

1 Legalising land rights in Africa, Asia and Latin America: An introduction

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The potential of legalisation of land assets

Millions of people live and work on land that they do not legally own in accordance with enforceable state law. Secure land rights are a basis for household food security and shelter, and provide a safety net in case of unemployment or retirement. The absence of state recognition for local property rights is considered to affect people's tenure security, which in turn impinges on people's social-economic security and impedes development. People who are not secure in their property rights will not invest labour and other resources in the fertility and productivity of their agricultural land, the improvement of their houses built on the land, and the infrastructure of their neighbourhood. Tenure insecurity also hinders the provision of services and infrastructure by the government. Furthermore, people are unable to acquire formal loans, as they cannot use their land or houses as collateral. The lack of state-guaranteed documents moreover inhibits the ability to make transactions of land and houses with strangers who are not familiar with local ownership structures, which will restrict the land market.

Traditionally, endeavors to legalise or formalise extra-legal land tenure have focused on state-led individual titling and registration.¹ This was based on the assumption that individual property rights would improve access to credit and thus increase the ability of landholders to invest in their land. Furthermore, individual titles would remove disincentives to invest through an increase of landholders' confidence that they would not be deprived of their land. This paradigm was broadly supported by legal scholars as well as by those in other disciplines as diverse as economics and land surveying.

There has been some success with titling and registration. Feder et al. (1988) and Li, Rozelle, and Brandt (1998) argue on the basis of data from Thailand and China that private property increased security, investment, and productivity. Deininger (2003:47) has reported increases in land values and agricultural investment following registration programmes in Nicaragua, Ecuador, and Venezuela. However, in several other countries, especially but not exclusively in Africa, no significant relationship was found between tenure regimes on the one hand and

security, credit use, and productivity on the other (Atwood 1990; Bruce and Migot-Adholla 1994; DFID 1999; Gerschenberg 1971; Migot-Adholla et al. 1993; Ouédraogo et al. 1996; Varley 2002). Registration programmes have proved to be ‘slow, expensive, difficult to keep up-to-date and hard for poor people to access’ (Cotula, Toulmin, and Quan 2006:20). As a result, very little land has been registered, and ‘where titling and registration have been implemented, greater agricultural investment has not necessarily materialised’ (*id.*). Empirical evidence shows that land titling and registration of private property can create, rather than reduce, uncertainty and conflict over land rights (Atwood 1990:663). ‘Latent disputes can flare up when local actors realise that registration will bring about final adjudication of land rights’ (Cotula, Toulmin, and Quan 2006:20). Unsuccessful attempts to substitute state titles for customary entitlements – and according to Cousins not one attempt has been fully successful – may even reduce security by creating normative confusion, which the powerful may take advantage of (Cousins 2000:171; cf. Atwood 1990:663-5; Bruce, Migot-Adholla, and Atherton 1994:260; Coldham 1979:618-9; DFID 1999:11; Lanjouw and Levy 2002). ‘Many registration programmes had negative distributive effects, as those with more contacts, information and resources were able to register land in their names, to the detriment of poorer claimants’, and holders of secondary land rights are often expropriated (Cotula, Toulmin, and Quan 2006:20. See also Atwood 1990; Lund 1998; Migot-Adholla and Bruce 1994:20-1; Nyamu-Musembi 2006:19-22; Platteau 2000; Van den Brink et al. 2006:12).² Research has also shown that registration does not improve access to credit where high transaction and other costs hinder credit supply, and that many poor families are unwilling to borrow for risk of being unable to repay and losing the land through foreclosure (Cotula, Toulmin, and Quan 2006:20; Durand-Lasserve and Selod 2007:10, 12; Gilbert 2002:14-20; Home and Lim 2004; Van den Brink et al. 2006:13). Field and Torero even suspect that titling may reduce the banks’ ability to foreclose as the latter could anticipate that governments who promote titling will also protect borrowers. This would deter them from lending (Field and Torero 2006, quoted in Durand-Lasserve and Selod 2007:25).

The failures of state-led individual titling and registration (ITR) projects coincided with research showing that some property rights which are only informally agreed on and enforced can be very secure (Bruce and Migot-Adholla 1994). This is a recurring theme in more recent literature. Gilbert (2002:7) for instance states that in urban squatter areas in Latin America, evictions are only likely to occur when settlements threaten powerful vested interests, for example through their geographical proximity to elite residential areas, or when military or authoritarian governments are in power. In sub-Saharan Africa, according to

Durand-Lasserve (2006:3-4), communal or customary land systems guarantee a reasonably good level of security, even when these are not formally recognised by the state. At the same time, many authors also stress the limitations of this security. Durand-Lasserve (*id.*) points out that the customary arrangement can deteriorate due to, for instance, conflicts between those who allocate the land and other members of the group, or when a major conflict arises between customary owners and public authorities about the ownership and the use of the land, or about the legitimacy of the customary claim. Other research and policy papers point to the decreasing security of tenure in the face of land shortage and competition and express new worries about increasing inequity of informal, including customary, land tenure. They emphasise issues of unequal power relations within communities and point out that local institutions are vulnerable to power plays of elites, as well as to politics of exclusion (Amanor 2001:11-20; Carney and Watts 1990; Cousins 2002:77; Lavigne Delville 1999; Moore 1998:42; Oomen 2002; Peters 2002:48; Toulmin, Lavigne Delville, and Traoré 2002:15).

The disappointment with ITR approaches to formalisation, together with the realisation that some state regulation is desirable to prevent the usurpation of rights by local power holders – whether customary leaders, local politicians, or criminal big men such as mafiosi – have led to a widely supported search for ‘a third way’ or ‘a new paradigm’ which ‘does not prescribe a specific approach to land reform’ but is based on pluralism (Toulmin and Quan 2000b:5). According to this new approach, existing property rights often do not seem to be in need of a wholesale replacement with new property rights regimes. Alternative policies from titling are needed to strengthen security of tenure, and must build on local concepts and practice rather than importing one-size-fits-all models (Otto 2004:8). This entails, among other things, recognition by the state of local land rights and increased formalisation of those systems (Bruce and Migot-Adholla 1994; Cotula, Toulmin, and Quan 2006:21; Van den Brink et al. 2006:5). ‘Land registration may still be a useful component of a broader tenure security strategy, particularly where customary systems have collapsed, where land disputes are widespread’, and in areas with high competition for land (Cotula, Toulmin, and Quan 2006:21. See also Bruce, Migot-Adholla, and Atherton 1994:262; Van den Brink et al. 2006:13-15).

