No.10

Forest Participation Series

Rights and Wrongs of Rights to Land and Forest Resources in sub-Saharan Africa

Bridging the gap between customary and formal rules

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International Institute for Environment and Development

Forestry and Land Use Programme

Rights and Wrongs of Rights to Land and Forest Resources in sub-Saharan Africa: bridging the gap between customary and formal rules

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Note on author

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Preface

Negotiating roles for forest management: constraints and opportunities

An analysis of the evolution of approaches to forest management in Africa over recent decades shows that we have passed through two main phases and are now entering a third:

The technocratic era: management for the forest and against the people

Up to the early seventies, priority was given to the trees at the expense of the people who use them. It was thought that enhanced technical capacity in forest management would be sufficient to guarantee their renewal for the good of the nation. Programmes aimed at developing capacity primarily concerned technical matters and were intended for government staff.

However, over the years, significant failures of "top-down" initiatives, driven solely by technical considerations and from the top led to the realisation that bad forest management was not due to lack of technical skills alone.

The participation era: forest management for and by the people

The flaws of the technocratic approach have led to the pursuit of the concept and practice of *participation*, as a means to ensure that local people's interests and needs are taken into account in the decisions concerning the fate of forests. Participation gradually became a *sine qua non* condition for success of forestry initiatives in rural areas. It has been politically incorrect to criticise the concept and it invariably constitutes a requirement for securing donor support.

However, in recent years, "participation" has proven difficult to implement when it means going beyond mere consultation and achieving active involvement of forest users in decision making. Reasons for this include:

- active participation implies a process of social transformation. As such, it requires commitment and flexibility over long periods and does not always fit target-oriented agendas; be they by governments alone or with the support of donors;

- participation is often seen as an increase of responsibility given to local people, but without a corresponding increase in their rights and access to benefits. As such, participation actually becomes a burden and is usually refused or passively accepted;

- somewhat paradoxically, the pressure for participation (from donors and NGOs) has led to attempts to appilying it mechanistically, a little like blueprints. This contradicts one of the original aims of participation, i.e. that it should be adapted to local contexts;

- participation also requires logistical means for advisors (technicians, NGO staff) to be in close contact with rural

dwellers. Such means are often lacking in rural areas.

Even when successful participation is achieved, the sustainability of the new framework for decision-making is often doubtful, for several reasons:

- "success stories" often appear with donor-support but without the need for commitment on the part of government authorities;
- "participation" has tended to focus on the use of resources by people. It has more seldom dealt with institutional participation, i.e. collaboration between all the interest groups.

As a result, participation has been mostly accepted so long as it does not disturb existing power structures. Often this means its restriction to project frameworks; which have a limited lifespan; and where less powerful are called upon to share decision-making.

The emergence of political negotiation: forest management with the people and other actors

It is increasingly apparent that participation is often limited in scope and faces extreme difficulties in scaling up beyond local level.

What has been missing in both the technocratic and the participatory "eras" is the recognition of the *highly political character* of forest management, even at local level. The need for a *social definition* of forest management has been proven by the experience with participation. But this requires negotiations between institutions which represent all existing interest groups, and especially the weaker ones. Hence, the implementation of participatory forest management needs to be *politically negotiated*. Thus, participation should be accompanied by the development of mechanisms which allow for the negotiation of stakeholders' roles. This implies changes in existing power structures.

To achieve a constructive negotiation process, capacity needs are more institutional than technical. They can be divided into two categories:

- capacity for *negotiation* itself, such as empowerment of the weakest stakeholder(s), which may involve literacy, provision of information, and other activities related to the concept of training for transformation;
- at a later stage, capacities for *sustaining roles*, such as accountability and representativeness of local governance, leadership, and economic resilience.

The highly political nature of these issues explains why they have been poorly dealt with in the development arena, despite the fact that they often constitute the major constraints to sustainable forest management.

Another difficulty concerns the vagueness associated to the term "roles". One can try to overcome this weakness by defining stakeholders' roles via their respective *rights, responsibilities, returns from forest resources and relationships (i.e. their "4Rs")*. Stakeholders' "4Rs" are often unbalanced, a situation which often impairs adequate negotiation and leads to forest decline.

Papers 6,7,8,9 and 10 in this Forest Participation Series illustrate different constraints created by imbalances in stakeholders' roles; but also how these can evolve towards forms of collaboration which are conducive to more sustainable management of the forest.

Samuel Egbe (paper No. 6) provides an overview of the historical evolution of forest tenure and access to forest resources in **Cameroon**.

Natural resource tenure and access policies in Cameroon have, since the colonial period, generally ignored the existence of local populations, done little to strengthen the ability of peasants and their institutions to cope with the blunt nationalisation of the resources upon which their lives are inextricably linked. This unilateral usurpation and top-down approach not only undermined traditional institutions, but demotivated many rural people whose energies could have been mobilised in the management effort.

The author argues that state control and ownership of natural resources has not ensured rational management nor brought about rapid social and economic development. Lack of social legitimacy of forest regulations and policies is considered to be a main reason for such failures.

The thrust of this paper is therefore to examine past experience, and identify constraints and opportunities, in an attempt to engender a more indigenous resource tenure system in Cameroon.

The paper by **Jonas Ibo** and **Eric Léonard** (No. 7) presents a historical analysis of developments in policy and social practice relating to forest management and conservation, against the economic and social transformations undergone by the **Ivory Coast** since the beginning of the century. In particular, it seeks to assess the most recent experiments aimed at involving small farmers in the implementation of rehabilitation programmes, based on two examples. This a rare example in sub-Saharan Africa, where the state officially tackles the issue of encroachment of the forest by farmers, in contrast to the usual *"laissez-faire"* attitude in other African countries. Yet, it does so by means of a strategy aimed at actually excluding farmers from commercial use of the forest resources, however in a "participatory" manner. The last part of the paper discusses possible means to improve this strategy.

In paper No 8, **Alain Pénelon** discusses a study carried out in two forest communities in **Eastern-Cameroon**. The study had two-fold objectives: to analyse how roles in land and forest resource allocation are defined at village level, and to what extent the provisions on community forestry of the 1994 Forestry Law are applicable at local level.

The author describes nine steps used in the completion of the study. It concerns land differentiation in terms of use and access according to the distance from the village and major problems in the implementation of the New Forestry Law concerning community forestry, i.e. costs, tedious character of the procedure, etc.

The paper finishes with some proposals to improve the existing Law and other

regulations which affect local communities' involvement in forest management.

Liz Wily's paper (No. 9) illustrates how a facilitating role by government has allowed interesting community-based initiatives to take place in the miombo forest of **Tanzania**. It describes how, in a situation of severe degradation of the forest cover, two communities have met the challenge of achieving sustained, effective control of the use of the forest resource in a very cost-effective way. This was made possible because they were given appropriate rights and access to benefits to effectively assume their responsibilities as forest managers. In her discussion, the author points to some very interesting generic lessons that may be drawn out from these examples.

Finally, **Olivier Dubois'** paper (No. 10) attempts to provide a synthesis of recent literature - both Anglophone and Francophone - about rights to land and forests in **sub-Saharan Africa**. These are at the heart of the debate on sustainable land use in this Region, because the dualistic situation where formal and customary rules co-exist creates often confusion and tensions, which result in quasi open access to forest resources.

Policies aimed at improving tenure security have generally failed and reinforced existing power structures, as they only look at the spatial dimension of security, contrasting with the more social aspects of rights built into customary rules. Initiatives such as formal titling of land on the one hand; and codification and formalisation of customary rules on the other hand, have so far not lived up to their expectations. The author discusses more recent experiments and proposals aimed at bridging the gap between customary and formal rules. These concern adaptive legislation, enabling institutional frameworks and ways to convey information to stakeholders. Such actions are just in their infancy and are likely to be difficult to implement, as they threaten to destabilise power structures. Hence the need to allow for experimentation , continuous learning, and building confidence for these attempts to materialise in efficient policies.

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June 1997, London

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Liz Wily

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Sustainable Forestry - Getting the Roles Right

There is a growing *consensus* amongst key forest decision-makers in Africa about what is needed to make the transition to a more sustainable forestry that will ensure the security of forest goods and services at household, national and global levels. This transition may cover one or more of several dimensions:

- from a timber focus to multiple goods and services
- from little management to informed management
- from exploiting forests as a free or cheap resource, to nurturing forests as assets of multiple values
- from domination by government to an organised, participatory approach reconciling different interests

These transitions have never been achieved in one dramatic transformation. They are likely to involve an iterative process of continuous improvement. The process would require action, not by governments alone, but also by the market and civil society as a whole.

