Harmonising Formal Law And Customary Land Rights In French-Speaking West Africa[1]

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INTRODUCTION

The complexity of land tenure in West Africa is the result of the coexistence of several systems (whether customary - sometimes with Islamic influence - or State), none of which is completely dominant. Modern tenure legislation, designed in accordance with the model of private ownership and registration, takes no account of the legal principles underlying local land-holding systems, v so that, in the eyes of the State, most rural people's landholding status is precarious, if not actually illegal. This legal pluralism, deriving from the colonial era and the way West African states were set up, causes a degree of uncertainty about land rights and leads to conflicts for which the many different arbitration bodies (customary, administrative and judicial) are unable to find lasting solutions. The gross inadequacy of tenure legislation - the colonial legal system had been largely retained after independence - resulted in legal reforms being adopted by African states during the 1980s. The reforms aimed to incorporate local land rights into the national legal framework, although the approaches differed widely. This paper summarises current thinking on tenure issues in rural West Africa, then describes and analyses recent experiences before drawing some conclusions about ways to harmonise customary rights and formal law.

STATE LAW AND LOCAL LAND-USE SYSTEMS: LEGAL PLURALISM AND "MANAGING CONFUSION" IN WEST AFRICA

Socially-determined land-use rules

Any attempt at an overview of local systems shows the wide variety of situations on the ground and the profound transformation that they have undergone. Nevertheless, where customary tenure principles and local regulatory mechanisms still prevail it is possible to point out some common features. These include the fact that rules governing access to land and resources are an integral part of the social structure, that tenure is inseparable from social relationships; and that the usage of land confers certain rights. These principles are implemented and arbitrated by customary authorities, whose legitimacy usually derives from prior occupancy (they are the descendants of the community founders) and from the magic/religious alliance with the *genii loci* (spirits of the place), or from conquest (Chauveau, 1998). These authorities (the land chiefs) then control the territory, exercising their political power to allocate land to other lineage groups and carrying out the

rites required for them to clear it for cultivation (Bouju, 1998). Families settled in this way have control over the bush areas allocated to them, and these can become family landholdings with transmissible cultivation rights. Individual farmers may themselves delegate cultivation rights to "outsiders", in the form of short-term loans or, quite often, loans of unlimited duration with restrictions on the permanent investments allowed. There may even be various types of rental or share-cropping arrangements allowed (Le Roy, 1998b). Such "outsiders" may marry into the community and become full members of it, thereby changing their landholding status.

The distribution of rights is, therefore, based on the socio-political system (the political history of the village and region from which the alliances and hierarchical relationships between lineages are derived) and on family relationships (access to land and resources depending on one's social status within the family), so that social networks govern access rights (Berry, 1993). Far from being the result of enforcing a series of precise rules, rights held by individuals are the fruit of negotiations in which the local land authorities act as arbiters; customary law is by nature "procedural" and not codified. It does not define each person's rights, but the procedures by which access to resources is obtained (Chauveau, 1998).

These basic principles continue to apply in most of rural Africa, even though the authorities, socio-economic conditions and the rights themselves have profoundly changed over time. Researchers prefer to talk about local landholding systems, conforming to what P. Mathieu calls "socially-determined land-use rules" (*logiques sociales du territoire*), rather than customary systems (*système coutumier*), since the latter term could suggest something "traditional" or "ancient" with roots in the past. As is demonstrated by many field studies, local landholding systems do not consist of the rigid rights so often described in the academic literature. They are flexible, and evolve in accordance with the logic of customary law whereby rights are negotiated with the authorities on the basis of a number of shared principles. For example, new land-use rules have been devised for plantations, valley bottoms (*bas-fonds*), etc. in response to new ways of farming and alterations to social relationships. Tenure rules also evolve in the face of major changes in the conditions of production, or when the pressure on resources increases. There is no system that is "traditional" or customary in itself, but there are forms of land management based on custom.

Legal pluralism

The state and the communities

Colonial states, and the independent states which followed them, enacted legislation on land and renewable resources. The colonial state was motivated by the desire to assert its power and to transform farming into a sector geared to development, but its action was based on profound ignorance of the local systems, both in terms of tenure and production. Some of the mechanisms imposed (eg. public registration, derived from the Torrens system developed in Australia to distribute land among the settlers) clearly fit into a logic of land appropriation in favour of colonial settlers, inevitably involving the dispossession of local landholders (Comby, 1996). In French-speaking regions, the urge for centralised authority led the colonial state to seek to break the power of the customary authorities and replace them with state management, particularly regarding forests, fisheries, etc. In English-speaking regions, the system of indirect rule left more room for customary authorities. These colonial "traditions" were based on a different conception of the relationship between the state and the communities.

Although the underlying principles differed, in practice a lasting mark has been left on the legal and institutional culture of both regions (Common Law in the English-speaking countries, the Code Civil in the French-speaking countries), as well as on landholding systems. Views of "customary" systems were coloured by interpretation of existing rights on the basis of imported legal precepts and the different objectives of the colonising powers. This interpretation was then built into local handholding systems.

