The formalisation process in Tanzania: Is it empowering the poor?

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The purpose of this note is to provide some thoughts about some of the basic premises of the Property and Business Formalization Program, also known as the De Soto approach. Special considerations are given on the possible impact on the poor and on issues of gender. Specific references are given to the Tanzanian context, but the analysis provided can equally be applied to most countries that are considering the De Soto approach.

Background

The basic premise of the De Soto approach is well known: The failure to codify property rights and businesses stops the poor stuck in the so-called informal sector from accessing their 'dead capital'. By setting up and implementing a programme of formalisation and registration, the poor will gain access to credit and the protection of the legal system afforded those in the formal sector.

To illustrate the potential that can be realised through formalisation and registration, Hernandos de Soto has calculated that the value of dead capital in the developing world far exceeds the amount ever being disbursed through international development assistance. In the Diagnosis Report of the Property and Business Formalization Program in Tanzania, for example, the researchers calculated that the value presented by dead capital in the country totals $29bn, which is more than Tanzania has received in foreign assistance since independence. The suggestion here is that by entering into a programme of formalisation and registration, vast amounts of capital will be brought to life, helping the poor.

As is set out clearer in Hernando de Soto's book *The Mystery of Capital* than in most of the voluminous reports that are churned out by various formalisation studies, the underlying problem is that the poor do not enjoy the effective support and protection of the legal system. A secondary problem is that without the backing of registered property and business rights, they are not able to realise their full economic potential. A poorly designed, poorly enforced and often inaccessible property and business registration system bars poor entrepreneurs from achieving economics of scale and accessing credit, while suffering from inordinately high transaction costs in any business dealings they have.

The sequencing of these problems is important. The first is about a failure to achieve rule of law, the second is about reaping the benefits of a well designed operational capitalist system.[1] These are indeed core problems in the development agenda and both needs to be addressed. The danger lies in the tendency, well evident in the present formalisation agenda, to see the former solely as a means to achieve the latter.

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[1] I define a capitalist system as a system that provides strong property rights for all and which provides a regulatory framework to enforce contracts and enable efficient trade in goods and services.

As in most issues concerning development, country specific process is important. As we will see, this is also the main weakness of the present formalisation programme in Tanzania. Property and business rights exist in a legal, regulatory and institutional framework. More importantly, these structures are to a large extent shaped by power relations at the national and local level. Aspects of existing systems and practices are often aligned with the interests of those in power. This can make changing them more difficult. Empowerment has to be seen in this perspective. Power is relative, when the poor manage to gain more power; they are better placed to challenge the already powerful. Thus, empowerment is a political exercise.

This paper provides a critical look on the formalisation process in Tanzania in a historical perspective. The next part of the paper outlines a brief history of formalisation of land tenure in Tanzania and the evolution of the local government system. The third part summarises the agenda and preliminary findings of the Property and Business Formalisation Programme, better known by its Swahili acronym Mkurabita. The fourth part considers the some of the most common arguments against the formalisation process. The final part suggests some alternative initiatives and concludes.

A brief history of formalisation, land tenure and local government reform in Tanzania[2]

This section covers the history of formalisation of property rights from the colonial era to the present. Since the colonial era, development in Tanzania[3] has been driven by modernisation ideology. The traditional society is seen as backward and the state is the modernising agent that has as its prime function to develop the country by providing expert advice and guidance. This has had, and continues to have, a profound impact on the way land rights have been viewed.

The colonial era and the birth of formalisation in Tanzania

The first formalised tenure system in Tanzania was introduced by the Germans in 1895 by an Imperial Ordinance. It stated that land could only be allocated with the consent of the Governor, and that there had to be assurance that the allocated land was unoccupied or that compensation would have to be paid to the occupants for their loss of land. There was also supposed to be a safeguard that the natives should have enough remaining land for their present and future needs. All non-titled land was deemed to be *Herrenlos Kronland* (Ownerless Crown Land). After the initial years, land was granted to whom these days would have been termed as investors, on the condition that they developed at least 10% of the land each of the first years.

After the First World War, Tanzania was handed over to the United Kingdom, as a Mandate of the League of Nations. The Mandate granted UK the rights and duties to administer the territory "in the interest of the native population." In 1923, the colonial government passed the Land Ordinance, which remained the principal piece of land legislation until it was repealed under the 1999 Land Act. The Governor was empowered to grant Rights of Occupancy, which were government leases up to 99 years. Natives, on the other, would hold their land customary law.

After some year, in which fairly substantial tracts of land were allocated to what would now be termed investors, the League of Nations criticised the colonial government over "the cavalier manner in which the Administration treated customary law titles" (James 1971: 96).

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[2] This section is a summary of an analysis I have presented earlier (Sundet 1997). Good sources on Tanzanian land policies from colonial time to the present include Iliffe (1979), Piblado (1970), Chidzero (1961), James (1971), Wily (1988), Shivji (1998) and URT (1993 and 1994).

[3] The United Republic of Tanzania was formed in 1964, following the union of Tanganyika and Zanzibar. This paper refers only to mainland Tanzania, as Zanzibar has a different land tenure regime. For sake of simplicity, I use the current name of Tanzania throughout.

In response to this, the government amended the Land Ordinance in 1928, and codified land held under customary law as "Deemed Rights of Occupancy." The titled rights were from now on known as Granted Rights of Occupancy. The Governor, Sir Donald Cameron, summarised the effects of the amendments as follows:

> the native community and the Native who occupies the land,...has exactly the same legal rights to the land as if he held a lease from the Government. He is in exactly the same position as the non-Native who leases land from the Government; he has the same legal rights to the land. (Chidzero 1961, 223)

The Deemed Rights of Occupancy were not formally registered and no mechanism was put in place for documenting the rights.

Land Regulations were introduced, that attached Development Conditions to the Granted Rights of Occupancy, to forestall land speculation. In 1948, it was made illegal to sell land before such Development Conditions had been fulfilled. No development conditions were attached to Deemed Rights of Occupancy, but African farmers and livestock keepers did have to comply with an abundance of by-laws that directed agriculture and livestock keeping.

In the interwar period, the colonial policy was that of the 'paramountcy of native interests', and relatively little land was alienated. After World War Two, there was increased pressure from the settler community, and at the same time there was increased pressure on the colonies to pay for themselves. After the failure of a large scale groundnut scheme in the south, where substantial capital had been invested on sub-optimal land, the colonial government adopted a new approach to the alienation of land. It now saw an irreconcilable contradiction between prioritising what it saw as protection of African land rights and the need for economic development. In 1950, Governor Twining explained the change in the following terms:

> The emphasis has...changed from one of who shall have a particular piece of land to a decision in each case as to how that piece of land can best be developed in the common interest of all communities in the Territory. (Chidzero 1961, 229)

This was followed with an increase in the rate of the allocation of new grants of occupancy. This did not pass without political implications. Particularly one land case became a rallying point for the burgeoning independence movement, the Meru Land Case. In 1952, 3,000 families were evicted to give way for a 78,000 acre dairy farm near Mount Meru in northern Tanzania. The farm was to demonstrate how modern methods of cattle rearing and dairy farming could improve economic yields. Tanzanian activists took the case all the way to the United Nations, with their young leader, Julius Nyerere, travelling to New York to plead their case. The pleading was unsuccessful, but the case galvanised the political struggle for independence. A few years later the settlers abandoned the dairy farm, having been unable to make a success of their venture.