This, in turn, is likely to require changes in stakeholders' respective roles in forest resource utilisation and management (Upton and Bass, 1995). If one defines forest stakeholders' roles by their respective rights, responsibilities, returns from the resource, and relationships, it appears that there has often been an imbalance between these attributes (Aluma et al, 1996):

The State

- has too many responsibilities relative to its means
- usually has ownership rights over forest resources
- receives often inadequate returns from forest resource use
- relationships with the local communities and the private sector usually depend on local, often covert arrangements. Mutual distrust is common amongst these stakeholders.

The private sector

- is given concession rights to exploit the forest
- is not responsible for the long term objectives of the forest, i.e. those related to forest as a public good - although it has some means to manage the resource
- the level of returns is not clear and constitutes a controversial issue. The private sector claims it is low, other stakeholders believe it is high, especially when compared to the price paid for the right to exploit the resource
- relationships with local communities are often opportunistic

Local communities

- usually have no or few formal responsibilities
- have no significant official rights besides user rights. Customary rights are often more important than formal rules
- need permits to obtain tangible returns from the forest resources; such returns are usually small.

This situation creates an imbalance in

power relationships and conflicts of interests, which, in turn, makes it difficult to achieve good relationships between stakeholders and clarity concerning their roles.

The issue of *rights* over the ownership and use of forest resources is at the heart of the debate concerning role changes in forest management in the tropics, i.e:

- The need to recognise the original land claims of indigenous people underpin Principle 22 of the Rio Declaration.
- The right to full ownership by indigenous people is still a contentious issue.
- It is increasingly acknowledged that more responsibilities without more rights and access to benefits actually result in a burden.
- A significant gap exists between the policy legislation and what actually happens at the field level.
- There is a need to reconcile customary and formal ('modern') law.
- There is a significant lack of information, especially at the local[1] community level, on formal existing rights over forest resources. This raises the issue of how to convey the necessary information to stakeholders in a timely, user-friendly and cost-effective way.

The discrepancy between formal regulations and local practice (usually based on indigenous norms) is a common reality in rural sub-Saharan Africa. Several African governments (e.g. Cameroon, Kenya, Uganda and Tanzania) formally recognise the value of indigenous rules. However, such recognition is often not translated into practice, largely because the conflicting parties must first agree to use indigenous norms before being able to officially resort to them.

This inconsistency between *de jure* (supported by law) and *de facto* (supported by common practice) rights leads to what Lekanne dit Deprez and Wiersum (1993) call the *'pluriform legal situation'* whereby:

- the local traditional authorities resort to customary legal systems because the State is not reliable. However, they cannot fully exert their power on resources (land and trees) that 'do not belong to them' under formal law;
- the State lacks the means to enforce its policies and regulations over vast tracks of resources;
- the private sector (e.g. logging concessionaires in Central Africa and woodfuel collectors in West and Southern Africa) often takes advantage of the confusion and pays an underpriced value to obtain usufruct rights over forest goods.

Such a confusing situation leads to *'quasi open-access'* forest resources, which, many contend, is a major cause for their depletion.

This paper attempts to shed some light on current issues and possible ways forward in trying to reconcile customary rules and formal regulations, as a condition for achieving a balance of stakeholders' rights that is more conducive to sound use of natural resources in Africa.

[1] In this document, 'local' refers to the actors who interact with a site-specific resource, and not to the origins of the actors themselves.

African Tenure - Myths and Realities

Some preliminaries

Tenure regimes are defined by Shepherd et al (1995) as *'socially defined rules for access to resources and rules for resource use that define people's rights and responsibilities in relation to resources'*. Due to their social character, tenure regimes vary over time and space, depending on social, economic and political arrangements, and are embedded in cultural backgrounds. They reflect power relationships between different stakeholders. Conversely, outside rural areas of Africa, tenure security is often equated only with ownership, hence control. These contradictory views have led to much misunderstanding and inefficiency in land and forest management.

Thus it is important to clarify the concept of tenure security, as it is interpreted in different ways by different stakeholders. Government and international bodies usually associate tenure security with its spatial aspects; whereas the customary view relates it more to securing social relationships. Consequently, *any policy which attempts to increase tenure security in Africa should develop mechanisms that not only validate tenurial rights according to formal law, but also allow for social validation and clarification as to their socio-political implications* (Chauveau, 1996).

A growing body of evidence shows that *the relationship between tenure security and a more efficient and sustainable use of the resources is not always straightforward* (Dubois, 1994; Platteau, 1996). In fact, many observers agree that *usufruct or management rights may often be more important than ownership, so long as confidence in future access and mutual recognition exist*. Indeed, granting rights to individuals or groups that lack the means and knowledge to manage and defend them is usually counterproductive.

A pragmatic way to look at property rights is in *the continuum approach*, whereby *relative* access to the resource distinguishes private from common property, as underlined by Messerschmidt et al (1993):

'If we view private and common property on a continuum, private property falls at one end, defined by the most delimited rules of access and the most restrictive rights of use. Common property takes up the rest of the continuum, with the commons of a whole community at the far end and communal commons and government reserve falling somewhere in between.'

An advantage of the continuum approach is that it accommodates the notion that common property regimes (CPRs) can encompass *shared private property* (McKean and Ostrom, 1995). Under such systems, resources are not divided into pieces. Holders of such rights have to abide by some obligations, common to all holders of land in the communal area.

There is intense debate over the pros

Table 1: Some Myths and Realities about Common Property Regimes

MYTH	REALITY
Individual gain provides a stronger motivation than communal good and, as a result, CPRs are over exploited.	Individual survival and security, both in terms of material resources and social identity, is dependent on community survival, particularly within a harsh environment.
As a resource becomes more valuable and/or there is increased pressure to use that resource, over exploitation and a cycle leading to degradation is inevitable.	If increased pressure on CPRs comes from within the society of the original resource users, they will evolve responses to manage it. However, if it comes from more powerful outsiders, CPR organisational rules will be ignored and/or will need support to adapt on time.
CPRs are 'impure' public goods (where one person's use subtracts from the use of others). This subtractability works in two ways: • firstly any user of the commons subtracts from a flow of benefits to another; and • secondly, cumulative use by increasing numbers will eventually lead to a reduction in the productive capacity of the resource.	In reality, CPR management decisions are constantly taken and enforced. 'Free riders' are quickly sanctioned. It is important to acknowledge the interdependence of communities which manage CPRs.
Common property is an inefficient way to manage resources. aim.	Common property management is the most efficient way of managing certain resources, for example rangelands with limited, seasonal water sources.
Such systems rarely maximise production.	Maximising production is not always user's main reducing, or spreading risks is often important, together with the presence of a safety net in times of hardship.

Source: Shepherd et al. 1995

and cons of CPRs. To provide some clarification, myths and realities surrounding CPR are summarised in Table 1.

The CPR approach recognises four categories of property rights: private, common, state, and open access (i.e. no property rights). Lynch (1992), however, reckons that this categorisation contains two major flaws:

- it creates confusion between private and individual ownership;
- it virtually requires disentangling individual and group rights for recognition in community-based systems.

He therefore provides a simplified way to analyse tenure: he distinguishes only two types of rights, i.e. *'public'* or state owned and *'private'*, referring to rights held by

This leads to four possible combinations:

	Individual	Group
Private	eg. titled land	e.g. ancestral domains
Public	eg. leases on individual farming or woodlot parcels	e.g. communal leases

non-state entities, whether individuals or groups.

Although rural dwellers usually see trees as part of their farm land, it is often convenient to separate land tenure from tree tenure, as it allows for a better perception of the reality[2]. Land and tree tenure are examined separately in the following sections.

Tree tenure[3]

The concept of tree tenure, as opposed to land tenure, has gained momentum in the last decade. This stems from the increasingly acknowledged observation that the relation between these two concepts is usually complex, given that rights to trees can be multiple and separable from land. Hence, *there is for example no straightforward relationship between security on land and tree planting* (Bruce and Fortmann, cited in IIED/FD, 1996).

Fortmann (1985) defines *tree tenure* as *'a bundle of rights which may be held by different people at different times'*. She distinguishes four major categories of tree tenure rights:

- the right to *own* or *inherit*
- the right to *plant*
- the right to *use*
- the right of *disposal*.

