

## **Access, Formalisation and New Wave Land Reforms. The overlooked role of formal institutions**

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*Draft paper, not to be quoted or circulated*

### **Introduction**

Debates about land and land reforms in Sub-Saharan Africa have been hijacked by the highly politicized debate about titling. A narrow focus on titling, however, blurs our understanding of the wide ranging changes caused by national reforms. Typically, the role of formal institutions is either overestimated, by formalisation proponents, or underestimated, by access analysts. Not least due to the recent new wave of land reforms, which changes governance of land at the local level, there is a need to redefine the concepts and to acknowledge the role of formal institutions.

Formalisation through land titling has been propagated by colonial and post-colonial decision makers alike. They have seen it as a way to enhance economic growth. Within academia, a corresponding 'property rights school' has existed (Platteau 1992 p. 4, Broegaard 2008 p. 23), which got renewed strength with Hernando de Soto's '*The Mystery of Capital*' from 2000. In the book de Soto identifies the ability to access credit through formal titles as a major explanation for the West's economic success and the lack of access to credit as the explanation for developing countries' economic failures (de Soto 2000).

The belief in titling has been passionately criticised by another academic tradition, which has pointed out the persistence of informal and traditional institutions and their strong influences on access to land. Through analyses of access these scholars, primarily anthropologists and historians, have criticised state-led land reform policies, emphasized the continued negotiability of land rights at the local level, and directed attention towards inequalities in access to natural resources at the local level (Peters 2009 p. 1322).

The positions are largely replayed in debates about the new wave of land reforms which have been passed in Sub-Saharan Africa during the last couple of decades, which typically recognise existing rights and contain elements of registration of rights and decentralisation of responsibility for land management (Lipton, 2009: 126-7; Sikor and Müller, 2009: 1308; Boone 2007: 558; Deininger, 2003; Quan 2000: 33, Wily 2000). Formalisation proponents still focus quite narrowly on titling (see for instance de Soto 2006 and 2008) whereas access analysts tend to focus on the irregularities and the lack of implementation of state-led reforms (Peters 2010 p. 604, see for instance Bruce 2008, Müller and Sikor 2009, Lund 2008).

New wave of land reforms combined with the increasing competition over land, which creates a demand for registration of rights, however, challenge these static positions. Based on field research in Tanzania and supported by preliminary findings from other stable countries in Sub-Saharan Africa, this article argues that the combination of national reforms and the competition for land are likely to have a systemic impact on institutions at the local level. Whereas policies are still unlikely to result in full-scale formalisation with universal titling and well-functioning land administrations they are likely to strengthen the role of the more formal, state-backed institutions. Therefore, the concepts of formalisation and access need to get redefined.

The formalisation concept tends to focus on the issuance of titles and underestimates the processual aspects of the reforms. In order to issue titles institutions at the local level are required. Institutionalisation and access to state-backed institutions become crucial. It may be more appropriate to distinguish between more or less formal institutions than to focus narrowly on a utopian end-goal of full-scale formalisation.

The trends which strengthen the formal institutions are likely to be strongest in stable countries with a combination of new wave land reforms and an increasing competition over land. Even here, the outcomes will often be unintended and contradictory. The reform processes are not uni-linear and their outcomes can not be predicted apriori. Complex configurations of coexisting formal and informal institutions are likely to be found. The exact configuration depends on context.

That is a key insight of the last couple of decades' access analyses. However, despite possible irregularities, setbacks and persistence of informal institutions the formal institutions are still likely to become more important in mediating access to land. The development lays bare a mutually constitutive interrelationship between formal and informal institutions. The predominant, current definition of access, however, underestimate the role of the state-backed formal institutions.

The article does not aim at participating in the related, highly politicised, debates about the pros and cons of land titling. The new wave land reforms entail a much wider spectrum of policy changes than titling, which also deserves analytical attention. Instead, I aim at discussing the theoretical implications of current developments within the local governance of land.

It is part of the PhD project 'Decentralisation and Local Governance of Land in Africa. Land Reform Implementation and Citizen Participation in Tanzania', which aims at analyzing how the Tanzanian land law reform from 1999 affects local governance of land. To ensure that some implementation had taken place, two villages in the North-eastern part of the country in which interventions to implement the legislation had been carried out already were chosen. The article is based on around a hundred structured, qualitative in-depth interviews and follow-up interviews with villagers, local leaders, district officials, NGO representatives and ministry officials conducted during six months of fieldwork in 2009-10. Interviews were supplemented with information from documents in village offices, land conflict councils and formal courts, as well as from reports from the Ministry of Lands, Housing and Human Settlement Development and other Tanzanian organisations working with land.

Many of the examples and much of the literature referred to in the paper thus derive from a Tanzanian context. The phenomena they describe, however, are applicable to other Sub-Saharan African countries which are experiencing similar developments; the reform is an

often highlighted example of the market friendly ‘new wave’ of land reforms. Other scholars’ findings from elsewhere are referred to when relevant.

**Box 1: Tanzania’s New Wave Land Reform; strengthening of formal authorities at the local level**

The Tanzanian land reform from 1999 consists of two acts, the Village Land Act, governing village land in rural areas, and the Land Act, governing land in cities and other types of land. The former decentralises responsibility for the administration of land to village authorities. Along with new legislation on forestry from 2002, it represents a significant move towards a more important role for village authorities in managing natural resources at the local level (Wily, 2003a: 14).

The Village Land Act is not directly a part of Tanzania’s Local Government Reform Programme, but it is part of the same, broader trend towards decentralisation of responsibility for the delivery of public services to the local level, which has been ongoing in Tanzania for more than thirty years. The development denotes a gradual strengthening of formal state-backed institutions at the local level, also in land matters.

