BRIEFING NOTES

to improve our understanding and ability to ask the right questions and take effective action on land matters in West Africa

"Land Tenure & Development" Technical Committee

The troubled history of customary rights registration policies in rural sub-Saharan Africa

by Jean-Pierre Chauveau[1], February 2018

Since the 1990s, most countries in sub-Saharan Africa have implemented wide-ranging policies to formalise so-called 'customary' rights, framing them as efforts to 'register', 'legalise' or even 'secure' land rights through titles that rural actors can use to access credit and investment. However, these policies have not proved any more successful than similar initiatives in colonial times: only 2% to 10% of rural land is officially registered today, and many changes in tenure are not updated. Despite recurrent questions about the effectiveness of these policies and their potential to cause political and social disruption, it seems that policy makers are still keen to promote the supposed benefits of formalising local rights. How does this bode for the future?

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Colonial attempts at formalisation limited by fears of potential social disruption

The colonial authorities soon abandoned their attempts to introduce proprietary legislation for 'indigenous' populations. In the period between the two world wars their priority was maintaining social and political stability while local producers fed the export market, rather than concerns about the 'suitability' of customary land tenure regimes. Then, after the Second World War, colonial aspirations to legalise customary lands were curbed by international pressure from various quarters and opposition from nationalist parties.

Throughout the colonial period, this unwillingness to introduce formal private ownership in rural societies was reflected in the tension between wanting to avoid what administrators, experts and researchers saw as serious social upheaval in rural areas, and 'proactively' encouraging these areas to open up to colonial economic interests and external markets. As successive countries regained their independence, the question of formalising customary rights became a recurrent theme in debates about 'the culture of development'.

Poor outcomes and uncontrolled repercussions of colonial registration initiatives

The colonial authorities made limited attempts to systematically issue title deeds. In French colonies, where customary land rights were recognised as non-transferable personal use rights, these efforts were limited to periodic initiatives to promote simplified discretionary indigenous titles for those with political influence and vested interests in developing land use: traders, junior civil servants, agricultural settlers, chiefs and dignitaries. Most local producers ignored these indigenous titles as they were not accompanied by systematic or binding measures, while the new independent governments disregarded the decrees of 1955 and 1956, which eliminated the presumption of state ownership and could have led to legal recognition of local transactions.

In the British colonies of West Africa, the principle of indirect rule meant that most land was under the political, legal and judicial authority of local chiefs and 'native courts'. This was very different from the general regis-

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tration programmes introduced by the colonial authorities in East and Southern Africa, where local populations had been displaced by British settlers.

These plans still provide insights into the ambiguities and limitations of what is now regarded as the 'orthodox' approach of using formal titles to secure customary rights. The objective of shifting indigenous producers away from 'customary practices' so that they could access credit and modernise their operations was largely politically driven, and failed to deliver the desired outcomes in either of the two main arenas concerned: the kingdom of Buganda (in Uganda) and Kenya.

In addition to their intrinsically political intentions and targeted beneficiaries, these systematic and proactive initiatives to register rights also had unanticipated short-term effects, and even long-term negative repercussions when they resulted in discrimination and exclusion among certain sections of the population.

EXPERIENCES IN BUGANDA KINGDOM AND KENYA

From 1900 onwards, the allocation of *mailo* lands to the ruling aristocracy in the kingdom of Buganda (and registration of contractual arrangements between landlords and tenants) served both political and economic objectives. Obtaining property titles did not increase agricultural output, and titled lands were still managed under traditional systems that supported nepotistic social relations. The *mailo* system remains one of the mainstays of the kingdom's identity, and is now a predominantly political issue.

The first attempts to allocate land titles in Kenya came in the 1950s, in the wake of the resettlements caused by European colonisation, and in conjunction with soil protection and agricultural modernisation projects in the Rift Valley and Central Province regions. Much can be learned from the Swynnerton Plan, which started in 1954 and continued long after Kenyan independence. It was supposed to help create a class of African farmers with plenty of land, a class of landless farmers (something regarded as 'a normal stage in the evolution of a country'), and discourage farmers who benefited from the programme in Central Province from 'political dissidence' following the suppression of the Mau Mau uprising, whose roots were as much social as anti-colonial.

After Independence, the Swynnerton Plan was extended into a national registration programme that ultimately achieved very little over the space of half a century. Experience has shown that issuing titles is neither necessary nor sufficient to create a land market, as titles only facilitate the expansion of the land market when land transfers are socially acceptable. Local producers have not appropriated titling programmes, and the rights that were formalised have reverted to customary management. Rural populations do not want to register their land transactions and divisions with the government, or register changes in titleholders. In the end, the new system of titles did not replace customary tenure or systems that were regarded as customary, but simply added another parallel legal framework with its own margins for manoeuvre. Worse still, land titles were used to redistribute land among certain interest groups and contributed to the inter-ethnic clashes of the 1990s. As it continued through the 2000s, the programme did just as little to facilitate access to credit or increase productivity.