Probably the most prominent proponent of legalisation is Hernando de Soto. In ‘The Mystery of Capital’ (2000) he recommends that to combat poverty, the poor should quickly move their assets from an unproductive extra-legal sphere into the legal sphere where these assets could turn into ‘capital’. He heavily criticises the standard legalisation projects and the lack of progress in land tenure reform. In a chapter on ‘the mystery of legal failure’, De Soto blames lawyers for being un-

willing and unable to construct the 'bridges' that would enable the poor to enter the realm of law and capital. He proposes a twofold alternative strategy for legalisation: first, the 'discovery' and analysis of informal 'social contracts' that presently regulate human-land relations; and second, a legal and political strategy for designing 'bridges' to connect, harmonise and integrate those rules with the formal legal system. He claims that this twofold strategy will speed up the legalisation of land tenure. The ease with which De Soto promotes 'discovering' the informal 'social contracts' suggests a limited awareness with the many well-documented difficulties of doing so. Unfortunately, his writing does not answer the question of how such exercises should be undertaken (Otto 2004:9, 2009, forthcoming). De Soto's choice of wording, referring to the building of bridges between customary, informal, or illegal assets and the formal legal system – although it remains largely an abstract notion – seems to fit well at face value with the 'new paradigm' noted by Toulmin and Quan. On second look, however, it becomes clear that he sees titling and registration of individual property rights as the only way to reach his goal of transforming property into collateral, collateral into credit, and credit into income (Woodruff 2001:1219).

Most people are glad to receive a title deed. It is this popularity that explains why many governments have taken up this option, especially in urban areas (cf. Gilbert 2002). Recently, however, as a result of the shift in thinking and the 'new paradigm', several land policies and laws present important innovations compared to their predecessors. A number of countries have provided for the registration of customary rights (e.g. Uganda, Mozambique, Tanzania, Niger, and Namibia). In Mozambique, customary use rights are even protected when they are not registered. And several titling programmes have issued titles not only to individuals but also to families (e.g. Nicaragua and Brazil) and to groups or communities (e.g. South Africa, Mozambique, Kenya, and the Philippines) in rural as well as urban areas (Cotula, Toulmin, and Quan 2006:21. See also Durand-Lasserve 2006:10; IIED 2006:7-8).

This book hopes to contribute to the ongoing quest for a new paradigm in land tenure regulation that will reconcile state perspectives of a programmatic, national and legal nature with local land rights and allocation processes. The material in this book arises from an international, comparative research project on the potential of legalisation of land assets.³ The main objective of the book is to obtain an overview and in-depth insight into legalisation policies that have evolved in Africa, Latin America, and Asia. It contains eleven case studies in eight different countries that deal with urban, peri-urban, and rural land, and focus on agricultural as well as residential land use. These case studies examine the different designs of land tenure legalisations, the justifications and objectives for the legalisation processes, and their effects on

tenure security and on the vulnerability of smallholders to losing their land rights. They furthermore identify the winners and losers of the legalisation processes and the challenges that need to be addressed to improve the tenure security of smallholders.

Only with sufficient knowledge of both the local socio-legal contexts and the particularities of the various land tenure regimes can the documented attempts at legalisation be understood.⁴ Given the broad scope of countries studied and the great diversity within and between countries and continents, it was considered necessary to supplement the case studies of legalisation projects and programmes with overview studies of the land tenure regimes of the countries in which they were situated. Land law often forms an arena for struggle between different ideologies and interests, including: enabling a free market for land, providing security for the poor, keeping government agents in control, democratic decentralisation, and respecting the customary traditions of the region (McAuslan 1998). National regimes vary according to the priority attached to these goals (Otto 2004:9). The countries selected for this book include various degrees of recognition of customary law, of democratic decentralisation, of state interventionist control as well as different colonial legal backgrounds. These criteria, combined with the backgrounds of the research group, have led to the selection of the following countries: Ethiopia, Ghana, Namibia, Senegal, Bolivia, Mexico, China, and Indonesia.

The integration of extra-legal tenure

Land tenure may be defined as the terms and conditions on which land is held, used and transacted (Adams, Sibanda, and Turner 1999:135). It designates the rights individuals and communities have with regard to land, and should thus primarily be viewed as a social relation involving a complex set of rules that governs land use and land ownership (Durand-Lasserve and Selod 2007:4). In practice, a continuum in land tenure rights can be observed, especially in developing countries where different sources of law and different ownership patterns may coexist (Payne 2002, quoted in Durand-Lasserve and Selod 2007:4). There is thus a diversity of tenure situations, ranging from the most informal types of possession and use to full ownership (Durand-Lasserve and Selod 2007:4).

From the viewpoint of the state, three main situations of 'extra-legal' land tenure can be distinguished. First, many people have rights in land on the basis of customary law; when customary law and customary rights are not recognised by the state, this creates an extra-legal situation (according to state law). Second, a large number of people occu-

py public or private land against the wishes of the legal owner. Third, there are a number of people who have acquired land from a legal or customary owner but reside on unauthorised land developments, for instance where land is subdivided and sold illegally by informal developers – because the required permission for land subdivision was not obtained or because it violates zoning or planning regulations. This situation can also occur when the new occupants of the land have not gone through the compulsory procedures for registration or titling or have not acquired the right permits for settling or building (see also Gilbert 2002:6-7). Rural areas mainly display the first type of extra-legality, based on customary rights in land that are not recognised by the state. This is not an exclusively rural affair, though. Research shows that also in urban and peri-urban areas, land transfers and acquisitions often depend on customary rights and relations (see Hesselings and Eichelsheim, this volume; Reerink, this volume). The second and third types of extra-legality are mainly urban and peri-urban occurrences.⁵

Legalisation is a process by which extra-legal tenure is integrated into the national legal system.⁶ Obviously, this can be done in many different ways. Tenure legalisation programmes are influenced by the approaches and orientations to legalisation as defined by governments, funding agencies, and implementing agencies. They also depend on a set of legal, social, administrative, and political factors that include the constitutional, legal, and regulatory framework, the political balance of power at the central and local government levels, the state of demand for tenure formalisation, political will and commitment, pressures from civil society, the perception of the legitimacy of the extra-legal tenure situation by governmental institutions and the population, the financial and human resources available for implementing tenure formalisation, the administrative apparatus available for implementation including checks and balances and accessible administrative justice to control the abuse of administrative powers, and the extent of legal empowerment of local stakeholders (cf. Durand-Lasserve and Selod 2007:15). The local diversity of these factors results in a range of different legalisation policies. These policies can for instance be geared towards any of the three categories of extra-legal land tenure mentioned above (customary tenure, occupation against the wishes of the legal owner, or unauthorised land developments); they can aim to deliver personal rights or real rights to individuals or collectives; and they can focus on rural, peri-urban, or urban areas, and on residential or agricultural land. Together these policies form a whole spectrum ranging from recognition of land administration of certain groups to individual titling and registration of extra-legal property. The case studies described in this book deal with legalisation projects and programmes throughout this whole spectrum, and include the recognition of cus-

tomary land rights and communal land management rights, administrative recognition of occupation, often in the form of permits to occupy or short-term leaseholds, and the delivery of property rights through titling and registration.