The challenge of modernising the agricultural sector continued to frustrate the colonial government. To tackle this problem the British commissioned their leading experts to provide a comprehensive assessment of the situation and draft recommendations on how to bring a about a systematic modernisation of rural East Africa. The East Africa Royal Commission submitted its report in 1955, and it was the most comprehensive strategic statement for the sector produced by the colonial government. In its report, the Commission highlighted the 'shortcomings' of 'traditional' husbandry, which was seen as uneconomical and environmentally destructive. Its conclusion was that "the relationship of land tenure and land usage [...] permeates all the faults of the present system" (EARC 1955, 323). The Commission argued that the key to agricultural development lay in the modernisation of land tenure, through a process of individualisation, titling and registration (ITR) of land rights. Security of tenure would provide incentives for investing in improvements on the land and, it stressed, would enable such investments by giving progressive farmers access to credit.

The Government accepted the Commissions recommendations, and in 1958 plans were announced to encourage "the transition from native customary tenure into 'freehold' in

appropriate areas."[4] The plans were never implemented, due to concerted opposition from the now powerful TANU (Fimbo 1974a: 243).

The position adopted by TANU on land policies is best represented by Nyerere's paper *Mali ya Taifa* (National Property), published in 1958. The paper was a response to the colonial government's plans to gradually replace customary tenure with freehold titles. Nyerere stresses the detrimental socio-political effects of a land market:

> in a country such as this, where, generally speaking, the Africans are poor and the foreigners are rich, it is quite possible that, within a eighty or a hundred years, if the poor African were allowed to sell his land, all the land in Tanganyika would belong to wealthy immigrants, and the local people would be tenants. But even if there were no rich foreigners in this country, there would emerge rich and clever Tanganyikans. If we allow land to be sold like a robe, within a short period there would only be a few Africans possessing land in Tanganyika and all others would be tenants. (1958: 55)

Mali ya Taifa was not a defence of the 'traditional' system of land tenure. Nyerere concurred with the colonial government's intention to remove the "menace of shifting cultivation." (Nyerere 1958, 55) His alternative to a freehold system of land holding was government leaseholds, which he argued provided the same advantages for the modernisation of agriculture: "sufficient land, security and a way of raising capital" (Nyerere 1958, 57). On customary tenure he simply stated that "we have the obligation to...rid ourselves of the old customary system" (Nyerere 1958, 58). This shows that while he was against the free marketing of land, he supported a process of formalisation of property rights.

Independence, ujamaa and villagisation: formalisation retreats

At independence, in 1961, the new Government was presented with another report with comprehensive recommendations on how to achieve development and modernise the rural areas, this time from the World Bank (IBRD 1961). It outlined two strands of strategy; the Improvement and the Transformation Approach. The former targeted progressive farmers, who should receive titles for their land, assist to achieve credit and get support to improve their farming practices. The latter was a more radical approach of resettlement of communities in areas where there was a lot of underutilised land or where the existing populations were seen to be less progressive.

The more conservative elements of the independent government, who held the finance and agriculture portfolios in the early years, preferred the former option, which was more or less a continuation of the colonial agricultural policies. Nyerere and the radical faction of the party, on the other hand, were concerned with what they saw as the increasing inequalities in land ownership and the early growth of an agricultural middle class. They saw this as incompatible with their vision of a modern, socialist system, without class divides.

Nyerere resigned from his post of Prime Minister only a month after independence in 1961. First he retired to his home village, Butiama, where he wrote several papers, before he embarked on a tour of the country where he spoke to enthusiastic crowds about his visions for the country. The most influential of his early papers was *Ujamaa – the Basis of African Socialism*, in which he outlines an idealised African past where people worked together in a classless society. In 1962, the country's constitution was changed, dropping the Westminster model it had inherited from the British with the British monarch as the head of state, introducing an executive President, while retaining most other features of the Westminster system. In his Presidential Inaugural Speech, Nyerere again emphasised the backwardness and superstition in rural Tanzania as the major impediment to development. His strategy for getting rid of the shackles of backwardness was straight forward. The rural population had to be settled in villages:

[4] *Review of Land Policy*, Government Paper no. 6 of 1958, cited in Wily 1988, 74.

> For the next few years Government will be doing all it can to enable the farmers of Tanganyika to come together in village communities. . . unless we do we shall not be able to provide ourselves with the things we need to develop our land and to raise our standard of living. We shall not be able to use tractors; we shall not be able to build hospitals, or have clean drinking water, it will be quite impossible to start small village industries. . . If we do not start living in proper village communities then all our attempts to develop the country will be just so much wasted effort.

In the first years the Government pursued both improvement approach and the transformation approach. Initially, the transformation approach consisted of the establishment of highly capitalised villages, with collective farms. The new settlements failed to repay the heavy investment in them, and the strategy was dropped in 1966 (James 1971, 233). The failure of the transformation approach was a disappointment to Nyerere and the radicals in the party and there was a strongly felt need to recalibrate.

In 1967, the Arusha Declaration was launched. This is probably the most influential policy statement in Tanzania's history, and it firmly put *ujamaa* at the centre of the policy agenda. The means of production should by and large be controlled by the government and leaders would take a cut in salary and benefits and be barred from engaging in capitalist activities. Some, but not all, large agricultural estates were nationalised in the period after the Arusha Declaration, although the significance of this should not be overestimated, as the estate sector was relatively small.

For the agricultural sector, and land tenure, the most important policy paper was *Socialism and Rural Development*, which came some months later. This paper provided the blue-print for the *ujamaa* era's rural development policy. The rural population had to move together or be settled in villages and should start collective farming in order to achieve sufficient economics of scale to mechanise and adopt modern farming practices. In the first post-Arusha the villagisation policy, as it became known, was to provide incentives for voluntary settlements. After what was seen as a disappointingly low uptake by the population, this changed gradually until a famous statement by Nyerere in 1973, that "to live in villages is an order."[5] Through a series of military style operations, the whole country was villagised by 1975.

All villages were required to have at least one communal farm, although not all did, and there was an obligation on villagers to contribute work to these village farms. Nevertheless and contrary to what was widely reported by the World Bank and others at the time, villagisation did not entail large scale collectivisation. Albeit intensely unpopular, enforced collective labour did not have a significant impact on most people's productive activities. The resettlement did impact negatively on production, on the other hand, as people lost crops in the operations and were also often settled on land with a poorer quality than they had before. The movement into concentrated settlements also meant that many had to spend more time walking to their fields than before.

Serious mistakes were committed during the villagisation operations and the whole process no doubt had a negative impact on productivity, at least in the short term. There is, however, one positive side to this chapter of Tanzania's history. The villagisation process did provide the country with an ideal basic political and administrative unit. The 1975 Village Act defines the village as the basic administrative and political structure at the local level, with an elected Village Council and a Village Assembly consisting of all adults of sound mind living in the village. The Village Assembly was effectively given to role of a Village Parliament, in the spirit of the classic Greek model of direct democracy.

