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 and Development" Technical Committee

Overlapping of Land Rights in Europe

by Joseph Comby[1], December 2010

In Africa, it is often assumed that securing land tenure rights necessarily involves administrative land titling to give owners all rights on their lands, as opposed to the insecurity of various customary rights that overlap with one another. The history of Europe shows instead that rights on land can be secure, while remaining multiple. It reveals many layers of competing rights in the same space. However, conflicts are rather seldom, mainly because of a good definition of individual rights.

Overlapping of rights in Ancient Europe

Overlapping of land rights existed in ancient rural Europe. The dual system of overlapping rights was widespread.

- **The right of peasants to till a land, known as "propriété utile"** in France and "lease hold" in England, was subject to fulfillment of the land entitlements of the Lord of the Manor (known as "propriété directe" in France and "free hold" in England). Each lord of the manor could sometimes hold rights over several villages; exceptionally, a village could be under the authority of two or three different lords. Manorial rights consisted of collecting royalties from peasants and a series of honorary privileges, especially during religious ceremonies. As from the late Middle Ages, lease hold and free hold could be sold by their respective owners.

- **The peasant's right to land was only a seasonal one**, running from the planting season to the harvest. After harvesting, the land became again the collective good of the village community (right to "the second grass" that grows after the first has been mown). In each province, the custom used to set the beginning and ending dates of the collective right.

Many other overlapping rights were defined by local rules, especially those related to the use of forests and wetlands: the right to cut timber, the right to collect firewood, cattle grazing rights, the right to hunt, often had different owners.

Traces of the old overlapping private right system

The seasonal nature of land ownership only gradually disappeared after having caused violent social conflicts, especially in England where important landowners were able to withdraw their lands from village community rights (conflict of enclosures). One of the last vestiges is the "droit de vaine pâture" (the right to graze cattle on a private land after harvest), which survived in France until the late nineteenth century, and the "droit de glanage" (the right to use crop residues in another person's farm after harvest), which still exists, but is hardly enforced.

A wide range of "easements", whose origins go back to ancient customs also continue to regulate neighbourhood relations (right of way on others' land to access public roads, right of way to wells, etc.). Some of these rights of way have even been strengthened in recent years; for example, the obligation to leave a free crossing strip on private land along waterways and coastlines.

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Traces of old common land right systems

Apart from state-controlled lands, many areas have remained the common property of the residents of a town or a village ("biens sectionaux" in France). This is often the case with community forests whose products are equally allocated to the residents (firewood) or sometimes in proportion to the area covered by estates.

Less commonly, there are still situations of common ownership between village communities, even if individuals no longer live there. This is the case in Switzerland, where families from a town still meet each year to manage their common property (often pastures and forests), which is distinct from municipal property managed by the municipal council.

"Grazing rights," which still exist in several countries for the movement of cattle, are also common rights on private property. There are also rights of movement (or camping) on the property of others outside planting periods in Scandinavian countries. Hunting rights are seldom exercised by the landowner. In France, there are "municipal hunting companies," and in Great Britain, hunting rights inherited from ancient feudal privileges are still in force, even though they are state-controlled (opening and closing of hunting periods, protected game, etc.).

There are still owners' associations formed to work jointly on some public interest development projects: marshland reclamation, construction of irrigation canals and land servicing. In France, such associations can be either freely formed by all the owners or imposed by the préfet in order to carry out certain activities of common interest. In the same vein, since the 1960s, "urban land associations" can be created by a two-thirds majority of neighbouring landowners to implement, together and at their own cost, a town planning operation. Many similar systems can be found in Germanic countries.

Quite similarly, in all European countries, "community ownership" has developed to the detriment of individual ownership. Land no longer belongs to a family or an individual, but to a community or group of owners. This is often the case for the management of private forests and prestige vineyards. There are also many "horizontal condominiums" in peripheral housing operations, with the various homeowners co-owning lanes and gardens that they jointly maintain.

Strengthening public rights on private lands

Despite their diversity, all European land tenure systems have two levels of legitimacy over land in common: the public authority and the private owner, with a clear allocation of roles between both of them.