> "*Strictly speaking, customary law was derived from the way administrators interpreted rights over land and people as described to them retrospectively by the chiefs at the beginning of the colonial occupation. It was filtered not just by the chiefs and leading figures who tended to over-estimate and often invent the fees due to them, the privileges they held and the land they controlled, but also by administrators seeking to express what they heard in terms familiar to Western law and bring it into line with the demands of the colonial system*" (Olivier de Sardan, 1984: 223).[2]

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[2] On this subject, it is somewhat surprising to see the term "customary" used in Southern Africa to describe the way tenure and local society currently operate in the former reserves (pseudo-independent Bantustans or reserves tactfully renamed "community zones"), where the African population was dumped in marginal and currently overcrowded areas, used as

In the main, the post-Independence states retained the colonial legal system and sometimes reinforced its centralising tendencies with the aim of binding the nation into closer unity. In the French-speaking regions, land was often nationalised, which amounted to formal abolition of customary systems. Usage rights, however, have normally been tolerated and sometimes recognised in so-called *terroirs* (village community land), as in Senegal, but the customary authorities have usually been denied any official responsibility (except in conflict management, for instance in Niger). Legislation in these countries is, therefore, generally based on legal principles and a conception of law which are profoundly alien to the customary principles and landholding practices of rural communities (Le Roy, 1987, Keita, 1996). This dichotomy creates a situation of "legal pluralism" in which different, incompatible rules overlap.[3]

The effects of legal pluralism

Areas governed locally by "socially-determined land-use rules" (i.e. the vast majority of land) come under national legislation, in theory if not always in practice. Within the same village or the same farm, areas governed by different legal systems may coexist. This can happen, for example, when part of the village land is removed from customary authority for a hydro-agricultural scheme in which plots are allocated by the State based on the labour power of the production units. The result is individual appropriation of irrigated plots within a peasant landholding system that is based on the socio-political relationships between lineages, with rules on the transmission of rights which neither enforce principles laid down by the State nor merely reproduce customary rules (Mathieu, 1991). Legal pluralism causes uncertainty over rights, not because land-use rules and rights are ambiguous as far as local stakeholders are concerned, but because they are likely to be challenged - and canceled - through resort to State law (or to State authorities).

As a result, rights which are legitimate according to local rules, are not legally recognised. Rural people find themselves in a position of permanent illegality and insecurity, especially in forest areas, where the gap between formal law and

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labour pools for white industry or agriculture. This often involved forced villagisation, compulsory restructuring of land use, the imposition of new cropping methods, manipulation of the "chieftancy" and the establishment of new, tame local authorities. Not only that, there is virtually no farming in these areas now. There are undoubtedly local social rules and rules governing access to land, resulting in partial social autonomy vis-à-vis state power, but this is far less a reflection of historical continuity than a product of the situation. To speak of "custom" in this case obliterates political and economic history and the fact that social and political reality in the Bantustans is shaped first and foremost by the domination to which their populations have been subjected...

[3] Legislation designed in the interests of the colonial power has also been carried over in English-speaking African countries (McAuslan, 1999).

local practice is greatest. This exposes people not only to fines for bringing fallow land back into cultivation, but also the risk of having their land allocated to other people via the registration procedure. In all cases, this situation has favoured the urban elites (or people close to the regime in power), who have been able to use the legal system to acquire land or other renewable resources (wood, fish, etc.) to the detriment of holders under customary rules.

The fact that tenure legislation is rarely, if ever, applied does not prevent it from having an impact as soon as any attempt, however partial, is made to enforce it. This applies of course to the authorities responsible for enforcing the law (territorial administration, courts, etc.), but also to the urban elites and some local stakeholders who may have a strategic interest in using the law to claim rights to which local rules do not entitle them. Slogans such as "the land belongs to those who cultivate it" (*mise en valeur*) speed up the rate of clearance, both by migrants seeking to appropriate virgin or fallow land and also by customary landholders using evidence of tillage to protect their rights. Loans also become less common, for fear that borrowers will try to appropriate the loaned land. Stakeholders pick and choose opportunely between the different systems to further their own interests.

According to customary logic, access to land and resources depends on being a part of social networks. Far from doing away with this clientalist aspect of tenure, both colonial and independent governments strengthened it by reorganising socio-political networks governing access to land around the State machinery (Berry, 1993).

Hybrid practices

Evolutionist theories of land rights tend to cite macro level causes such as demographic and market pressure for changing local practice and increasing tenure conflicts (Lavigne Delville and Karsenty, 1998)[4]. However, these are just as much the effects of State intervention and the legal pluralism which is directly responsible for some of the conflicts because the uncertainty about rights encourages people to take advantage of the dichotomy between the rules. One can no longer contrast "traditional" local practices with official legislation; rural communities have been faced with State interference for almost a century and have incorporated it in their landholding practices. Stakeholders can be opportunists, using the various systems to back up their land claims. Current local landholding practices are not "traditional". As Le Roy stresses, they also borrow from "modern" law, resulting in hybrid contemporary systems which do not follow a linear progression from "traditional" to "modern".

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[4] Cf. Platteau, 1993 and 1996, for analysis of evolutionist theories.

Arbitration problems: the multiplicity of authorities

Recent studies show that legal pluralism need not be a problem in itself (Chauveau, 1997). By allowing changes to take place and practices to be adapted, it plays a functional role. The real problems arise not from the coexistence of different systems but from the multiplicity of arbitration authorities. There are unclear links between these authorities (customary chiefs, imams, *préfets* who do not stay long in one post, project technicians, not to mention interfering politicians - Lund, 1995) and uncertainty over who may deliver sometimes contradictory and fluctuating rulings. This leads to a situation where no arbitration can be recognised and accepted because a decision by one authority may be overruled by another. As a result, outcomes cannot be predicted and all forms of arbitration may be challenged, so conflicts escalate and lasting solutions are harder to achieve.

This situation is compounded by the complexity of legal texts, unfamiliar to and poorly understood by everybody including members of the local administration, and by the absence of clear political directives. The policy of the *fait accompli* has every chance of success. An example is given by Traoré (forthcoming); fields which progressively engulf livestock routes - nicknamed by Traoré "wandering fields".