The chiefs were abolished in 1962 (Max 1991 p. 27), but often retained a role in land management. With Ujamaa, the villagisation programme in the mid-1970s, the villages became the basic units of the local government system, and the right to control public land was subsequently passed on to district and village authorities (von Oppen 1996 p. 213, Fimbo 1992 p. 39). Though the village authorities, in practice, did not immediately gain control over land, they slowly became more important in deciding over land use.

The 1999 land law reform reinforces this trend. Whereas the division of labour between customary, village and district authorities was not too clear earlier on, the land acts make it clear that it is the village authorities who are responsible for administering village land (Sundet 2004 p. 123). They are also given new tasks, namely to register rights, issue ownership certificates and protect women’s access to land.

My research indicates that implementation of the land reform is slow and uneven in rural areas (Pedersen 2010). Still, village authorities, over the years, have become important in governing land matters. In my two case villages, formal procedures for allocating land have now been established and access to the formal village institutions registering and/or allocating land has become crucial for gaining access to land in both villages.

The development has not been uncontested. Elders, for instance, still have a say over land matters. Elders in my case villages claimed that they could still allocate land. When researched, however, it appeared that the land they allocated typically belonged to them personally.

The Tanzanian reform may not revolutionise the local governance of land overnight. The case villages have shown that the formal village leaders struggle to stay in control in an often chaotic reality. If they are to carry out the more complicated tasks like issuing ownership certificates and establishing the conflict resolution bodies, prescribed by the land acts, support from the outside is required. Nevertheless, it is obvious that the formal institutions at the village level, over the years, have become

key in managing land and natural resources at the local level.

## **The Formalisation and Access Debates**

### *Introduction*

#### *Formalisation*

The concept of formalisation evokes strong feelings and it has come to mean a host of different things. It is rarely clearly defined. In the everyday language in developing countries, the formalisation concept is often used to characterise states' efforts to demarcate plots and issue titles to individuals. Within academia it is also quite policy-oriented. Roberts Mitchell's definition of formalisation of rights to land as 'defining, certifying and registering such rights in a public registry' (Mitchell 2007 p. 334) is quite typical.

The titling approach is often thought to promote economic growth. Customary systems to recognise rights are thought to be inefficient because they do not provide standardised procedures for transactions, for instance in case of land sales. They do not provide the infrastructure and impersonal rules of conduct required by modern land markets.

Historically, different schools have evolved. Platteau, in his analysis of reformers' formalisation efforts in Sub-Saharan Africa from the 1970s onwards, distinguishes between a 'property rights school', and an 'evolutionary theory of land rights'. Whereas both approaches aim see titling as desirable, they differ in the role of the government. The former squarely advocates for the creation of private property rights (Platteau 1993 p. 5). The latter sees formalisation as evolutionary processes in which governments supply 'institutional innovations in the form of land titling' as the need for titling arises (Platteau 1993 p. 12).

A modernised, highly influential version of advantages of a formalisation of property is provided by the Peruvian economist, Hernando de Soto, which emphasises formalisation of property. De Soto does not use the word 'formalisation' very often. Instead he talks of 'legalising' the extralegal property (de Soto 2000 p. 198). De Soto explains that the historical explanation for why the West has grown rich whereas the rest has not is to be found in the property systems which have been developed over centuries to register property rights and make them visible, legally, and thus easy to transfer, for instance through sales. A formal property system also makes it possible to borrow money by using property as a collateral for loans, thus turning dead assets into capital. Poor countries have these systems. The problem is that they are inaccessible to the poor:

*...most of the poor already possess the assets they need to make a success of capitalism (...). But they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded, unincorporated businesses with undefined liability, industries located where financiers and investors cannot see them (de Soto 2000 p. 5).*

Whereas de Soto has a political agenda and tends to see the challenge ahead as a matter of getting the administrative techniques and the legal frameworks right in order to register extralegal property, formalisation is also an analytical concept within academia. Here, the concept of formalisation has been defined in a number of distinct ways; as the use of official and/or written documents; as a tenure system created by statute (i.e. by law); as governance by formal institutions (Ikdahl et al 2005 p. 4).

The differences makes it clear that formalisation denotes not one, but at least two different ways of regularising social life which are of interest in this article; the production of written records and the establishment of institutions governing land.

The discussion points to the processual aspect of establishing institutions. It is precisely this aspect that a narrow understanding of formalisation as a registration and titling exercise has been criticised for ignoring. Some scholars point out that it does not grasp the complex and uneven processes at stake (Ikdahl 2005 p. 4). Titling is a highly complex and very political process with far-reaching distributional consequences. Often the consequences differ significantly from the policy intentions.

Increasingly, proponents of formalisation acknowledge this. Titling may not, they say, be advisable if a state does not have the resources to finance the operation of the system (Mitchell 2007 p. 364, Deininger 2003). Even de Soto acknowledges that all third world formalization programmes '*where all assets were properly represented and integrated into one system so as to produce capital*' have failed so far (de Soto 2000 p. 170).

Formalisation, thus, is not only a question of issuing titles. It is also a matter of the establishment of institutions. Institutions are typically either analysed as rules or as stable patterns of interaction. The latter can also be termed 'institutionalisation' in order to stress that certain cultural norms have become very strong and that deviant behaviour will be punished (Voss p. 7563). Talcott Parsons has defined institutionalisation as:

*...an articulation or integration of the actions of a plurality of actors in a specific type of situation in which the various actors accept jointly a set of harmonious rules regarding goals and procedures* (Parsons according to Voss p. 7563).