In the short term, the impact on villagisation on individual property rights was negative. In places where the population had been comprehensibly resettled, the law implied that they derived the rights to the land on which they were resettled from the village, which in turn

[5] Daily News, 7 November 1973, cited in Coulson 1982, 249.

derived it from the district. Villagers were often settled in block farms, where the intention was to combine the benefits of individual holdings with the potential for achieving economics of scale through allowing villagers to share in the use of tractors, something which rarely, if ever, was realised. Even in villages where villagisation entailed less resettlement rather than the drawing of village boundaries around existing settlements, security of tenure was undermined, as the Village Government was given extensive powers over decisions on land utilisation. The following statement by a villager from Tabora recorded by Elizabeth Wily is a telling illustration on the impact villagisation had on individual land rights:

> In the old days, that is before Villagization, people owned the land. You could sell the house and the earth because no man would buy a house without first looking at the land with it. But most people cleared their own land, and even when people began to come and buy houses here they got more land by asking people with a lot of land to give them some, or they borrowed it. Today you can't do anything with your land. It is not our land anymore. (Wily 1988: 288)

It is relevant to note that during and the first years after villagisation, the actual legal status of land and land allocations were not accorded much importance. Although the 1973 Land Utilization Act, passed shortly before the brunt of the operations, allowed the state to declare large tracts of land to be "planning areas", thereby in effect revoking whole-scale all legal rights to land in the area, this had not been used. Instead, the whole villagisation process took place without reference to the law. On a related note, the Village Act stated that the villages were to be allocated land by district authorities. It did not, however, state where districts derived their rights from. The whole villagisation process, therefore, took place in a legal vacuum. There still would be many years before the courts agreed to hear any cases against the land allocations that were executed during the operations. The mid- to late-seventies, therefore, can be seen as the low point of the formalisation process in Tanzania.

Incidentally, this was also a period of increasingly serious economic problems. By the early eighties, agricultural output had slumped to an all time low, and an over-valued exchange rate continued to bleed surplus from the rural areas, while the constant shortage of foreign exchange and consumer goods fed growing black market.

The Agricultural Policy and the return of formalisation

In 1982, an Agricultural Task Force was set up to assess the state of the agricultural sector and to draft up recommendations for reform. Touring the country, the Task Force members found that the agricultural policies of ujamaa were not working. They concluded that too much emphasis had been put on smallholder farming and that there was a need to encourage the development of medium and large scale farms. Secondly, village smallholders complained about having to do mandatory work on unproductive village farms. Villagers also complained about weak security of tenure for their individual plots, especially in villages that had block farms, as it was fairly common practice for the village government to reallocate plots from time to time. It is relevant to note that the Tasks Force's report made strong recommendations on the need to facilitate the growth of a viable medium and large scale farming sector (URT 1982). On the second group of findings, notably on the unpopularity and low returns of village farms, the Report pulled its punches. The Task Force later acknowledged this anomaly, but stated that this was done for strategic reasons, as they didn't want needlessly to bias the party leadership against the report. It was very clear, that for the Task Force, the main priority should be to allow the growth of a larger scale commercial agricultural sector, and that they vested less importance in supporting poor smallholders. The Agricultural Task Force turned out to be a powerful advocate for formalisation, but it did not prioritise the empowerment of the poor.[6]

[6] See Sundet 1997 for a detailed discussion of the work and recommendations of the Agricultural Task Force, which is based on interviews with most members of the Task Force, including the chairman and the secretary.

The Report of the Agricultural Task Force marked a turning point in the formalisation process in Tanzania. The analysis and recommendations were taken aboard by the political leadership and adopted in the 1983 Agricultural Policy of Tanzania (URT 1983). The authorities reversed its earlier implicit ban (there was never a formal policy to that effect) against granting titles of larger tracts of land to private farmers. The number of land allocations in subsequent years increased sharply. The impact on smallholders was more subtle. Over time, the mandatory contribution of labour to village farms faded away. Gradually, smallholders who had been resettled felt they could return to their previous farms, where these hadn't in the meantime been taken by others. Villages started to spread out again, and more land was put under cultivation.

What turned out to be the Agricultural Policy's main contribution to land tenure in villages was the introduction of village titles. The Policy advocated that villages should be demarcated and provided with titles vested in the village government. The village titles were intended as the first step of transforming the village land tenure arrangements. The policy document states that the village title would be vested in the Village Council and that the Village Government would in turn provide subleases to the individual households. As is evidenced by the policy directions, such sub-leases would confer what amounts to mere user rights to the individual households with the Village Government retaining control over all rights of disposition:

> … each Household will normally be given its own long-term sub-lease so as to provide reasonably permanent occupancy of the house and the Household Shamba [farm], but the right to free sale will not be included in that lease; if the family wish to surrender their sub-lease they must return it to the Village Government in return for compensation for the value of the house and other buildings, of any land improvements which have been made, and of any permanent crops. (URT 1983, 11)

What we see here is an attempt to codify and formalise the arrangement that had been intended to follow from the 1975 Village Act. It clearly illustrates how villagisation had undermined the sovereignty of each smallholder's land rights and helps put into context the plaint from the farmer in Wily's account from Tabora region that "It is not our land anymore" (see above).

Perhaps even more interesting is the Task Force's main motivation for demarcating and titling villages. The Task Force anticipated problems in finding land for investors as there was little land that was not already claimed by a village. As one member put it, "villages say that no land is not village land." Essentially, there was a strongly felt need to identify available land for large scale commercial farmers, and the seemingly simplest way to that was seen to demarcate village land with the view to identify free land. Thus, the village titling exercise was conceived of less as an exercise to protect village land, than as an exercise to take land away from villages. Of course, this is not the way the Policy was sold to Nyerere and the Party leadership. In the highly politicised discussions that took place at the time the Policy was adopted, the Task Force stressed that village titling was an important means of protecting smallholder farmers from capitalist encroachers.

A little know directive that was sent to District Land Officers by the Ministry of Lands in 1991 provides a telling view of how the technocrats in Government really approached village titling:

> Village viability assessment should be carried out in order to establish the carrying capacity of each village, on the basis of which land requirements for the village population will be determined for a period of 20 to 30 years. Once the requirement for the village population is established the remaining amount of land will be shown, and that may be set aside for private investors from outside the village. From then, land use plan preparation should be carried out together with the demarcation of village boundaries and titling. (Cited in Lerise 1996: Chapter 10, 9)

In the years after the Agricultural Policy was adopted, conflicts over land became ever more prevalent. Allocation of large tracts of village land to outsiders, often with the collusion of the village leadership, was deeply resented. Also, as farmers started to move back to their pre-

villagisation plots, they often found others on their old farms. Court cases started mushrooming as they realised that they could still lay claim to these plots under customary law, as their old rights had never been revoked. The latter was a particular concern in Arusha region, where indigenous large scale farmers who had lost their farms during villagisation found that their land had been settled by other villages. In urban areas, particularly in the suburbs of Dar es Salaam, well connected individuals acquired residential plots in a veritable rush for titles. Double and triple allocations abounded when both the local authorities and the Ministry of Lands were issuing titles for the same plots. A stand-off between the Ministry of Lands and the Prime Minister's Office (then the Ministry responsible for local government) was eventually resolved in the Ministry of Lands favour. The ascendancy of titling made land a valuable commodity which in turn unleashed intense competition over what was becoming an increasingly scarce resource.

Investment Promotion, the National Land Policy and the Land Acts

It was against this background that the work towards the present National Land Policy started.[7] By the beginning of the nineties, ujamaa was out and investment promotion the new buzz word. In 1990, a technical committee was established in the Ministry of Lands to prepare a new land policy. Their mission was to update the country's land policy to modernise it and make it investor friendly. Shortly after this committee commenced its work, the Minister of Lands at the time had become concerned at the growing problem of land conflicts. In consultation with the President, he set up a Presidential Commission of Inquiry into Land Matters, which became known as the Shivji Commission, named after its chairman, Prof. Issa Shivji.