Tenure security

One of the main stated objectives of legalisation programmes is the enhancement of tenure security. Various definitions of tenure security circulate in the literature.⁷ Some of these definitions focus on the element of certainty of land rights. Certainty is mostly seen as a function of two elements: (1) assurance in exerting rights, and (2) the costs of enforcing these rights, which should not be inhibiting (Place, Roth, and Hazell 1994:19-21). Durand-Lasserve and Selod (2007:6), for instance, define tenure security in urban areas as the right of all individuals and groups to effective protection by the state against forced eviction. In contrast, insecure tenure should be viewed as a risk of forced eviction (cf. UN Habitat 2004:31).⁸ FAO, in a study on rural land tenure, defines tenure security as ‘the certainty that a person’s rights to land will be recognised by others and protected in cases of specific challenges’ (FAO 2002:18). Other definitions not only encompass the certainty of land rights, but also the extent or breadth of these rights – which refers to the quantity and quality of the land rights held – and their duration – the length of time for which these rights are valid.⁹ For instance, Migot-Adholla and Bruce (1994:3) have defined tenure security as the perceived right by the possessor of a land parcel to manage and use the parcel, dispose of its produce, and engage in transactions, including temporary or permanent transfers, without hindrance or interference from any person or corporate entity, on a continuous basis. Place et al. (1994:19) have in similar fashion defined land tenure security as existing when an individual perceives that he or she has rights to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as the ability to reap the benefits of labour and capital invested in the land, whether in use or upon transfer to another holder.

Most authors agree that, rather than defining land tenure security as something that either exists or does not exist, it is more accurate to think of it as a continuum. The first group of authors then posits that it can be measured by the amount of certainty. The second group claims that it can be measured by three criteria: extent or breadth, duration, and certainty. This second definition of tenure security, with its three elements, provides more details with regard to the position of the landholder. As such it is a valuable instrument of measurement

and information. On the other hand, Van Rooij (this volume) shows that higher values of land resulting from increases in breadth and duration might lead to intensified struggles over land and therefore to decreased certainty of the bundle of rights. This poses the question of how to weigh these various factors. Has tenure security increased or decreased when farmers hold bigger bundles of rights for longer periods but with less certainty? Besides, as Lund cautions, when the extent and duration of rights determine the measure of tenure security, this seems to imply that private property has the highest tenure security possible. However, while increasing exclusivity may produce more tenure security for the excluding party, the opposite will be the case for the one who is being excluded. Thus, increasing tenure security for one usually correlates with decreasing tenure security for another (Lund 2000:16). In individual titling programmes of communal lands, for example, claims of subordinate right-holders to conditional, partial, or common access tend to be neglected (Atwood 1990:661; Cotula, Toulmin, and Hesse 2004:2; Lund 2000:16; Shipton and Goheen 1992:316). In the same vein, individual titling of family lands can lead to the exclusion of vulnerable family members such as women, youth, and the elderly (cf. Hesselting and Eichelsheim, this volume). When talking about increasing tenure security, one should thus always ask whose security is increasing. Safitri (this volume) furthermore shows that in her case-study area in Indonesia, the willingness to invest and the effects on poverty reduction were not so much determined by the extent of rights bestowed in the legalisation scheme, but rather by the kind of lands targeted and especially the level of their productivity. FAO (2002:19) points out that 'equating security with transfer rights to sell and mortgage is true for some parts of the world but it is not true in many others. People in parts of the world where there are strong community-based tenure regimes may enjoy tenure security without wishing to sell their land, or without having the right to do so, or having strictly limited rights to transfer'. A restriction of transfer rights may even protect people from distress sales. The provision of full private title might in such cases rather lead to loss of land than to higher tenure security. Finally, the predilection for private property rights ignores the preferences of households, who may value some tenure category above freehold tenure (Payne 2002, quoted in Durand-Lasserve and Selod 2007:29). It might be for instance that the lack of formal titles is a price which the poor pay to gain access to plots which they could otherwise not afford (Payne 2000:9). Or it might be that the members of a community fear the loss of communal cohesion when community members can individually determine to transact their rights to outsiders (see Duhau, this volume).

Two of the four definitions above mention that tenure security is a perceived quality. Other definitions do not incorporate people's perceptions, but distinguish between people's real tenure security and their perceived tenure security. There is no consensus, however, among researchers about the correct indicators of this real tenure security. In empirical studies, researchers therefore often rely on perceptions of tenure security. For instance, research may report that households seeking legalisation state that their motivation is to increase their security of tenure, or that legalised households tend to believe their tenure is more secure than that of extra-legal households. Even researchers using definitions focusing on some kind of concrete element, such as the extent of protection against eviction, often have no choice but to focus on people's perceptions in their empirical research. They might for instance be unable to measure the threat of eviction but can ask people whether they believe they are at risk of being evicted. The incorporation of perception in the definition of tenure security can thus partly be explained by the methodological difficulties of measuring real tenure security. A second explanation can be found in the often supposed relationship between tenure security and willingness to invest in land. This link indeed presupposes that the people perceive their tenure situation to be secure; it is their perception that will make people act. On the other hand, the relationship between tenure security and the collateralisation of land rather depends on the perception of the money-lender with regard to the security of tenure of the borrower, and the willingness of governments to upgrade settlement areas depends on their perception of the permanency of the settlement.

Besides a distinction between real and perceived tenure security, another valuable division is the one between *de jure* and *de facto* tenure security. People's perceptions of the security of their tenure are not only formed by their legal position, they are equally formed by the practical situation they find themselves in. Have there been many evictions and demolitions of buildings or destruction of crops lately? Has their land occupation been acknowledged by the local authorities, for instance through the payment of taxes to local government¹⁰ or tribute to traditional authorities, or through the servicing of residential areas? Have local authorities made any statements about the security, legitimacy, or legality of their occupation? When the *de facto* tenure security of an informal tenure situation is high, legalisation may be 'a less efficient engine of change' than its supporters suppose (Varley 2002:455).