The right of disposal encompasses notably the rights for stakeholders - especially local communities - to decide that forest resources will not be commercialised. This right is often overlooked in the analysis of community forestry activities, despite its importance (Ribot, 1995).

Rights to trees may constitute a powerful development tool (Bruce, 1989):

- as a security for loans, where individual rights to land are weak
- as an incentive for disadvantaged classes of individuals, e.g. women who can only have access to land rights through their husbands
- as incentive and security where nationalisation of land may have lessened farmer motivation for planting trees.

Fortmann (1985) discerns three sets of factors that influence rights over trees:

(i) The nature of the tree: tree tenure regimes are very variable. They may

[2] Indeed, the two types of rights are often very distinct in national legislations. For instance in Ghana, outside forest reserves, traditional authorities hold allodial title to land on behalf of the people, whereas rights to timber trees are vested in central government on behalf of the traditional authorities (Sargent et al, 1994).
[3] This section derives mainly from Fortmann (1985).

differentiate planted trees from wild trees, or trees on private land from trees on common land. Distinction is often based on the principle that *'labour creates rights'* (Fortmann, 1985). In general, *wild or self-sown trees* on common land are common property. *Planted trees* belong either to the planter or to the owner of the land. In some cases, wild trees growing on private land belong to the landowner.

(ii) The nature of the use: the distinction is often made between *subsistence* and *commercial* uses. Trees used for subsistence are often free for use by all, especially when they grow on communal areas. In the case of commercial use, the right may be restricted to trees growing on the seller's property; it may also be forbidden, depending on the use. Fuelwood can fall into both categories and, where it has become scarce, rules governing its use tend to be tightened up.

(iii) The nature of the land tenure system: tree and land tenure affect each other:

- where land tenure is *communal* and tree tenure is strong, the planter of a tree generally owns that tree. This very often characterises places where shifting cultivation is the main agricultural system;
- in contrast, where *private rights* to land are strong, rights to trees are more correlated to land rights. This favours landowners, at the expense of groups with weaker land rights, e.g. tenants, squatters, pledgees, mortgagees, and women. These groups have restricted rights due to the possibility of using tree planting to claim permanent rights on land.

In societies where women cannot own land, their rights to trees may be restricted. Thus, where tree planting establishes a claim on land, women are often forbidden to plant trees. In other instances, women's rights to trees may be related to residence and/or marriage.

Local arrangements can sometimes result in *multiple ownership of trees*. For example, Leach (1988, cited in Bruce, 1989) explains how in the Halfa Province of Sudan, products of date trees are divided into three parts, 1/3 belonging to the person who planted them, 1/3 to the one who owns the land where they were planted and 1/3 to the individual who watered them. This system spreads the risk of entire loss of crop.

Tree tenure systems may change over time - 'often in the direction of privatisation as tree resources become scarce or commercially valuable' (Millon, 1955, cited in Fortmann, 1985).

Hobley (1995) rightly stresses the importance of properly assessing *who are the users of tree resources and what are their respective rights*. Proximity to the forest and regularity of use are often key determinants to define the type of forest user, i.e. primary, secondary, etc. However, the assessment may be quite different if the criterion used relates more to the importance of forest goods and services in people's livelihoods. This situation is often further complicated by the interference of 'outsiders' to the local communities (e.g.

migrants, civil servants, traders), eventually leading to the need for negotiation processes over both time and space to determine prevalence of rights.

Colfer (1995) suggests six dimensions to use in assessing the links between people and forests, and along which stakeholders can be placed:

- proximity to the forest
- dependency
- local knowledge
- forest/culture integration
- power deficit (vis-à-vis other stakeholders in deciding on the use of forest resources).

She also proposes a simple scoring technique that helps to differentiate those people who only benefit, or fail to benefit from the forest, from those who have the capacity to act on the forest (i.e. the actors).

In assessing tree tenure systems, Bruce (1989) suggests working *from behaviour to tenure* rather than the other way around. Indeed, in starting to probe issues such as where newly married couples should get poles for their new house, how far the source area is, and whether it be used by other people, one begins to ascertain people's rights to trees based on their use. This strategy avoids using questions that contain too many assumptions (e.g. who owns the land? Can this piece of land be sold?).

A growing body of evidence shows that *where rights to harvest and sell tree products increase, farmers tend to plant more and harvest less than expected* (Mayers and Kotey, 1996). However, securing more rights for local farmers will probably often be resisted by local government and traditional authorities for some time. *Interim solutions* can be proposed, such as recently in Ghana (FD/IIED, 1994):

- farmers can decide whether or not, and when trees ought to be felled on their parcels of land;
- farmers can claim direct payment at the time of felling, and better compensation for felling damage;
- farmers are involved in the issuance of permits for the transportation of timber.

It is not only a question of change in tree tenure however, as argued by Scoones and Matose (1993, noted in Mayers and Kotey, 1996):

'The incentives to manage resources, under any tenure setting, are centred on management and institutional capacities, appropriate enabling frameworks and co-management between local and central authorities. It is a question of institutions, and the structure within which they operate rather than the tenure and title themselves.'

Land tenure

Following Hesseling and Ba (1994), *land tenure* refers to *'relations among individuals and groups that govern the appropriation and use of land'*.

In most rural areas of sub-Saharan Africa, overlaps between *de jure* and *de facto* property rights to land blurs distinctions between private, state, communal and open access tenure

situations, thereby limiting their use for the development of policies and strategies. The definition of land tenure regimes is still an unresolved and hotly debated issue, as demonstrated by the existence of different systems of categorisation.

Private individual land - does title really matter?

Some major international development players have been taking the stance that the joint influence of demographic and market pressures will gradually evolve towards more individualisation, resulting in more formalisation of land rights. This trend is assumed to bring more security, better access to credit, higher prices for land, eventually leading to social peace, economic 'efficiency', political stability, and better management of natural resources.

However, systematic data to support such rationale are crucially lacking, and the World Bank itself admits that nearly all its rural titling schemes have achieved 'poor' results (The Economist, 1995). Research in several Anglophone and Francophone African countries (e.g. Uganda, Senegal, Somalia, Rwanda and Ghana) has found that indigenous land tenure systems are not as insecure as claimed (Bruce and Fortmann, 1993; Thébaud, 1995). In places where swidden-fallow agriculture prevails, registration may even bring more insecurity and inequity (Boserup, 1965).

The impacts of registration in sub-Saharan Africa have been more recently critically assessed by Platteau (1996). His main findings are synthesised in Box 1.

Platteau concludes that:

'African land arrangements or practices have evolved in a significant way under pressure of changing circumstances, yet retain some basic features of erstwhile institutions, particularly with respect to modes of exchanging land: the notion of land as a (freely tradable) commodity remains deeply alien to most African people'.[4]

The broader notion of private good is considered by some authors to be rather alien to communal societies like most rural communities in Africa (Le Roy, 1996a). What is considered to be private by western observers may actually be related to 'external' institutions that modern law does not acknowledge[5]. The distinction between private and public goods is therefore often blurred in rural Africa (Karsenty, 1996b), despite the fact that the rate of privatisation of property is gaining pace.

There are nevertheless cases where title can be an appropriate answer. In theory, this occurs when the costs of registration (e.g. in protecting boundaries) are outweighed by its benefits, which may not be financial alone (Hobley, 1995).

[4] However, in situations of intense land scarcity and lack of conditions to intensify agriculture, land sales tend to increase dramatically, even in the absence of formal regulations. This is illustrated by the case of Rwanda in the last decade (André and Platteau, 1996; Okoth-Ogendo, 1996).

[5] Hence the frequent differences in opinion about nepotism, neo-patrimonialism and tribalism used to describe African societies.

Box 1: Impacts of land registration in sub-Saharan Africa

1. On security of tenure and litigation costs

Registration can create rather than reduce uncertainty and conflicts over land rights, because:

- The confusion that arises from the co-existence of two sets of legal rights often leads to the misuse of the law to their advantage by the most clever and powerful. Some other sections of the population - especially marginalised groups - that rely on customary law to claim rights to land, are often denied recognition of rights during the registration process.
- Costs of establishing and operating registration are often prohibitive, both for the claimant and the concerned state agency. Moreover, weak administrative capabilities entail very long delays in the completion of registration. As a result of these constraints, registration ends up being either permanently incomplete or obsolete upon its completion; thereby creating more uncertainties and conflicts.