On the one hand, the public authority has the right to define the permitted, prohibited or mandatory uses of the land, either globally or by area. On the other hand, and provided there is compliance with usage regulations set by the public authority owners could manage their lands according to individual preferences.

These rules have increased over the last fifty years. The awareness of environmental issues has brought about their strengthening. The rules vary from one country to another and from one area to the other.

Here are some examples:

- strict delimitation of areas where construction is permitted (even in rural areas);
- obligation to clear the land in areas exposed to fire hazards;
- obligation to clear the land in areas exposed to fire hazards;
- control of water catchments and their flow;
- control of tree felling, obligation to reforest.

Nowhere in Europe are owners completely free to do as they wish with their land. In addition, all the countries have the right to expropriate the owners (on a compensation basis) for the implementation of projects of common interest.

Furthermore, there is a relatively high proportion of public properties everywhere. Some countries, including France, make a distinction between lands which the State owns like anyone else ("private domain of State") and those for which it enjoys privileges in relation to a public service ("public domain of State" on roads, coastlands, public utilities, etc.).

New cases of overlapping private land rights

Overlapping of private land rights, whether or not considered as "property rights", is on the increase.

These are primarily rights recognized in each country for non-owner users, particularly the rights of a farmer who rents land from its owner. In France, this protection, (under the 1945 law concerning tenant farming) is so strong that the farmer virtually becomes the owner. Rents are determined by the

state, and the owner cannot take back the land at the end of the lease, unless he is a farmer himself. Protection is weaker in Southern and Eastern Europe. A further step was taken in 2005, with a law that allows the farmer to choose a transferable lease or an "entitlement to be a tenant" which the former tenant may transfer to the new tenant, with the latter assuming all the obligations of the former tenant (e.g. rent, lease ending date).

Furthermore, the long-term transferable lease, (long lease) system, because of its particularly long-lasting nature, initially allowed for the planting of fruit trees on the leased land. Later, this lease could be used by the tenant to construct a building that would remain his property throughout the lease. This distinction between the ownership of the land and that of the building is particularly common in Northern Europe and in some other countries such as Japan.

In France, attempts were made from 1960 to 1970 to expand the system, especially in order to reduce the amount of the buyer's investment, inasmuch as the buyer of the building remains the tenant of the land. Consequently, a "building lease" system was introduced (for a term of 18-99 years), which made the construction of a building the primary obligation of the tenant, and might sometimes be the only remuneration for the leasehold owner who then became owner of the building at the end of the lease.

The old practice of "splitting ownership into volumes" (building across an alley, cellars or underground quarries belonging to another owner, etc.) which consists of dividing ownership into three dimensions, was also revived with slab and large urban operations such as business districts (e.g. "La Defense" in Paris).

Transaction control

The control of farmland transfer developed with different objectives: to prevent the formation of overly large properties, and also their excessive fragmentation; to prevent the acquisition of land by agro-industries and rich city dwellers who could transform it into recreational areas to the detriment of farming. The approaches were different from one country to another.

In France, emphasis was laid on the control of farmland sale, with the establishment in 1960 of rural development and settlement corporations (SAFER) which hold a right of preemption (right of purchasing property before or in preference to other persons) to prevent, in particular, land purchasing by non-farmers, with the possibility to have initial prices reviewed in court if they depart from the usual farmland prices. This practice seems to be effective, since France has become the European country with the lowest land prices.

In the Germanic countries, the emphasis was on the control of inheritance. The division of a farm among heirs is prohibited if the latter may no longer be viable. The heirs must agree on which one of them would take over the farm, and then that person will pay them an "owelty" in compensation.

Land transactions in urban areas are even more closely supervised. For example, it is prohibited to sell urban land without obtaining a certificate stating the applicable town planning rules from the City Council, which would often be entitled to replace the purchaser and proceed to carry out the development work. ●

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ORIGINAL VERSION IN FRENCH "Superpositions de droits sur le sol en Europe", translated by Lara Colo.

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