The above discussions of the literature pose the question of where this book stands. With regard to the various defining elements of tenure security – certainty, extent, and duration – the studies in this book make an effort to combine a focus on the element of certainty of land rights with careful attention to the possible existence of restrictions

with regard to the elements of extent and duration of rights. Where relevant, they discuss the latent consequences of the existence or otherwise of such restrictions. In many case studies, the extent of *de jure* tenure security and of *de facto* tenure security are distinguished, compared, and explained. Most case studies in this book focus largely on the local perceptions of tenure security, which they regard either as a defining part of tenure security or as an indicator of tenure security. In this book, we do not take the relationship between formalisation and tenure security as a given, but rather regard it as the main object of study. The various case studies explicitly pose the question ‘tenure security for whom?’ and include an analysis of the effects of legalisation programmes on smallholders and urban/peri-urban poor. Notwithstanding its focus on the link between legalisation and tenure security, this book also recognises that tenure formalisation may have a series of objectives other than that of providing security of tenure to households living on informal land. These other objectives – which often include improving the efficiency of land and housing land markets, promoting private investment through the use of land as collateral, improving the property tax base, and increasing public sector influence over land and housing markets (Payne 2000:6-9) – are also an object of study in this book.

In the following section I shall describe the legalisation programmes and policies that are analysed in the case studies, and the lessons that can be drawn from their implementation. As stated before, this book also contains overview studies of the land tenure regimes in the eight countries in which these legalisation policies are found. These rich and detailed country studies not only add value to and offer a necessary background for understanding the case studies, they are also valuable instruments for comparing state land tenure regimes. However, as their level of detail and diversity do not easily allow for short descriptions, I shall limit myself in the following section to a discussion of the case studies, and focus on the main debate in this book: the relationship between legalisation on the one hand, and tenure security, legal security, investment, marketisation, and productivity on the other.

The scope of the case studies in this book

Ethiopia

Dessalegn Rahmato (chapter 3) describes a programme of rural land registration that has been undertaken in Ethiopia since 2003, with the goal of issuing every rightful holder of farmland a certificate of use rights and having his/her plots recorded in a registry. The registration programme was expected to enhance tenure security and reduce the

number of land disputes. The author shows that although the number of land cases in the Social Courts has declined, the number of disputes in the localities has not. It seems that they have rather been rerouted to other dispute settlers, mainly the Land Administration Committees. It cannot be concluded therefore that land registration has allayed the prevalence of rural conflict and antagonism on account of land disputes. An additional argument the author makes is that the employment of local techniques and familiar methods of measurement and demarcation – often considered a success due to their low costs – in fact has not delivered accurate, consistent, and reliable results, and is therefore likely to lead to disputes and conflicts. Additionally, the local authorities do not have the capability to update the information in the land registry, which makes the whole undertaking far from sustainable. With regard to conflicts between peasants and the government, the average peasant feels that there is no legal mechanism for the redress of grievances. Despite the registration programme a majority of the peasants still believe that the government can take away their land if it wants to, for development projects for instance or to redistribute land to accommodate the increasing numbers of landless people. Although most peasants believe that they will receive some governmental compensation in such cases, they worry that it will not be adequate. As peasants attribute their tenure insecurity to a large extent to actions by the government and believe that these actions cannot be challenged in court, the author concludes that the peasants' perception of tenure insecurity cannot be removed merely by issuing user certificates. The construction of strong tenure security for peasants needs to involve measures in the political sphere and the sphere of governance, including empowerment of the poor. At the moment it is only rarely that peasants contest the decision of local officials. Empowerment cannot come about without rights awareness, which includes not only knowledge about land and property regulations but also about political-juridical rights and ways to use them in the interest of the poor.

Ghana

Kojo Amanor (chapter 5) focuses on the impact of new wealth created in the cashew and timber sectors in the Brong Ahafo Region of Ghana. In the first sector, the Forestry Service has developed a programme of informal mechanisms for registering teak plantations. However, the costs of registration are high, and the benefits of registering are not clear or tangible, as government has not been able to develop a programme of loans to support the development of teak plantations. These factors, combined with an unwillingness to take long-term risks, are important factors which presently hinder the capitalisation of teak

plantations. In contrast, within the cashew sector an institutional framework for the disbursement of loans to small farmers has been developed, which eschews linking land to collateral, since this would result in high transaction costs resulting from poorly developed land markets and information systems. The loans programme for cashew forces farmers to bear the transaction costs of a tedious programme of farmer group monitoring which combines peer group pressure, threats of removal of extension, and financial support with more coercive measures including police action. This does not translate into the easy capitalisation of assets by independent farmers developing their own investment strategies, but into forms of dependent accumulation in which support to farmers is conditional upon them following the prescriptions of agricultural banks, agricultural extension services, and agribusiness. Discussion of agricultural policies in these two sectors shows that security in land does not necessarily translate into collateral, unless particular types of land can be capitalised and the risk of investment in these sectors is low. When the assets of farmers are not easily capitalised, the disbursement of loans may occur through other forms that do not use land as security. Thus, the assumed relationship between registration, tenure security, and capitalisation are not supported by this evidence from Ghana. Amanor's case study furthermore points to the intricacies of legalising customary tenure situations. Customary relations are often contested and subject to power struggles over the control and definition of land rights. When the contested nature of customary relations and power relations is not recognised by the state, attempts to legalise informal arrangements frequently accommodate the interests of the local elite, and in the process the rights of the poor are eroded. Additionally, the pressures of commodification within customary systems often result in conflicts between notions of user rights and fungible assets. Since processes of legalisation are often concerned with the creation of clearly defined rights in fungible property, this easily results in the erosion of forms of property based on dynamic land use and the strengthening of fungible assets, which transforms the nature of customary property. This becomes particularly clear in the case of tree plantations. A first example lies in the requirement that the documentation needed for the registration of teak plantations be signed by chiefs and family elders, which opens up potential avenues for monies to be exacted from planters by chiefs for recognition of their land rights and acquisition of documentation. A second example can be found in the undermining of the bush fallowing system of small food farmers with the development of tree plantations that permanently remove land from the recycling system of bush fallowing. This expansion of tree planters with registered holdings often ultimately undermines and erodes the base of the food crop farmers and of their system of land use. While

tree planters usually constitute the richer segments of the population with surplus capital to invest in hiring labour, they paradoxically constitute a major clientele for poverty reduction programmes concerned with security of customary land tenure and securing land rights for the poor, since tree plantations are fungible assets, which are easily mapped and demarcated, unlike the mobile resource base of bush fallow cultivators. This shows that notions of customary tenure are selectively constructed to mould and fashion the customary to fit contemporary policy agendas, and exclude elements that are not considered compatible. This process is carried out through the legalisation, formalisation, and recognition of customary land tenure.