2. On land sales and their effects on efficiency of use

Frequency of land sales has not increased thanks to titling, except at the beginning of the process, and under the manipulation by local elites. On the supply side of the land market, this is due to:

- Interference of customary rules in the marketing mechanisms. Traditional control often persists, even when land is duly registered. This relates to the social role of land, as a primary factor of well-being, insurance and integration;
- the emotional attachment of most African people to their land, land sales occurring generally under conditions of distress.

On the demand side, demand for land often arises from non-economic motives, i.e.:

- for social and political advantage;
- as a relatively safe investment and a good protection against inflation for people with regular incomes;
- as a means to provide land to future generations of the family. Under such circumstances, absentee ownership is frequent where land markets exist. Therefore, land sales can seldom be associated with more entrepreneurial use of the land.

3. On credit and investment

Opinions seem to converge on the fact that titling has negligible effects on smallholders' access to credit. On the supply side of the credit market, this stems from:

- the lack of reliability of titled land in the view of moneylenders, due to difficulties to foreclose it in case of default (see above the reasons why people purchase land), ineffective judicial system (this can be worsened by popular opposition, e.g. if titling and the consequent reshuffling are considered customarily illegitimate);
- the usual strategy of credit institutions, which are reluctant to handle small loans in order to cut administrative costs.

On the demand side of the credit market, there are several constraints to attractive investment that are not related to tenure, i.e.:

- lack of access to technology, infrastructure, markets, all factors conducive to intensification of agriculture;
- taxation of visible wealth;
- jealousy on the part of the village elites and peers.

Source: Platteau, 1996

Titling is likely to be more feasible in special circumstances, e.g. where indigenous rules are weak, such as in new settlement areas, or where they have been eroded. However, even in those cases, titling does not have to be limited to individuals. In the case of farm land, demand for titling often results from the sense that it may be the most efficient protection against reallocation by the State (Bruce, 1993).

As regards forests, titling is virtually impossible for individual properties, and protection from outside encroachment should be sought across groups of people (Hobley, 1995).

A gradual increase in the demand for privatisation of land in Africa, particularly in the Sahel, has to be acknowledged. It originates mainly from urban-based civil servants and traders, and often concerns peri-urban areas. However, more and more farmers, especially in the Sahelian region, demand some sort of formalisation of land tenure, or as Mathieu (1996) puts it *'a paper countersigned by the local administration authority'*. However, even under such circumstances, exclusive ownership rights such as title may not be the most suitable solution. *Intermediate settlements* might be more appropriate, so long as they are officially recognised by the local administrative authority. These include lease between communities and individuals, and priority rights defined on an ad-hoc basis (Hesseling and Ba, 1994; Lawry, 1993).

Community-based systems - building upon indigenous rules?

Local or *community-based systems* typically refer to a multitude of *'discrete, localised systems where users have developed and are the members of organisations responsible for management of the resource'* (Shepherd et al, 1995). They include both individual and group rights and, in our understanding, are usually associated with some kind of indigenous control over the access and use of land and natural resources. The main feature of community-based systems is that *'their legitimacy is drawn from the community in which they operate and not from the nation state in which they are located'* (Lynch, 1992). According to Lynch's categorisation described earlier in this paper, such systems can encompass both private and public group types of tenure.

Given the weak enforcement of state regulations, recently more and more attention has been given to indigenous rules, as a possible alternative to regulating the use and management of natural resources in rural areas of Africa.

Some major features of these indigenous rules systems are summarised in Box 2.

In summary, indigenous rules offer some potential *advantages* in the management of natural resources:

- They are based on social status and relationships, and are therefore likely to bring about a more effective and cost-effective control of local regulations, through peer pressure;

Box 2: Some features of indigenous land rights in sub-Saharan Africa

In contrast to the exclusive character of titling and state regulations, indigenous tenure regimes in sub-Saharan Africa are characterised by inclusive rules, based on social ties (Okoth-Ogendo, 1996). These rules link rights to membership of a community. The strongest one would be related to birth, probably followed by marriage and adoption, whilst those without lineage or kinship ties (e.g. migrants) attain the weakest rights. As a social concept, rights depend also on the observance of norms, acknowledgement of the community's authority structures, acquisition of lineage, etc. Rights can therefore vary over time, according to membership status and performance of social obligations.

Within a given tenurial structure and under the influence of external stimuli, rights can change according to the following process (Okoth-Ogendo, 1996):

- In the absence of pressure on land, equity is the rule and all present and future claims are accommodated;
- the next stage involves a reduction of land sizes. However the quality of access remains the same;
- the third stage implies the creation of new types of access rights, e.g. tenancies for the more marginal members of the community.
- under more pressure on land, some exclusion rules appear; access rights may become suspended, both in space and time for some more marginal members, however with the possibility of restoration at a later phase. Nevertheless, transgenerational rights are not affected.
- more severe rules of exclusion, such as expropriation emerge only under severe conditions of land scarcity, linked to social tensions.

The process is not linear; it may even be cyclical. Thus, its duration cannot be estimated.

This process helps to illustrate another important feature of systems based on customary rights, i.e. the inalienability of some land and other natural resources such as forests. A third notable feature of many customary rights concerns the belief that natural resources are a kind of gift of some supernatural agent that look after the people it protects, and will therefore supply the resources as needs arise. Consequently, natural resources are often perceived as limitless and man is not perceived as an agent of ecological change (Baland and Platteau, 1996).

This state of mind holds mainly in situations where external pressures are weak. It can sometimes lead to non conservative use of natural resources (de Garine, 1996).

- They are locally designed, hence adapted to local contexts and familiar to local dwellers;
- Being based more on social criteria than space, they are more inclusive than formal regulations. They therefore display a flexibility that allows for the co-existence of multiple rights on the same resource as well as for adaptability to change. This capacity to adapt should nonetheless not be romanticised. It actually varies according to the community concerned, and often needs outside support, especially when local resources are under strong exogenous pressures.
- Application of rules operates through the internalisation of well-known principles rooted in indigenous values. Hence conciliation rather than punishment usually sanctions conflicts (Traoré and Lo, 1996).

However some major *shortcomings* of indigenous rules should not be overlooked:

- They often neglect the interests of certain minorities and other socially weaker groups, e.g. herders, women;
- Being based on oral tradition and collective memory and seldom with transcription of proceedings, they may be challenged with time or as power structures and alliances evolve (Traoré and Lo, 1996);
- Indigenous rules often lack effectiveness when it comes to solving conflicts between stakeholders who do not share the same values, e.g. local dwellers and a logging company;
- They depend a lot on the preferences of the traditional leaders, who can sometimes not represent the interests of their constituencies;
- They are embedded in indigenous knowledge, which is not always conducive to sustainable use of resources, as indigenous beliefs consider availability of resources to depend more on irrational and divine factors than scientific factors (de Garine, 1996). As an important consequence, *the existence of indigenous rules does not guarantee sustainable use nor management of natural resources* (Baland and Platteau, 1996).

It is sometimes argued that *codification* of traditional rules would help their recognition at governmental level. However, this task seems almost insurmountable, given the complexity of these rules. The utility of such an exercise is also questionable, when the geographical scope of application of traditional rules is limited. Furthermore, in circumstances where customary rules have been codified, such as in the case of the Maliki law in northern Nigeria, they may need to be re-codified over time and due to local demand and pressures (Mortimore, 1996). Such a process can be seen as equivalent to absence of codification.

Formalisation, i.e. the enactment of legislation to regulate customary rules , is sometimes claimed as another possible mechanism to avoid dualistic tenure regimes. This would give a prominent role to the State in engineering the orientation of customary systems, hence the possibility to offset some of the their drawbacks. However it bears several disadvantages (Mortimore, 1996):

- The government assumes the right to define the goals, and is not an independent party with respect to natural resource use
- The complexity and flexibility of customary rules, as well as their inclusive character, are almost certain to be overlooked
- Organising tenure along 'modern' principles and using 'modern' tools (i.e. titles) is very expensive and time-consuming. The costs of maintaining the system should also be considered.

A more promising approach to build upon indigenous norms to regulate natural resource use might be to develop mechanisms that officially recognise some indigenous rules, but on an ad hoc basis, and taking into account the weaknesses mentioned above. Such an approach is currently being tried in Madagascar and is summarised in Box 3.