The failure of titling projects in Sub-Saharan Africa can be described as a lack of institutionalisation. Typically, pre-existing informal practices are being described as being too strong or the resources allocated were insufficient. To conclude that titling failed in the past, however, does not render much insight into the effect of current land reform processes.

New wave land reforms, with their recognition of existing rights and their decentralised administration of land differ from previous state-centric approaches. Titling is only one potential aspect of these novel reforms. Some reforms do not even aim at issuing titles. Ikdahl et al's more modest definition of formalisation as 'the process of increased state engagement in terms of legal regulation and registration of land rights' (Ikdahl et al 2005 p. 5) recognises that reform implementation is more a process than an end-state.

However, to capture also minor shifts and changes in the local configuration of institutions I prefer to focus on the more or less formal institutions. Formal and informal institutions are often used as binary oppositions. Typically, a distinction is made between written formal and unwritten informal institutions, though that distinction, too, can be discussed (Leftwich and Sen 2011 p. 321). Keith Hart,

a pioneer within the study of informal economy, emphasizes regularity and the relationship to a national bureaucracy as defining features (Hart 2008 p. 11). That also captures gradual changes and intermediary forms. A formal institution is typically established by actors who have some kind of backing of the state and rely on third parties for monitoring and enforcement (Leftwich and Sen 2011 p. 322, Voss 2001 p. 7563).

Informal institutions, on the other hand, are usually thought of as unwritten norms and practices and do not rely on external authorities monitoring and policing (Voss 2001 p. 7563). Within the study of land the concept of informal institutions has become widely used by scholars studying access, as demonstrated below. As will become clear, an informal institution within this tradition often comes to denote local level negotiations, the involvement of traditional authorities and practices or outright irregular administrative practices.

It may often be more precise to describe institutions as being more or less formal rather than formal or informal. Many new wave land reforms for instance recognise traditional authorities and local practices which, thus, become more formal.

The point is not that the new wave of land reforms get implemented to the letter. They do not (Bruce 2008). Governance today, however, has less to do with top-down hierarchical policy implementation than with poly-centric governance. Networking and regulation gives agency to actors at both the local, the intermediate and the national level (IDS 2010, p. 9, Hill and Hupe, 2002: 15). The point is that the reforms aim at setting up new land administration structures at the local level which are likely to have a significant impact on how land is governed on the ground.

### *Access*

The concept of access has become a widely used concept within the study of land, property, and natural resources. It has different origins and is often used without any precise definitions. It is typically used to criticise the formalisation discourses and formalisation programmes outlined above. Typically, the last two decades' access analyses have emphasised the persistence of informal institutions, legal pluralism and local level negotiability as a contrast to the ideas of formalised private property rights.

A revisit to the 1970s definitions of access and their focus on the power of formal state institutions reveals a striking contrast to the current emphasis on local level negotiability. The question raised by this review is whether there is a need to revisit the role of formal state-backed institutions?

Access became a hot topic in leftist debates within the 1970s' social sciences. It was also applied in discussions about the relation between underdevelopment and power in the third world. A book from 1979 with the indicative title 'Access to Power' circles around urban poor's access to government authorities to mobilise support for solving their problems (Nelson 1979 p. 9 and 263).

Within Structural Marxism, the concept of access was developed as a critique of the widespread, but naïve, Marxist understanding of power as a question of taking over control of property and the state. The state and state bureaucracy, it was pointed out that, were relatively autonomous bodies with their own norms and repressive logics. Taking over the state, therefore, was not an easy task. What

mattered more was whether the behind-lying logics could be changed. If not, the position of dominant classes and their privileged access to state resources were likely to persist (Lamb 1975 p. 130).

Within the studies of land and natural resource management, the access concept also was deployed as a critique of a predominant orthodoxy. Piers Blaikie, in the 1980s, made explicit the link between access and natural resources. In an attempt to refine the analyses of conservation and soil erosion and to move away from blaming the poor for soil degradation, Blaikie focuses on 'the political economy of soil erosion' (1981 p. 57, 1985 p. 5). In his analytical framework he emphasizes the processes and cumulative, distortive land-use decisions which may pressure marginalized groups to over utilise marginal natural resources. A part of the responsibility, he writes, lies in the global capitalistic processes which increase commercial cash-crop production and removes the control over natural resources from the local level at the expense of marginal land users (Blaikie 1981 p. 66, 1985 p. 146).

The state and the new classes play important roles during these processes of dispossession. Still, Blaikie emphasises that access is not only a question of class, but also about access to other resources. He uses the somewhat imprecise term 'access qualifications' to emphasise that though there may be available land to farm or graze at the local level, a farmer may not be able to use it, if he or she does not have the required means to make it productive, for instance the right to use the land, the money for buying seeds or pay for labour, access to irrigation. There are, thus, marked differences between 'groups or classes' who have access to and use the state apparatus and those who do not (Blaikie 1985 p. 6):

*'The class composition of the society under study is therefore, in a sense, 'operationalised' in terms of the income opportunities and their access qualifications.'* (Blaikie 1985 p 112 and 1981 p. 59. See also 1989 p. 27).

Ironically, Blaikie remarks, those with access to the other required resources rarely have problems with soil erosion. Access qualification are also unevenly distributed. He thus maintains the emphasis on access' political nature. Only political, collective action can change the rules of game. He mentions a Chinese radical Land reform and the establishment of cooperatives in Zambia as examples of such changes (Blaikie 1985 p. 112).