The Commission's Report was the most comprehensive analysis of the land issue in Tanzania ever made, including the Mkurabita assessment.[8] It documented that the land tenure regime had come under severe strain. Countless examples were provided of escalating land conflicts and rampant corruption in the allocation of land. The Commission's analysis drew on a rich historical, legal and institutional analysis. It argued that the main distinction of the land tenure regime, which had remained largely the same since the colonial era was its distinctly administrative bias. Land was seen as something to be managed for the good of the public. The protection of property rights, especially for the traditional smallholders, had not been the priority of the successive governments. The Commission argued that the state had repeatedly failed to uphold a meaningful guarantee for land rights under customary law. The Commission identified the following points to be the main failings of the existing arrangements.[9]

- a failure to separate between the legal and the administrative aspects of land tenure, with resulting confusion in the implementation of land related policies.
- inadequate security for land claimed under customary law.
- insufficient presence of checks and balances on the allocating authority and absence of transparency in allocation procedures.

The Shivji Commission recommended a radical restructuring of the nation's legal and institutional framework for land. It recommended that the ultimate rights to land be divested from the Presidency. Village lands should be vested directly in the villages for perpetuity. Outsiders of the village would be able to lease land from villages, but not buy it outright.

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[7] A detailed account of the long and complex policy making process surrounding the National Land Policy is found in Sundet 1997.

[8] The commission visited every district in the country and its two volume report was supported by several thousand pages of transcripts, although, unlike the Mkurabita team, they never used the sheer bulk of evidence as proof of the quality of its analysis.

[9] See URT 1994, 19-24 for a concise summary of the Commission's assessment of the system's shortfall's in reference to customary tenure.

Villages should be demarcated with common boarders, precluding any attempt by the authorities to identify excess land. The Commission recommended that the remaining national lands be vested in a Board of Land Commissioner answerable to the Parliament, and administered by a National Land Commission under the guidance of the Board. Marketing of national land should be allowed, but safeguards put in place against speculation.

A couple of the recommendations of the Shivji Commission are of particular interest to the issue of property formalisation and empowerment of the poor. These are the systems and procedures outlined for issuing Customary Land Certificates (CLCs) in villages and the registration of properties in urban squatter areas.

Each village should establish a Village Land Registry, and through an open process of adjudication villagers should be provided with Customary Land Certificates that could be traded or mortgaged within the village, but not traded to village outsiders. The CLCs should carry the name of the owner of the land as well as the spouse. No transfer of mortgage of the land would be allowed without the spouse's consent. In urban squatter areas, it recommends that villages be established, and inhabitants be provided with CLCs like in conventional villages.

The Commission's report was not well received by the Government. Its main bone of contention was with divesting the control of land from the Executive. As stated in the unpublished Government position paper on the Commission's report:

> The President as Head of State is responsible for the development of the country and well-being of the people, and land being an important element for development has to be controlled by the President. If land is vested in [the] Board of Land Commissioners and the Village Assemblies then the Government will be turned into a beggar for land when required for development ... The Government will not implement its policies in that way. The Investment Promotion Policy will be impossible to implement when the Government does not have a say in land matters. Land has to remain in the hands of the Government. (URT 1993a: 5)

This is an excellent summary of what remains the Government's view of the role of land tenure in Tanzania. Providing strong guarantees of ownership to the citizens of Tanzania is only a secondary objective of a good land tenure regime, which must not be allowed to hamper the Government's responsibility to develop the country. It should also be noted that stronger guarantees are allowed to the non-poor, who are the owners of registered land. It is the traditional sector of customary land holders who should not be allowed to stand in the way of development.

The technical committee seated in the Ministry of Land referred to above, continued its work unabated. The Shivji Commission's report was only considered one of the inputs in the policy making process. The National Land Policy was eventually adopted in 1995. The Policy was not a radical departure from the previous policy. The only notably change was that it recognised land as having value on its own right. Previously, it was only allowed to charge for what was on the land and "unexhausted improvements" of the land when selling.

The Policy incorporated some of the terminology of the Shivji Commission's report. It does for example state the intention to introduce Customary Land Certificates. Rather than establishing a Village Land Registry, though, the Policy states that CLCs should be registered at a District Land Registry.

The National Land Policy was codified into law with the passing of the Land Act and the Village Land Act in 1999. [10] Like the Land Policy, the Land Act provides little that is new. The following highlights justify mention:

- The law provides for a land market, but retains discretion to refuse or cancel sales at will, without assistance from the courts.

[10] For a detailed analysis of the Acts, see Sundet 2005.

- The law does not require land to be auctioned, so it is free to allocate land at prices below market value.
- Land administration remains highly centralised. All titles must be sold by the Land Commissioner (the senior land official in the Ministry of Lands).

The Village Land Act, on the other hand, contains significant elements of change. It provides the parameter for what appears to be a self-contained system of registration and titling at village level. Village Councils are authorised to issue Certificates of Customary Rights of Occupancy (CCROs), which would seem to be significant step forward in formalisation of property rights and the empowerment of the poor. The Act is unlikely to have the expected effect, though. The following are some of the reasons why:

- Although the Act seems to be breaking new ground by setting up new village land administration, there is not much new thinking evident in the detail. It is essentially the rather complicated and paper oriented process of land allocation at national level that has been replicated at village level. The proper administration of village land requires 50 different paper forms. Keep in mind that many villages don't have offices, let alone stationary or filing cabinets.
- The Act does appear to devolve substantial authority over land matters to the village. However, ones sees that the district and national level can override any decision made by the village. Land is registered at district level (which can be many days of travel from some villages). And there are five ways in which the President can forcefully and legally acquire land from the villages. It is also telling that the Land Act states that General Lands, the category of land that is administered by the Ministry of Lands, include "unoccupied or unused village land."

What we see here, is a tokenistic devolution of partial authority to village level. There is no effective diminution of the ability of local authorities or national authorities to interfere in the administration or control of land at village level. There are elements of innovative thinking and some of the processes outlined for blanket demarcation of village land are good. The problem is that they are embedded in an overly complicated set of regulations and it is consequently unlikely that they will bring about the required shift from secretive and non-accountable allocations of village land to an open and transparent system, in which the rights of the poor have a better chance of being supported.

Underlying this problem, especially from the perspective of the poor, is the dichotomy of customary law, which is not formalised and statutory law, which is. The poor own their land under customary law and enjoy little effective protection from the legal and administrative system. The better off in the formal sector, have land titles and while they also suffer from insecurities of tenure and may be vulnerable to interference from central and local government authorities, they are much better placed to withstand any competing claims to their land. This dichotomy has been well illustrated by Hernando de Soto in his book *The Mystery of Capital*, who refers to those inside those outside the bell jar. The Ugandan scholar Mahmood Mamdani also refers to the same type of dual system in his book *Citizens and Subjects*. A summary of the two descriptions is presented in Box 1.

It needs to be appreciated that the modernisation drive is fundamentally disempowering for smallholder farmers and livestock keepers who are viewed by officialdom as being part of the traditional sector.