<u>Managing confusion?</u>

It is this situation, which allows the most contradictory claims to be put forward, rather than any uncertainty about customary rights as such, which is responsible for the uncertainty surrounding land rights. This observation is not new, having been made repeatedly since the 1920s. The inadequacy of legislation has also been denounced repeatedly, but the various adjustments and reforms have had little real impact. It is no longer possible, more than 30 years after Independence, to blame the situation entirely on the colonial past, or on legal training biased towards the French civil code.

> "*Wherever access to resources is highly politicised and the rules are confused, it is generally those who have the most financial resources, or those who have privileged access to political power and strategic information (including simply the ability to understand and use the complexity of the laws) who draw the best advantage for themselves from the coexistence of different rules and the resulting regulatory confusion. Hence, this confusion and the non-application of land rules are not simply accidents or unfortunate imperfections, and their role is not a negative one for everyone*" (Mathieu, 1995: 56).

While it facilitates change and thus plays a relatively functional role in rapidly evolving contexts, the confusion surrounding land rights favours powerful players, particularly the political-administrative class and some local elites who are the only ones able to master the legal and administrative complexities. They take advantage of the situation in varying degrees: using their influence to acquire land, arranging allocation of land in irrigation schemes to civil servants, using the concession procedures to transfer State-owned land to political elites, and gaining various (political and economic) advantages from charging for arbitration. Meanwhile Forestry Commission staff receive bribes from granting logging permits or imposing arbitrary fines on local people forced into permanent illegality.

Finally, as access to land is related to social identity, the land rights of some social groups are frequently contested by challenging their national and ethnic identity, opening the door to the political exploitation of ethnic tensions. It is a volatile mixture; politicians play on competition for land and on social identity, which leads to challenges to national allegiances against a background of ethnic divisions.

There is, in fact, more logic than disorder in the current situation (partly explaining the reluctance of elites to implement reform), which leads Paul Mathieu to agree with Piermay (1986) when he refers to African land tenure systems as "managing confusion".

HARMONISING FORMAL LAW AND CUSTOMARY LAND RIGHTS: RECENT EXPERIENCES IN WEST AFRICA

We have seen that legal pluralism lies at the heart of the tenure issue. The logic of State ownership gives local landholding systems (rights and regulatory mechanisms) ambiguous legal status, oscillating between denial and mere tolerance. Having recognised this, the challenge for new policies is to do away with the gross inadequacy of tenure legislation, to give legal recognition to existing rights, and to build links between local landholding systems and formal law. As an example, using different approaches and strategies reflecting their political history, the French-speaking West African countries have, since the mid-1980s or early 1990s, engaged in comprehensive debate about the tenure issue, leading to legislative reform (ongoing or under preparation) and/or innovative interventions at local level, all aimed at harmonising the two systems. We shall give a brief overview of these before drawing some lessons.

The principles of the legislative reforms of the 1990s[5]

Senegal anticipated these issues with its very innovative 1964 law on Public (State-administered) Property that was finally applied in 1980. While retaining the principle of national property owned by the state (all non-registered land), in rural areas the law distinguishes between "pioneer areas" which remain under state control and *terroir* areas where land management is the responsibility of the rural municipalities (decentralised administrative bodies set up in 1972). The existence of local usage rights is recognised in the latter areas, but the land may be taken over by the state for development projects or allocated by the rural councils to whoever can "develop/use it productively".[6] In a way, such allocation mirrors - on a local scale and with fewer legal guarantees – the registration procedure, by which land may be allocated to individuals without taking existing rights into account (although, in practice, the rural councils rarely make allocations without the agreement of customary holders). While more flexible and under local control and despite being applied differently depending on local economic and political factors, this procedure still follows the factional or clientalist logic of land management (Blundo, 1996).

The second major reform was the Agrarian and Land Reform of 1984 in Burkina Faso. The revolutionary regime of Thomas Sankara hastened to enact (unwieldy) legislation codifying a "modern" tenure system centred on ownership of cultivated land by those who worked it. In its "revolutionary" logic, the reform rejected any role for the customary authorities, regarded as representing "feudalism". The inappropriateness of the reform law, which denied all customary rights and was so complex that not even the officials responsible for its enforcement could understand it. Successive versions followed (1991 and 1996), which allowed for private property and formally recognised customary rights in undeveloped areas (although providing no legal safeguards).

In Mauritania, the development objectives of a private irrigation scheme in the Senegal river valley led to a land law (1983, 1990) clearly favouring private ownership and based on the concession system which, for political reasons, remains very centralised and retains the cumbersome colonial registration procedures (Crousse, 1991).

In the 1980s, pressure from structural adjustment programmes encouraged the privatisation of land in West Africa but except in specific contexts such as

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[5] This section draws mainly on the findings of Keita, 1998 and Le Roy, 1998.
[6] On the ambiguity of the concept of "productive use", cf. Traore, 1996.

Mauritania, the political authorities resisted this. The state always retained a final right to land, so there was never a question of full private land ownership. Privatisation, whose appropriateness for rural Africa is hotly disputed by most observers, was not the only response to emerge from the widespread questioning of state management of land. Better understanding of local landholding systems encouraged clearer recognition of local rights. International debates, particularly those held under the auspices of CILSS and the Club du Sahel, put forward the idea of decentralised management of land, based on recognising the logic and efficacy of local land-use practices. Le Roy (1996) notes three main trends in the legislative reforms of the 1990s aimed at harmonising the different landholding systems:

      - codification;
      - the registration of local rights with the aim of giving them legal status;
      - state administration of property and management of 'common heritage'.