The second chapter on Ghana, by Janine Ubink, similarly stresses the intricacies of legalising customary tenure situations (chapter 6). Her case study deals with quite an indirect form of legalisation, through constitutional recognition of customary land management and of the position of chiefs. She describes how in peri-urban areas the new value of land has triggered a multitude of struggles and negotiations, mainly between chiefs on the one hand and villagers on the other, for the rights to allocate land and share in the revenue. Despite high local resistance, the chiefs in a number of case-study villages persisted in their style of land management, which was highly lucrative for themselves and sometimes for other selected members of the community – such as elders or royal family members – but extremely detrimental to the livelihoods of the poor majority. The farmers' tenure security was severely corroded by the chiefs' actions. Practices such as multiple sales and allocation of land unsuitable for residential purposes also threaten the tenure security of the new lessees. The author points to the behaviour of government to explain how chiefs are able to continue acting contrary to the wishes of the majority of the villagers, both old and new. Despite the constitutional provision that customary land should be managed on behalf of and in trust for the people, the government hardly steps into local land management issues. State institutions established to check upon chiefly land administration do not in reality exercise effective control. They currently provide hardly any checks and balances on local land administration. Their discourse as well as their actions rather point towards the existence of an informal 'policy of non-interference', inspired by the political power of the chiefs and the alliance between traditional and state elites. The fact that the government continually emphasises the sovereignty of the chiefs and that land administration rests exclusively in their hands gives additional legitimacy to the chiefs and provides them with ample leeway to administer land the way they please. The National Land Policy and the Land Administration Programme (LAP) do not seem to promise any change in this respect in the near future. On the contrary, despite the

formulation of goals like equity and accountability, the government has not actually imposed any such requirements on the chiefs in the implementation process of the LAP so far. In combination with a progressive erosion of local checks and balances, the chiefs have a free hand to determine their own position in customary land management. It seems that this has given chiefs the power to overstretch the somewhat dynamic nature of customary law by manipulating it to suit their needs and legitimise their claims, resulting in the described detrimental effects on the tenure security of the people. Any substantial change in this situation requires two intimately connected transformations: the organisation and empowerment of local farmers, and a different attitude of the government towards chiefly rule and customary land management. Similar to Amanor's chapter, Ubink's chapter thus brings to the fore that legalisation of customary tenure arrangements without attention to the contested nature of customary relations often furthers the interests of the traditional elite and damages the rights of the poor.

Namibia

Marco Lankhorst and Muriël Veldman (chapter 8) analyse the Flexible Land Tenure Bill, an innovative form of legalisation of extra-legal land tenure, which for some years now has been awaiting passage into law in Namibia. This bill is innovative in two ways. First, recognising that the executive branches of most developing countries lack the capacity and resources to manage the complex procedures involved in legalisation and subsequent upkeep of the registration system, this bill simplifies and thus reduces the costs of the registration process. Second, acknowledging the financial constraints of the target group, it allows those who seek to acquire title to share the costs of registration amongst each other, as members of a group. The study focuses on the town of Otjiwarongo, and compares the costs and benefits of both flexible titling and extra-legality for its inhabitants, as these factors will together determine whether flexible titling provides settlers incentives to join in a scheme and to continue to respect its regulations. The main cost of extra-legality lies in the threat of future relocation without compensation. Such relocations of extra-legal settlers have occurred with some frequency. One of the central objectives of the bill is to provide secure tenure. In the two neighbourhoods studied in Otjiwarongo, however, the majority of the plots do not adhere to the provision in the National Housing Development Act prescribing that plots have a minimum size of 300 square metres. Another problem is that in the current layout of these settlements, there is no room for public services to be provided. To remove the need for further relocations and thereby enhance tenure security of its inhabitants, the registration scheme should

be supplemented with the design of a layout for the area. According to the authors, however, the same result could be achieved by (1) designing a layout, or requesting central government for dispensation from the problematic layout requirements, whilst postponing titling, or (2) dropping the prospect of titling altogether. Put differently, the same results can be achieved under extra-legality. Another expected benefit of the Flexible Land Tenure Bill is that it enables registered landholders to engage in transactions such as sale or rental. The data reveal, however, that plots are already sold and sub-rented with some frequency by extra-legal holders. The absence of third-party-encroachment problems, which is related to the existence of a registry and the fact that plots are pegged and fenced, suggests that current arrangements enable such transactions in a way that would appear to fairly effectively shield buyers from competing claims. Therefore, the provisions in the Flexible Land Tenure Bill that enable holders of a title to engage in transactions neither constitute an advantage or a drawback. In fact, if we include in the analysis (1) the fees incurred in registering transactions, and (2) the various limitations on the freedom to engage in such transactions that the bill makes, we see that extra-legality may even constitute the more attractive alternative. With respect to the third expected benefit of the bill, *viz.* the opening up of access to credit, the chapter also states it as unlikely that landhold titles will in practice be used as collateral. Micro-financing programmes and saving groups may offer settlers better prospects. The authors therefore conclude that it is doubtful whether the Flexible Land Tenure Bill could achieve its objectives, at least in Otjiwarongo's extra-legal settlements. They plead for a careful selection of zones where conditions for implementation are more favourable than in Otjiwarongo and for implementation of the registration scheme in those areas only. It is crucial that policymakers take into account the perspective of the settlers because their cooperation is indispensable to the success of legalisation. Settlers' lack of interest will lead to non-compliance and continued extra-legality. In areas where cooperation cannot be expected, bolstering existing extra-legal arrangements might provide a more promising way of improving tenure security.

Senegal

In their chapter Gerti Hesseling and John Eichelsheim describe re-allocation programmes that have been undertaken since the 1970s in the Senegalese town of Ziguinchor (chapter 10). These programmes were intended to replace the earlier land tenure situation based on Diola customary law. In reality, they created a new, hybrid system that combined a continued emphasis on the Diola patron-client (*adjati-ad-*

jaoura) relationship with a role for new actors involved in municipal town planning. In this new urban constellation, the position of the patron became more and more politicised. This expansion of his role was acceptable for the members of the traditional society as long as the political ambitions of the patron did not result in him neglecting his obligations towards his indigenous clients in favour of the interests of his other, 'immigrant', followers. When the patron starts to answer to political demands that hurt his inner circle, he loses his authority, and his clients turn against him and his political associates. In Ziguinchor, this resulted in high tensions between locals and 'outsiders' and even in violent clashes. The authors discuss the effect of this new hybrid system on people's tenure security. They show that most people in the study area feel quite secure in their tenure. This is partly based on an erroneous belief that their 'tickets' or other documentary evidence provide a legally sound title. However, people who know that they do not possess a valid legal title still have quite a strong perception of tenure security. This is based on their experiences with administrative agents, who rarely tear down houses without state compensation. People trust this state of *laissez-faire* to continue and expect to be protected by political strong men, through their relationship with their patrons, or with people involved in the municipal land planning system. This chapter also brings to the fore the effect of the individualisation of family land on marginal family members. The case of the Sagan plots shows that the issuance of personalised 'tickets' enhances tenure security of some people – the people whose names appear on the 'tickets' – but usually coincides with the erosion of that of others. In this way, the drive for individualisation of tenure can significantly increase the vulnerability of people who lack knowledge of urban legislation and who are dependent on family relations. The authors therefore end with the warning that when the effects of re-allocation programmes on tenure security are discussed, one should thus always ask the question, whose tenure security?