What is strikingly different in Blaikie's access definition from the 1980s from the definitions before and after him, is his focus on the interrelationship between the local, national, and international levels. Even though he puts more emphasis on the local level, he still, in his late article 'Environment and Access to Resources in Africa' from 1989, maintains:

*'...that political, economic and cultural structures in Africa are continually changing as they become more integrated into national and international systems...that the functioning of households, regional economies and national and international systems are interdependent'* (Blaikie 1989 p. 18).

Blaikie's work became a major inspiration for the analyses of access in the 1990s, which were often criticising the World Bank's policies aiming at privatising and individualising property. With later scholars' focus on the local level complexities, however, these analyses downplayed the direct importance of politics and policies on access to land and natural resources.

Politics is thus almost absent in the next major attempt to define the term which appears in 2003 with Jesse Ribot's and Nancy Lee Peluso's article, *'A Theory of Access'*. The article outlines a general

theory of access, not tied to any specific geographic locations. As their point of departure Ribot and Peluso identify the distinguishing features between access and the more theoretically developed concept of property. Whereas property, they say, is about rights to benefit from resources, access is about ability to benefit:

*Our move from concepts of property and tenure to access locates property as one set of factors (nuanced in many ways) in a larger array of institutions, social and political economic relations, and discursive strategies that shape benefit flows* (Peluso and Ribot 2003 p. 157).

Access, according to this definition, is much more contingent than was Blaikie's concept of access qualifications which had been developed specifically to a third world context. In a phenomenological manner Ribot and Peluso thus defines access in itself.

This broader understandings of access is about access to natural resources. It is not necessarily mediated by institutions. Peluso and Ribot mention 'access to authority' as only one out of a large number of 'structural and relational mechanisms of access'; access to technology; access to capital; access to markets; access to labor and labor opportunities; access to knowledge; access through social identity; access via the negotiation of other social relations (Peluso and Ribot 2003 p. 164ff). With the distinction between property and access, they direct attention to the aspect of power and power relations in governing access to natural resources.

The focus has thus changed from the 1970s and 1980s emphasis on classes and the state. A wider range of actors come into focus as potentially influencing access. Those who are able to mobilise support from these various sources are in a privileged position whereas those who can not mobilise are left out, even if they are entitled, legally, to benefit from a resource:

*Access analysis also helps us understand why some people or institutions benefit from resources, whether or not they have rights to them.* (Ribot and Peluso 2003 p. 154).

It is no coincidence that inequality and vulnerable groups' access are often important aspects of analyses of access (see for instance Lund and Sikor 2009). The broad definition of access has an analytical advantage in that it also allows scholars to focus on natural resources which are not usually comprised in analysis of property and property rights. Pastoralists may, traditionally, have access to grazing land without having any formal rights to the land. Women may have access to collecting firewood on land which is commonly owned or which belongs to somebody else. This has most clearly been pointed out by feminist scholars researching women's access to land:

*'While in many cases women have access to land, they do not have a formal right to land. Rights to land imply security that is tied to an enforceable claim, while access is more informal and less enforceable'* (Giovarelli 2009 p. 204).

A large group of scholars, typically anthropologists and historians, has worked within this conceptual understanding of access. They stress that relations over land are socially embedded and point out the flexibility of traditional systems in the management of natural resources as opposed to formal state backed systems, which they find reduce access to resources to merely being a question of titling and private ownership rights (Peters 2006 p. 91).

The tradition inscribes itself in a broader academic tradition, which sees the African state and its institutions as being extremely weak outside the capital cities, partly because it never gained control



over land tenure issues (Herbst 2004 p. 180). Not even formal property rights do automatically imply that the actors holding them are able to derive material benefits from the resources the rights apply for (Lund and Sikor 2009 p. 5). Access is more informal and irregularities and corruption only add to state weakness.

By pointing out the negotiability of land rights in Africa, these scholars often criticise land reforms and formalisation efforts for not being implementable. Sara Berry's influential book 'No Condition is Permanent' from 1993 lies out the analytical framework within which later studies came to operate:

*'...over the course of the twentieth century, changes in conditions of access to land and land-based forms of capital (such as cleared fields and tree crops) followed a different trajectory from conditions of access to labor and working capital. (...) Specifically access to land continued to be mediated through membership in various social networks, while access to labor has become increasingly individualised'* (Berry 1993 p. 17).

These defining characteristics of land in Africa undermines states' efforts to formalise property (Berry 1993 p. 200). Berry's book can be seen as an attempt at identifying why African agriculture failed to modernise. She sees land as a key variable. People at the local level, according to Berry, often prefer main less clearly defined types of ownership than prescribed by state-led reforms, because they leave room for negotiations which can deliver other benefits. The unresolved relationship leads to ongoing negotiations about land at all levels:

*'If access to resources and opportunities depends on one's ability to negotiate, people may be more interested in keeping options open than cutting them off, and in strengthening their ability to participate in and influence negotiations rather than acquiring exclusive control over resources and severing connections which are not immediately profitable'* (Berry 1993 p. 14).

Later, scholars have analysed the unresolved relationship between formal and informal institutions as a competition over authority. 'Legal pluralism' describes a situation 'in which two or more legal systems coexist in the same social field' (Merry 1988 p. 870). Analytically, legal pluralism may imply the coexistence of different law codes or institutions, or a combination of the two. Within this anthropological tradition, a close relationship between property, power and institutional authority is depicted:

*'The institutional contestants' pursuit of control over natural resources involves them, unavoidably, in the competition for authority, its consolidation, reconfiguration and erosion'* (Lund and Sikor 2009 p. 3).

