

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

# Different strategies and procedures to formalise rural land rights

by Philippe Lavigne Delville<sup>1</sup>, March 2018

*Formalising land rights entails giving written and legal form to rights that were previously mainly regulated by local custom rather than the law. Policies to formalise rural land rights in francophone Africa and Madagascar employ a wide range of strategies, methods and mechanisms. They reflect different conceptions of land governance, different interactions between state and local rules and procedures, and different social choices. Policies to formalise land rights face numerous practical difficulties. This note highlights the advantages of mechanisms that focus on the formalisation of land transactions and agreements, within and between families.*

## A classification of the different procedures

Historically, most rural land rights in Africa have been informal, that is not supported by formal documentation, not legally recognised. Since the 1980s, many countries have tried to facilitate or encourage the formalisation of these rights, either by converting a range of land rights into individual property rights, or by trying to formalise existing land rights without altering their content. Such trials have been incorporated into recent land policy reforms to varying extents, and at very different scales. The purpose and procedures vary from one country to another, and can be characterised in several ways.

### ● Land titles or certificates/ attestations?

Formalisation policies aim to incorporate previously ‘informal’ land rights into one or more legal categories, as defined by the law. This is classically done by issuing land titles that confer absolute private ownership, guaranteed by the State. In such a process, which is often long and very costly, all other existing rights are revoked, which usually involves major changes in rural land rights and results in the exclusion of numerous rights hold-

ers. This is especially the case where the land concerned is a family holding, held indivisibly, and where access rights to natural resources (such as trees, water, grazing) differ from rights to the land itself. Looking for more appropriate solutions, some countries have created other legal forms, such as land certificates or attestations of customary ownership or holding. Depending on the situation, these certificates and attestations may correspond to a kind of private ownership (but which is not guaranteed by the State), or to customary property rights, held individually or collectively. Such forms may or may not be freely transferable. They often may be converted into a formal land title, and sometimes even must be converted within a certain time-frame.

These certificates and attestations are more flexible than land titles, and may be more in line with existing rights. However, due to a lack of clarity about the concrete content of rights held in the land by different people, these certificates can often be seen as proof of private ownership, even if rights holders do not have such rights to the land. This can lead to existing rights being distorted: such

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as those of incomers long-established on the land, rights to renewable natural resources are rarely covered, and little if any consideration is given to the obligations and restrictions associated with the rights of third parties, especially those associated with broader family membership.

While more appropriate than land titles, certificates and attestations may introduce some degree of bias during the legalization process. They may also weaken unregistered rights and help strengthen or redefine the rights registered by individuals or groups, particularly when, as is often the case, local land rights are a complex combination of individual and collective regulations, and where rights of access to natural resources are held separately from rights to land.

### ● **Systematic or demand-led formalisation**

Demand-led formalisation is a voluntary procedure aimed at people who want a written document affirming their land rights. As these people are usually better-off and know how the administrative system works, there is a risk that less socially privileged actors will be unable to take advantage of this procedure to secure their rights. The formalisation process is based on a supposedly inclusive plot survey, but other rights holders and neighbours may not be informed of the survey and thus those seeking a title may be assigned stronger and more comprehensive rights than they can properly claim, while others are deprived of their legitimate rights.

Systematic formalisation is supposed to prevent the better-off from gaining at the expense of the less privileged, as well as reducing unit costs. The procedure is supposed to cover the whole

village 'territory', systematically identifying and validating rights to all the plots within it. However, systematic approaches run into problems when the borders of the territory or village lands are unclear or contested, when certain areas are not covered by clearly-defined rights, and for land held in the form of reserves or grazing areas.

This procedure aims to give everyone equal access to the registration process, but does not prevent certain rights holders being excluded (typically recent incomers, absentees, widows, etc.). Other forms of interference with the process may occur (which those conducting the survey may be unaware of, tacitly allow or even be party to themselves). There is also a risk that areas of common land and other areas which have not been claimed by a particular family or individual may be privately appropriated, unless steps are taken to ensure that such areas are excluded from the survey of all plots.

Systematic procedures assume that all rights holders want to apply for their certificate or attestation, and will subsequently register any changes in these rights, which is not necessarily the case. It is also worth noting that these procedures require a land administration capable of managing very large amounts of information.

### ● **The institutions responsible for administering formalised rights**

Formalised rights are recorded in registers that are housed in the institution which is responsible for their administration, ensuring that records are kept up to date, registering changes and issuing new titles or certificates. Land titles are managed by the government's land administration service,

which is often centralised and physically far removed from both the land, and the people claiming these rights. Various countries have introduced reforms to bring land administration closer to citizens through decentralisation (setting up local branches of the national institution) or devolution (transferring responsibility to a local body).

Procedures to promote legal alternatives to land titles often favour the creation of a specific commune-level land administration service, which may rely on village committees to validate transactions or prepare applications for registration. In cases where no specific public institution is put in place, rights are often dealt with by land commissions at various levels, usually composed of both customary authorities and government officials.

The framework chosen for administering registered land rights reflects the role that local authorities, their rules and procedures, play in identifying rights, and determines their importance in the subsequent administration of these rights. When this is done by a state administrative body, registered plots pass from customary regulation into a state regime, which inevitably reduces the role and power of customary structures and the procedures they follow.