Ambivalent formalisation policies from Independence to the 1980s

The land policies promoted by African governments until the 1980s followed pretty much the same line as those of the colonial authorities, with some variations. Driven by political rather than doctrinal interests, they swung between maintaining existing customary prerogatives in order to avoid alienating local authorities, and upholding the state's prerogatives over unregistered customary lands, which allowed it to control productive land use in the name of the national interest. This ambivalence resulted in tacit or official support for migrants' rights to state-sponsored agricultural settlements, and state land allocations to political elites or large agricultural development projects.

Apart from these large agricultural development projects and the national registration programme in Kenya, there was little justification for these registration programmes. The informal market fed by elites was not affected by the absence of titles. Quite the contrary, in fact, as titles could hamper clientelistic strategies to redistribute state land to the elites in former French colonies, or through the state's privileged position as 'the main landholder' in former British colonies. The new land legislations and numerous rural development projects that were implemented from the 1960s to the 1980s were able to accommodate donors' belief in the benefits of formalisa-

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tion without challenging the governments' preferential management style. In the meantime, the legal pluralism that now prevails on the ground was starting to take root and become institutionalised. Regions where small-scale commercial farms were developing saw an exponential increase in the number of land transactions secured through customary procedures, which were officially illegal. The administrations made little effort to find legal solutions to the paradox that land had to be registered prior to a transaction to make it legal – something that was unaffordable for small producers but not elite actors who could register land they had acquired through customary transactions. On the ground, this led to the predominance of 'modern' local land practices (with increasing social recognition of market transactions and individualisation of rights) and the proliferation of arrangements between diverse social groups with a stake in rural land regulations: civil servants, different elements of local farming communities (indigenous actors, migrants, local dignitaries, ordinary people, pastoralists, agro-pastoralists, etc.), economic and political elites (pursuing their own investment strategies while making political capital from tensions over land), and experts from rural development projects (who are not always aware of the implications their interventions will have on land matters).

How will the modern orthodoxy of widespread formalisation stand the test of time?

Rather than trying to understand why ordinary land governance operates according to such plural norms, development assistance actors, and the World Bank in particular, found new arguments in the 1980s and especially the 1990s to justify the urgent need to formalise land ownership (desertification, environmental degradation, food crises, etc.). The idea that securing customary rights necessarily entails issuing formal titles was regarded as self-evident received wisdom.

This new orthodoxy reignited arguments in development institutions about the structural tension between the objective of enabling the best performing economic actors to access legally recognised rights and protecting existing rights, especially those of the most vulnerable groups. Although recommendations have shifted in favour of a more flexible approach to securing rights, the numerous calls for alternative approaches to registering rights should not ignore the growing prevalence of generalised privatisation in contemporary national land policies.

It is instructive to look at the formalisation policies of the last two decades from a historical perspective. The first thing to note is that the colonial and post-colonial authorities' concern that wide-ranging initiatives to formalise customary rights might aggravate social and ethnic divisions faded away in the 1980s. In fact, the World Bank and other donors now recommend systematic titling in post-conflict situations, along with pro-business initiatives and authoritarian policies and interventions to register and redistribute land between small-scale producers, entrepreneurs and international firms.

FOR FURTHER INFORMATION

>> Amanor K.S., 2012, *Land Governance in Africa: How historical context has shaped key contemporary issues relating to policy on land,* Framing the Debate Series, no. 1, Roma, International Land Coalition.

>> Bromley D.W., 2008, "Formalising property relations in the developing world: The wrong prescription for the wrong malady", *Land Use Policy*, 26: 20-27.

>> Chauveau J.-P., 2017, "Les politiques de formalisation des droits coutumiers en Afrique rurale subsaharienne : une perspective historique", in: CTFD, *La formalisation des droits sur la terre : bilan des expériences et des réflexions*, Regards sur le foncier nº 2, AFD, MAEDI, Paris, April 2017: 49-66.

The second point is that the lessons learned from previous attempts at compulsory systematic registration have been ignored. Kenya is a remarkable example of a dogmatic belief in the benefits of formalisation uninformed by a global perspective on agricultural and economic policies. Rural Africans are not poor because they don't have land titles. They are poor because flawed economic policies have failed to provide remunerative jobs in agriculture or in other sectors (Bromley).

Finally, the long history of formalisation policies since the colonial period shows how contradictory they become when they go beyond the reasonable objective of formalising as many rights as possible, as requested by rights holders and in accordance with their needs and resources.

This is what happens when development policies overestimate the extent to which land can act as a lever for economic development, place far too much emphasis on formalising customary rights rather than considering formalisation as one of several options for securing rights, and fail to consider the socio-economic repercussions that this option will have on different interest groups.

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