, wealthier local households were soon in need of additional

arable land for the production of sufficient winter forage. To this end, many of them have begun to irrigate and cultivate land from a communal land fund. They claim rights to these areas based on arrangements during the Soviet times, yet they use the land without the consent of the communal authorities in charge of the fund and thus without paying any use fees. Such illicit appropriation has become possible because communal control over this land has always been very weak. However, in cases where the local authorities detected such practice, the concerned households usually formalize their claim *ex post* by concluding a lease contract. Wealthy rural households thus make use of their possibilities of 'forum shopping' – i.e. manoeuvring between non-formal appropriation (based on an earlier normative order) and formal recognition – to secure their private claims over land resources. Bichsel et al. emphasize that the new Kyrgyz land property regime thus continues to be conditioned by its preceding regime and by related social relations and local power disparities – irrespective of a seemingly clear allocation and legal recognition of private and common property rights over land and other natural resources (Bichsel et al. 2010: 264f).

Another example of the central state's incapacity to fully implement formalized land rights is the case of the Kyrgyz pastures. Unlike arable land or livestock, pastures were not privatized after the Soviet collapse, but remained in the ownership of the state. In the late 1990s, a legal framework for pasture use and management was put in place, which allowed individuals and groups to lease pastures from the state. However, the law left many loopholes, and the state authorities were neither able nor willing to enforce it. The result is that pastures have remained highly contested between different actors at various levels (Steimann 2011). At the local level, households have repeatedly secured their access to pastures either by abiding by state law (i.e. conclusion of a formal lease contract), or by negating it. In the latter case, this mainly happened with reference to individual customary use rights (usually based on pasture use practices from Soviet times), or by insistence on often-vague notions of pastures as a common pool resource. This coexistence of norms and claims has repeatedly led to conflicts when leaseholders tried to bar non-leaseholders from using 'their' pastures. Again, in the course of these conflicts, the wealthier leaseholders are usually in a better position than their less wealthy competitors due to their ability to practice 'forum shopping'.

Tanzania: Knowledge and power differences in defending and registering customary land rights

The Tanzanian land law (URT 1999a, 1999b) is praised for respecting customary rights and providing management responsibility over rural areas to village bodies (Knight 2010; Alden Wily 2003). Evidence from two case studies, based on qualitative interviews conducted by Locher shows, however, that the law is complex and difficult to understand for many among the local population and even for government officials. It is thus a challenging task for district officials to teach the often-illiterate local population the necessary knowledge on defending and registering non-formal rights. Village leaders – who are usually more educated and have more regular contacts with district officials and better access to the relevant legal documents – often have a lead over other villagers in terms of relevant knowledge and may be able to take advantage of that situation. The formalization of land property also requires registration at village and district level and includes certain costs for landholders. Thus, it might be less accessible for poor people (personal communication by Locher 2011; see also Knight 2010; Pedersen 2010; Odgaard 2006). Also when it comes to defending customary rights, local elites are often in a better position than other villagers, as one example related to the above mentioned case in the Tanzanian Southern Highlands (see first concern) shows: When district officials by mistake were in the process of demarcating an area which was used by several villagers under customary law, a well situated businessman, who has considerable knowledge about the statutory land law, stopped the officials from surveying his plot. Realising that the village council was the proper authority to impede the demarcation process, he managed to get support from council members (personal communication by Locher 2011). At the same time, other villagers failed to defend their customary rights and lost them to the investor against their will (Locher 2011).

Conclusions from the presented cases

The cases from Kyrgyzstan and Tanzania show that the redefinition of land ownership or use rights by the state may create situations in which legal provisions are unclear or not implemented strictly (for Tanzania see also Pedersen 2010, 2011). The presented examples show that in such situations, even under very different circumstances, local elites often benefit disproportionately from land titling processes. They either build on good connections with state representatives, use their economic potential to practice 'forum shopping', or benefit from the fact that they are more knowledgeable in terms of rules and procedures than other

people. That way, former Soviet elites directed the Kyrgyz land privatization according to their own needs, wealthier Kyrgyz households refer to either statutory or customary law to claim access to communal land and pastures, and Tanzanian village leaders can register their land rights easier than poor or vulnerable groups. Also during the land reform in Nepal (see our second concern), a similar process was observed. Local elites who had access to the state power centres and privileges managed to leverage the land-related state structures, institutions, acts and regulations. Thus, despite the declared objective of a more equitable land distribution, mostly large landowners (who frequently control more land than the legal maximum) have benefited from the land reform, while the poor, marginalized and lower sections of society were often badly affected (Kshetry 2011; Pyakuryal and Upreti 2011; Alden Wily et al. 2009; Upreti et al. 2008). All this again illustrates how strongly social power relations determine property regimes. As Meinzen-Dick and Pradhan point out, property rights "are only as strong as the institutions or collectivity that stands behind them" (Meinzen-Dick and Pradhan 2001: 11). Consequently, socioeconomic disparities and the resulting power relations have a considerable influence on what people can or cannot do to claim and secure property rights over resources. This becomes particularly problematic in the case of secondary use rights of landless people, who are often unable to secure their already weak claims in the course of a land titling process (see also FIAN 2010b: 3). The evidence presented here also suggests that even well intended participatory processes can hardly avoid being strongly influenced or captured by local elites.