Codification prolongs colonial attempts to systematise customary rights and seeks to provide a legal definition, having regard to land-use rules applied in practice. The aim, then, is to integrate the customary systems into formal law, with rules clearly spelled out. The recent Rural Code of Niger, drawing on prolonged studies of local farming, pastoral and forestry practices, follows this trend. However, the desire to take local practices into account comes up against the obstacle of their great diversity. Customary practices are not a series of precise rules applicable to everybody in a given area and just needing to be formalised. They are the particular expression of general principles, in accordance with local socio-political history, the social status of individuals and negotiation with other stakeholders and the land authorities. Even within units, which are homogeneous from the agro-ecological and/or socio-cultural point of view, identifying and formalising customary practices can only result in the simplification and systematisation of a more complex body of flexible and variable rules.[7]

Such failure to reflect the diversity of local practices means that the Rural Code in Niger is in danger of being perceived as inappropriate or illegitimate in a locality, though much less so than the legislation it is slowly replacing. Codification still follows positivist and instrumentalist reasoning whereby the purpose of the law is to define what should be, and to transform reality accordingly. The Rural Code also makes provision for the setting up of "Land Commissions" at district level (currently being done on an experimental basis), with the task of receiving applications for land title, recording land rights, and

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[7] For a discussion of codification approaches in rural France, cf. Assier-Andrieux, ed., 1990.

issuing title deeds. Existing rights may be formalised through simplified procedures, on request, meaning that the customary rights can be legally recognised. Yet as the concept of "ownership", cited in the basic statutes of the Code is not defined, conflicts are likely to ensue over who may be recognised as an "owner" (Lund, 1993, Gado, 1996). A key part of the approach embodied in the Rural Code is to carry out detailed surveys and to hold public debates. However the difficulties in organising these, coupled with fear of the potential risks of the reform, has sometimes given the impression that the whole process has become bogged down.

In view of the difficulties and political implications of legal reform, the Ivory Coast has adopted an instrumental approach, the Rural Land Plan, which attempts to identify and map all existing land rights. A flexible and effective survey and mapping method has been devised, with the intention of producing a simplified land register (cadastre). The aim is to record the existing rights and arrive at a local consensus; the subsequent land reform will define all the recognised forms of tenure and give legal status to the local rights recorded. The approach is intended to be a politically neutral one, since it seeks merely to give concrete expression to actual existing rights. In fact, the instrumental logic of the Plan creates difficulties of a different order. During the current pilot phase, the emphasis placed on mapping has meant a socio-tenurial analysis of existing rights has not often been made (Chauveau et al., 1998). Despite the declared intention not to fall into the trap of "ownership-based" simplification, the different levels of interlocking rights that actually exist have been reduced in the surveys to a simple differentiation between "land managers" and "land users". Secondary rights (eg., rights of women, rights to trees and grazing rights) are superseded in the records in favour of the right to cultivate. Finally, in the interval between the start of the pilot project (1990) and the adoption of the law (1998), uncertainty has remained over the legal categories to be established (eg., where would collective rights fit in?) and, therefore, over the future of existing rights.[8]

In Mali, the transitional government set up after the overthrow of Moussa Traoré's dictatorship suspended the Forest Laws (one of the causes of an earlier peasant uprising) and launched a debate on the links between tenure issues and decentralisation (Diallo, 1996). The aim was a substantial revision of the 1986 law on state property and land, and a specification of the powers of the future municipal authorities. Following the National Conference and the Rural Convention, an innovative plan for a land charter was launched. The Land Observatory (*Observatoire du foncier*) was set up in Mali to encourage debate

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[8] The legislative process does not seem to have relied very heavily on the outcome of the Rural Land Plan (Chauveau, pers. comm.).

on tenure issues and to provide support to those development projects which were involved. Its brief was to study land-use practices and their dynamics in the various agro-ecological regions and to put forward proposals in respect of the charter. The approach was both ambitious (rejecting a land and property code in favour of a land charter recognising rights and local tenure rules) and cautious (launching a series of field analyses). It fitted in well with the appraisal made of the situation, but the reforming ambitions of the transitional government seem to have disappeared, giving way to a straightforward overhaul of the land and property code. The municipal authorities are being set up without clarifying the tenure issue, establishing a "communal estate" for local development schemes, but not resolving the issue of how village and communal areas are linked together.

Initiatives focusing on managing the common heritage (Le Roy et al., 1996; Weber, 1998) have recently begun to be implemented in Madagascar, but not in West Africa (although some experiments with regard to timber resources have similar principles; cf. Bertrand, 1998).

Major issues

While most surveys and expert studies advocate decentralised management of land and resources, restoring decision-making powers to local communities and seeking alternative methods of settling conflicts, legislative reforms range from privatisation through registration to more or less open recognition of local rights. There are also different degrees of recognition: from mere tolerance, as in Burkina Faso, where local rights are limited to areas in which the State hardly intervenes and cannot benefit from legal recognition, to the attempt by Ivory Coast's Rural Land Plan to map all existing rights in order to give them legal status. In between lies Niger's recognition of existing farming rights and the possibility of registering these on request.

Although we have little benefit of hindsight so far, comparison of the approaches and analysis of their initial results allow some of the major issues in these processes to be identified.

The question of interlocking rights

In the customary system, apart from the territorial control exercised by the land chiefs, cultivation rights are exercised at different interlocking levels: all the bush land cleared by a lineage makes up its landholding, under the overall responsibility of the head of the lineage. However, depending on inheritance rules and the degree of operational autonomy enjoyed by individual farms, the actual division of land and cultivation rights may be managed at the level of the

compounds (residential units) or directly by the production units, with the higher levels of the kinship structure playing only a minor or formal role. Even when land is managed at farm level, the compound head may sometimes arrange reallocation to offset demographic imbalances between units. A distinction is then drawn (Schlager and Ostrom, 1992; Le Roy, 1996a) between management of administration rights to the lineage land (the rights to manage, allocate and distribute farming rights - transmission and sometimes the right to alienate) and management of usage rights (access to the resource, offtake and cropping) which may occur at different levels of the lineage social structure.[9]

There is also a third level of rights: secondary or derived rights may be temporarily delegated by a holder of cultivation rights to an individual. The head of a farm may allocate plots to his dependants (young people and/or women), in accordance with social rules and land availability; various types of agreements exist to allow an "outsider" or someone who is not a member of the family to cultivate a plot - short or long term leases, renting, etc. (Le Roy, 1998b).