Box 3: Expanding the use of traditional rules to regulate the use and management of natural resources in Madagascar

In Madagascar, '*Dina*' are community-inspired by-laws which local decision-making bodies use for the benefit of the community. They date back to at least the 19th century. They concern family issues but also territorial and security matters, such as cattle rustling, bush fires, and use of certain trees.

'*Dina*' are always embedded in local values and beliefs, and once they are agreed upon by the traditional authorities, deterrents against their infringements can take various forms: fines, ritual sacrifices, and, in extreme cases, expulsion from the community. Traditional '*Dina*' normally ignore formal law, as do also most local dwellers.

Recently, there have been tentative moves to expand the use of local '*Dina*':

- In some instances, local '*Dina*' that have proven operational are being expanded to district, provincial, or even regional level. This process is cumbersome, since it requires the approval of all traditional leaders concerned, and in some cases the restoration of their authority via newly-built institutions;
- In other cases, the state and some NGOs (e.g. WWF) use the '*Dina*' principles to create new ones that suit their purposes. Traditional leaders are used as conduits to promote and enact such 'Dina'. Thus far, such mechanisms have been notably used to regulate tree cutting, bush fires and shifting cultivation.
- more recently, '*Dina*' have been officially incorporated in the new government's strategy regarding the management of natural resources, which devolves many responsibilities and rights to local communities.

Indeed, the use of '*Dina*' has proved a very good tool to:

- *inform and train* natural resource users at the local level, as the acceptance of a 'Dina' involves thorough debates on the pros and cons of different practices, environmental values, etc;
- *improve communication* between the State and local communities;
- *control* the use of natural resources, being based on local values and initiated by local dwellers.

Source: Raharimala, 1996 and Razanaka, 1996

We have already mentioned the common co-existence of traditional and formal laws to govern access and use of land, which often result in the permanent production of local, temporary and pragmatic compromises. In many cases - especially under harsh ecological conditions such as in the Sahel - the precariousness of such hybrid arrangements tends to jeopardise considerate management of natural resources. Several observers argue that the changes necessary to avoid such situations should be based on the adaptation of indigenous rights to land to modern circumstances.

Changes that allow for some reconciliation with formal law have been occurring in several parts of Africa, for example:

- Shepherd et al (1995) cite the case of Ghana, where governments have exerted rights to trees, but the clan system, supervised by Stool Chiefs, has continued to control the allocation of rights to NTFPs and non-forested land. Moreover, stools also receive a share of the royalties from logging (Quan, cited in Shepherd et al, 1995).
- In Botswana, "traditional chiefs have ceded their role of land allocation to land boards, units of the local government independent from both tribal authorities and elected district councils. At the same time, chiefs maintain a veto prerogative for land board allocation in their areas, as well as an overseer role regarding land use" (Dia, 1996).

The *dynamic character of current customary rules* is emphasised by Bruce (1993) who contends that, nowadays, important customary rules often turn out to be only a generation old[6].

However, the adaptability of customary tenurial rules to different circumstances, though undeniable, is not evenly spread among local communities. It therefore often needs strengthening, with assistance from outside entities.

The role of the State - to what extent can and should it regulate rights over land and resources?

In most African countries, control of forest land and assets by the State has been introduced by both colonial and independent governments, often at the expense of customary rules[7]. In principle, this implies a shift from local authority, and therefore often traditional leadership structures in Africa - to national authority as guarantor of public interest. It therefore legitimates the government's role to control the use of the resources. However, state rules - often inspired by European forestry codes - have revealed themselves inappropriate to local realities, because they are:

- *too specific,* focusing on technical and cadastral aspects and overlooking the

[6] Thus it is more appropriate to use the term indigenous rather than customary when referring to locally drawn rules.

[7] However this is not necessarily the case in Anglophone West Africa, where the colonial governments did not involve themselves directly, by and large, in local tenurial matters, rather using indirect rule to regulate these (Mortimore, 1996).

social and cultural dimension of natural resource use;
- *too exclusive*, being devised to exclude most individuals from the use of forest products;
- *too repressive*, often being used as a means to punish villagers (Buttoud, 1995)

The tension between customary and formal rules over land rights has been further aggravated by the lack of means for the State to exert its statutory role. Too much control, without adequate means to enforce regulations ends up actually 'killing' control (Weber, 1995). As a result, local dwellers tend to resort to customary rules to manage natural resources. In reality, state and customary regulations co-exist, creating a confusing *'pluriform legal situation'* (Lekanne dit Deprez and Wiersum, 1993). Thus, there is often a situation of *'quasi open access'* to land and forests, which is regarded by many as one of, if not the major cause of forest depletion, especially where demographic pressure causes fierce competition over the resource and between different land uses (e.g. in the Sahel). Weber (1995) claims that the termination of this situation should precede any action conducive to better management of forest resources.

This loose situation in terms of rights over land and its resources, further compounded by the inadequate wages paid to forestry sector staff, has often resulted in the *prevalence of covert arrangements between stakeholders at the local level*, e.g. replacement of official fines by bribes, or clientelism. Very often, such deals suit both parties: on the one hand, they complement the forest agent's insufficient salary; on the other hand, the briber can use the resource at a lower expense by paying less than the official fees or fines[8].

However, a concomitant result of bribery and rent-seeking is that the individuals will seek to access the resource as quickly as possible, so as to derive the best and most out of it before leaner times, changes in authorities, etc. Thus, conservation and long term considerations are remote - if present at all - in such users' rationales. Furthermore, corruption introduces a worrying equity problem. Access to resources favours those who have more wealth and political leverage.

This kind of relationship between land users and state authorities also cultivates distrust, which is not particularly conducive to the goal - currently pervading government rhetoric - of collaborative *and* sustainable management of the resources. Finally, on a more macro-economic level, corruption has been shown to reduce domestic and foreign investment (Sizer, 1997).

Such a troublesome picture begs the question of the extent to which the State should intervene in the regulation of property rights. In the case of Africa, this is all the more relevant given that several observers claim the notion of state itself is rather artificial[9] (Le Roy, 1996a). This makes true legitimisation of the State difficult. Le Roy (1996a) contends that animist communities in

[8] See notably Buttoud (1995) and McLain (1992)

[9] In two respects: introduced by colonial states and as a unifying body.

Africa reason in a more 'functional' fashion than Christian societies, in that they are not so used to - and often distrust - outside and omnipotent bodies such as the State. One possible way to improve this poor recognition of the State by citizens in Africa may lie in *the combined use of existing, recognised local organisations and government bodies.*

Based on emerging evidence from Pakistan, Nepal and the Philippines, Lynch (1992) suggests *limiting state intervention to the formal delineation of perimeters of community-based tenure systems, leaving the regulation of individual property rights to the communities themselves, at least insofar as tribal and indigenous people are concerned.*

In Africa, a similar approach is being followed in Tanzania, where decisions on land allocation and broader decisions on land-use are made at village level. More restrictions used to apply to forest reserves, but recent changes in the Tanzanian forest policy seem to have addressed this anomaly (Shepherd, 1996).

Another example comes from the Imamba-Ivaka project in Madagascar and is described by Karsenty (1996b). The project obtained permission from the local administration to simplify the procedure associated with registration of communal land based on aerial photographs. The customary communal territory was then delineated and demarcated on the ground. The registration "title" with legal value was then given to the traditional leader, who could, in turn deliver "internal titles" (without formal value) to user groups or individuals. This has resulted in a gradual reforestation of the area.

The efficiency of such an approach results from both its application to local actors' specific needs, and from the combination of formal tools and locally tailored rules. However, this approach does not discard the role of state forest officers as providers of advice in the management of forest resources[10]. In such cases it is also important to establish mechanisms to guarantee the legitimacy of local decision making bodies.

The specific case of logging concessions in Africa

Pragmatic arrangements - including collusion - often also occur between state agents and private logging concessionaires. Some suggestions for improving the tenure situation of logging concessions are noted in Box 4.

[10] The situation could be similar to what has been happening for decades in the agricultural sector, where extension agents provide assistance in farm management without controlling the tenurial rights of their constituencies.