Bolivia

Diego Pacheco discusses two areas in the Bolivian department of Santa Cruz where local indigenous/*originary* groups have demanded formalisation of their rights to common-property areas (chapter 12). Following the 1995 constitutional mandate of recognising legal pluralism and certain territorial rights in order to ensure collective tenure security for indigenous peoples, Bolivia has constructed new legal arrangements for indigenous territorial autonomy allowing indigenous peoples to govern themselves, within a certain territory and to a specific extent, according to their own cultural patterns, social institutions, and legal systems.

Despite these official arrangements, the two cases in this chapter show that such formalisations involve lengthy and complicated procedures riddled with uncertainty. The chapter analyses the contextual, motivational, and informational hurdles obstructing the titling of common-property areas, and the effects of the regularisation processes on people's tenure security. In the cases studied, indigenous people's tenure security, in areas that were considered to be in their *de facto* possession, actually decreased as a result of the starting of the titling process. In both case-study areas, the land regularisation seems to have triggered a more rapid expansion of non-indigenous individual land owners into the areas because they saw it as a last chance to claim ownership rights in those areas which in their view were 'open access areas', despite their *de facto* use and occupation by indigenous people. This process of last minute land-grabbing by 'third parties' can largely be explained by three factors: power asymmetries between medium- and large-scale non-indigenous landowners claiming forestland and indigenous people claiming communal property rights; limited capacity of indigenous peoples to develop relationships of trust with the technicians involved in the regularisation processes; and the inadequate supervision of professionals operating at the local level by their principals. Tenure security is also affected by the actions of the indigenous people themselves, through land transactions between indigenous people's leaders and illegal intruders which are then ratified by the government. In particular, indigenous people located in well-endowed natural resources areas are more often inclined to follow their own self-interest, which erodes the tenure security of the community as a whole. Conversely, indigenous people with less incentive to resign the common good may gain some local power as a result of the regularisation process. In cases of both externally induced tenure insecurity and internally caused tenure insecurity, the problems are intertwined with the lack of control on the implementation bureaucracy, which delays and distorts the titling process through mismanagement and corruption.

Mexico

In Mexico, more than half of the national territory is held by *ejidos* and *comunidades agrarias* (agrarian communities), agrarian property institutions regulated by the Agrarian Law involving collective as well as individual property rights. They were created in the context of agrarian reform and the process of land redistribution, which was one of the main outcomes of the Mexican Revolution (1910-1917). The exercise of *ejidal* or communal property rights implies the mediation of a collective entity or corporation made up by the group of duly recognised and registered *ejidatarios* or *comuneros* in each agrarian nucleus (i.e. each *ejido* or

comunidad). While two-thirds of lands granted to *ejidos* and *comunidades* are held collectively, individuals in most *ejidos* and many *comunidades* have long-term use rights to particular parcels that they cultivate independently. Prior to the 1992 constitutional reform, rights over *ejidal* lands were non-transferable and largely inalienable. Despite these legal rules of non-marketability, irregular/illegal transactions of *ejidal* rights were common. These transactions created a class of landholders that did not have formally recognised agrarian rights and therefore were in a precarious tenure condition. In chapter 14, Emilio Duhau focuses on an *ejido* in a peri-urban area of Mexico City's Metropolitan Zone and analyses the impacts of the post-1992 legal reforms that largely removed the restrictions on transfer and alienability of *ejidal* lands and that included the legalisation of some of the property rights that have arisen out of formerly illegal transactions. The author shows that the current agrarian legislation has considerably enhanced the certainty and protection of *ejidatario*'s property rights. Mexican peasants have seized without much reticence the advantages offered in those respects by the agrarian rights certification process and the possibilities opened to them by the enhancement of their property rights. At the same time, however, just like in the great majority of the *ejidos*, the *Ejidal Assembly* in Duhau's case study has so far not opted to adopt a regime of freehold tenure. Although many younger and better informed *ejidatarios* desire such a change, older *ejidatarios* fear that this will invoke specific burdens such as the payment of property taxes and drinkable water fees, and that this will change their way of life and their ability to define and adopt collective strategies and in general to form a meaningful local community. This brings to the fore that farmers' interest in enhancing the security of their tenure does not always run parallel with their interest in acquiring full individual property. The author explicitly stresses the limited knowledge and awareness among *ejidatarios* of the existing legislation and the competences of the municipality on the one hand and the autonomy and jurisdiction of the *Ejidal Assembly* on the other. These generalised confusions and misunderstandings explain why many *ejidatarios* fail to comply with and also fail to profit from the optimal strategies within their reach. Additionally, it makes them susceptible to manipulation by their better informed colleagues.

China

Benjamin van Rooij (chapter 16) describes two recent Chinese laws, the 1998 Land Management Law and the 2003 Rural Land Contract Law, that have increased the breadth (more rights of transfer) and the duration (from fifteen to 30 years) of land use rights. Although the awareness of the new laws is high and many land contracts have been

signed and land certificates issued, farmers' security in exercising their new rights is threatened by the widespread and often illegal taking of their land without satisfactory compensation. The sharp rise in such land loss conflicts warns that Chinese land tenure still lacks certainty. These conflicts find their roots in unclear legislation, weak checks and balances on local governments and Village Committees, and the resultant weak implementation of law. Changes in legislation alone will thus not be sufficient to decrease current land loss conflicts. It seems rather that legislative changes should be combined with measures that help to enhance implementation. Such measures should be a combination of improving state law enforcement action against violations of the law and increasing possibilities for access to justice for aggrieved farmers. Behind the weak checks and balances are not so much legal or socio-legal problems, but rather political problems related to the existing power relations. At its heart, the current land loss crisis is thus one of power, involving weak farmers and strong elites. Future reforms should be directed at such power imbalances and, as with any institutional change adopted, the risk of elite co-optation should be considered. Enhancing land tenure security in China therefore involves empowerment of the weak and poor. Such empowerment first requires enhancing their access to the legal system, strengthening the role of civil society, while work should also focus on general development activities such as literacy training, strengthening community organisation, and legal awareness promotion.

The second case study on China, by Jianping Ye and Jian Wu (chapter 17), also reports the increasing amount of illegal land use and land loss conflicts. The authors blame these occurrences on the existing dualist tenure system, with government-regulated collective land and market-based, state-owned land tenure regimes, which necessitates a tedious land conversion process to legally change farmland into land for residential or commercial construction. The case study describes two different responses of the Chinese government to the irregularities. The first part of the chapter portrays a programme to formalise and recognise illegal land use and constructions in Shenzhen city, Bao'an District. Due to the large profits to be made through illegal land uses and to the ineffectiveness of the state regulatory apparatus, illegal land use and illegal buildings have become a permanent feature of the peri-urban landscape over a period of more than a decade. The high administrative and social costs of demolition have made it virtually impossible to re-convert the land to agriculture. The Bao'an government felt it had no other alternative than to recognise the illegal land use. This is done under certain strict conditions, to prevent encouragement of further illegal behaviour. The second part of the chapter refers to a 'Land Exchange Programme' in Tianjin Municipality, Dongli District.