Another way of describing this dichotomy is modern versus traditional. This is particularly relevant in the Tanzanian context, where we have seen that the traditional (or customary, informal or extra-legal) sector has consistently been seen as a sector of little promise. Consecutive Governments have sought to advance the modern sector. In colonial times, this was by allocation of large tracts of land to settler agriculture or large scale agricultural projects. After independence it was through an attempt to transform smallholder agriculture into collective village farms managed along modern lines. Since the 1984 Agricultural Policy

and the investment promotion drive that started in the early nineties, this has been through government seeking to attract large scale investors by making attractive land available to them. It needs to be appreciated that the modernisation drive is fundamentally disempowering for smallholder farmers and livestock keepers who are viewed by officialdom as being part of the traditional sector. We shall return to this towards the end of the paper.

Box 1. Two ways of illustrating the formal/informal dichotomy

The bell jar: In his book *The Mystery of Capital: Why capitalism works in the west and nowhere else*, Hernando de Soto contrasts the situation in the developed west with the one in most other places in the following manner. In the West, there are areas where the formal sector is not working, like in disadvantaged urban areas where there may be a high level of criminality and large parts of the population make a living off the record and many may be squatting, that is living in properties without any formal rights. De Soto invokes the image of a bell jar and asks the reader to imagine areas in the west where the formal sector is not working as being inside a bell jar, whereas the formal sector is the whole area outside the bell jar.

In the developing countries like Tanzania, on the other hand, it's the other way around. There are areas, mostly in bigger cities, where the majority of the population work in the formal sector and live in houses which they own our rent from registered owners. Outside the bell jars of the developing world is the informal, or extra-legal sector, as de Soto terms it.

Citizens and subjects: In his book *Citizen and Subject*, Mahmood Mamdani uses a more politically dynamic vocabulary to describe the same situation in the developing world, with specific reference to the history and legal system in African countries that were under British colonial rule. He traces the use of the legal system in national building and administration in the political history of South Africa and Uganda. He shows how the operation of the dual legal system of statutory law (law that is guided by written law) and customary law (law that is not written and that is not supported by legal documents) has impacted on rights and the division of power.

Those operating within the statutory system are recognised as *citizens*. That is, they have clearly defined rights, a political voice and the backing of the legal system. Those who operate under customary law, on the other hand, Mamdani classifies as *subjects*. They do have rights and property, but these are upheld or not at the discretion of the authorities. Thus, the post-colonial state has retained the basic quality of the colonial states where the inhabitants are divided into two groups, citizens and subjects.

Both the bell jar and the citizen/subject are good ways of putting the formal/informal divide into context. De Soto's bell jar is a good way of explaining how the divide differs in developed and developing countries. What it does not do, is explain in any way the reason why the formal-informal divide persists, or why the extra-legal fails to go legal. The citizen/subject explanation, on the other hand, captures the power dimension of the divide. The formal sector, or the establishment, has a vested interest in keeping the informal, the subjects, under the control of the state. Formalisation, therefore, takes on political connotations, as it would imply redistributing power from the citizens to the subjects. This supports the link between formalisation and empowerment, expounded by de Soto, but it also suggests that the idea that formalisation will lead to empowerment may be simplistic. Perhaps the causality is more likely to work the other way. Should one consider empowerment first and formalisation later, or perhaps the two are best tackled simultaneously?

The Property and Business Formalisation Programme in Tanzania

The Property and Business Formalisation Programme started as a partnership between Hernando de Soto's Peruvian Institute of Liberal Democracy (ILD), the Government of Tanzania and the Government of Norway (as instigators and financers of the programme) in 2003. The Programme, which is best known in Tanzania by its Kiswahili acronym MKURABITA,[11] is divided into three phases:

[11] *Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania.*

1. **The Diagnosis phase**, which was completed in 2005;
2. **The Reform Design phase**, which started in 2005 and is expected to finish in 2007; and
3. **The Implementation phase,** which is due to start in 2007.

The diagnosis report was based on research done in 11 regions on Tanzania mainland as well as Zanzibar. The report contained no surprises. The following three findings were along the expected lines:

a. The report documented that the lion's share of Tanzanian assets are 'extra-legal'…

b. … and that they represent vast values; and

c. the report documented that in the 'extra-legal' sector, Tanzanians "have created a self-organised system of documented institutions that allows them to govern their actions" which it classifies into 17 'archetypes' or "patterns of social interaction."

The objective of MKURABITA is to build on these archetypes, in order to create a legal and institutional framework from the bottom up. In this way, the new regulatory framework will reflect the realities on the ground which means that it is both politically acceptable and institutionally feasible to implement.

The Reform Design phase, which is currently around the half-way mark, combines this bottom-up approach with a top-down approach, in which an analysis of the national legal system is conducted in order to see how best to accommodate the archetypes of social organisation in a comprehensive national system of property and business formalisation. Let us now have a closer look at each of the main findings and then the outlined strategy for formalisation.

Assets in the 'extra-legal' sector – will formalisation empower the poor?

First we turn to the share of assets that are to be found in the 'extra-legal' sector. The report states that in Mainland Tanzania,[12] 89% of properties are 'extra-legal'. The definition of 'extra-legal' here justifies some further discussion. ILD defines as 'extra-legal' properties that cannot be freely traded and that cannot be used as security for loans from established banks. This would also include properties that may have documented titles, such as Certificates of Customary Rights of Occupancy.

This is a needlessly 'binary' approach. The aim of the Programme is to impart titles to the poor that are freely tradable and that are acceptable by banks as security for loans. This seems to be a massive leap from a system where there is very poor security of tenure and where the institutions at the level where most of the poor live and hold their property, namely in the country's villages, are very poorly developed. The intention here is not to argue against the ultimate objective, merely to point out that this level of analysis is a fairly blunt instrument.

As illustrated in the brief history of formalisation in the first half of this paper, the idea of individualisation, registration and titling of land is not a new one in Tanzania. There is nothing essentially new in the ILD approach, and one is therefore well advised to retain a healthy degree of scepticism as to how likely it is that a whole scale transfer to a modern system of tenure can be introduced. By way of illustration, Kenya initiated a titling

[12] In the following discussion, I only refer to Mainland Tanzania. Land and business registration are not Union matters and it is beyond the scope of this paper to discuss the Zanzibari situation. The key difference is that Zanzibar lacks the institutions of local government that the Mainland has, and as we will see, the institutions of local government down to village level have a very important role to play in the formalization process, although this is given surprisingly little attention in the MKURABITA reports.

programme issuing fully marketable and mortgagable titles in 1957 through the Swynnerton Plan. After half a century, the process is still far from complete. The implication in the ILD report is that once the silver bullet of formalisation of property rights have been provided, the rest will follow as long as the methodology is correct and enough resources are provided.

Arguing for a more realistic or less ambitious approach is not to suggest that nothing can be done. On the contrary, the argument here is that there is a need to take a much more nuanced approach to the formalisation process. If one were to accept that to aim for the provision of fully and freely marketable titles to all Tanzanians is unrealistic in the short, medium and even longer term, then the next question is what should be prioritised in the shorter term.

Only two issues will be considered here. Who should the target group be and what should the primary objective of titling be. The question to the first appears already to have been answered through the association between MKURABITA and "empowerment of the poor." So, if the poor is the primary target group, how can the formalisation process best support their needs? This question reveals one of the main weaknesses of the Diagnosis study. It has simply been assumed that what they need is fully marketable titles and access to credit. There was no multiple or open ended questionnaire asking the poor to indicate what they would like to see coming out of a process of formalisation and titling. The MKURABITA diagnosis study, therefore, does not tell us what the poor sees as their most important problems relating to property rights and what they consider to be the most important issues to be tackled by a formalisation process.