Discussion

Already before the recent rise of foreign direct investments in land, there has been much debate on the use of formalizing poor people's property rights over land and other resources as a means to reduce poverty. In reaction to the wave of neoliberal (land) reforms in the wake of the Washington Consensus, land titling was promoted as the 'silver bullet' for the poor (de Soto 2003). Yet, critics have repeatedly remarked that formalized property rights are no guarantee that poor people can actually access and cultivate land, or can derive any other benefit from it, e.g. through land markets (Borras and Franco 2010; Sikor and Müller 2009: 1309; Cotula et al. 2006; Fitzpatrick 2005). Assies shows for instance that the expectation that formal land titles facilitate access to credit often does not hold true in practice, either because banks are not interested in the provision of small loans to poor people, or because smallholders fear using their land as mortgage security (Assies 2009: 582).

Besides the debate on the use of land titling, there is also some debate on different ways of formalizing customary rights and the related overall objectives. Focusing on the formalization of existing property rights over land and other resources as suggested by the FAO guidelines and the RAI principles we have raised three concerns by arguing from a legal pluralism perspective and building on evidence from Kyrgyzstan, Nepal and Tanzania. In the following, we discuss our concerns in light of the existing debate.

Centralist approaches to formalization of existing tenure rights

Assies shows that in principle, the whole formalization debate has evolved around two contrasting objectives or visions (Assies 2009: 574f, referring to Payne 2000), he names them legal centralist, "marketability-based vision" (where formalization mainly serves to turn land into a marketable good), and "security and rights-based vision" (which aims at strengthening local people's rights and self-determination). According to John Griffiths, notions such as 'recognition' or 'formalization' of existing rights are typical reflections of a legal centralist approach, because they imply that customary laws must ultimately be recognized by a single validating source, i.e. statutory law (J. Griffiths 1986: 8). Such an approach is suggested by the RAI principles. However, a centralist or 'state-led' land reform does not only have important limitations in achieving its targets (Sikor and Müller 2009) but – as we argue in our second concern – it also inevitably strengthens the state administration at the expense of local communities and individuals. While this is not negative *per se*, our examples have shown how involved state representatives can leverage their position in a formalization procedure to lead reforms astray. Whereas the RAI principles largely ignore this apparent problem, the FAO guidelines propose a series of measures that states can take to recognize property rights in a fair and transparent manner. They thus rather suggest an orientation towards a security and rights-based vision.

Approaches that recognize pluralism and their implementation challenge

The FAO guidelines propose that: "States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems" (FAO 2012:14). They are thus in line with what Assies suggests for the implementation of a security and rights-based vision (Assies 2009: 586). Assies proposes to 're-institutionalize' existing property regimes wherever possible, i.e. to allow for an

overall legal recognition of plural customary tenure regimes, rather than to forcefully subject them to a single, national property system under statutory law (Assies 2009: 586, referring to Bruce 1998). This approach "does not prescribe a specific approach to land reform" but is based on pluralism (Toulmin and Quan 2000: 5, cited in Ubink 2009: 9). An approach that "accommodate[s] the complexity of rights and practices at multiple levels, including especially the local level" (Meinzen-Dick and Mwangi 2008: 43) may also allow recognizing overlapping bundles of rights or protecting existing common property rights from the risk of being privatized in the course of a formalization procedure.⁵ We conclude that formalization of land tenure needs to be anchored at the local level. The example of Tanzania, whose Village Land Act of 2001 provides customary rights – be they registered or not – the same legal status as statutory rights under the Land Act 2001, is an attempt in that direction. However, the implementation of such types of land reforms faces its own challenges (Sikor and Müller 2009; for Tanzania see Pedersen 2010, 2011). First, there is often a lack of commitment on different state levels to fully implement respective laws and allocate the necessary means to the local level (Knight 2010: 258). After all, letting others participate in the formalization of property rights means sharing power over resources.⁶ Knight thus concludes that if a reform is not to "face a kind of subtle bureaucratic mutiny" (Knight 2010: 259), it requires broad changes in governance: "state officials need new powers, roles and responsibilities if a new law strips them of their previously-held authority" (Knight 2010: 258).

Second, as we have demonstrated in our examples related to the third concern, and as Wiber states: "The consequences of the introduction of state law into minority regions are not, however, always those planned by state bureaucrats" (Wiber 1992: 487). Formalization processes can be very complex endeavours, which may kindle latent conflicts (Assies 2009: 584; see also Cotula et al. 2006: 20). Hence, they require, besides political will, considerable capacities on the part of the involved state authorities – capacities lacking in many of the countries affected by large-scale foreign investments in land (see also Li 2011; Pedersen 2011). As a consequence, local elites outside the state institutions or certain skilful groups often benefit disproportionately from land titling processes, while claims and rights

⁵ On the complexity of formal recognition of group rights in general see Alden Wily 2006 and Fitzpatrick 2005, and for Nepal see Alden Wily et al. 2009 and Upreti et al. 2008.