Box 4: Some possible ways to improve the tenure situation of logging concessions in Africa

In most parts of Africa logging enterprises are usually assigned usufruct rights over tracks of state-owned forests in the form of concessions. One important characteristic of logging in Africa is its selectivity, i.e. usually less than 10 m² (equivalent to one or two trees) per hectare are harvested. This stems both from botanical reasons - a diversified species composition - and trade related reasons - about 60 % of the African timber exports go to Europe, where the market demands high quality timber[11]. This results in a form of logging - 'creaming off' (écrémage in French) or high-grading - that underuses the existing timber resource. Several measures are currently being proposed - and sometimes tested - to overcome this situation and exploit more trees per hectare. Those related to land rights include:

- *Putting access rights up for bidding or auction*, as a mechanism to adjust the price of concessions to the real value of the resource. Although often proposed by economists, this measure has been seldom used, perhaps for patronage reasons. On the other hand, the rise of the resource price does not necessarily lead to conservationist practices (Baland and Platteau, 1996).
- *Length of concessions*: This is a contentious issue. The hypothetical direct relationship between long-term concessions and quality of management has been disputed by several authors (Karsenty, 1995b; CIRAD-Forêt, 1993; Baland and Platteau, 1996). One option would be to link the length of the concession to some conditionality in management quality. The World Bank suggests a *'sliding' system*: an initial lease of 10 years would be granted, with an auditing of the situation after 5 years. If the result is positive, a ten year extension is granted, with re-examination after 5 years, and so on (Karsenty, 1995b). The process is akin to the issue and maintenance of 'certified forest' status by independent auditors.
- *Relating the annual allowable cut to a certain area rather than to a certain volume* (ESE, 1994). Under such a system, concessionaires would be allowed to exploit only a given area[12], during a defined period. This would not only ease supervision by the forestry service, but would also create incentives for the forest manager to exploit 'secondary species'[13]. Given the current structure of demand in the European market, this implies selling more timber on the domestic market and promoting secondary species abroad. Such a strategy has been tried - seemingly with some success - in Côte d'Ivoire.
- Going beyond the specific case of concessions, CIRAD-Forêt (1993) suggests gradually defining rights - which it calls 'commands' ('maîtrises' in French) - not necessarily based on territorial concepts, since, in reality, several different rights can co-exist on the same parcel of forest. Rather, rights would be defined according to the circumstances and problem at stake. This flexibility comes closer to the one that characterises more traditional concepts of tenure rights.

[11] This specificity must be assessed in comparison to the situation in other tropical regions. For instance, in south east Asia, the average volume extracted amounts to more than 50 m³, as a result of both the homogeneity of dipterocarp forests and the local market, where there is a demand for all qualities of timber. This differentiation may however currently be losing ground, due to the increasing proportion of logging concessions in Africa that are being operated by Asian managers, who use the same methods as are used in Asia, their target market.
[12] ESE (1994) suggest the area should correspond to the ratio between length of the concession and felling cycle.
[13] Secondary species are species that are usually left in the forest due to the absence of outlets that provide profits greater than the costs of extraction.

Reconciling Formal and Customary Rights: Emerging Responses and Possible Ways Forward

The right to know

A significant lack of information of stakeholders' formal rights, at the forest resource level, prevails in many rural areas of sub-Saharan Africa. For many years, this neither concerned nor affected local communities, mainly because they only occasionally resorted to formal rules in their daily lives. Indeed, *farmers' behaviour in relation to tenure has been primarily guided by a complex set of mutual benefits rules.* Adjustment to formal rules would very often result in *temporary and pragmatic arrangements* with local authorities, with all the potential negative impacts of such deals on the resources.

More recently, and in the wake of decentralisation, there has been a greater concern on the part of both the legislator and local communities, that the latter should be more informed about their new rights and duties - the assumption being that they would become more involved in the management of natural resources[14]. Different mechanisms have been tried to address this concern and are described in the following sections.

More participation of local communities in the debate

This was one of the major objectives of the national conference on desertification in Mali and the Rural Code in Niger at the beginning of the '90s. The idea was that more involvement of the public in such matters would, among other things, help bridge the gap between formal rules - usually set from the top - and people's concerns. However, in these two cases, public debates were actually dominated by local elite groups, with little participation from farmers, herders, or fishermen (Hesseling and Ba, 1994).

Dissemination of formal rules to the local community level

This has been attempted in several ways in Francophone West Africa:

1 *Judicial clinics*: In several countries of West Africa (e.g. Senegal and Niger) and, more recently, in Cameroon, judicial clinics ('cliniques juridiques' in French) have been set up. These consist of groups of 'para legal experts'[15], backed up by a group of lawyers, who organise consultations in villages and in local dialects. Thus far, most of these organisations have focused on family matters (marital issues, children's issues, etc). However, more recently, some of them have agreed on the need to venture

[14] However, the legislator often still wants power over the communities, i.e. communities should be able to act as effective stewards or servants of the State.

[15] These are individuals that could not or chose not to finish their degree in Law, but have taken some courses on the subject.

into issues related to natural resource management.

2 *Translation of all (or part of) legal texts:* in recent years, legal texts implying greater involvement of local communities in natural resource management have proliferated, both in Anglophone Africa (e.g. Ghana and Zimbabwe) and Francophone Africa (e.g. Niger, Cameroon and Senegal). Hence the need to properly inform rural dwellers of their 'new' rights and responsibilities. This requires cost-effective mechanisms to provide timely, user-friendly, though not distorted information. Some examples on how such issues have been tackled in three African countries are presented in Box 5.

Dissemination of information on rights and duties should take into account the often relatively low level of literacy of

Box 5: Some examples of translation mechanisms used to disseminate legal texts at the local level.

- In Niger, the New Rural Code has been translated in several local languages and disseminated at the local level. However, there have been many complaints about the quality of the translations, which often seem to distort the original version. This weakness probably stems from the lack of involvement of lawyers, and the lack of feedback checking mechanisms.
- In Cameroon, regulations pertaining to communal forests have been translated in a local language, in the context of the rural development side of the API / Dimako Project. The original text, written in French, was first translated by a high-school graduate into the local dialect. The translated text was then translated back to French. This feedback checking mechanism highlighted several misinterpretations, which could thereby be corrected. This process has avoided distortions and has greatly enhanced the quality of the final product (Alain Pénelon, 1996, pers comm.).
- In Senegal, the Law Department of the University of Saint Louis has been collaborating for some ten years with ARED - an NGO specialised in literacy training - on the dissemination of legal texts at village level. The process involves several steps (Samba Traore, 1996, pers comm.):

step 1: choice of topic according to its pertinence to and receptivity by local communities

step 2: selection of significant texts pertaining to the topic and documentary analysis of the topic

step 3: lawyers simplify the original texts in a way that can be understood by illiterate or poorly-educated individuals

step 4: The simplified text is submitted to French speaking non-specialists who are asked to explain what they have understood. This step checks whether the content of the legislation has been respected in the simplification process

step 5: The simplified text is then translated into a local dialect and disseminated by ARED specialists.

Thus far, the process has been completed for the Constitution of Senegal (translated in 3 languages) and the National Domain Law (translated in one local dialect). The translation of the New Forestry Code is in preparation.

rural dwellers. It should be included in adult functional literacy programmes and/or use of other means of communication, such as local radio programmes, comedy, etc.

3 Land tenure monitoring centres
("observatoires" in French)

In Mali, a land tenure monitoring centre has been recently set up. Its mandate includes (Gado, 1996):

- identification and interpretation of the features of the land tenure situation and explain the mechanisms at work;
- assistance to the implementation of practical measures aimed at solving conflicts over land;
- setting up of a database at the disposal of users (e.g. farmer organisations, NGOs, public authorities, etc).

Asking the right questions in assessing tenure

Local situations are very diverse, suggesting many possible ways to overcome tenurial problems. Also, tenurial changes are time consuming and expensive to implement. It is therefore crucial to properly assess the existing situation, by asking the right questions. Some questions are suggested in Box 6.