The MKURABITA diagnosis study … does not tell us what the poor sees as their most important problems relating to property rights and what they consider to be the most important issues to be tackled by a formalisation process.

The Shivji Commission's report, which is the most thorough study of land in Tanzania to date, describes a situation wherein poor smallholders and livestock keeper in rural Tanzania suffer from chronic insecurity of tenure.[13] Poor people in villages face a steady threat against their scarce land resources from a number of sources. Actual scenarios through which the poor loose their land include:

- The National Land Bank has identified a large tract of land within the village boundaries to be allocated to a large scale investor. The land has been used for grazing for livestock by villagers, who are now barred from using the land.
- In anticipation of the rise of property prices as investors move into the area, an influential businessman has secured a title to 200 acres of village land. The land has recently been settled by people in the village, but they have now been classified as squatters and have been told to vacate the land. There are no records in the village of the allocation of the land.[14]
- The Village Chairman and Village Executive Officer has concocted the minutes of a Village Council meeting, on the strength of which 20,000 acres of village land is allocated to outsiders. The Village Assembly has not been informed and there is no record in the village of the land allocation. Much of the land is already being used by households in the village, mostly for grazing of cattle.[15]
- A new game reserve has been registered with donor support, and land that was previously controlled by a village has now been transferred to the district authorities.

[13] For a more up to date assessment see Shivji 1998.

[14] This example reflects the current case in Zinga village in Bagamoyo, where a villager was killed, reportedly by a police officer, in the conflict that ensued over the land (see various reports in This Day in November and December 2007).

[15] This is a real case from Simanjiro district in the early nineties.

- A previous Prime Minister has an around 5,000 acre farm in Morogoro district. The farm has been carved out of village land, and it is unclear whether any compensation has been paid to the village.
- In Simanjiro, a group of commercial farmers have adopted the practice of ploughing and planting maize on plots over several thousand acres over three to four years, then abandoning the plot after the soil has been exhausted. They then move on to new plots. This is land belonging to villages but no compensation is paid to these villages. The enterprising farmers have the support from the local authorities.

In none of the cases above is any kind of compensation likely to have been paid to the affected villagers and these are only a few of the different scenarios through which poor Tanzanians may loose their most prized assets.

If the MKURABITA diagnosis had included a poll on what the poor see as the most pressing issue in reference to land tenure, it is quite likely that the need for better security of tenure would have come out tops. Providing stronger guarantees for land rights would to a large extent depend on the establishment of a system in which land could be administered in a transparent and accountable manner at the local level.

As outlined in the previous section, the Village Land Act does not provide a system that is appropriate to the capacities of administration in Tanzanian villages. There are simply too many and too complicated regulations. Moreover, they don't make sufficient use of clear and enforceable provisions to ensure full transparency in the administration of land at village level. There are also a number of ways in which district and national authorities can intervene, and as shown in the examples above, it is extremely rare that such interventions benefit the poor.

Promoting large scale registration of land at village level in this context is not likely to empower the poor. On the contrary, it's an almost certain recipe to favour the better connected villagers to increase their landholdings at the expense of the poor. This is the warning that was given by many at the start of the MKURABITA. Unfortunately, this is also what is now unfolding in the initial pilots of the MKURABITA approach. A civil society representative taking part in the recent pilot in Handeni district summarised the impact of the exercise as follows:

> All in all, the titling process realigned land ownership [in the villages], created new landlords and formalized landlessness. It has drawn a line between those that may look to the future with hope having a means of livelihood, and those who will nearly permanently host all the disgusting images of poverty in their homes for land of land. (ole Kosyando 2006, 9)

The report which this citation is lifted from clearly illustrates the perils of rushing through a registration and titling process where there is poor understanding of the objective of the exercise, and where there are no or insufficient safeguards to protect to powerless against land grabbing. Some ideas for a more pro-poor system of formalisation of land rights at village level are provided in the final part of this chapter.

'Extra-legal' assets – the value of bringing 'dead capital' to life

As outlined earlier, MKURABITA sees security of tenure not as an end in itself, but as a means to accessing capital. The previous section suggests that this is not an accurate reflection of the priorities of the poor. In this section we will nevertheless look closer at the concept of 'extra-legal' assets as dead capital and the likely effects for the poor of bringing such dead capital to life. There are two basic arguments to be made in relation to formalisation of property rights and access to credit for the poor. Firstly, poor landholders are very unlikely to put their land at risk by using it as collateral for credit. Secondly, there are ways of assisting the poor to get access to credit that are more likely to be available to them

and that avoids putting their most prized asset at risk. Box 2 provides an example from a Tanzanian village to illustrate the discussion.

Box 2. Dead Capital?

Consider the case of two farmers in a rural Tanzanian village.

Amina is a young single woman with three children. She has a two acre plot, which brings a reasonable yield when the rains don't fail. Then she can make just enough to feed her family and to provide her children with the basic healthcare and pay various school contributions for her oldest child. She does not engage in any risk taking and has not sought to get any farming inputs on credit, as she knows she would not be able to repay should the rains fail.

Aboud is a middle-aged man who is among the well to do in the village. He has 20 acres of land next to a small river that goes through the village. He manages to get a surplus even in dry years, and when the rains are good, he reaps a good profit. He also has more than 20 cattle that are grazing in the village commons. Not being vulnerable in bad years, he can afford to take the risks associated with business. His wife has set up a small shop in the village, with the help of some credit he secured from relatives in the district capital. He is a member of the Village Council. His relatively strong position in the village is largely due to the assets held by him and his wife, the land and the shop. Neither of these have the backing of formalised property system, but one could hardly deem his and his wife's assets to be 'dead capital.'

Neither Amina nor About have titles to their land. How would their lives change if they got titles? Both would benefit.

For Amina it would be very welcome as protection against land grabbing. In the last years, several thousand acres in the village has been sold off to outsiders who want it to invest in growing hops for the brewery and other ventures. A title would help her hold on to her land, by far her most important asset. It would also stop attempts of her deceased husband's family from taking her land from her, although the new land law invalidates the local tradition that dictates that when a man dies, his land goes to his brother. She would not, on the other hand, use the land title to get any kind of credit. Firstly, no bank will give her a loan for such a small plot. Some local business could consider it, but they charge exorbitant interests rate. Secondly, she knows that she would have serious problems keeping up a mortgage if the rains failed, or if her crops were ruined by a pest. She can't afford to risk loosing her land, as that would leave her destitute.

Aboud would also feel the benefits of more secure tenure. He would be very unlikely to use the title to get a mortgage as few banks would consider giving a loan for a reasonable interest rate for a 20 acre plot in the middle of a village. He could probably get more attractive loans, should he need them, through more informal means. Still, he would enjoy increased security of tenure and it would also probably strengthen his position vis-à-vis his wife, particularly if his was the only name on the title. An added advantage for him would be that the process of titling would open opportunities for him to annex adjacent land that is presently held by poorer members of the village. As a member of the Village Council he would be well placed to manipulate the titling process to increase his holdings, particularly if there weren't solid systems in place to ensure transparency and protection of the poor village residents in the titling process.

These constructed cases illustrates that the main benefit in land titling in Tanzanian villages is to strengthen security of tenure and not to enable access to credit. In fact, access to credit is not likely to be an issue at all for most Tanzanians that would be fortunate enough to receive titles for land that they already own. It also questions one of the central tenets of the de Soto approach to formalisation, that of the monetary gain implicit in titling, through bringing 'dead capital' to life.