Finally, when the same piece of land supports different resources (eg., crops, pasture and timber), each resource is covered by specific rules of appropriation and use. For example, a field cultivated individually during the growing season becomes common grazing land after the harvest and until it is needed for the following growing season. Also, the use and ownership of trees may be separate from the use and ownership of the land on which they grow.

This level of complexity (varying from place to place) clearly illustrates why a perspective based on ownership, which considers that all administration and management rights are in the hands of a single person, and distinguishes only between owner and user, cannot reflect the reality of local systems and may invite or exacerbate many contradictory claims to the same area. At each level, stakeholders can claim to be the "owner" or main holder of all the different rights. The use of the term "owner" triggers a struggle between claimants (holders of rights) to gain recognition as such. The head of a lineage may seek to become the owner of the land he is managing on behalf of the family group, thus reducing the other members of the family to the status of mere tenants or sharecroppers (if this was attempted by farm heads it would be tantamount to breaking off ties with the lineage). The secondary rights of women or young

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[9] It is only when the two coincide at production unit level that the term ownership may be used. As a result of dynamic changes in family structure (fragmentation of lineages, splitting up of production units and so on - cf. Raynaut, C. and Lavigne Delville, P. 1997; Quesnel, A. and Wimard, P., 1996), there is no single model per region and different scenarios may be found in the same village.

people are liable to be marginalised. As regards derived rights, conflicts hinge on payment or non-payment of the symbolic fee marking the holders' dependence in terms of land. Changing things in this way may be a political choice, but it is important to realise to what extent social relationships and land-use are thereby transformed, and to weigh up the social and economic issues and risk of conflicts.[10]

Any operation to register land rights come up against the difficult question of status. One could devise categories to reflect grass-roots realities, specifying the lineage holding to which each plot belongs, who has the right to allocate the farming rights, who holds the farming rights and on what terms, the different encumbrances on the plot (common grazing, rights to the trees on the plot), specific arrangements applying to the plot, etc. This would, however, produce a most unwieldy system, which would in any event lose the flexibility provided by customary rules.

The question of the system of authority

> "*Every ownership system is based on a system of authority. Only an efficient authority can guarantee the effective and lasting application of the relational fabric of rights and reciprocal obligations on which the ownership system is based*" (Mathieu, 1996: 41).

In the debates on land in West Africa, "*an unspoken, fundamental question is that of the relationship between the power of the state and that of the customary authorities*" (Mathieu, 1996: 41). In formal law (in Ivory Coast, Burkina Faso and, more ambiguously, in Niger where the "traditional chiefs" were granted a right of mediation) the recognition of 'customary rights' is most often limited solely to the right to cultivate. This disregards a fundamental part of customary regimes: the authorities who have the task of implementing and regulating rights and who are an essential dimension of local land-use systems. Even though the state has sought to take over the monopoly of land authority, these local authorities usually remain legitimate in the eyes of the community or continue to enjoy considerable political power.[11] This is, therefore, a debate about local land management bodies, their status (state, local or equal representation), their composition and their prerogatives. As centralised state

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[10] A similar process occurred in France: depending on the balance of power, either the peasantry succeeded in consolidating their rights and wiping out the remaining feudal power or, as in the West of the country, the landed aristrocracy became owners and peasants became their sharecroppers.

[11] Or in any event, while the customary authorities may be discredited by their involvement in competition over land, the communities will look for regulation along customary lines, implemented by new bodies.

management has proved inadequate, consensus currently favours "local" management. However, this apparent consensus around the loose term "local" hides a split between advocates of participatory management (under the control of the state technical services), supporters of decentralised management that gives real prerogatives to the community (Bertrand, 1996), those wishing to entrust land management to rural councils set up as a result of administrative decentralisation, and those who prefer this to be handled at village or inter-village level. These questions about levels of authority and types of management body actually encompass political debates about the relationship between the State and local communities and between the State and the customary authorities: when harmonising legal systems, should room be made (in what way?) for the customary authorities (which authorities? how?).[12]

It is easy to overlook the fact that local land authorities are also involved in the competition for resources. Lineage chiefs sometimes sell parts of the lineage holdings over which they hold only management rights. Whereas local systems limit the rights of "outsiders" (who may remain so after several generations), welcoming new family groups is a way to reinforce the chief's political influence. As competition for land and resources grow fiercer, politics of exclusion can override those of inclusion.

Where the population is heterogeneous and where the number of "outsiders" is significant, the choice and composition of local authorities raises several political and economic issues. Endorsing "customary" power could sustain exclusion, leading to strengthening the "ownership" rights of the indigenous population at the cost of undermining or even withdrawing rights granted to migrants, sometimes decades ago. Conversely, installing "democratic" or elected bodies could give power to migrants and trigger strong reactions on the part of the indigenous population. These institutional options are all linked to political choices.[13]

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[12] Apart from political aspects, the problem is complicated by the fact that there are many different "customary authorities" (political chieftaincy, land chieftancy, administrative chieftancy appointed by the State) within a hierarchical structure (from the land chief to the Naaba in Burkina).