Instead, these scholars often talk of what can be termed a 'third sector' which incorporates characteristics from both categories of the formal and the informal in a rather haphazard manner, usually decided by local politics in what has been termed 'multirational' politics' (Peters 2006 p. 99, see for instance Lund 2008 p. 4).

This phenomenological understanding of access is often used to study governance of common pool resources in developing countries. Still, based on these findings, generalisations are often made about access to natural resources in developing countries in general. Though Peluso and Ribot actually advocated for taking into consideration the specific political-economic framework (Peluso and Ribot 2003 p. 160), it is rarely done in practice. The concept of access is defined as contingent and open-

ended. It is characterised by intricate and unpredictable negotiations at the local level. Even when scholars, lately, have come to recognise that the state is important in the competition for land, they tend to stay within Berry's framework of negotiability at the local level.

Berry herself recognises that states are not necessarily weak. Still, she emphasises the variations, fluctuations and negotiations over time (Berry 2009 p. 41). According to Lund, the informal institutions have come to permeate the Ghanaian state, whose institutions, in turn, become tools or platforms in the ongoing negotiations:

*'The institutions such as the Forestry Department, the Ministry of Agriculture, the police, the Town and Country Planning, and the Land Commission were more than just bureaucratic institutions when conflicts emerged from the 1990s; they were theatres where conflicts were debated and outcomes had far-reaching effects' (Lund 2008 p. 181).*

Berry published her book back in 1993 under the influence of an economic crisis and the weakening of state authorities caused by structural adjustment programmes (Berry, 1993: 184). However, current new wave land reforms are described in similar terms by her and related scholars: neoliberal reforms have only added to the confusion over rights of ownership (Berry 2009 p. 40); implementation is slow, and local-level institutions are only established to a very limited extent (Bruce and Knox, 2008); state-led land reforms encounter 'significant problems on the ground' because of a lack of local support (Müller and Sikor, 2009: 1307); and rather than achieving clarity, reforms may add to the repertoire of rules and regulations at the local level, making local politics decisive for implementation (Lund, 2008: 173). Consequently, they claim, local elites benefit the most from reforms. These scholars often recommend strengthened customary institutions as an alternative to state-led reforms (Peters 2006 p. 99).

The question is whether this understanding of access underestimate the role of the state and formal state-backed institutions in structuring access to power and resources, which was emphasised so strongly by the 1970s Marxist scholars? For sure, it only pays little heed to the specific historical processes, which may deviate from governance of common pool resources in the 1980s and 1990s. I shall argue, that, currently, there is a drive towards institutionalisation of more formal land institutions in many developing countries which challenges the broad conceptualisation of access. A demand from below for written and regularised registration of rights has been observed by many scholars. Simultaneously, a new wave of land reforms has been initiated in several countries in Sub-Saharan Africa. Typically, registration and titling is a part of these reforms. The implementation of the policies should not be taken for granted. Still, I argue, the concept of access needs to be redefined to grasp the proportions of these changes.

### **Towards more Formal Land Institutions?**

Much energy has been devoted to formulating ambitious formalisation policies and, subsequently, to identifying the failures of these policies. As pointed out above, however, the formalisation concept is not well-defined and it is being used about a number of quite different phenomena. The critique of the concept and the policies it denominates is easily justified.

The debate does not, however, make use wiser on the changes on the ground which are currently taking place in many countries in Sub-Saharan Africa. These changes challenge not only the formalisation concept, but also the access concept with which much critique has been formulated. The current drive towards more formal land institutions is characterised by two components; a demand from below for written documents and concurrent efforts at the national level in many countries to increase and regularise control over land matters. The predominant form of the latter is the new wave of land reforms, which have been passed in Sub-Saharan Africa in recent years. When the two tendencies converge they are likely to promote a shift from informal to more formal institutions and, over the years, a more formal governance of land.

### *New Wave Land Reforms*

The new wave of land reforms are the second generation of post-colonial land reforms. In 2003 land reforms were underway in more than twenty countries in Sub-Saharan Africa (Wily, 2003b: 4). They are thought to promote the dual goal of increased tenure security and economic growth, but in different ways than previous reforms.

The first land reforms, in the 1960s and 1970s, viewed customary land systems as being ineffective in providing the security of tenure required to ensure a productive use of land. Consequently policies were aimed at strengthening the role of the state in establishing enforceable land rights, but with little success (Peters, 2009: 1318; Quan and Toulmin, 2000: 2). Typically these classic land reforms also aimed at redistributing land from large-scale to small-scale or landless people. Another type of land reform from this era aimed at restitution, that is, at correcting old wrongs, caused, for instance, during earlier collectivisation programmes or colonial land confiscations (Lipton, 2009: 126; Müller and Sikor, 2009: 1309). Descriptors like 'redistributive' land reform, 'tenure' reform, and so forth, were often added to emphasise a predominant element. However, most reforms, now and then, contain several of these features. Even today's reforms often entail elements of redistribution and restitution.

The new wave of land reforms vary quite substantially. Typical common denominators, compared to previous reforms in Sub-Saharan Africa, include; recognition of existing rights, registration and titling; the promotion of markets in land; decentralisation of the responsibility for managing land to the local level which is thought to improve the prospects of implementation (Lipton, 2009: 259; Müller and Sikor, 2009: 1308; Boone, 2007: 558).

The type of institution, through which reforms are sought implemented at the local level, differs. In Tanzania, the responsibility of registering rights and issuing title deeds is vested in existing, elected, village authorities. UGANDA? In Malawi, it is vested in customary land committees headed by chiefs and elders (Peters 2007 p. 465). A reform may thus vest power in customary and still enhance a more formal administration of land, because it provides the legal basis for their authority and regulates the way these authorities work (Boone 2007 p. 575).