⁶ For a conceptual analysis of the reciprocal constitution of property and authority see Sikor and Lund 2009.

of the less wealthy and powerful are infringed upon (see also Ubink 2009; Meinen-Dick and Mwangi 2008; Sawyer and Gomez 2008; Cotula et al. 2006). Since wealth and power disparities are essential constituents of property regimes, even participatory approaches cannot always avoid 'elite capture' or other types of struggles within local communities. Thus, even a clear political will for 're-institutionalization' cannot ensure that all people get treated in a fair manner.

Avoid legal intervention whenever possible

Due to the outlined challenges, Fitzpatrick suggests that the extent of external legal intervention in customary land systems "should be determined by reference to the nature and causes of any tenure insecurity" and intervention should be avoided whenever possible (Fitzpatrick 2005: 449). This means that in those cases where customary property regimes have worked considerably well so far and where local individuals and communities show no interest in selling their rights to outsiders, the state's role should be limited to recognising existing customary rights as a whole and protecting them against external threats. Thus, existing claims and rights would remain embedded in a given social context and not be incorporated into the mainstream market system. Land would thus remain out of reach for investors. This is much in line with the demands of global farmer organizations such as La Via Campesina who have been fighting for an overall recognition of customary property regimes beyond statutory law since the 1990s (La Via Campesina 2011). It is certainly not in line, however, with the intentions of the RAI principles, which – even more than the FAO guidelines – emphasize the ostensible advantages of land as a marketable good.

The complexities of participatory land titling

Nevertheless, there may be justified needs for state interventions at the local level. Customary property regimes may fail to de-escalate local resource conflicts, or – more essential in the context of foreign investments – communities may explicitly wish to create marketability for their land resources. In these situations, Fitzpatrick recommends certain forms of state regulation. However, he also warns of "quick-fix attempts to impose formalized titles on fluid customary interests" (Fitzpatrick 2005: 472). In such cases, participatory approaches are a must. Yet, as we argue in our first concern and unlike suggestions by the FAO guidelines and the RAI principles, these can neither be 'simple' nor 'quick'. Identifying customary property rights is a delicate endeavour, because it usually concerns

overlapping bundles of rights, which are embedded in a social and political context and constantly reproduced through people's relations and everyday practices. Our example from Tanzania shows that even elected village leaders are not always aware of all existing claims and (secondary) rights. Yet if common knowledge regarding detailed property rights is absent within a community, it can take a lot of time and money to identify different groups of stakeholders, to understand local patterns of domination and dependency, and to carefully select adequate representatives. In cases where certain land rights are held by external actors (e.g. in the form of patron-client relations), participation may even need to be scaled up beyond the local level.

Concluding Remarks

When analyzing potential economic and socio-political effects and proposed measures in the context of 'land grabs' it is crucial to gain a holistic understanding of land tenure systems. This article concludes that employing a legal pluralism perspective is very helpful in this regard. Adapting this perspective and using also empirical cases beside the classical examples of 'land grabbing', we have demonstrated that the identification and recognition of customary property rights over land is a very complex and delicate endeavour, which risks neglecting locally existing property claims and rights. Unfortunately, neither the RAI principles nor the FAO guidelines address this challenge in a satisfactory way. First, both initiatives propose to identify existing rights in a participatory manner, an approach that is certainly indispensable yet anything but 'quick' and 'simple'. Second, the centralist approach to land tenure in the RAI principles does not allow acknowledging legal plural orders and the social embeddedness of local property regimes. Third, even a more security and rights-based vision as brought forward by the FAO guidelines entails the risk of elite capture and of reinforcing unequal power structures within local communities. To some extent, however, it allows for the incorporation of land-related cultural, social and normative practices and of plural legal arrangements and thus for the protection of locally existing tenure rights. It further leaves it to local communities to decide whether their land and natural resources should become a marketable good to outsiders or not. However, in many countries the realization of this vision would require the adaptation of whole legal regimes and national regulations which takes, besides political will, a lot of time for implementation and involves fundamental changes in governance. Further, careful participatory land use planning at the local level could prove to be an additional tool to reduce negative effects of foreign land acquisitions. Completed before any external interests arise, it serves as a basis for local

communities to take decisions regarding the availability of land for potential investors. However, the introduction of meaningful nationwide land use planning is a major endeavour. All of these challenges cannot be addressed adequately and convincingly within the framework of such guidelines alone. Instead, more long-term strategies for the protection of customary rights are required. Thus, from an analytical perspective, a moratorium on 'land grabs' as postulated by some civil society organizations (IPC 2011) would be most appropriate. From a more pragmatic perspective though, we acknowledge the FAO guidelines and – to a much lesser extent – the RAI principles as more immediate efforts to reduce negative effects of 'land grabs'. However, investors and host governments should by no means mistake these guidelines as guarantors of ostensibly harmless land acquisitions, as the complexity of plural land orders cannot be underestimated. Even when following the guidelines the risk of infringing upon local people's land rights continues to be very high.

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