[13] However, it is inevitable that national policy will have differentiated socio-political effects depending on the local balance of power. In this way, the imposition of private property on feudal systems at the time of the French Revolution had differential effects: where de facto peasant ownership had already been consolidated, this completed the eviction of the land-owning aristocracy and the establishment of a class of small farmers owning their land. Conversely, in Western France, the aristocracy succeeded in getting its ownership acknowledged, thereby transforming tenants into mere sharecroppers.

One of the difficulties in harmonising customary rights with formal law is that they are based on radically different systems of authority, which compete all the more because the land prerogatives of the customary authorities (land chiefs) are founded on the logic of territorial control. Thus their claim to authority is profoundly political. Meanwhile the State intends to retain the power to allocate land. Yet without tackling this issue, is there any chance of solving the problem of having many different arbitration bodies?

The power to allocate land

The right of eminent domain and the power to allocate land rights are fundamental to customary systems and the power of the local land authorities. Pre-colonial states also made use of the right of conquest to allocate land to their clients or servants. In establishing State control over land and concession procedures, both the colonial and independent governments also gave themselves such powers, which in Senegal were then delegated to elected rural councils, in the form of allocation procedures. While land chiefs' power to allocate land was generally confined to uncleared bush and was thus extinguished when the entire territory had been allocated to lineages, states assumed the right to allocate already occupied land. It is clear, therefore, that the power to allocate land is a structural feature of landholding systems and is why they are inherently so clientalist and political at both national and local level.[14] Where unoccupied bush is increasingly scarce and where allocation procedures are one of the ways favoured by powerful or informed players to manipulate rights, the choice of whether land allocation should lie with the State or with future municipal councils is entirely political.

Harmonising two legal systems: by registration or authority systems?

There is now consensus that private ownership cannot be imposed from the top down. Attempts to transform practices radically through law have been ineffective: landholding systems have their own dynamics, subject to economic developments and power relations; the state may influence them and provide them with guidelines but, save in exceptional situations, it cannot swim against the tide. It is also acknowledged that local landholding systems are not the expression of an unchanging "traditional law", but the fruit of a process of social change, which incorporates the effects of national legislation. The relationship between ownership, land title and productivity has recently been reassessed, demonstrating that customary systems rarely hinder agricultural intensification (Bruce and Migot-Adholla, 1994; Platteau, 1996). Consequently, the issue is no longer one of substituting a "modern" tenure

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[14] Cf. Blundo, 1996 for an analysis of clientalist, factional land management by rural councils in the Kounghel area of Senegal.

system[15] for a "traditional, ineffective" system, but of getting away from the unregulated coexistence of tenure rules. In this way the logic of State ownership of land and resources and the allocation of concessions "from the top down" from which it originated, will give way to legal recognition of local landholding systems. Even if the aim is eventually to promote private ownership, this will not come about through the spread of registration procedures, but rather through gradual evolution of existing rights, facilitated by the law. The paradigm is thus one of "adaptation", rather than "substitution" (Bruce et al., 1994).

To recognise the existence and legitimacy of rights is not the same as going back to frequently idealised "traditional" systems. The local context in Africa has changed; landholding practices and rights to land have progressed. Existing reality, with all its complexity and hybrid forms, must be taken as the starting point. This does not mean taking a neo-traditionalist stance, and advocating "customary" rules which are no longer enforced, or simply allowing customary authorities complete control. Experience in English speaking countries has shown problems associated with this; that chiefs sell land over which customary system allows them only a right of administration, thus dispossessing farmers of their land (Abudulai, forthcoming).

How, therefore, can legal systems be harmonised? Recent initiatives in Africa are based on recognising the current duality of the land authority system, namely the legitimacy of both local practices and State intervention. By approaching such harmonisation from the status of both usage rights and the system of authority, the two systems are combined in varying proportions.

Registration

According to the logic of registration, to harmonise the two legal systems involves legal recognition of appropriation or ownership rights, and the registering of existing rights in order to bring them under formal law. By adopting a lighter approach, based on what exists already, makes it possible to break away from official land titling. However, it is still up to the State to put land rights on a secure footing. This requires the mapping of plots, the creation of a land tenure register and a system for recording changes in rights over time. As this comes close to the cadastral approach, promoting private ownership of land is - unfortunately - often an implicit or explicit goal of such policies. Nevertheless, although technically more complex to implement, the lighter approach could acknowledge other sorts of land appropriation, and this does

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[15] Forgetting that registration is a colonial procedure designed to grant considerable rights (stricter than French civil law!) to settlers and that it is therefore particularly archaic from the point of view of states which have been independent for 30 years.

not amount to adopting a simple system of individual private ownership. There are various procedures possible, such as creating original legal categories matching local socio-tenurial categories; issuing titles in collective names; recognising various forms of derived rights; and acknowledging any restrictions on the right to alienate land or "encumbrances" connected with other usage rights over the same area. All of these provide a better "fit" with existing rights. Deciding which types of rights should be acknowledged is therefore more a political and legal choice than a functional necessity. However, this type of arrangement does call for complex tenure information systems and an administration responsible for managing and updating them, which raises the problem of its cost for both the public authorities and for holders of rights (transfer fees, etc.).

Moreover, in this model, security of tenure is based on land title and the State, superposed on local mechanisms and the steps taken by stakeholders to secure their rights in a world governed by many different rules (Koné et al., 1999). Land tenure management becomes an administrative act, linked to recording transfers, rather than a socio-political mechanism in which the customary authorities act as arbiters. They are left with practically no role to play (except perhaps as mediators in cases of conflict during a transitional phase before the registration system has become fully operational). Although experts tend to suggest that registration is a way of recognising customary rights and even though a tenurial survey may record more or less accurately the *rights* which exist at a particular moment, having a policy of systematic registration suggests there are ways of providing security unlike those which currently exist. This implies quite a radical transformation of the *ways of managing* land rights and hence the very nature of local landholding systems (with implications for the whole social structure of local society).