Whatever their nature, the viability and success of the mechanism chosen will depend on information being rigorously archived and changes systematically registered. This assumes that the institutions concerned are sustainable, with the requisite administrative, material, financial and technical capacities (including ability to handle computerised records). There is often, however, a trade-off between proximity and administrative capacities.

## ● Procedures to identify rights and conduct boundary surveys

The procedures for identifying and registering rights on a given plot combine investigation into the different rights relating to the plot and a survey of the physical boundaries. These tasks can be undertaken by local people, a team of professional experts, or some combination of the two. Rights are identified through an investigation into the plot conducted in the presence of neighbours, witnesses and sometimes members of the village council and local authority, followed by a phase during which the rights claimed are made public, so they can be scrutinised, and possible errors or biases identified and rectified.

Depending on the choice of legal categories, the investigation may or may not take account of rights to access natural resources or rights held by family members and other actors who occupy the land in good faith. Procedures vary in terms of whether the customary and local government authorities are involved, the rigour with which information is made available prior to

the survey, the extent to which neighbours, witnesses and potential rights holders are present during the survey process, and the means and extent to which information about the claims being asserted are made available. If procedures to inform neighbours and potential rights holders are insufficiently rigorous or carried out too far from the land in question (for example, if information is posted at the town hall, or court where stakeholders are unlikely to see it), this can lead to errors in and manipulation of the registration process.

Plot surveys may involve village or local government technicians or professional specialists (surveyors, topographers, researchers, etc.), and may use simple tools (clipboards, aerial photos) or sophisticated equipment (satellite images, GPS, computers, GIS, etc.). Professional teams tend to use more technically sophisticated processes and systematic village-level procedures, which inevitably increase the cost of operations. Demand-led formalisation has the advantage of responding to a rising level of interest in registering land rights, progressively covering the territory and spreading the costs to the land administration service over time. The quality of the surveys and maps produced by local bodies may leave something to be desired, but this is not necessarily a problem in many contexts, while calling in professional surveyors will substantially increase the costs for applicants and thereby exclude the most vulnerable actors from the process.

The findings of plot surveys and investigations are usually put on public view, so that different people (rights holders, family members, neighbours, etc.) can check the validity of the land claim before any legal documents are issued. However, this period of public scrutiny

will only serve its purpose of detecting errors and legitimising the findings if the land information is posted in places that are physically and socially accessible, if actors really have the capacity to verify the information, and if comments and complaints are rigorously recorded and systematically registered.

## Finding a balance between registering land and achieving broader land governance

National policies to formalise rural land rights may combine several objectives, depending on the type of spaces involved. They can be situated on the spectrum between two approaches: firstly, that of *land administration* based on a cadastral system where private property rights are formalized and are managed by specialist state mechanisms, and secondly, that of *land governance* where local bodies govern the management of land and its various resources and organise the demand-led formalisation of rights and registration of changes. These bodies (possibly a hybrid mix of customary and government representatives, operating at different levels) draw on local principles, but their operations are framed by law. The second approach gives priority to the peaceful use of land and resources, and broader governance of the territory involved, giving more weight to the formalisation of *rules, agreements* and *uses* than to formalising *rights* as such.

The formalisation procedures that are presented as 'alternatives' to land titling reflect very different circumstances. When legal categories and survey methods privilege private ownership, and take no account of local land arrangements or third parties' rights, and when the administra-

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tion of formalised rights is seen as a technical operation involving the land administration and the holder of a legal document (and possible buyers, heirs, etc.), the approach necessarily involves the replacement of local rules with state regulation. This will be quick to achieve where systematic titling has been followed, and more slowly in the demand-led case.

The less common approaches that try to take account of the diverse arrangements by which people access land, and try to avoid biased outcomes, have tried to construct hybrid public mechanisms that maintain a degree of autonomy for local society in how they manage their shared space. These approaches recognise that local and state systems for managing land rights will need to coexist for some time, and the desire to suppress local systems is at best utopian and at worst highly risky. Rather, some means to integrate legislation and local mechanisms are needed which can evolve over time to accommodate the changing demand for formalisation, alongside the legal recognition of negotiated rules for managing space, and mechanisms for conflict arbitration. Such approaches are more in keeping with the realities of rural land arrangements than

### FOR FURTHER INFORMATION

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- >> Chauveau J.-P. and Lavigne Delville P., 2012, *Les limites des politiques de formalisation des droits fonciers et coutumiers (2) : L'illusion de la 'photographie' neutre des droits*, Les Notes de politique de Negos-GRN n° 11, Nogent-sur-Marne, NEGOS-GRN / GRET / IRD, 4 p.
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state-led methods which emphasise private property. However, they are more complex to implement, require detailed knowledge of local practices, and raise questions about the political will in government to promote such an inclusive form of land governance, and ensure that registered rights are properly administered.

Deciding which strategies will be used to formalise land rights is not just a technical or legal matter. The choice

also reflects different political views of how individuals, social groups and the State relate to each other, differences between local and State norms, and finally, different visions for society.

Having seen the difficulties associated with policies to formalise *rights* to land, approaches that focus on formalising *transactions* look more workable options that are less complex and more likely to reduce tenure insecurity. ●

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