Anybody who has observed enterprise in Tanzanian villages would have noted the differences in the behaviour and economic choices made by the poor and not so poor farmers. Poor farmers are notoriously risk averse. They are unlikely to make capital investments - in farming implements, fertiliser or pesticides, or in setting up a small business - unless they are certain that they will pay off. They may even desist from making labour investments in the land they till, unless they feel assured that the land won't be taken away from them as soon as

they have improved its productivity. Due to the lack of strong guarantees for the few assets they do possess, they avoid any of the risk taking that could help elevate them out of poverty. This is what is often referred to as the poverty trap.

The less poor, on the other hand, are more likely to improve the productivity of their land through investments, as they are more likely to have a surplus to invest and because they are in a better position to defend their investments, in poor years and against threats from the better off and the political establishment. Thus, their land affords them both social and economic capital. It is not dead capital.

Arguing that formalised rights to property is not likely to lift the poor out of poverty by enabling them to access credit to unleash their latent entrepreneurial spirit is not meant to suggest that access to credit for the poor should not be on the agenda. On the contrary, provision of credit to the poor is an important component of any poverty reduction strategy. The Bangladeshi Grameen Bank, whose founder was recently award of the Nobel peace prize, is but the best known example of initiatives that have succeeded in empowering the poor through the provision of credit.

Box 3. The VICOBA model

The Swedish supported LAMP programme, which operates in Singida, Babati, Simanjiro and Kiteto District Councils, employs a rights based approach in its support to economic development at village level. This has entailed the training of Village Legal Workers and support to the establishment and operation of Village Forest Reserves.

Village Community Banks (VICOBAs) have been established with membership from women in the village. These work through women agreeing on saving plans on an annual basis, through which they deposit an agreed amount every week or month into a sealed box. They are provided with the training on how to keep the accounts. Members are able to borrow a set ratio of their savings (at zero or low interest).

Like the Grameen Bank, the VICOBA functions by instilling financial discipline among its members by providing training in financial literacy and planning. In several villages, the LAMP programme has observed that the main impact of the VICOBAs has been that the women take a more active part in the management of village affairs as a result of the financial literacy that they have gained.

Also in Tanzania, there are a number of examples of how saving societies or community banks have helped their members access capital at reasonable rates, without exposing them to the kind of risks associated with a mortgage. Box 3 gives the example of the Village Community Banks (VICOBAs) developed with support from the LAMP programme in Northern Tanzania.

The simple lesson from successful programmes of credit provision to the poor is that such programmes need to be explicitly targeted to fit the target communities. Also, such programmes typically do not depend on the use of registered property as collateral.

Archetypes of social interaction – appropriate building blocks for a new system of formalisation?

The bottom up part of the ILD approach consists of identifying ‘archetypes of social interaction’. The idea here is that in most ‘extra-legal’ contexts, people on the ground have found their own means of codifying property and contractual obligations. By building on these ‘archetypes’ it is possible to construct a legal framework that reflects norms that are recognised and accepted by people on the ground.

The Diagnosis report of the MKURABITA identifies a number documentation, negotiation, adjudication and other mechanisms which it classifies under the pre-defined 17 ‘archetypes of social interaction.’ These include the following:

- Conflicts over rights of land are adjudicated by third parties and the decisions of these parties are respected. This is seen as an archetype of official Adjudication mechanisms.

- The 'Mwneyekiti'[16] stores collections of business and property documents. This is seen as an archetype of official Registries.
- Tanzanians use signatures from recognised authorities to attest the validity of a transaction. This is seen as an archetype of Attestation.

The approach of building a national system from the bottom up is a good one, and the identification of existing systems, whether legal or 'extra-legal', is obviously a valuable part of this process. The way this has been approached in the MKURABITA Diagnosis report, however, has at least two problems.

Firstly, in the opinion of the author of this paper, the classification of 17 'archetypes' is more confusing than illuminating. The impression given is that people on the ground have invented instruments and mechanisms from scratch, so to speak, which the ILD researchers have organised under their pre-defined classification of 'archetypes.' This obscures the reality that what the ILD researchers have identified, are in fact legal or quasi-legal instruments under Tanzanian law.

According to the colonial legislation inherited and retained by the Tanzanian authorities, local government executives have quasi-legal functions. Therefore, if the Village Chairman signs a document or a contract, it has legal status. Village authorities have legal, executive and judicial authority, and although this raises serious questions as to the existence or non-existence of checks and balances, it allows for great flexibility in the issuance of documents of various degrees of legality. How useful it is to document such documents and practices and to classify them under 'archetypes of social interaction,' on the other hand, is open to question. At the very least, the usefulness of such an exercise would depend to the extent to which these 'archetypes' are placed in their proper legal and institutional context.

The failure to contextualise the 'archetypes' is the second problem of the approach. There is very little discussion of the existing legal and institutional framework in the report. The formalisation process in Tanzania is a long standing one, and the Land Act and Village Land Act address many of the main objectives of the MKURABITA. There are flaws, to be sure, but one would expect any reform to build on the stronger sides of the existing system. Still more important, there is very little discussion of the local government structure, and this is impacting on the formalisation process at the local level. As illustrated in the first half of this paper, the legal and institutional structure of local government and not least the political economy of the administration and allocation of land resources have a profound impact on the impact of the ongoing process of formalisation on the poor. Not discussing this in any detail would appear to be missing the point, particularly for a process that is touted as "single-handedly fomenting a revolution in the third world."

The MKURABITA approach has a seemingly boundless confidence in administrative tools and legal instruments. The recommendations starting to come out of the Reform Design phase abound with recommended forms and offices. This fails to take into account the political context in which such instruments operate. As illustrated by Mamdani's parable of citizens and subjects, the formal – informal divide is a political divide and while the denial of strong formal rights may be disempowering for the poor, it is simultaneously empowering for the establishment that refuses strong rights. The way this operates is particularly clear to see at the district and village level.

At the district level, there's a network of overlapping lines of authority and accountability. The district administration is nominally accountable to the district council, which consists of locally elected political representatives. Although it is frequently argued that the council has

[16] Mwenyekiti is consistently used as a title in the Diagnosis report. It is Kiswahili for Chairman, and presumably most often refers to the Chair of a Village Council. The term appears to be used to give the report a local flavour. It is representative of the analysis presented that the legal role of the Village Chair, or Mwenyekiti, is nowhere defined in the report.

limited influence in the exercise of the local administration, it needs to be appreciated that individual councillors, particularly the chair, can exercise considerable influence in individual cases, such as land allocations or adjudication of business conflicts.[17]

The district administration is also accountable to the District and Regional Commissioners, who are held accountable by the Party and President for the implementation of the Party Manifesto in the district. The District and Regional Commissioners will frequently intervene in land conflicts and their support or opposition can make or break local business ventures.

The district administrations also need to defer to the Prime Minister's Office, Regional Administration and Local Government (PMO-RALG) for approval of their plans, budgets and local bye-laws. The Ministry of Finance also has a final say in the setting of the parts of the local budget that depend on the subventions from central government (95% of the budget in the case of rural councils).

Ironically, the multiplicity of reporting channels and controlling authority also gives the local administration considerable lee-way to do what it pleases in individual cases. Overlapping lines of authority and the resulting confusion in reporting lead to ineffective oversight. This means that if the District Executive Director and heads of departments wish to make decisions based on their personal interests, they are frequently able to do so.