Where land value is so low or tenure so secure that rural communities do not see the need to register land transfers, or where procedures are complex and costly, or where accepting formal arrangements means breaking with long-standing principles of local land-use management, it is highly unlikely that information will be updated. In these cases, the tenure information system rapidly becomes obsolete and is overtaken by informal ways of achieving security. This leads towards confusion surrounding rights rather than clarifying the rules of the game.

Managing the common heritage
This type of initiative takes regulatory mechanisms as a starting point and provides security of tenure by clarifying rules and forms of arbitration, so as to reduce ambiguity about which norms are legitimate. The aim is not to

formalise all rights as such (except when customary rules are no longer sufficient to ensure security of tenure), but for stakeholders to adopt a system of shared rules so that, at least at local level, the rules of the game are the same for everyone. This approach is based on a conception of the land and its resources as a common heritage ("*a heritage is, by definition, non transferable (which is what distinguishes it fundamentally from property) and it is inter-generational by nature (it must be handed on unchanged to the following generations) It has a permanent character and is intimately related to its holders' identity of which it is an essential component.*" Le Roy, 1996b: 311). It also recognises local arbitration mechanisms, operating in accordance with principles laid down at national level. Rules change partly through negotiation and partly through jurisprudence. There is substantial reliance on mediation and judicial process, but the important role of the customary authorities is recognised. Rather than suppressing legal pluralism by absorbing one system into the other, the aim is to retain the most dynamic aspects of each. At the same time they are linked together within a national legal framework and a hierarchy of arbitration bodies, in order to avoid the most flagrantly perverse effects of the current situation. This means improvements to arbitration processes, whereby the customary authorities are approached in the first instance and/or joint authorities are set up at regional level. Their role is to define national land tenure principles in accordance with specific regional features, or to settle conflicts by coming up with solutions which are acceptable according to both systems. Forums may be organised to help reach consensus over the principles to be used in a given area, and these may also be used as a vehicle to enforce these principles (Le Roy et al., 1996).

Attempts are often made to find a middle road or a hybrid form for land tenure administration, borrowing from both systems to varying degrees. Elements can include:

- subsidiarity, which gives genuine prerogatives to the community, without challenging the principle of State administration;
- allowing land titles to be issued on demand or systematically, with the State providing additional security on top of local mechanisms for safeguarding tenure;
- legal innovations that move away from excessive reliance on the French civil code (eg., registering land in collective names[16]), and registering village lands to protect them against expropriation;

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[16] Where specific legal status is given to collective appropriation rights to cultivated land, careful attention must be paid, when defining such legal forms, to internal rules and methods, especially as regards decision-making. In particular, it is important to ensure that the various holders of rights are involved in any fundamental decisions (eg., the alienation of a portion of

- considerable delegation of land tenure management power to bodies arising out of administrative decentralisation;
- provisions aimed at directing change towards individualisation and greater circulation of land rights (eg., allowing registration on request, thereby switching part of the land into a "modern" system of private ownership; incentives to share out inheritances); etc.

In any event, emphasising rights (via registration) or rules (and arbitration) is more a matter of making political choices about systems of authority and regulatory mechanisms than a technical necessity. In deciding on the system of authority, it is worth debating the institutional coherence of land tenure management arrangements. Is it realistic to think that village committees can provide an open, neutral forum for the regular updating of a tenure information system whose very rationale profoundly alters the nature of local landholding systems?

In all cases, clarifying tenure necessarily involves clarifying multiple claims to land. Clarifying what is meant by "prior occupancy" or "indigenous occupancy" is particularly problematic. While this is an issue for legitimisation, it is often the basis used to justify the revival of "ancestral" rights that may have been lost, or to challenge open-ended loans of land that were later transformed into de facto ownership. In some cases, the intervention of the Rural Land Plan in Ivory Coast enabled the Senoufo to re-claim ownership of land that had been made available to a Dioula village for several generations.[17] Recognising existing rights must therefore go hand in hand with the principle of giving priority to other sorts of rights - those that go with appropriation and cultivation. There needs to be a statute of limitations, granting ownership or appropriation rights to those who have actually exercised them over a certain period of perhaps 20 years, or even a generation[18].

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the land), otherwise the transaction will not be valid. Appointing an individual to speak for all stakeholders is not sufficient to prevent abuses of power, which would actually, having in a sense been legally validated, be even harder to check.

[17] J.P.Chauveau, pers. comm.

[18] I am grateful to J.P.Chauveau for drawing my attention to this point. A sufficiently long period of effective occupation is needed to consolidate de facto situations and avoid the perverse effects of slogans such as "the land belongs to those who work it", where cultivation for a few years, even on the basis of derived rights, is considered sufficient to claim ownership of land.

CONCLUSION

Once land title is no longer seen as absolutely vital to the process of agricultural intensification in Africa, the question of tenure shifts from the economic to the social arena. Although an *economic* impact may be achieved by putting transactions on a secure basis and allowing freer movement of land rights, the challenge for any tenure reform is to meet a *social* goal: to ensure that the rural population is not left in a legally precarious position. Providing adequate security of tenure to rural communities is increasingly seen as a condition for, and means of establishing, the rule of law.

In the current circumstances, choosing a tenure policy is, in the final analysis, a political choice about authority systems - customary, State or mixed - and the geographical level at which land management should take place. Irrespective of any judgement about these options, it seems very ambitious to seek to register all land, bearing in mind the cost of maintaining a systematic tenure information system. It is unlikely that the State has the resources to impose systematic registration of transfers and land registers become out of date very quickly, as has happened in Kenya. Cases where security is ensured through title alone are rare.