Rather than a restorative response after the creation of illegal land use and buildings, this programme entails a pro-active strategy to avoid the creation of such illegal land use and construction. The main plan is to move farmers out of their rural houses into high-rise buildings that allow for a much more intensive land use. As a result, the total cultivated land area can be maintained while more construction land can be released. As the Land Exchange Programme converts all land at once, it prevents commercial land users from circumventing the tedious land conversion process, and thus decreases the incidence of illegal land use. This programme does not change the total agricultural land area, therefore tenure security of farmers' agricultural land is guaranteed. Nevertheless, the authors opine that the ease with which the government unilaterally decides to requisition collective Rural Residential Land (RRLS) and rural houses in the Land Exchange Programme may serve as an alarm bell for tenure security, as there is no reason to believe that agricultural land may not one day also be requisitioned by the government for one reason or another. One of the supposed benefits of the programme lies in the capitalisation of residential land. Whereas the sale of rural residential land to non-members was prohibited, the new high-rise apartments can be transacted freely, thus bringing dead capital alive. However, an important comment is made in this regard by the authors when they explain that rural housing was only a 'dead' asset because of the legal prohibition of free circulation. It is therefore nothing but the state and the property rights arrangement it imposes that make rural houses illiquid. The authors furthermore criticise the lack of participation from farmers in this top-down administrative programme, and the fact that they are largely excluded from sharing the economic benefits arising from economic development taking place on the formerly collective peri-urban land. Despite these criticisms, the authors acknowledge the innovation of the programme and its attempts to dismantle institutional rigidities and barriers that have bred illegal land use.

Indonesia

Gustaaf Reerink discusses a systematic registration programme under the Land Administration Programme (LAP) Indonesia (chapter 19). He shows that although systematic titling programmes such as LAP have been able to overcome financial, bureaucratic, and time constraints of sporadic registration programmes and related negative perceptions of the people regarding the registration process, they nonetheless fail to reach the *kampung* dwellers with the lowest incomes. This limited reach can be explained by the fact that the LAP is only implemented in locations where registration is relatively easy, which means that loca-

tions where many low-income dwellers reside are ignored. Besides, some of the same obstacles occurring in cases of sporadic land registration remain in place, namely the stringent evidence requirements for initial registration and a lack of political will to grant new rights to informal landholders. The author draws two important conclusions from his case study with regard to tenure security. First, that registration does not always enhance the legal security of the landholders. Land registration programmes in Bandung contributed little to the legal security of *kampung* dwellers, due to the fact that they often do not meet other legal requirements such as the obligation to obtain spatial planning related permits or to perform derivate registration after a change in the legal status of the land. Additionally, registration of land only offers limited legal security for two reasons: first, a land certificate is not regarded as conclusive but only offers strong evidence regarding a land right which can be disputed by a third party during the five years after the certificate has been issued, and second, the issuing of double land certificates by the NLA – due to maladministration and corruption – affects the reliability of the land register and the extent of protection a certificate offers. In his second main conclusion, Reerink challenges the fact that legal security is often equated with tenure security. Further data from his research show that in Post-New Order Bandung, both the *de facto* tenure security (measured by interference from third parties) of low-income *kampung* dwellers holding land certificates (but often not fulfilling other legal requirements) and the perceived tenure security of these people are stronger than among those who do not have such documents. This for instance also means that the former invest more in their land and housing than the latter. These data thus show that legal security is not always a determining factor for *de facto* and perceived tenure security.

In the second Indonesian case study Myrna Safitri describes the effects of two different legalisation processes in Langkawana, a village in the forest frontier of Lampung (chapter 20). The first involved the registration of individual property rights in residential non-forest land. Although this legalisation enhanced the legal status and the tenure security of the land, it did not lead to an increased use of the land as collateral for loans, nor to a higher number of land transactions. Despite the legalisation, Langkawana villagers considered their residential land as an asset that needed to be held onto at all costs, not as a marketable commodity. This legalisation did not enhance investment in the land and did not change the people's level of poverty. The second legalisation process involved the granting of a community forestry license on forest land. Although this did not provide the villagers with individual titles, it did enhance their (perception of) tenure security, i.e. the extent to which the villagers felt assured of their ability to access their land, to

manage and use it, and to effectively exclude others. As a result, people invested more time and labour in their forest gardens, diversified their crops, and planted more perennial and cash-producing crops. This led to a significant improvement in the people's quality of life. After the granting of the community forestry license, the number of market transactions decreased, which contradicts the theory that enhanced tenure security will lead to more land transactions. This case on the contrary shows that villagers prefer not to sell secure and productive land. The greater the profits that can be expected from land, the less willing people are to transfer their land. The less tenure security, the less one can count on profits from the land in the future, and the more willing people will be to transfer the land. This case thus shows that legalisation of land rights does not always lead to marketisation. People's decisions to take part in land transactions are determined by their perception of the value of the land and the contribution of the land to their household economy. The legal status of land is merely one factor, but not the major one, in determining land transactions. This case furthermore shows that the relationship between legalisation of land tenure and poverty reduction will be determined not only by the kind and extent of rights – individual or communal rights, ownership or use rights – granted to the people but also by the kind of lands on which these rights are granted. In other words, it will have a greater effect on poverty reduction to target lands that are highly productive than to target lands that are unproductive.

Concluding remarks

The case-study chapters of this book provide rich descriptions of projects and programmes of legalisation of extra-legal tenure ranging from the recognition of communal ownership to the creation of full private title and various forms in between. They draw grounded conclusions on the relationship between legality, tenure security, investments, and marketisation. This section does not aim to produce a full enumeration of all the lessons learnt, but wishes to stress some of them with regard to the book's main object of study, *viz.* the relationship between the various programmes of legalisation and tenure security. The tendency of several scholars to equate extra-legality and tenure insecurity and presuppose a causal link between tenure legalisation and tenure security improvement has already been criticised in the literature. This book provides additional scientific underpinning for this refutation, and provides new details of the circumstances under which certain kinds of formalisation may fail to increase tenure security and may sometimes

even decrease it. Some of the lessons to be learnt from the case studies in this regard include the following:

- 1) The *de facto* tenure security/insecurity of informal land varies considerably. It depends on a multitude of factors including the normative basis of the land interest, the legitimacy of the informal claims, the identity of the land user and of the original owner, the location and market value of the land, the alternative uses of the land, the nature and attitude of the government and of the local power holders, and their relationship. When the *de facto* tenure security of informal land is high, a programme of formalisation may not have the effect of increasing it. Additionally, when people have a highly limited legal awareness – as many poor people do – changes in the legal situation may not have much effect on people's perception of their tenure security (see Dessalegn Rahmato; Hesselting and Eichelshheim; and Reerink, all this volume; cf. Gilbert 2002:8; Varley 2002:455).
- 2) When threats to tenure security find their roots not only in weak legal positions but also in the weak implementation of legislation, changes in legislation alone will not be sufficient to enhance tenure security. When the tenure insecurity is caused by political problems, the response needs to involve the creation of effective checks and balances on implementing bureaucrats, improving state law enforcement action against violations of the law, and increasing possibilities for access to justice for aggrieved farmers, and in general the empowerment of the weak and poor (see Dessalegn Rahmato; Pacheco; Reerink; and Van Rooij, all this volume).
- 3) Certain formalisation processes can create conflict over land rights, due to the finality of the process (Pacheco, this volume). Similarly, the enhanced value of the land expected to result from the legalisation process may raise the number of conflicts about such land (Van Rooij, this volume).
- 4) Limited awareness of the poor of legislation, procedures for legalisation, and division of regulating competences can lead to easy manipulation by the better informed, whether local elite, street-level bureaucrats, or national politicians (see Duhau, this volume; cf. Cotula, Toulmin, and Quan 2006:20; Cousins 2000; Durand-Lasserve 2006:10; Migot-Adholla and Bruce 1994:20-21; Van den Brink et al. 2006:12).
- 5) When the contested nature of local (customary) relations and power relations are not recognised by the state, attempts to legalise informal arrangements frequently accommodate the interests of the local elite and erode the rights of the poor (Amanor; Ubink, this volume).

- 6) When legalisation processes are too complex for the bureaucracy or too complicated, time-consuming and costly for the intended beneficiaries, formalisations will only occur sporadically, and mainly by the wealthier section of communities. The poorest households in particular may not have the means to pay their share of the formalisation costs. Additionally, these households may not be entitled or eligible for tenure formalisation (Reerink, this volume; cf. Durand-Lasserve and Selod 2007:10).
- 7) The regularisation of urban or peri-urban plots may not always lead to legally secure positions due to the fact that the newly formalised households often cannot comply with additional regulation involving planning and construction norms and standards (Lankhorst and Veldman; Reerink, this volume).
- 8) Formalisation can give incentives to landowners to try and evict secondary rights holders, usufructuaries, or tenants in order to value their land in a more profitable way (Amanor; Ubink, this volume; cf. Durand-Lasserve 2006:7; Durand-Lasserve and Selod 2007:11; Payne 2000:9).
- 9) Registration and titling in the name of an individual will create higher tenure security for this individual but can simultaneously decrease the tenure security of people dependent on this person (Hesseling and Eichelsheim, this volume).
- 10) When the insecurity of extra-legal property or the restrictions on transactions of such property are caused by the state, the state could as easily remove them in a different way than through legalisation. Lankhorst and Veldman (this volume), for instance, state that the main threat of relocation comes from the fact that the settlers in their study areas do not conform with certain stringent lay-out requirements and plead that a change of those requirements would have a greater impact on the tenure security of the settlers than a registration scheme. Similarly, Ye and Wu (this volume) stress that the restrictions on transactions of rural residential land result from state legislation, which could be changed without the whole process of 'Land Exchange' that the Chinese government is now piloting.

Notes

- 1 See for an overview of the main international publications and policy statements concerning land tenure legalisations, Assies 2007.
- 2 Several ex post evaluations of the state-imposed tenure conversion program in Kenya have observed that individualisation has led to land concentration, increased marginalisation and landlessness as people in positions of economic and political power take advantage of the less powerful, deepening tenure insecurity instead of lessening it (Coldham 1979; Okoth-Ogendo 1976; Quan 2000:35-7).

- 3 This project was originally entitled 'The Mystery of Legal Failure? A critical, comparative examination of the potential of legalisation of land assets in developing countries for achieving real legal certainty'. It was funded by the Dutch Council for Scientific Research (NWO/WOTRO), and managed jointly by the Universities of Leiden, Amsterdam, and Nijmegen, and the African Study Centre (Leiden), see Otto 2004.
- 4 The project will also produce a second book, entitled "*Legalising Land Rights: Law, tenure security and development*". This book will discuss the more general and theoretical debates surrounding the issue of legalisations. It will also compare the lessons from the case and country studies presented in this book. Publication is expected in 2010.
- 5 Whereas we use the term 'extra-legal' to denote all property rights that are not recognised by the state, FAO (2002:11) uses it only for property rights that are not recognised by the law but also not against the law.
- 6 Instead of legalisation, many authors use the term formalisation, which refers to changing a situation of 'informality'. We wish to avoid using this term as it is unclear and inherently confusing. According to some authors, it carries with it a vision of squatters on urban lands. Such a situation can often easily be formalised, especially when the landowner is the state, which can agree to give land to squatters with zero or low compensation. Unlike urban squatters, many customary landholders do not hold land informally, but according to an alternative, community-based formality. This makes formalisation – in the sense of replacing this situation of community-based formality with state-based formality – a completely different exercise (Van den Brink et al. 2006:12). Others rather understand informal as customary or traditional rights and formal as statutory rights, but this distinction ignores the fact that in some countries customary rights have been given formal legal recognition (FAO 2002:11). Additionally, formalisation seems to imply a linear evolution from informal to formal situations, ignoring the fact that in reality situations of informality are often the result of new laws, as people who cannot or do not want to observe them are thereby brought into a situation of informality. As Durand-Lasserve and Selod (2007:6) put it, tenure informality is the end result of legal, political, and economic exclusion mechanisms. Formalisation thus creates new situations of informality. Admittedly, this last critique could also be waged against the term legalisation. See for a critique on the distinction between legality and illegality, Varley 2002.
- 7 For an overview of donor understandings of what defines land tenure security, see International Land Coalition 2006:6-7.
- 8 They distinguish four interrelated factors that together determine the level of tenure security: tenure status (unauthorised commercial developments or squatter settlements); the primary tenure rights of the land (public, private, or customary-owned land); the occupancy status of the dwelling (owners, tenants, etc.); and the political and legal context (Durand-Lasserve and Selod 2007:6).
- 9 In general, as duration lengthens, tenure security improves. However, duration need not be perpetual to create an adequate incentive framework for land investments and improvements; see Ping et al., this volume.
- 10 In many countries, including Egypt, India, and Columbia, tenure security is achieved over time through the accretion of various documents relating to property taxes and other formal documents (Durand-Lasserve 2006:10).