At the village level, the formalisation process also faces significant problems of capacity. Very few villages in Tanzania have a functioning village bureaucracy. Without an office, a filing system and an established capacity for recording and sharing information, there are obvious challenges in establishing a property register and ensuring fair and impartial adjudication of ownership rights. The introduction of new systems and processes at this level are unlikely to have the desired impact unless they also address the core of the governance limitations in Tanzanian villages. This would require the Village Assembly to be able to hold their Village Council accountable, decision making processes that leave a traceable paper trail and appropriate systems that ensures appropriate transparency and contestability of policy and budgetary decisions and adjudication of property rights.

To conclude, the discussion on the three major findings of the MKURABITA Diagnosis report raise serious questions on the usefulness of ILD's analytical framework. The distinction between legal and 'extra-legal' is unhelpfully lacking in nuance and makes no reference to the specific legal situation of the country. The preoccupation with access to credit is not backed up with any empirical research on whether this is indeed the priority concern of the poor. This paper suggests that security of tenure in its own right is likely to be the prime concern of the poor. Reports from the MKURABITA pilot in Handeni suggests that the registration exercise there undermined the land rights of the poorer and less influential of the communities there. This points to the irony of ILD's use of the term "empowerment of the poor" seeing how, in Tanzania at least, the political economy of the administration of property rights is largely missing from the analytical framework. The assumption that the design and provision of new instruments and processes will strengthen property rights for the poor is based on an ahistorical understanding of the development of rights and political systems. Any attempt to address the rights of the poor that does not begin with an analysis of the political institutions where the poor live and that bases its recommendations on how these can be made more accountable and more responsive to the needs and priorities of the poor and the general public is unlikely to succeed.

Is the formalisation of property rights bad for the poor?

The debate on Hernando de Soto has been exceedingly polarised. If the proponents of formalisation have been naively enthusiastic about the revolutionising impact of their particular approach, the opponents have also been particularly bleak in their predictions on

[17] Tim Kelsall's account of the tax revolt in Arumeru provides one of the best illustrations of the machinations of local level politics in Tanzania (Kelsall 2000).

the impact of formalisation of property rights on the poor. The received wisdom among this camp is that formalisation and 'marketisation' of land is a process that is fundamentally against the interests of the poor. At the risk of oversimplifying, the argument runs along these lines:

1. Providing the poor with marketable property rights exposes them to the vagaries of the market, which they are poorly equipped to manage
2. Banks or other financial institutions may trick them into getting mortgages on terms they can ill afford, and they may loose their land (which may have been the banks hope to start with)
3. Also, formalisation may lead to an increase in property prices which puts them beyond the reach of the poor and which may also 'force' poor property owners to sell their properties as they cannot afford not to.
4. The process of formalisation itself is likely to put property used or owned by the poor under threat, as the better wealthy and better connected use the process to acquire additional land, leaving many of the poor landless.
5. Women are particularly at risk, as registered property rights are more likely to be in the favour of the men in the family, while rendering whatever traditional safeguards there may have been previously in place ineffective.

Whereas there's a good basis for these misgivings, especially the last two ones, the way in which they have been used as arguments against formalisation have two fundamental analytical shortcomings. Firstly, the view of the market as being hostile to the interests of the poor fails to consider the alternative. Secondly, much like ILD's analytic approach, the criticism of formalisation also appears to take place in a historical vacuum, primarily as it ignores the fact that formalisation is already taking place.

The extensive literature on land reform and land tenure in Africa suggests that the main source of land inequality and allocation of land on preferential terms to the non-poor is Government intervention in land markets.[18] The historical overview of land tenure and formalisation in Tanzania shows clearly how successive Governments in their drive to modernise the agricultural sector have consistently failed to prioritise the land rights of the poor. Whereas it would also be naïve to expect a land market to miraculously solve the problems of manipulation of land rights in the interest of the rich and politically well connected, it would seem more realistic to hope that a transparent and reasonably well functioning land market can provide stronger guarantees for the poor, than the present government controlled system.

Secondly, in arguing against a new process of formalisation, it is important not to loose sight of the fact that there's already an ongoing process of formalisation. In Tanzania this started more then one hundred years ago, and for every new title issued and every land transaction registered, the formalisation process takes one step further, for better of for worse. This paper's discussion of land tenure in Tanzania clearly shows the present process fails to provide the poor with strong property rights. Therefore, the question should arguably be not whether or not to support a process of formalisation, but how best to support formalisation. This final section of this paper gives some thoughts on what could be some of the components of a process of formalisation that favours the poor.

Is it possible to formalise property rights and empower the poor?

As set out at the beginning of this paper, de Soto's analysis shows how the poor suffer as they do not enjoy the effective support and protection of an operational legal system. The argument has been made that the problem following from this, that of the poor not having

[18] See, for example, Binswanger *et al.* 1993 and Bruce and Migot-Adholla 1994.

fully fungible and marketable property rights, is a secondary one. Empowerment is about power, and if the poor is to benefit from formalisation, then it is first and foremost important that the institutions of managing power, particularly at the local level, are set up in a way that provides reasonably strong guarantees for the transparent and accountable exercise of power.

This suggests that the ongoing Local Government Reform Programme is at least as relevant to the formalisation process as the MKURABITA or even the Strategic Plan for the Implementation of the Land Laws, of the Ministry of Lands. John Bruce, a leading expert on land tenure, made the following comment on the link between local government and land tenure in his review of the Shivji Commission's report for the World Bank:

> control of land and viable local government seem to be inextricably tied together in rural Africa. A local government which does not control land is almost irrelevant, given that the concerns of rural people are so focused on land. (1994: 4-5)

The fact that land is a key concern in local government in Tanzania is further illustrated by the recent relatively recent exercise of 109 Local Government Authorities (LGAs) drawing up their own Anti-Corruption Action Plans. By far the most frequently mentioned problem was corruption in the process of allocating land, which was listed by 76 of the LGAs. Corruption in the delivery of health services was a distant second with 56 mentions. It should therefore be abundantly clear that land tenure and formalisation is an issue of governance and not merely of finding the right formats and processes for documenting rights.

Any further support to formalisation of property rights in the Tanzanian context should take local decision making processes as its point of departure. The key challenges, and the biggest opportunities for gain, are at village level. The village is the basic building block for democratic governance in Tanzania and it already has the institutions required to make village governance and local land administration work, the Village Assembly, the Village Council and the Village Land Council. What is required is an extension of the Local Government Reform Programme and a more systematic effort to build capacities for transparent and accountable governance at village level. This could include the following efforts:

- Strengthening of the position of the Village Assembly vis-à-vis the Village Council, it could be argued that under the present system the latter is first accountable to the District authorities and only secondly to the village.
- Putting in place minimum physical requirements, including a village office, a village information management system (which could include a village land registry) and a village noticeboard that would function as Village Gazette.
- Simple and appropriate regulations ensuring transparency in decision making with clear minimum requirements of transparency. Good systems for village land adjudication are provided for in the Village Land Act, the problem is that they are not mandatory (see Sundet 2005).

It is puzzling that the Local Government Reform Programme is in its eighth year of implementation and that the issues suggested above have not yet been considered. At the district level, there is a pressing need to clarify accountability mechanisms and to specify what is the role of the various actors in the adjudication of property rights.

Above all, there is a need to contextualise the process of formalisation and to recognise that this is something which is already happening. In addition to linking the formalisation process up with the Local Government Reform, more support to he monitoring of the multiple initiatives currently ongoing and the facilitation of an open and frank debate of the process would be helpful.

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