Box 6: Questions to ask when assessing tenure systems

- *Security of tenure: What does it mean for local stakeholders ?*
  Is titling necessary? To what extent do flexible arrangements provide enough confidence in,hence security over existing land rights ?
- *for whom ?*
  Should it concern native inhabitants,migrants, farmers, herders, etc? There is a need for a proper stakeholder analysis at this stage
- *of what kind ?*
  Ownership or use rights? For how long? Transferable or not? What investments on land should legitimise security of tenure?
- *how to guarantee it ?*
  Referring to legislation? Government recognition of local rules? A combination of both? Who should be made accountable?
- *Is 'common knowledge' about the local tenure system correct?*
  Need to assess what should be considered outdated, due to continuous adaptation of local rules, especially in rapidly changing contexts.
- *Who is constrained (in addition to what is the constraint)?*
  This will determine the seriousness of the constraint and the appropriateness of strategies to deal with it.
- *Is this tenure constraint a bottleneck?*
  Comparison with other constraints are necessary,in order to prioritise action in both an efficient and cost effective way.
- *What purpose or purposes are served by the feature of the tenure system that is in question?*
  The apparent constraint may be an enabling factor in another context.The feature may be part of a risk-avoidance strategy.There is a need to evaluate the trade-offs involved in the removal of the constraint.
- *How static is the constraint?*
  It may resolve itself over time. Changes may already be happening.
- *Is there a non tenurial solution to the problem?*
  The problem may actually relate more to, e.g.policy or project constraints,than to tenure.
- *Finally,are there opportunities posed by the structure of the system and its institutions, of which policy makers could take advantage in planning change?*

Source: Bruce, 1993 and Hesseling and Ba, 1994

Flexible frameworks - resource management rather than space management

There is a growing body of information that tends to favour a *flexible* approach to rights to land and natural resources: it argues that *rather than a fixed set of rules, rights should be defined on a more ad-hoc basis, through a process of continued negotiation as ecological, social and economic conditions change* (McLain et al, 1993). This is notably in line with Karsenty's (1996a) idea of envisaging natural resource management in terms of possible co-existence of different resource uses within the same area rather than just according to space, which is based on the exclusive notion of zones[16], i.e. *use is the first consideration, not geographical area.* Under formal law, it tends to be the other way around. In other words, *definition of clear rights - and duties - over the resource could prove more important than area ownership issues*, especially in the context of collaborative management. Karsenty (1995a) and Pénelon (1996) go further by discussing the pros and cons of formal area delimitation and its corollary, mapping, i.e:

- on the one hand they provide security and clarification of boundaries, two factors likely to reduce conflicts
- on the other hand, they may easily be used to shift back from the concept of multiple use of resources to exclusive use of space
- moreover, mapping is a very expensive operation, often not affordable by local communities, as exemplified in the process of allocation of a communal forest within the API/Dimako project in Cameroon (Pénelon, 1996), and finally
- they do not reflect the dynamic character of tenurial regimes under changing conditions.

Several researchers and practitioners - particularly from Francophone countries - stress that such a consensual mode of resource allocation should be accompanied by *mediation processes* and *contractual relationships between the major stakeholders*[17]. In comparison with the *'cahier des charges'*[18], the contractual approach offers flexibility in several aspects:

- it can involve several parties
- it can deal with 'bundles of rights'
- it can give temporal security, in that a

[16] This latter concept seems particularly inappropriate in the case of mobile resources, such as wildlife or cattle, or of desiquilibrium ecosystems, such as drylands, where climatic episodes change the resource locus. Furthermore, delineations such as the ones existing in most of Francophone Africa - between private forest domain ('forêts classées or forêts domaniales' in French, i.e. under strict control of the state) and national domain, ('domaine national' in French, i.e. belonging to the national community, however represented by the State!) - is often confusing and misleading as regards management and policies under present conditions. For instance, in a country such as Côte-d'Ivoire, loggers have recently moved into the national domain, where most remaining timber is present. An interesting consequence of this trend is that it has forced logging companies to negotiate with local farmers concerning the use of forested land, without any State intervention so far. This is to be compared to the - rather contentious - formal negotiation mechanisms created by the state, i.e. the well-known 'Peasants - Forest Commissions' ('commissions paysans-forêts' in French) (Karsenty, 1996).

[17] See notably CIRAD-Forêt (1993), Karsenty (1995a) and Weber (1996).

[18] A 'cahier des charges' is a list of obligations of two parties involved in a deal, however usually one-sided in favour of the concessionnaire, for forest operations involving local communities.

contract can last as long as mutual obligations are fulfilled
- it can be tailored to specific situations
- it can stipulate the obligation to link to regional and national policies.

The need for flexibility is further compounded by the fact that the relative abundance of the resource at stake influences the preference which local users give to one or another tenure regime. As Campbell et al (1996) argue:

'The greatest motivation for increased resource tenure under population pressure is the desire to secure preferential access in circumstances of resource inequality. A community which has better than average common property resource endowments will have much to gain from an effective common property regime.'

How to manage individualisation of tenure rights?

The trend for individualisation of tenurial rights in Africa has already been mentioned. In several areas, indigenous institutions - where differentiation was based on social status - are increasingly being supplanted by those more based on wealth differentiation[19].

Land sales are currently occurring in several parts of Africa in the absence of official market mechanisms, such as around capitals in the Sahel, and often under severe conditions of distress, such as in Rwanda (André and Platteau, 1996). In most such instances, however, informal land markets tend to favour the wealthier and more powerful. This inequitable land transaction requires government intervention, at national and/or sub-national levels, to ensure greater social equity in accessing land titles.

However, individualisation should not be seen as necessarily associated with titling, nor with the existence of formal mechanisms to alienate land. As regards titling, Lesotho, for example, has seen the development of a relatively cheap, alternative system of occupation permits, possibly convertible into formal lease rights (Lawry, 1993): for instance, an entrepreneurial farmer purchases customary land rights from an existing holder. Both parties then approach the village chief and advise him of the agreement to transfer the customary right. A specific form is issued to endorse such a deal, and it is felt to provide sufficient security to the buyer. This type of indigenous allocation is perceived neither as inadequate nor as a disincentive to investment. Furthermore, it retains the social security role of indigenous systems.

- acquisition of a temporary authorisation to invest on the land, provided by the local administration;
- official title on the land is subject to the approval of a land development plan by local traditional authorities, through a process of negotiation; and the physical proof of the investments

[19]See, for instance, André and Platteau (1996) for Rwanda and Woodhouse (1995) for Kenya.

made to improve the value of the land;
- the official title is renewable every five years, through a process that also depends on the level of investment and approval by local traditional authorities.

Renting (for instance in Lesotho and much irrigated perimeters in West Africa) and leasing are other types of land transactions that retain the flexibility of indigenous systems.

As expressed by Hesseling and Ba (1994):

'In any case it will be necessary to:
- take account of the high cost of a privatised land tenure system (social cost for some social groups, financial costs);
- choose the right moment to introduce private ownership in a given area, i.e. taking account of changes under way;
- sometimes allow several systems to co-exist; and
- sometimes seek intermediate solutions'

The social and political nature of tenure - envisaging different options

Many observers agree that *tenure matters should be perceived and apprehended as social and political issues*[20]. Tenure actually concerns rights between different individuals and/or bodies over natural resources. Eventually, it all boils down to *power relations*. This explains why, more often than not, tenure regimes have not been designed to enable a more efficient management of natural resources, but rather to reinforce existing power structures.

The approach to tenure issues should therefore take into account not only rights but also modes of control of resource management. Referring specifically to Africa, Le Roy et al (1996) suggest a very interesting way to classify tenurial systems, which also combines formal and customary rules. They consider a matrix where the rows are composed of different modes of control over land and the columns consider different types of rights to the same piece of land, as illustrated in Table 2.

Treating tenure issues outside their institutional and political contexts will not have a significant impact because it will not challenge stakeholders' willingness to change existing power structures. In addition, situations are very diverse and often complex, calling for *creativity* and *flexible approaches*. On the face of it, it is important to develop interim measures and test them over time, through *a trial-and-error process*. A range of possible solutions should always be assessed. Although it should not be used as a blueprint, Table 3 attempts to provide some guidance on possible tenure options. It is important to note that these options are not mutually exclusive.

As a result of this *participatory learning*

[20] See notably Bassett (1993), Karsenty (1995a), Laurent et al (1995) and Shepherd et al (1995).

Table 2: Possible relationships between people and land in Africa
(C refers to customary types of rules, F to formal types of rules)

Types of Rights / Modes of management control	Access F	Access Extraction C	Access Extraction Management Exclusion C	Access Extraction Management Exclusion Alienation C	Access Extraction Management F
Public: common to all F					
External: common to several groups C					
External-Internal: common to two groups C					
Internal: common to one group C					
Private: by one individual F					

Source: Leroy et al, 1996 - translation by the author of this paper

approach to implementing tenure reforms, legislation should adapt to realities rather than the reverse, or, as argued by Hesseling and Ba (1994):

'rather than laws that stipulate a specific form of land tenure, laws should be drawn so as to allow for the search of a whole range of possible solutions'

Such an approach requires legal policies to shift from a public/private dichotomy to a *more locally based strategy*[21] to regulate rights over natural resources. This does not question the notion of property. It incorporates it in a framework which takes into account sustainability and specific uses of resources by different groups.