Overall, there seems to be a consensus that what characterises new wave land reforms is a reluctance to centralise and override land markets and a will to simplify complex mixes of tenurial regimes, in which pre-colonial informal practices, colonial land policies enhancing large-scale farming and postcolonial, state-led redistribution programmes coexist.

Therefore, Zimbabwe's redistributive land reform is not a new wave land reform (Lipton 2009 p. 149), because the Zimbabwean government did not even pretend to acquire the land for redistribution on willing-seller terms without the use of force.

On the other hand, some scholars argue that a reform should still have a redistributive element and benefit the poor to qualify for the land reform label (Lipton 2009 p. 260 and p. 327). However, even reforms with no intention of redistributing land may have unintended distributional consequences. The Tanzanian reform which merely aims at streamlining land laws and land administration has significant distributional consequences when implemented (Kosyando 2007 and 2008). Still, it is often categorised as a new wave land reform (Wily 2000 and 2003, Boone 2007). I do therefore not find it fruitful to disqualify a reform a priori because it does not intend to redistribute land.

**Box 2:**

**More Formal Customary Authorities. Elders and Women's Rights in Tanzania**

*A Demand from Below*

A number of studies reveals this demand for some kind of registration of rights in many areas. This demand from below for registration of land rights is another strong impetus for increasing the role of formal land institutions at the local level. A review of the experiences from four African countries, Mali, Niger, Ethiopia and South Africa, reveals that 'some form of demand for property formalisation clearly exists within the cases' (Benjaminsen et al. 2006, p. 19). A review of land rights and land conflicts across Africa from 2006 noticed that growing population pressure and development of market had led to new practices.

*'Different structural processes have promoted an 'autonomous' privatisation process in Africa. (...) Recent research shows that the autonomous processes of privatisation, of exclusion, and of outright land grabbing are often accompanied by different efforts at formalisation. However, to obtain a title is a cumbersome and costly process in most African countries, well beyond the reach of most rural poor. As a consequence of the unsatisfied demand for formalisation of land rights, a process of what one might call informal formalisation is emerging in many places with land scarcity' (Lund et al. 2006, p. 20-21)*

As indicated, citizens and communities often invent practices to establish proof of ownership/use rights and to register transactions in the absence of access to formal registration and titling services. These practices often borrow features from formal registration practices like using seals and signatures. Citizens then rely on informal practices by customary leaders, informal leaders or local level formal authorities.

In some areas in Tanzania, this demand for registration has been developing for decades. It has most noticeable been identified in areas with high population density and increasing competition over land, i.e. in urban and peri-urban areas. Often citizens there have also been exposed to the idea of individual

land ownership introduced by the colonial authorities for non-African residents. In these areas some kind of written proof of ownership or use right often has become the norm when land is transferred between citizens by sale or rental, or allocated by local authorities (Daley 2005 p. 554, Daley 2008 p. 72, Kombe and Kreibich 2006 p. 33, Gastorn 2007). In remoter, rural areas and even in areas dominated by pastoralists, a similar pressure for registration of land can be observed (Gastorn 2007 p. 108).

The tendency to secure right by using public authority characteristics has been termed ‘informal formalisation’. Benjaminsen et al conclude that such formalisation and privatisation from below is currently taking place regardless of state policies. ‘Not to formalise’ is therefore not a realistic option. The crucial question they raise, therefore, is whether national policies facilitate such local solutions and practices and manages to secure transparency during the formalisation process? (Benjaminsen et al 2006 p. 19).

### *The Drive towards more Formal Land Institutions*

Significant changes are taking place in how land is governed in Sub-Saharan Africa. In particular areas with a combination of reform policies and an increasing demand for land witness these changes. Still, if a narrow formalisation definition which focuses narrowly on regularised, full-scale, state-led registration and titling of property, hardly any of these areas are likely to pass the formalisation test. Implementation is likely to be incomplete and citizens’ and officials’ practices rarely comply with the legal framework.

To compare policy implementation with a utopia, however, does not render insight into the changes on the ground. Implementation studies have shown us that even in the North, policies are being interpreted during implementation processes at the local level (Hill and Hupe 2002, Lipsky 1980). The current trends in many Sub-Saharan African countries appear to point towards strengthened formal land institutions. These changes should be analysed as processes, not as an end-state.

The demand from below for written documents to register rights and the new wave land reforms, with their increased involvement of state-backed formal institutions, are two major components in the drive towards more formal institutions.

However, policies aiming at establishing state-backed formal institutions and a demand for written documents are merely intentions. Whether more formal institutions are established in practice depends on the extent to which the changes get institutionalised at the local level.

New wave land reforms usually aim at strengthening both components of the drive. The way they do so, however, differs. The differences in local, state-backed land administration institutions are outlined above. In terms of provision of documents the reforms also differ. Most seek to provide registration and titles to those demanding it. Some reforms make registration of rights mandatory, whereas others do not. Some require a cadastral survey of the boundaries of the land in question, others do not. In some, land may be sold, in others not (Wily 2003 p. 33ff). A demand for written documents may also have different outcomes.