Conversely, to give communities the right to define management rules in their own areas (observing the general principles laid down by the State), encouraging legal recognition of local arrangements and facilitating negotiation processes undoubtedly constitute necessary steps. However, when it comes to managing agricultural land, can ambitious approaches based on the common heritage idea really operate effectively on a large scale? What are the conditions needed for "forums" to come up with common rules which acknowledged by everyone and which clarify multiple claims?[19]

A hybrid and perhaps more realistic option consists of combining community and State safeguards. Some rural communities are attempting to do this, by validating local regulatory mechanisms and providing stakeholders who feel that local rules do not provide adequate security with the opportunity to apply for State endorsement of their locally-recognised rights.

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[19] The question must be framed differently when it comes to renewable resources which are taken rather than produced (wood, pasture, fish): in a given area, stakeholders may negotiate joint rules governing access and use for themselves. Government intervention could give the inhabitants a legal, exclusive right and validate the management rules by making them binding on third parties. Cf. Bertrand, 1998, on the rural wood fuel market in Niger and Lavigne Delville, 1999, for an analytical overview.

One way of doing this, sticking more closely to existing practice, would involve providing an opportunity for administrative/legal recognition of land transactions. Where the parties involved feel the need for it, because their membership of the community does not or no longer offers sufficient safeguards, or where they do not share enough social ties to regulate their relationship, they could formalise their arrangements and set them down in writing for endorsement by the administration. In fact, apart from the risk of having one's land acquired by the State, most cases of insecure tenure relate to transmission of rights (inheritance, loans, sales, etc.). Land transactions should be put on a secure footing, by ensuring that the person transferring the rights has the power to do so and by specifying the content of the transaction. This would guarantee that the beneficiary of the transaction legally receives the transferred rights from someone who actually held them and was entitled to transfer them. Such a 'contractual approach' has the advantage of relying on the written documentation which rural people are quite accustomed to and will often demand (Lavigne Delville and Mathieu, coord., 1999), and on local ways of ensuring security of tenure (Mathieu, 1999; Koné et al., 1999). It provides for great flexibility, covering the whole range of derived rights and market transactions ("true" sales, lifetime sales of cultivation rights, reimbursable "sales", etc.[20]), providing that the clauses are clear. It is also far less cumbersome than a systematic registration system, since it only formalises contracts deemed "unsafe" by one or other of the parties, without implying changes in regulatory methods as a whole. The common heritage approach (which recognises the durable nature of legal pluralism, which it seems futile to attempt to eliminate in the short term) and the pragmatism of registration, are realistic approaches based on clarifying procedures and the use of written documents to help to stabilise the tenure situation. These approaches clarify and stabilise a limited but crucial aspect of tenure dynamics and the problems of providing secure tenure, by defining procedures which are both legitimate and legal, flexible and in line with local practices, but sufficiently clear and unambiguous.

This is a purely hypothetical approach for the moment and it is too soon to assess its feasibility and how it could be put into practice. It would probably, like any other approach, involve delicate legal and institutional choices. Various studies are under way on this topic, which should allow some progress to be made.[21]

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[20] Cf. Lavigne Delville, 1998a, 45-47, for a summary of the debate on sales.

[21] Cf. Lavigne Delville, 1998a, 115-117 for an initial formulation, and Lavigne Delville and Mathieu, coord. 1999, which gathers together various papers on the way rural people put land transactions down in writing. Research into the dynamics of derived rights and ways to

Debate and experimentation on approaches to security of tenure are still ongoing and it is not certain that genuine responses to the challenge of the tenure issue are yet available. However, even though the desire to take local landholding systems into account still often clashes with a broadly administrative conception of land management, recent experience in French-speaking West Africa has clearly shown what is at stake and which points must be debated. We now have a good appreciation of the situation and a range of varied tools to bring about appropriate legal, technical and institutional solutions, depending on the political choices made by governments. There can be no universal solution, as the choices necessarily reflect the historical traditions of the various states, the current balance of power and their political options. There remains, however, much to do to in the struggle to construct an overall approach which links together these three essential aspects of land management in a coherent, functional, legal, institutional and technical arrangement. Accurate, meticulous legal work is needed, based on rigorous socio-tenurial analysis, and a recognition of lineage rights over land and their importance for maintaining security to stakeholders. A great deal of attention must be paid to practical choices, to defining the prerogatives of the various bodies involved, the links between them, and the social repercussions of technical choices. The difficulty lies in defining this framework precisely, while sticking closely enough to existing practices and, at the same time, anticipating how the different players, depending on their reasoning and room for manoeuvre, will try to use that framework (and its legal or institutional loopholes!) and attempt to distort it to their own advantage.

The greatest difficulty lies ahead. The need to clarify political choices often seems to be left in abeyance. This is because political change implies possible risks, and because the current situation favours some sections of Africa's political and administrative class. Beyond the rhetoric about decentralised natural resource management, few countries seem ready to abandon the doctrine of State ownership or even to recognise genuine subsidiarity, and to delegate land management responsibilities to structures that represent the population. The question of drawing up a coherent, effective policy is further complicated by the "*features specific to the contemporary African state: mixing up authoritarian government practices and notions of common heritage, together with a degree of inability to control the national territory, thereby leaving local society some freedom of action*" (Constantin, 1998). So many factors - the multitude of different stakeholders, with contradictory agendas; the interaction of various government departments; resistance within the political

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provide security is under way, coordinated by GRET and IIED. A study on land transactions in Burkina Faso is also in progress.

and administrative class, some of whose members see their interests threatened; and the conditionality imposed by funders and experts - reinforce the uncertainty about the purposes of a tenure policy and its precepts. These must be acceptable to both the political/administrative class and the wider population.

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