[21] In Francophone literature the term 'patrimoniale' is used to described this more locally- based strategy to apprehend rights over resources. It follows from the 'gestion deterroir' (local land use management) approach.

Several options in terms of policies and tools are being proposed/tried in Africa (Karsenty, 1996b):

- Revive and adapt the principles of *indirect rule*, which sets up general legal principles and allows for flexibility in their use at local level (use of precedents and interpretation by local courts). This is also in line with the prioritisation of a tenurial policy framework at the expense of comprehensive sets of rules.
- A corollary to this *'flexible law'* strategy is the use of a *contractual approach* between governments and local communities, whereby mutual obligations concerning the use of natural resources are negotiated.
- Associate the use of space-based tools to delineate rights with communal registration mechanisms which allow for allocation of individual plots of land under locally designed rules.
- The foregoing points would lead to a gradual shift i.e. (Karsenty (1996b)

from

law → tools → project → participation

towards

general legal principles → negotiation → definition of long term objectives → common choice of instruments and setting up of local management authorities → evolution and adaptation of the law

This new sequence of steps is being tried in Madagascar. It places participation and the choice of instruments after reaching an agreement on long-term objectives.

It also requires *mediators*. In Burkina Faso, an adaptation of the current *'Tribunaux Départementaux de Concertation'*[22] could be attempted, in order for such bodies to play a mediating role between all local stakeholders. In Madagascar, a project attempting to create a body of environmental mediators started in 1996 (Weber, 1996).

[22] *"Tribunaux Départementaux de Concertation"* are district courts currently aimed at settling disputes between farmers and herders, and composed of neither chiefs, nor politicians, but rather of "honourable citizens" e.g. retired school teachers, older members of the civil service, younger high school graduates, etc. (Lund, 1996).

Table 3: Possible tenure options, enhancing conditions, and some suggestions for action by the State

Possible tenure situation	When is it most applicable ?	Enhancing conditions
Titling	•On farm land •Where indigenous norms are weak or have been eroded	•Possibility for several systems to co-exist • Take into account the high costs of titling •Sometimes search for intermediate solutions •Take account of changes under way
'Joint' management	•On public /state land •On collective property •Where resources are managed under local management rules	•Existence of a decision-making authority,recognised and respected at the local level,whether pre-existing or new •The presence of mediators,capable of leading negotiations
Community-based management	• On public group land • On private group land	•Long term tenure security to natural resources for local community •Formal recognition of community-based rights,responsibilities and management schemes • Mechanisms aimed at supporting community empowerment •Local checks and balance mechanisms that ensure equitable distribution of benefits and accountability of decision making bodies •An institutional environment that enables rules to be set by practices and reshaped as needs arise

Source: Hesseling and Ba, 1994

Role of the State
•Enable a gradual and flexible transition •Regulate the real estate market in order to halt land speculation and protect the most vulnerable social groups •Create simple, clear-cut procedures •Establish simple, relevant criteria to prioritise allottees •Design registration systems suited to local conditions
• Work out mechanisms for transfer of power •Seek out the appropriate at the level of transfer, through consultation with local communities •Act as facilitator, fostering constructive dialogue •Act as mediator in case of conflict between local communities and other stakeholders •Lay down simple procedures for recognising arrangements that have been agreed upon •Ensure that rules of joint management do not have negative effects on groups not represented in the management structure (e.g. pastoralists, neighbouring villages)
•Work out a legislation that: •Is flexible enough to facilitate the adaptation of local tenure practices to changes • takes into account the diversity of land tenure situations at the local level •Introduce fairly simple procedures for official recognition of rights derived from local practices •Provide incentives for equitable access to natural resources •Promote a democratic forum at the local level •Promote research aimed at identifying strong and weak points in the evolution

Conclusion

The rather gloomy picture of the use of modern law and tools to regulate rights over land and forests, and the links between law and realities, has led development practitioners and sometimes decision-makers to question the process itself and look for possible options.

- One option would be to maintain the status-quo or *'laissez-faire'*, hence the dualism between formal law and realities, which currently exists in most rural parts of Africa. However, dualistic tenure regimes may prove unsustainable in the long run, for the following reasons (Mortimore, 1996):
- Statutory tenure, based on topographical survey and registered titles offers advantages only to the wealthiest and the ones with most political leverage. Moreover it does not necessarily mean a better use of land and resources
- The question arises whether or not customary rules are able to cope with increasing scarcity of land and intensifying "outside" pressures[23]. Moreover, do these rules contain enough safeguards against advantaged groups, both within and outside local communities?
- The scarcity of unclaimed land no longer provides a safety valve for the marginalised groups and those who lose disputes over rights to access and use natural resources.

There is a growing consensus that (Karsenty, 1996b):

- Law inherited from colonial times, and often used after independence, is inappropriate to properly regulate the current use and management of forest resources;
- Local realities surpass technical and standardised models of development;
- There are local capacities to achieve sound management of tenurial systems and associated resources;
- There is a need for institutional and regulatory frameworks which support increased local security of tenure.

The crucial challenge is in the choice of options and tools to address the need for increased security on tenure and to overcome the risks associated with the *'laissez-faire'* strategy. As discussed in this paper, the policies and instruments to achieve that objective will have to be more based on what Le Roy calls *'local law'* (1996b), however legitimised by the State. This follows the tenet that a transaction *socially* accepted by *all* local actors, on the basis of mutual understanding of its meaning and implications is a *'securing'* transaction (Mathieu, 1996). This, in turn, will require the approaches to be (Mathieu, 1996):

- *progressive*, i.e. tenure practices, regulations and institutions should

[23]Mortimore (1996) identifies ten forces which currently impact on tenure systems: (1) the 'saturation' of rural space (2) land division (3) land degradation (4) migration (5) market participation (6) capitalisation and technical change (7) the redefinition of 'ownership' (8) family change (9) competition and conflict and (10) State intervention.

adapt to stakeholders' needs and wishes;
- *selective*, acknowledging the need for a transition phase, e.g. registration may not immediately concern all tenure rights, but first the ones related to transactions;
- *pragmatic*, supporting and improving rather than replacing existing practices. This would follow the call by Bruce et al (cited in Mathieu, 1996) for a shift from a *'replacement'* to an *'adaptation'* paradigm.

Effective solutions to tenure issues will not be easy to achieve, as they involve changes in power relations. Therefore, the years to come should be based on a *continuous and mutual learning process* allowing for:

- *experimentation*
- *confidence building* between stakeholders
- *better communication*, i.e. through information, negotiation and mediation, and finally
- *time* for the process to materialise into effective policies.

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Rights and Wrongs of Rights to Land and Forest Resources in sub-Saharan Africa: Bridging the gap between customary and formal rules

There is a growing consensus that the transition towards more sustainable forest resource use in sub-Saharan Africa will require a change in stakeholder's roles. These roles are currently unbalanced among stakeholders – especially as regards their respective rights, responsibilities and access to benefits from the resource leading to depletion of the resource. Rights over land and forests are at the heart of the debate, because the dualistic situation where formal and customary rules co-exist is often unsustainable.

The policies aimed at improving tenure security have mostly failed and reinforced existing power structures, as they only address the spatial dimension of security, in contrast with the more social aspects of rights built in customary rules. Attempts such as formal titling of land on the one hand and codification and formalisation of customary rules on the other hand, have not, so far, lived to expectations. More recent experiments and proposals aimed at bridging the gap between customary and formal rules suggest that:

- significant efforts should be made in informing stakeholders – especially at the resource level – about their formal rights and duties;
- the current strategy, based on the distinction between private and public goods, should gradually shift to an approach based on locally derived rules – however recognised by the State – where rights would not be based on a fixed set of rules, but rather defined more on an ad-hoc basis, through a process of continued negotiation as ecological, social and economic conditions change;
- hence, legislation should adapt to the reality rather than the reverse;
- approaches should be progressive, selective and pragmatic.

Actions following these principles are only in their infancy and are likely to be difficult to implement, as they challenge the status quo and threaten to destabilise power structures. Hence the need to allow for continuous learning, experimentation and time for confidence to build up and these attempts to materialise into efficient policies.

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ISSN 1026-6887

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