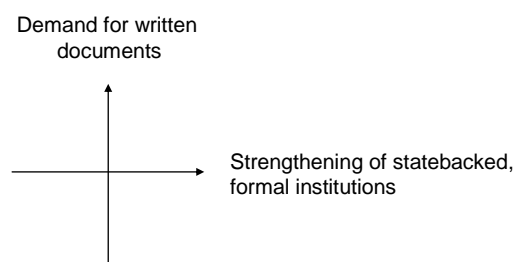
What matters in the end, however, is whether new practices change and get institutionalised. Overall, whether a more formal governance of land is established has much to do with institutionalisation and

access to institutions at the local level. The national legal framework, however, is important for the institutionalisation. Two examples from Tanzania illustrate the point:

- The first has to do with the establishment of new institutions. As box 1 in this article shows, the formal, elected village authorities in Tanzania have been established as the main land authority in terms of allocation of land and registration of rights in many places. Still, they may not yet live up to their role as the authority responsible for issuing titles and setting up dispute settlement bodies. The latter, in other words, may have been prescribed by the land reform policy, but has not yet been institutionalised at the local level.
- The second has to do with formal institutions influencing less formal practices. As box 2 shows, elders in Tanzanian villages may still have a role to play when it comes to settling family conflicts which involve. The Village Land Act encourages the incorporation of customary laws and practices as long as they do not discriminate (URT 1999 section 20, Knight 2010 p. 187, Ikdahl et al 2005 p. 42). Whereas the set up of elders is typically ad hoc, which is not ad hoc, the elders claim that they now protect women's rights to a larger degree than previous, partly because of government legislation. Thus, less formal institutions may become more formal without being formalised.

### Box 3:

#### The Drive towards more Formal Land Institutions



*The figure depicts the two components of the drive towards more formal institutions; more written documents and the establishment and/or strengthening of formal state-backed institutions at the local level. When both components are present the drive is strong and makes it more likely that governance*

*of land becomes more formal. If only one of the components is present it is less likely.*

## **Access Revisited. The Mediating Role of Formal Institutions**

### *Introduction*

The predominant definition of access as unmediated or informally negotiated access to natural resources gets challenged by a drive towards a more formal institutions. I do not claim that the focus on local level negotiability should be abandoned altogether. My point is that it may be less relevant in certain situations. New wave land reforms, when implemented, change the name of the game and aim at strengthening the formal institutions. That should get acknowledged in access analyses.

The problem with too much emphasis on the locally negotiated access to land and natural resources is that it blurs our ability to grasp the proportions of change. Ironically, it may scale down the very issue of inequality which it claimed to emphasise. Unmediated, unrestricted or informally negotiated access to land and natural resources still occurs and should still be included in the analyses. But to assume that it is always the predominant form of access, would be misleading.

### *Inequality Revisited*

Sara Berry's and other access scholars' research during the 1990s and early 2000s, pointed out the failure of previous reform policies. Often the state-centric policies had fatal consequences for women and vulnerable groups. These scholars' contribution is priceless for our understanding of the local complexity of land and natural resources. The question is, however, whether the analysis is still valid today?

The problem with propagating informal negotiations and practices is that it alludes to the existence of a local negotiation space, less marked by the power and the inequality issues, with which we associate more formal administrative hierarchies. The impact of different types of institutions, the formal institutions in particular, however, should not be ignored. On the opposite, we risk underestimating their impact on equity and inequality. This was the key insight of the 1970s Marxist access theorists:

*'We cannot retreat, though some would wish it, into the non-institutional world of the simple market, individual preference, and the weak contract adjudicated by occasional appeal to judicial equity. Nor can we advance, though some would wish this too, to an alternative non-institutional world of communitarian organization, free from secondary, complex, formal, heavily scaled and largely hierarchical organization'* (Lamb and Schaffer 1981 p. 2).

The big common pool theorist, Elinore Ostrom, also warns us against turning common-property into the new one-size-fits-all solution: *'This is equally as dangerous as the earlier reliance on government or private property as panacea.'* (Ostrom 2001 p. 143). Ostrom was a pioneer in pointing out the existence of other types of institutions governing access to natural resources than those of private

property and the state. Unlike many access scholars, however, she does not apriori assume that power is located at the local level. To her, institutions are polycentric and complex (Ostrom 2010 p. 664).

If not all kinds of institutions are systematically included in access analyses we risk miscalculating the proportions of change. By not very clearly reflecting on the differences between different types of institutions, it somehow renders all types of institutions equal in importance. In certain situations, the emphasis on the negotiable character of land rights at the local level may thus reduce our ability to understand the different degrees of inequality which may be at play. New wave land reforms represent such a unique situation.

Many scholars argues that marriage is the most important way for women to access land and natural resources in many countries in Sub-Saharan Africa (Silberschmidt p. 20, Yngstrom 2002 p. 26, More references). Typically, they do so to warn against titling projects which they see as endangering women's informally negotiated access to land. I shall however argue, that for women living in countries with a strong drive towards a more formal governance of land, access to the formal land institutions becomes crucial. Women may still be able to negotiate access to land through their marriage after land has been registered. But one could, rhetorically, ask, what matters the most for a woman: informally negotiated access to collect berries, or access to the institutions which currently allocate land or register ownership rights to land with far-reaching distributional effects? The answer to the question of course also depends on the context, the ethnicity and the socio-economic background of the woman. Still, the question deserves to be raised.

The gendered aspect of land allocation has been demonstrated in Zimbabwe, where land reform processes have been ongoing, slowly, for more than three decades. Until around year 2000 it was carried out without the use of massive force applied later. Whereas the single women acquiring land and a permit in their own rights usually experienced an improvement in their tenure security (Goebel 2005 p. 90 and 96), married women, whose rights were often registered in the name of their husbands, were in a less certain situation. For them, their marriage provided them with access to land, but their primary vulnerability also related to their marital status; in case of divorce they were without land registered in their own names, and, consequently, their access to land was delimited (Goebel 2005 p. 98). The relation between gender and access to land is, in other words, reconfigured.

The Zimbabwe experience points to the importance of the administrative design of the policies. Current new wave land reforms with their more gender sensitive legal framework and decentralised management structures, are also likely to affect women's access to land. But good policies are not enough. Policies do not guarantee that women's rights are automatically respected at the local level.

An important aspect often overlooked in policy debates is the enforcement of rights to land. Research has shown that access to justice is unevenly distributed, typically to the detriment of women (Goebel 2005 p. 146, Broegaard 2008 p. 229). This, however, applies for both formal and informal systems. We should not, in other words, take the outcome of the current processes for granted. To ignore them, however, would be equally misleading.

**Box 4:**

**More Formal Customary Institutions. Elders in Malawi and South Africa**



### *Access and Formal Institutions*

This article argues that formal institutions matter to an increasing extent in several countries in Sub-Saharan Africa. Open access to resources is one way to access resources, but it is far from being the predominant one everywhere. In recent years, some countries have experienced a strong drive towards more formal land institutions.

The individualisation processes and the pressure on land is likely to reduce the areas governed by open access and by common property regimes. During these processes, access to the institutions allocating land and registering rights becomes crucial. Furthermore, the new wave of land reforms typically seek to establish or strengthen the more formal institutions. Sometimes, power is vested in existing customary institutions, which, ipso facto, are incorporated in a more formal, state-backed governance of land. Access analyses should pay heed to these developments. Without a better understanding of the role of formal institutions in governing access to land and natural resources, they are likely to be imprecise.

Typically the positions in the debates about land reforms are decided by differing views on the desirability of titling, which entails an increased role of formal institutions. Many access scholars see states' land reform policies as a threat to the tenure security of vulnerable groups. The opposite position, that it is the individualisation processes more than the formal registration exercises, which poses the biggest threat to women's rights to land, can also be found (Whitehead and Tsikata 2003 p. 79 and 98). Some African feminists and female scholars even see state intervention as a source of gender equity (Whitehead and Tsikata 2003 p. 102, Goebel 2005 p. 146, Varley 2008 p. 1748, Daley and Englert 2010 p. 93).

These positions may have been relevant in the 1990s and early 2000s, when the new wave of land reforms were formulated and enacted in many countries. Now, it is time to move on. Access to formal institutions matter and should be an integrated part of access analyses. Similarly, attention should be paid to the impact of the higher political and administrative levels on local governance of land. With decentralisation governance has become multilayered. The focus within most access analyses on local level complexities becomes insufficient. National policies matter. In sum, no institutions and no administrative level should apriori be excluded from analyses of access.

To acknowledge the increased role of formal institutions is not to claim that the development is uni-linear. The access analyses of the last couple of decades have rightly identified the complexities which may affect policy implementation. Setbacks will appear and areas with no pressure on land may not experience any drive towards more formal institutions. Most often a complex combination of institutions and property regimes is likely to coexist at the local level. In rural Tanzania, I found that formal rules regulating land use, for instance the setting aside land for grazing or nature reserves, coexist with less formally allocated, privately owned, tenure rights and informally negotiated, individual agreements between a single woman and her relative over the borrowing of a piece of land.

Several scholars have pointed out that inaccessible formal institutions are often a key reason why informal or customary institutions persist. Citizens who need to register rights and settle disputes, even when the formal services are unavailable, use existing, customary systems or they invent new, informal procedures and institutions. They vote with their feet.

Bureaucrats and citizens thus influence the establishment of institutions, but more often based on pragmatic cost-benefit analyses of the cost of services rather than on ideological preferences for a certain type of institutions. The interrelationship between accessible institutions and citizen's practices is crucial for institutionalisation and, then, the configuration of institutions:

*'Access is, then, fashioned by its rules, its procedures: the service itself is, from one view, compounded of them; the distribution is so governed. The issue is, in fact, about the significance of these rules and procedures themselves, both for policy outcomes as for these formulations, exchanges and regulations of social life'* (Lamb and Shaffer 1981, p. 61).

Still, the importance of formal, state-backed institutions is likely to be on the increase. The competition paradigm within access studies is fruitful if one wishes to capture local complexities, but it cannot stand alone in an analysis of the drive towards a more formal governance of land, where outcomes are more systemic. Scholars like Daley, Kombe and Krebich, also researching in Tanzania, have described how land, increasingly, has become a matter for existing, formal, local authorities in some areas with increased competition for land, but not always in a state prescribed manner (REFERENCES). Therefore, the impact of these formal institutions deserve particular attention.

To acknowledge the importance of the state and of formal institutions in specific contexts does not mean that less formal institutions and practices become irrelevant in mediating access to land and natural resources, and, thus, for analysis (Pavri 2001 p. 71, Agrawal 1999 p. 639). It is not a question of either or. Keith Hart writes about a 'dialectic' between the formal and the informal:

*'The formal-informal dialectic is intrinsic to both the bureaucracy and the informal economy, as well as between them. We need to know how formal bureaucracy works in practice and, even more important, what social forms have emerged to organise the informal economy'* (Hart 2008 p. 21).

In a similar vein, the professor in comparative political economy, Lauren M. Maclean suggest to see the changes as processes of mutual transformation of formal and informal institutions, in which the state plays a crucial, structuring role, rather than seeing them as zero-sum games (Maclean 2010 p. 238).

This perspective requires to be sustained by empirical findings on the ground. The new wave of land reforms is still a novel phenomenon. In reality, we do not know much about the effect of reforms on local governance of land. In this article's boxes I have highlighted some examples of the likely impacts. Processes are still complex and the local context is still extremely important. To overlook the systematic strengthening of formal institutions, however, would be a fatal mistake.

## **Towards a Conclusion**

Work in progress.

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